

TANZANIA / JUDGMENT

PRESTIGE INVESTMENTS SA VS LUMAR

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM MISCELLANEOUS COMMERCIAL APPLICATION NO. 015495 OF 2024 PRESTIGE
INVESTMENTS SA APPLICANT VERSUS LAMAR COMMODITY TRADING
DMCC..... RESPONDENT

RULING

Date of last Order: 26/08/2024 Date of Ruling: 06/09/2024 GONZI, J. The application was brought under sections 93 and 95 and Order 43 Rule 2 of the Civil Procedure Code CAP 33 of the Laws of Tanzania read together with Rule 2 of Commercial Court Rules. The Applicant prayed for enlargement of time to deposit the security for costs pursuant to the order of this court dated the 13th day of June 2024 in Misc. Commercial Application 184/2023, out of time. It was supported by two affidavits sworn by Mr. Boniface Mwikomo, Principal Officer of the Applicant Company and Mr. Seni Songo Malimi, learned Advocate for the Applicant. During the hearing, the two affidavits were adopted and formed part of the Applicant's submissions, the Applicant was represented by Mr. Seni Songo Malimi, learned Advocate i while the Respondent was represented by Mr. Stephen Axwesso, learned Advocate. Whereas this Court had granted the Applicant 14 days to deposit security of costs in the main case, the Applicant failed to deposit the amount in the court account on time. According to Boniface Mwikomo's affidavit, the delay was for one day. In its Ruling dated 13th June 2024, the applicant was given 14 days to deposit 20,000 USD. The 14 days therefore started to run as from date of delivery of the Ruling. The Applicant stated that following delivery of the Ruling, there was a delay on the part of the Applicant to obtain the Court order itself up to 18th day of June 2024. By that time 5 days had already expired. After receipt of the Ruling and Drawn Order, the Applicant made efforts to deposit the amount timely, but until 27th June 2024 which was the last day for the Applicant to deposit the security for costs, the Applicant realized that he could not make be able to deposit the same because the Principal Officer of the Applicant was in Nairobi, Kenya and the court's online system for payment was not accessible to him without difficulties. The Principal Officer of the Applicant, therefore, transferred the funds to Mr. Seni Songo Malimi, Advocate for the Applicant who was in Dar es Salaam so as to deposit in court the amount as security for costs on behalf of the Applicant Company. The money was transferred on the 27th June 2024 which was the last date of the 14 days granted by the Court. Therefore, Mr. Malimi, learned Advocate, submitted that the delay was occasioned by reasons beyond control of the Applicant. It was caused by delay in getting copy of the Ruling, the travel from Dar es Salaam

