

TANZANIA / JUDGMENT

godrej consumer products limited vs hb worldwide ltd 2022 tzhccomd 268 7 september 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC.
COMMERCIAL APPLICATION NO. 82 OF 2022 GODREJ CONSUMER PRODUCTS LIMITED.....
APPLICANT VERSUS HB WORLDWIDE LTD.....RESPONDENT

RULING.

Date of last Order: 16th August 2022. Date of Ruling : 7th September 2022. MARUMA, J. The Applicant is before this Court for an order to set aside the order dated 21st April 2022 which striking out Taxation Cause No. 37 of 2020 for want of prosecution. The application is brought by a Chamber summons supported by the affidavits of Francis Kamuzora and Mohammed Zameen Nazarali. Opposing the application, the respondent filed a counter affidavit At the hearing the parties were represented by Mr. Mohammed Zammen, Advocate for the Applicant and Mr. Martin Frank, Advocate for the Respondent. 1 The brief background of this reference application is that arises from Taxation Cause No. 37 of 2020 resulted from Commercial Appeal No. 2 of 2019 where Mr. Francis Kamuzora had represented the Applicant whose decision was in favour hence the filling of this taxation on 30th June 2020, claiming for costs incurred in pursuing the said appeal. On 6th August 2020 the taxation cause was stayed at the request of the Advocate for the Respondent herein, pending determination of an intended appeal at the Court of Appeal in respect of which the Respondent had lodged a notice of appeal. The court ordered the matter to be set for mention in order to allow the parties to update the court on the progress of the appeal. Following the Court order multiple dates were set for mention until 21st April 2022 when the matter was struck out for want of prosecution hence this application. Challenging the order of the taxing master, through the affidavits of Mr. Kamuzora and Mr. Mohamed is on the facts mainly reflecting in paragraphs 6 and 12 of Mr. Kamuzora's affidavit and paragraphs 5 of Mr. Mohamed's affidavit. The referred paragraphs revealed that from 6th October 2020 to 7th December 2021, the parties appeared on various 2 dates before this Honourable Court in order to update the court on the progress of the appeal. However, from 7th December 2021 no summons was served to the Applicant either in person or through their firm calling for the parties to appear in court for any purpose in connection with the Taxation Cause. It is their main argument that

the taxing master errored in law and fact to struck out the matter as there was no summons to the parties while the Court notified the parties to be notified by summons. The taxing master also was erroneously struck out the taxation on the basis that the appeal was not determined and she was not aware of the status of the appeal. To buttress his argument, the counsel referred this Court to the cases of Court of Appeal that of Mbeya – Rukwa Autoparts & Transport LTD vs Jestina George Mwakyoma, Civil Appeal No. 101 of 1998, where the Court held that the right to be heard is a constitutional right page 265, Danny Shasha Vs Samson Masoro & 11 Others, Civil Appeal No. 298 of 2020 at page 6 . Also, Ophiry Energy PLC vs Moto Matiko Mabanga, Taxation Reference No.03 of 2022 before Hon. Nangela, J who determined the similar case with the same facts the right of the 3 applicant to be heard was not considered. He also argued that para 4 of counter affidavit which states that summons was served to the applicant among to escape his duty. He further argued that order 11 of the Advocate Renumeration that the detoxing officer when the tax officer has the right to determine the exparte. A recent case on appeal is not barred the taxation to proceed exparte and not to struck out based on the fact that the matter was stayed pending the appeal. He added that the applicant was not under the control to know the status and it was a duty of respondent. He concluded his submission in chief that it is unjust for the applicant to suffer in the expense of the respondent who was duty bound to so be please to set aside the order striking out the taxation. Having adopted the content of his own counter affidavit and part of Kamuzora's affidavit, Mr. Frank for the Respondent countered the application, submitted that the order subject to this application is clearly stated two things. First is to the want of prosecution and secondly is to time limitation. He submitted that the two issues are to be considered by this Court. He clarified that the 1st issue is that the parties failed to appear before the Court to prosecuted the case which 4 they expected to see why the applicant failed to appear before the Court. He said there is none rather it contained the facts on what it was transpired before the court's corridors and not why they did not appear before the Court. He contested the argument that it was a duty of respondent to update on what is going on the appeal. There was no such an order primarily that the respondent had a duty to inform the court on what was going on at the Court of Appeal. He referred paragraph 4 of the affidavit and he stressed that the Court ordered the matter to be set for mention in order for the parties to update the Court on the progress of the appeal. He argued as per this paragraph the obligation was vested to both parties so not shifting the blame to the respondent. He added that the respondent should not be a scape goat for the applicant's negligent to exercise his duty. On the issue that there was no summons issued by the Court. He submitted there is no duty for the Court to call the parties who have abandoned their case. He referred to the content of paragraph 5 of the Kamuzora's affidavit that from 7th Dec 2021 no summons was served to the applicant in connection of the taxation the statement which is in contradictory with paragraph 4. He submitted that the 5 parties were the one to update the Court and not the Court to issue summons. He submitted that is contradictory and a lie of which the affidavit contains lies should not be relied upon as the decision of Court of Appeal in the case of Jaliya Flex Rutaihwa vs Kalokora Bwesa, Civil Application No.392/01 of 2020 at page 12 and 17 the Court of Appeal while dismissing the appeal with costs, it clearly stated at pg 12 that an affidavit contained untruth is no affidavit at all and cannot be relied upon to support an application. He therefore requested this Court not to rely on these two paragraphs as they contain

