

TANZANIA / JUDGMENT

newco oil ltd 4 others vs international commercial bank t ltd 2024 tzhccomd 28 15 march 2024

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15 March 2024

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1 IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
PAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 2 OF 2024 {From Commercial Case No.
110 of 2022} NEWCO OIL LIMITED..... 1st APPLICANT PETER
AUGUSTINO MMASI..... 2nd APPLICANT NIZAR
BHIMJI..... 3rd APPLICANT GEORGE
KRITSOS..... 4th APPLICANT JOHN THOMAS
MCHETTO..... 5th APPLICANT VERSUS INTERNATIONAL
COMMERCIAL BANK (T) LTD..... RESPONDENT

RULING

February 21st 2024 & March 15th, 2024 Morris, J The five applicants above, have filed in this Court the present application. They are jointly moving the Court to extend time within which they may file a notice of appeal against the judgement and decree of this Court in Commercial Case No. 110 of 2022 delivered on October 20th, 2023. The application is supported by the affidavit of Augustino Peter Mmasi, the second applicant. The counter-affidavit of Marie Mang'anya opposes the application. 2 The history of this matter is easily comprehensible. The respondent lodged Commercial Case No. 110 of 2022 in this Court against all applicants. He won. The applicants, disgruntled as they seem to portray, wish to challenge the decision herein but time to commence the appellate process is not their best ally. They have, thus, presented this application to obtain leave to lodge the appeal-initiating notice out of time. During hearing of the application each party was represented by own advocate. With the requisite permission of the Court, parties were heard by way of written submissions. Messrs. Jonathan Kessy and Augustine Rutakolezibwa represented the applicants and respondent respectively. Both sides commenced their submissions with adoption of the respective affidavit and counter affidavit as part of the submissions. The counsel for applicants submitted that the application for extension of time is only grantable upon the applicant showing good cause for his delay. *Nicholaus Mwaipya v the Registered Trustees of the Little Sisters of Jesus of Tanzania*, Civ. Appl. No. 535/8 of 2019 (unreported) was cited as a case to buttress such argument. 3 Further, he recited principles in the

case of Lyamuya Construction Ltd v Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Appl. No. 2 of 2010 (unreported). That is, extension of time is sustained if: the applicant accounts for delay; the delay is inordinate; he exerted necessary diligence; and there is presence of illegality to be cured. The above position of the law notwithstanding, the sole ground advanced by the applicants; which basis is recurrent in their counsel's submissions is sickness of Peter Augustino Mmasi. From both documents, it is claimed that the decision of this Court in the suit was handed down on October 20th, 2023 in the applicant's absence. However, he was immediately advised by his advocate that the defendants-applicants lost the case. But due the alleged sickness, no remedial proceedings were commenced until expiry of the statutory time for filing appeals to the Court of Appeal. The applicants strongly argued that sickness constitutes good cause for extension of time as per *H eri Investm ent Ltd v Dongxing International Real Estates Ltd.*, Civ. Appl. No. 65/01 of 2022 (unreported). 4 It was also argued that the 2 nd applicant was unable to file this application pretty earlier because he was making necessary attempts to settle the decree with the respondent only his payment proposal to be denied by the latter in January 5th , 2024. The applicants, thus, prayed for the reliefs stated in the chamber summons. In reply, the respondent conceded to the applicant's argument that with exhibition of sufficient cause, applications for extension of time succeed. Nonetheless, he hastily argued that the applicant in this matter exhibits no ground worth considering as sufficient. To him, though sickness forms part of sufficient reason, the applicant herein has failed to prove that he was prevented from taking necessary action due to sickness. For instance, he stated that the submitted medical credentials by the applicant do not reflect that he was sick and admitted at the alleged hospital. Accordingly, he submitted that cases by the applicant should be sparingly applied herein because in such cases the applicants were able to prove their ill-plight. Hence, while driving towards his firm conclusion that this application lacks merit, the respondent's counsel reiterated that such good cause should 5 be analyzed in line with each day of the delay. In other words, he contended that each time wasted by the applicant must be accounted for. Lest, the court should disallow the application; the verdict the respondent considered appropriate in the current situation. To support the respondent's arguments and prayer for dismissal of this application, the Court was referred to various cases such as, *Mumero v BoT*, Civ. Appeal No. 12 of 2002; *H eri Investm ent {supra}-*, *Paul Martin v Bertha Anderson*, Civ. Appl. No. 2 of 2005; *Lyamuya Construction {supra}-*, *Elias Mwakainga v Dom in aK agaruki & Others*, Civ. Appl. No. 120 of 2018 (all unreported); and *Saturn Sururu Nabhani v Zahor Abdullah Zahor* \IW 8\ TLR 41. From the above contentious arguments, the obvious question to be determined by the Court is whether or not the grounds advanced by the applicants (sickness of one of them; and follow-up for satisfaction of decree) suffice to move it to allow the application. I will analyze each ground at a time, a little later. As I pedal-start to determine this application, I find it pertinent to reiterate the cardinal principle of law that court's power to extend time is 6 discretionary. But such discretion must be exercised judiciously free from personal whims, sympathy, empathy or sentiment. See, *Bakari Abdallah Masudi v Republic*, CoA Criminal Application No. 123/07 of 2018 and *Bank of Tanzania v Lucas Masiga*, Civil Appeal No. 323/02 of 2017 (both unreported). I, probably, should also state it here that; the essence of law setting the time limits is to: among other objectives, promote the expeditious dispatch of justice \Costeiow v Somerset County