to Nairobi of the Principal Officer of the Applicant Company and technical issues preventing the 2 Applicant from being able to deposit in the court's account the amount of security for costs while the Applicant's Principal Officer was abroad. Mr. Malimi, learned Advocate, submitted that the application at hand was officially admitted as filed on 2nd July 2024. However, it was brought to court for filing on 28th June 2024. He argued that immediately as from 28th June 2024, the application was already in Court and was pending admission. Therefore, he argued, the application was brought promptly within one day after expiry of the time and that the delay was minimal and negligible. Further, it was submitted that the Respondent is not in any way prejudiced by the delay as there is no procedural abuse. Mr. Malimi, learned Advocate, submitted that the application for enlargement of time is in the discretion of the Court. He prayed that the discretion be exercised in favour of the Applicant. He relied on *Mobrama Gold Corporation LTD versus Minister for Energy and Minerals (1998) TLR 425*, where there was a delay in filing a document and it was very negligible delay. The Court held that the courts will always grant an extension of time where the delay does not constitute a procedural abuse or a contemptuous process and where no prejudice is occasioned on the respondent. Generally, the Court will consider if the case will be stifled or not. Mr. Malimi, learned Advocate, prayed for this court to be inspired by the cited decision. He argued that if the application is denied, the main case will be dismissed and therefore be stifled as it will mark an end of the Applicant's case. He submitted that dismissal of the Applicant's main case for being denied to deposit security of costs on time will have negative consequences to the justice of the Applicant. Mr. Malimi, learned Advocate, cited the case of *Mashaka Juma Shabani and 42 others versus the AG*, Civil Application No. 279/01 of 2016, CAT DSM, which is also available on TANZLII website and data base. He submitted that the Court of Appeal in that case gave considerations in applications for enlargement of time. They include the length of the delay; the reasons for delay; whether there is accounting for delay for each day; the degree of prejudice to the other side; the delay not being inordinate and diligence by the applicant and not apathy, negligence or sloppiness. He submitted that the Application before the Court meets all these tests. He submitted that in the case at hand the delay is minimal and not inordinate. It is just a one-day delay. He argued that the two affidavits in support of the Application have accounted for each day of the delay and that the respondent will not be prejudiced except for costs which the court may grant. He added that there is no prejudice upon the respondent if the application is granted. He concluded by arguing that actually the Principal Officer of the Applicant had initially intended to wire the money by bank service from abroad. It was until when they were unable to wire it that they transferred the money to the advocate's account as evidence in the affidavit. By the time the money was wired to Mr. Malimi in Dar es Salaam, it was almost 14:36 minutes on 27th June 2024. He submitted that bank transfers are not immediately available to customers. Availability was not there until the next date. Therefore, the Applicant's advocate, despite the amount being wired to his bank account, was not able to retransfer the money to the court account as security for costs on the same date until the next date when the money would be available for withdrawal or transfer. He argued that upon receiving the wired money on 27th June 2024 at 14:36hrs, the Applicant's Advocate could have deposited the amount as security for costs in the court's account on the same date so as to meet the deadline, but banking procedures could not allow that. Hence the one-day delay. Mr. Stephen

Axwesso, learned Advocate, made his reply submissions. He adopted the counter affidavit filed for the Respondent and submitted that the application lacks merits because the application has been premised on a blame to the court system by the Applicant directing his excuses to delay by the court to provide the Applicant with a copy of the Ruling so as to allow the applicant to comply with order of the court. He submitted that the second blame by the Applicant to court is in respect of payment systems not being accessible at the time when the applicant chose to make the payment as ordered by the court. Mr. Axwesso, learned Advocate, submitted that this court could have been assisted if the applicant had indicated as to when he requested to be supplied with certified copies of the court's Ruling. There is no proof that the same was delayed to be supplied and that there is no proof to demonstrate when the Applicant received a copy of the Ruling. Mr. Axwesso, learned counsel, relied on the decision in Misc.Land Application No.3 of 2022 between Kahungu Kibhabhi versus Kayungilyo where at paragraph 2 of page 9 the Court (Hon. Manyanda, J.) observed that it is hard to believe the assertion of one having applied to be supplied with certified copies of Ruling without providing any proof of the allegation. He argued that the present in the case at hand the Applicant has not brought any proof of having applied for certified copies of the Ruling and Drawn Order and 5 when actually the same were supplied to the Applicant. He argued that the assertions of the Applicant should not be believed. Mr. Axwesso, learned Advocate, submitted that as demonstrated at paragraph 5 of the counter affidavit, the applicant was aware of the obligation to deposit the costs within the 14 days. However, he kept quiet without doing anything until the time had lapsed. He submitted that he days from 13th June, 2024 when the Order to deposit security for costs was given to 18th of June, 2024 when allegedly the Applicant obtained certified copies of the Ruling and Drawn Order, is not accounted for by the Applicant contrary to the position in the Lyamuya Construction case. He argued that, for one to obtain an extension of time, among others, every single day of the delay must be accounted for. After obtaining the Ruling on 18th June 2024, the Applicant as alleged, there is nothing being said in the affidavits in support of the application, and in the submissions in chief by the Applicant, as to what was going on from that date to 26th June 2024 when the deponent started his travel to Nairobi. He submitted that those are the days not accounted for in this application for extension of time. Mr. Axwesso, learned Advocate, submitted that in Mobrama case, it is clear that the court granted extension when there was no abuse of court process. In the case at hand there is an abuse of court process. The abuse is due to lack of evidence indicating the request made to this court and lack of proof as to when the ruling was actually received by the Applicant. There is also no proof that there was no any formal communication to court that there was a fault in its payment systems. That does not only constitute an 6 abuse of court process but also a sloppiness on the part of the Applicant. In the circumstances therefore it is hard in my view for the positions in Mobrama and mashaka Juma Shabani's cases to be applied. Mr. Axwesso, learned advocate, submitted that there is no reason stated in the affidavit in support of the application showing that certified copies of the Ruling and Drawn Order were necessary for the applicant to comply with this Court's directive to deposit the amount ordered as costs. He submitted that there is no law or case law that makes it mandatory for the Applicant to have a court order before he could comply with it especially an order for deposit of money in the bank account of the court as security for costs. He argued that the Ruling