lies and contradictory to each other. He also pointed out that the Court will issue summons if moved by the parties to issue summons but the Court itself should not. He added that in that basis it is not true that they barred to the right to be heard but are the ones waived such right by failed to appear if they could they would be heard *ex parte*. On the issue of time limitation on 2nd paragraph of the order. He submitted that the taxing officer stated the following, "... Keeping on adjoining this matter, in order to comply with the High Court Commercial Rules that the case in this Court ought to be determined within 12 months, and as far as this matter has been 6 pending for more than 12 months, I find this is a fit case to be struck out for want of prosecution..." He cemented this is the point where the matter was struck out for time limitation. He justified that it was undisputed that the matters stayed in this court as the 1st Summons issue on 1st of July, 2020 to appear on 16th July 2020 until the date it was struck out is more than years. He referred the Court to rule 32(2) of the High Court Commercial Rules which states that all cases shall proceed and determined within 10 to 12 months. He submitted that it was 2 years the matter was pending and it was within the bound of time limitation so decision was correct. He also pointed out that rule 32 (3) provides that thirty days before the expiry the party may orally request extension of time and the court may grant. However, this is not for the present application because it will be like to return the thing which was passed away by the operation of law so the application should not be granted as itself it is not sufficiently established to amount to set aside the striking out order. He further submitted that the fact that there is an appeal still in Court. The Applicant still have a room to refile after determination of the appeal. 7 He also submitted that the other issue is on paragraph 12 that they were directed by DR to file this application. As per annexure FK3, the same contained different information from para 12 contents so is also another lie, the same should not be relied upon. The respondent prayer was that since the application contain no sufficient reason as to why the applicant failed to appear and since the said application was struck out for time barred the same should not be granted instead be dismissed with costs. Rejoining, Mr. Mohammed who was ordered to file written submission on rejoinder, submitted that non appearance was due to the lack of knowledge of the date on which the application was scheduled for hearing. He also added that the Respondent was the one prosecuting the appeal on that basis the Applicant had no control over the appeal process. Replying on the argument that it is not Court's duty to call the parties who have abandon their case. His response is that there was a court order directing that summons be issued in order the parties o be notified of the proceedings and their said summons were not issued is a material irregularity. 8 On the issue of limitation, it was submission of the respondent that rule 32 (2) of the High court (Commercial Division) Procedure Rules, 2012 do not apply to Taxation proceedings and taxation by nature are execution proceedings which do not fall under the definition of the commercial cases under rule 3 of the rules. He added that as per Order 2 of the Advocates Remuneration Order, 2015 ARO, taxing officer is bound by the provisions of AROa alone and not the Commercial Court Rules. Hence the argument that the applicant could ask for an extension of the Speed track of the bill of costs under rule 32(2) of the Commercial Court Rules is misconceived. Having heard the submissions from both parties and evaluating the same, the main issue to be determined is whether the taxing officer erroneously struck out the taxation cause so as to grant the order to set aside the order issued on 21st April 2022 in Taxation Cause No. 37 of 2020. I have to start with the