Council(1993) IWLRL 256]; provide certainty of timeframe for the conduct of litigation \Ratman v Cumara Samy (1965) IWLRL 8]; and enhance public trust to the judicial system. Consequently, it works in the advantage of proper management of resources; most important of which are time and finance. In addition, it is an overriding rule hereof that, the applicant must demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in time. In so doing, he/she should prove how each day of delay justifiably passed by at no applicant's fault. This is the principle recapitulated in Hamis Babu Baity v The Judicial Officers Ethics Committee and 3 7 Others, CoA-Dar es Salaam, Civil Application No. 130/01 of 2020 (unreported), among many cases. Here and now, the court examines the grounds supporting the present application. The first point by the applicants is sickness. As correctly submitted by parties, settled in numerous cases, is the principle that sickness is beyond human control and, once proved, it suffices to warrant extension of time. Settling on this conclusion, I subscribe to holdings in, for example, A iasai Josiah v Lotus Valley Ltd, Civil Appl. No. 498/12 of 2019; Christina Alphonse Thomas v Saamoja Masingija, Civil Appl. No. 1/2014 (both unreported); together with cases cited by parties herein. In the matter at hand, the affidavit reveals that the 2nd applicant was undergoing medical checkup when the judgement herein was pronounced on October 20th , 2023; and was hospitalized at Sinza Hospital from November 19th , 2023 to December 13th , 2023. I will evaluate a couple of aspects casting concerns in the 2nd applicant's depositions more critically here. Firstly, evident, is the expose that the 2nd applicant underwent medical checkup for about a month before being hospitalized. The affidavit does not disclose what the medical experts recommended for him in line 8 with his health throughout such period of checkups. In other words, it took about 30 days for physicians to admit him for, to use his words, "serious attention and check-up". It is odd, to me, that a person may become seriously infirm and his doctors nest the frailty for about a month without taking necessary treatment. Secondly, if the medical report attached to his affidavit is the truth to go by, the 2nd applicant did not obtain the alleged medical attention at the said hospital around the period under review; or if he did, then it was on different dates. The subject report is specific that: "The above-mentioned Patient has been attended a n d Managed a t Sinza Hospital several times, due to Emergency hypertension since 19 Novemb to 2 8 Dece 2013" (bolding rendered for emphasis). From the excerpt above, apart form the medical doctor acknowledging the 2nd applicant's long-time ailment and management; the said medical services were offered to him about a decade ago. That is, while the duration subject of this application is between October, 2023 and January, 2024, the report covers November - December 2013. In addition, in its phraseology, 9 the report is not conclusive that in the stated period, inconsistent as it can seem, the 2nd applicant was really admitted. The "being attended and managed" phrase is unclear regarding the type and/or magnitude of services offered to him. Thirdly, upon his purported recovery and discharge on December 13th , 2023; the 2 nd applicant did not go back to his lawyers about the recourse to take following their previous information to him that the applicants had lost the case. Even when he became aware of the respondent's execution processes; he did not resort to court. Instead, he embarked on own efforts of satisfying the decree. Fourthly, all that the affidavital evidence is revealing is that the 2nd applicant was sick. On record, apart from the 1st applicant whose interests are protected by its principal officer (2nd applicant), there are three (3) more applicants. It is not deposed that they were also unable