was delivered in the presence of the counsel for the Applicant and it was heard to the parties. He prayed that the application be dismissed with costs. Mr. Malimi made rejoinder submissions. He argued that the two affidavits in the application have shown the good reasons for the delay. Also, he argued that in all the cases cited by the Respondent and by the Applicant on enlargement of time, the rule is that an applicant is required to account for "each day of the delay". He submitted that the delay to be accounted for is for each day of the delay not for the days which the court had given the parties an allowance to perform the order. In this case, the two affidavits the applicant show what he was doing within the time that was allowable. That was not explaining delay as there was no delay by then. He argued that the period of time spent in waiting to be supplied with certified copies of the Ruling, the travel abroad and communication between the client and 7 her advocates in Tanzania should be taken to be explaining how the Applicant consumed the allowed time. The principles should not apply for that period as the Applicant was not yet outside the time allowed by the Court. On lack of evidence as to when the Applicant had obtained the Ruling and the Drawn Order, he submitted that the applicant averred that there was a delay in issuance of ruling and court order. The Applicant was not thereby accounting or explaining the delay but was showing diligence and follow up. He submitted that it was necessary for the Applicant to get the ruling because that is the only formal means of communication to the applicant by his advocate on what had transpired in Court. The applicant is based in a foreign jurisdiction in Burundi. The Applicant needed the formal order of the court to understand clearly what was to be done. Mr. Malimi submitted that the delay should be counted from 28th June 2024 after the 14 days had elapsed on 27th June 2024. Counted that way, the delay was of only one day and hence minimal and negligible hence not inordinate. The application was done timely and the applicant was not sloppy or negligence but due to human challenge. That is the Applicant due to their incompetence to use the system, they failed to meet the deadline. It is nowhere near the procedural abuse. He concluded by repeating his prayers. The application is seeking for an extension of time for the Applicant to deposit USD 20,000 as security for costs in Commercial Case No. 130/2023 between the parties herein. In its Ruling dated 13th June 2024, this Court held that: 8

- (a) I do hereby issue an order compelling the Respondent to deposit in Court security for costs amounting to USD 20,000.00 (UnitedStates Dollars Twenty Thousand only) or its equivalent in Tanzanian Shillings as per the prevailing exchange rates of the date of this Order in respect of Commercial Case No. 130 of 2023 between the parties herein.
- (b) The Respondent shall deposit the costs in (a) above within 14 days from the date of this Ruling.
- (c) Each party to bear its own costs in this application It is the above order that the Applicant failed to comply with and has presented the present application for extension of time so as to be allowed to deposit the amount ordered as security for costs outside the time prescribed by the Court. As the Order was given on 13th June 2024, the 14 days period expired on 27th June 2024. The Applicant presented for filing in court the present application for extension of the next day that is 28th June