issue of whether the striking out was justifiable. As deponed in the affidavit of Mohammed Zaeem under paragraph 5, it showed the sequences of events in the taxation proceedings which I would like to produce hereunder; 9 “(i) On 16 July 2020, the matter was first called for mention which was attended by both parties to set a date for hearing. The matter was set for hearing on 06 August 2020. (ii) On 06 August 2020, the parties appeared before this Honourable Court ready to proceed with hearing however, counsel for the Respondent informed the court that an appeal to the Court of Appeal had been preferred against the decision from which the present taxation proceedings originated. As such, counsel for the Respondent prayed for the matter to be stayed pending determination of the intended appeal. Trial court ordered the matter to be scheduled for orders in order to obtain regular updates on the status of the appeal. The matter was set for mention on 06 October 2020. (iii) On 06 October 2020, the matter was called for mention however, both parties were absent. The matter was set for mention on 30 November 2020. (iv) On 30 November 2020, the matter was called for mention in the presence of the counsel for the Respondent. He informed this court that there had been no update on the status of the appeal, as such, 10 he prayed for another date for mention. The matter was set for mention on 15 February 2021.

- (v) On 15 February 2021, the matter was called for mention in the presence of the counsel for the Respondent. He informed this court that there had been no update on the status of the appeal, as such, he prayed for another date for mention. The matter was set for mention on 01 June 2021. (vi) On 01 June 2021, the matter was called for mention in the presence of both parties. They informed the court that there had been no update on the status of the appeal, as such, they prayed for another date for mention. The matter was set for mention on 13 September 2021. (vii) On 13 September 2021, the matter was called for mention in the presence of the counsel for the Respondent. He informed this court that there had been no update on the status of the appeal, as such, he prayed for another date for mention. The matter was set for mention on 07 December 2021. (viii) On 07 December 2021, the matter was called for mention in the presence of the counsel for the Respondent. He informed this court 11 that there had been no update on the status of the appeal, as such, he prayed for another date for mention. The matter was set for mention on 09 February 2022. (ix) On 09 February 2022, the matter was called for mention however, both parties were absent. The matter was set for mention on 28 February 2022.
- (x) On 28 February 2022, the matter was called for mention however, both parties were absent. The court ordered for the parties to be issued a summons in order to appear on the next date for mention, 17 March 2022. In case they should fail to appear after being informed, the matter will be struck out. (xi) On 17 March 2022, the matter was called for mention however, both parties were absent. The court granted a final adjournment to the parties. Should they fail to appear, the matter will be struck out. The matter was set for mention on 21 April 2022. (xii) On 21 April 2022, the matter was called for mention however, both parties were absent. The matter was struck out for want of prosecution on the basis that the parties have not appeared in this court since January 2022 to update the court on the status of the 12 appeal. In the absence of such updates, the court is unaware whether the appeal has been