to challenge the Court decision (Comm. Case No. 110 of 2022) on sickness basis or other grounds whatsoever. This quietness in the affidavit notwithstanding, the applicants' advocate vehemently submitted that the 2nd applicant "was the 10 solely person available within the United Republic of Tanzania and sound mind at the time of judgement". By implication, the foregoing statement may mean that the other applicants were out of the country or were of unsound mind or both. However, this line of approach is not helpful to the Court. I will give a couple of reasons. One, exhibit "NEWCO-6" to the affidavit partly states that the 4th applicant wrote to the 1st applicant proposing to redeem his property lodged with the respondent as security. It was on December 12th, 2023. He claimed to be in Arusha at that time. Moreover, it is not revealed that he committed himself to pay Tshs. 100m/- while labouring under mental health challenges. Even then, what would have been the use for the 2nd applicant to base on it in his request to the respondent? Two, given the advancement of ICT in the judiciary system, it would not have been impossible to procure affidavits from the applicants claimed to be abroad. To say the least, this incoherent revelation beats logic. Three and most importantly, such statements and/or facts are coming from the bar. In law, such strategy is invalid. Submissions from the bar is not evidence. That is the law. I accordingly seek reliance to the Registered Trustees of Archdiocese of Dar es Salaam v The Chairman, Bunju village Government, Civil Appeal No. 147 of 2006; and Ison BPO Tanzania Limited v Mohamed Aslant, Civil Application No. 367/18 of 2021 (both unreported). Another cardinal principle of law is that, one applying for extension of time must account for each and every day of the delay. In the case of Hassan Bushiri v Latifa Mashayo, Civil Application No. 3 of 2007 (unreported), the Court held that delay "of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken". Other cases in line with the foregoing legal position are Yazid Kassim Mbakiiki v CRDB (1996) Ltd Bukoba Branch & another, Civil Application No. 412/04 of 2018; Sebastian Ndauia v Grace Rwamafa [legal persona! representative of Joshua Rwamafa], Civil Application No. 4 of 2014; Dares Salaam City Council v Group Security Co. Ltd, Civil Application No. 234 of 2015; Muse Zongori Kisere v Richard Kisika Mugendi, Civil Application No. 244/01 of 2019, Ally Mohamed Makupa v Republic, 12 Criminal Application No. 93/07 of 2019; and Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (all unreported). In view of what is elucidated above, thus, the ground of sickness is devoid of merit. It is accordingly disallowed. The second ground is averred in the 10th paragraph of the 2nd applicant's affidavit. He alleges that he was making follow-ups with the respondent about the latter's response regarding his settlement proposal. That is, effective December 16th, 2023 (when he wrote to the respondent) to January 5th, 2024 when his letter was replied to. This point will not detain the Court for so long. To begin with, such efforts were initiated while the applicants were already out of time to file the requisite notice. Further, the law is very categorical that, out-of-court communications or negotiations associated with the matter in court do not constitute a ground to stopping the running of time. I am not short of supporting reference. Fortunatus Lwanyantika Masha and another vs. Ciaver Motors Limited, Civil Appeal No. 144 of 2019; M/SP&O international 13 Ltd vs. the Trustees of Tanzania National Parks (TANAPA), Civil Appeal No. 265 of 2020; and Kigoma Ujiji Municipal Council v UUmwengu Rashid t/a Ujiji Mark Foundation, Civil Appeal No. 222 of 2020 (all

unreported); are some of the cases in my mind to such effect. Obviously, I will not misdirect myself to hold that the applicants' allegations of negotiations herein have not moved me to find for a good cause to extend time; on the above bases. Without stretching my imagination beyond elasticity, I am inclined to opine that, allowing parties to sleep on their rights under the guise of flimsy excuses of amicable out- of-court negotiations; is to pave way for chaos to justice and mockery to due process of law. The decision which the applicants wish to challenge by way of appeal was delivered on October 20th , 2023. Therefore, it was unreasonable for them to pursue amicable satisfaction of the decree (which they were not satisfied with) while ignoring other legal remedies available to them. Hence, their allegations that they spent time from December 2023- January 2024 soliciting negotiations with the respondent are incomprehensible. In consequence, the second ground is equally abortive. 14 In upshot, I have found no sufficient cause to warrant granting the present application. It thus lacks merits. It is accordingly dismissed. The respondent has earned costs for this matter. It is so ordered. Judge March 15th, 2024 Ruling delivered this 15th day of March 2024 in the presence of Advocate Zuri'el Kazungu holding brief of Advocate Jonathan Kessy for the applicants. C.K.K/Morris Judge March 15th, 2024

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