2024. The Applicant stated that the money to be deposited as security for costs was wired to the Advocate for the Applicant on 27th June 2024 at 14:36hrs. to what extent was the Applicant late to deposit the money? Obviously, the delay was of one day. That is the period of delay that the Applicant was bound to account for. The Applicant cannot be required to account for all the days from the issuance of the Court Order on 13th June 9 2024 as he was not yet out of time to deposit the amount as security for costs. The duty to account for the delay, as well argued by Mr.Seni Songo Malimi, learned Advocate, was with respect for the days constituting the delay and not for all the days prior to the institution of the application for extension of time. The Applicant for extension of time has no duty to account for all the days prior to institution of the Application because they do not constitute days of the delay. Therefore, in the present case the delay was of one day. I have asked myself whether there is a good cause for the delay or for enlargement of time in the present case? I have taken note of the reasons advanced by the Applicant that he was experiencing technical problems to effect payment directly to the court account while he was in Nairobi Kenya. Also, I have taken note of the fact that his Advocate upon receiving the amount in bank account in Tanzania, the amount was not immediately available for transfer or withdrawal until the next day. There was no opposition from the respondent in respect of this account by the Applicant. The fact that the Applicant transferred the amount as security for costs to his Advocate in Tanzania to be deposited in court, shows the willingness and readiness by the Applicant to comply with the Court order. The amount of costs is security for the Respondent's likely costs in relation to the main case between them. The respondent will not be prejudiced but secured, if the extension of time is granted for the Applicant to deposit the amount as security for costs in favour of the Respondent in the event that the respondent wins the main case is awarded costs. On the other hand, the Applicant stands to suffer if this application is not granted as he risks the 10 main case being dismissed for failure to deposit security for costs as ordered by the Court. I am alive to the rule that the purpose of security for costs order is just to protect the Defendant from being dragged into a case which he is not able to recover his costs. The aim of security for costs order is not to stifle the claims or counter claims. In the main case, the Respondent has been sued by a foreign entity and has successfully applied for costs. It is through the extension of time in the present case that the costs can be deposited in the court's account to secure the likely costs to be incurred by the Respondent in the main suit. Where the party ordered to deposit security for costs is willing and able to deposit the same except that he is late to do so by a short period of time like in the present case, and where the main case has not yet been dismissed for failure to deposit the costs, I am of the view that he should be granted an extension of time where he applies for it and satisfies the necessary conditions, so as to enable him to comply with the court order. I am alive to the principle that in applications for extension of time, like the present one, there is no hard and fast rule as to what amounts to "sufficient cause". Each case should be determined on its own merits bearing in mind the prevailing circumstances of the case. This rule was restated in the case of REGIONAL MANAGER, TANROADS KAGERA V. RUAHA CONCRETE COMPANY LTD CIVIL APPLICATION NO.96 OF 2007 (CAT unreported), where the Court held that: "What

constitutes sufficient reasons cannot be laid down by any hard or fast rules and this must be determined by reference to all the circumstances of each particular case". In the circumstances of the present case, the Applicant has in this case I find that the delay was not to be inordinate. It is just a one-day delay. The Applicant showed diligence by immediately seeking an extension of time upon delay of one day by filing the present application. Although, I have held that the Respondent will not be prejudiced by the granting of extension of time, I must hasten to say that the delay has naturally occasioned costs to unconcerned parties and the court. The problems which faced the Applicant thereby causing him to delay to deposit the amount of security for costs, affected the Applicant and the consequences thereof should befall the Applicant alone. It would be unfair for the court to distribute the risks upon the other party to this case, that is, the Applicant's problems, misfortunes and hardships which prevented the Applicant from depositing the amount of security for costs on time. Loss lies where it fell. The peculiar circumstances resulting into failure to deposit security for costs befell the Applicant and the Applicant only. Costs of this application must therefore be borne by the Applicant despite having emerged victorious in the application. Costs will not follow the event. Thus the Respondent shall have costs of this application. Without much ado, I hereby grant this application. I grant the application for extension of time and make the following orders:

1. The Applicant is granted 7 days extension of time from the date of this Ruling within which to deposit security for costs pursuant to the order of 12 this Honourable Court dated the 13th day of June 2024 in Misc. Commercial Application 184/2023.
2. The Respondent is granted costs of this application. It is so ordered. 06/09/2024 Ruling is delivered in court this 6th day of September, 2024 in the presence of Mr. Ibrahim Kibanda, Advocate for the Applicant and Mr. Makori Lucas Makori, Advocate holding brief for Mr. Stephen Axwesso, Advocate for the Respondent. 06/09/2024 13

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