determined...” It was the main argument of the applicant that in all the above- mentioned dates, they did not see any copy of summons served to them notifying of the scheduled dates for mention as stated under paragraph 5 (xiii) of the Mohammed’s Affidavit. To respond to this argument, I must first address the legal stance on taxes. Generally, as it was held by Brother, Hon. Kahyoza in the case of Rose Mkeku (the adminitrix of the estate of the late Simon Mkeku), Misc. Land Application Case No.89 of 2021. At page 7 that, “...There is no law that an appeal to the Court of Appeal stays taxation of the bill of costs...” It is true that an appeal to the Court of Appeal cannot stay taxation of the bill of costs as it was also held by the Court of Appeal in the Case of Matsushita Electric Co. Ltd vs Charles George t/a C.G. Travers, Civil Application No.71 of 2001 (Unreported). 13 However, it was the prudence of the taxing officer who opted to wait for the outcome of an appeal for which the law did not bar her from doing so. Thus, on 6th August 2021, she ordered the matter to be scheduled for orders in order to obtain regular updates on the status of the appeal after she accepted the prayer made by the Respondent. Following her order, the matter was called on for several dates, which show that the applicants were on and off-attending court. It was on February 28th, 2022, when the taxing officer ordered the parties to be summoned to appear on March 17th March 2022, otherwise the cause would be struck out. However, on 17th March 2020 all parties entered non-appearance, but the taxing officer offered for the last adjournment for parties to appear on 21st April 2020. This is when the matter was struck out for want of prosecution. The pertinent question to be answered is whether the non-issuing of the summons barred the taxing officer from proceeding to take further actions. The argument by the respondent was that it is not a court’s duty to issue summons to the parties who have abounded their case. Going through the sequence of the events in the proceedings, as stated above, the applicants did appear in court only twice, that is on 14 6th October 2020 and 1st June 2021. However, no summons was issued to them. With the Court’s efforts to trace them now, they take advantage of not being served with summons. Besides, the applicant did not state in their affidavit as to why they failed to appear on those dates, including the date when the taxation cause was struck out. I have only seen the reason which was coming from the bar when the advocate for the applicant made his rejoinder. He rejoined that they failed to appear due to lack of knowledge of the date on which the application was scheduled for hearing. First of all, these facts came from the bar as they are not in the pleadings and this Court cannot entertain something which is out of the pleadings as guided by several decisions of the Court of Appeal, such as in the case of NHC vs Property Bureau (T) Ltd, Civil Appeal No.91 of 2007, where the Court elaborated on the purpose of pleadings in civil suits that, “... It cannot be overstated that for an issue to be determined by the Court it must have been specifically raised in the pleadings.....Accordingly, a party may not be permitted to 15 raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut it...” Moreover, the trend of the sequence of the events as narrated in paragraph 5 of the affidavit in support of the application vividly showed that not only the applicant but also the respondent had negligently abandoned the matter. It is at this juncture that I was about to agree with the Respondent that, it is not a duty of the Court to summon the parties who have abandoned their claim. However, this is not the position in

this application because of the date on which the taxing officer ordered for the summons to be issued for parties to appear on 17th March 2022. This is when the Court becomes bound by the order given on 28th February 2022. Unfortunately, the order of 21st April 2022 is silent on whether the summons was served to the parties or not. Also, the order is silent on whether the order of 28 th February was vacated and/or whether reasons for non-compliance with the order issued were given. It is at this point; the taxing officer has a duty to ensure that the parties were served or not and the reasons to vacate the order given on 28th February 2022. 16 In the absence of this proof, I have to direct myself on the fundamental principle of natural justice that probably if the parties could have been served with the summons as ordered, the fate of the 21st April 2022 could have been different. Either, as it was argued by the respondent counsel, by being served, the applicant could appear and the Court would proceed with the hearing *ex parte* or if the applicant could not appear, In those circumstances, the Court could rule that the applicant has forgone his right to be heard. However, that has not happened. On the basis of the foregoing observations, I recognize the fundamental right to be heard as guaranteed by Article 13(6)(a) of the Constitution of the United Republic of Tanzania, as emphasized in the case of Danny Shasha (*Supra*). On the issue of time limitation, that the taxation cause has stayed in this court for more than two years, contrary to rule 32(2) of the High Court Commercial Rules, which states that all cases shall proceed and be determined within 10 to 12 months. I don't want to labour much on this issue, as it is quite clear that in dealing with taxation matters, the 17 Court should apply the Advocates' Remuneration Order, GN No. 263/2015 so Rule 32 (3) of the Commercial Court Rules is inapplicable. Having the aforesaid observations, I have to take the route which my brother Nangera, J. has taken in Taxation Reference No.03 of 2022 (*supra*). This has taken into consideration the interests of justice and the purpose of taxation as stated in the case of Wambura Chacha vs Samson Chorwa (1973) TLR that. ".... taxation is to reimburse the successful party...". Applying this principle in the present application and to avoid miscarriage of justice, I proceed to set aside the order issued on 21st April 2022 which struck out Taxation Cause No. 37 of 2020, and the taxation cause is restored. The taxing officer is to proceed with the cause by taking appropriate steps to reach its determination. This is ordered with no order as to costs. Dated at Dar es Salaam this 7th day of September 2022. Z.A.Maruma. JUDGE 18 This ruling is delivered today 7th September 2022 in the presence of Mr. Allen Lema, Advocate for the Applicant and Mr. Hassan Salum holding brief for Advocate Hawa Turisia for the Respondent. Z.A.Maruma. JUDGE 19 20

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