

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KISANGA, J.A., MFALILA, J.A., And SAMATTA, J.A.)

CIVIL APPEAL NO. 61 OF 1996

BETWEEN

JOHN LESSA. APPELLANT

AND

1. ZAMCARGO LIMITED }
2. JONAS MMARI } RESPONDENTS

(Appeal from the Judgement of the High
Court of Tanzania at Dar-es-Salaam)

(Kyando, J.)

dated the 2nd day of February, 1994

in

HC Civil Case No. 6 of 1993

J U D G E M E N T

KISANGA, J.A.:

This is an appeal against the decision of the High Court (Kyando, J.) refusing to enter judgement for the plaintiff/appellant after the defendants/respondents had failed to file a written statement of defence within the prescribed time.

Very briefly the facts of the case are as follows:- After the appellant had filed the plaint in the High Court, that Court ordered that the written statement of defence be filed by 23.2.93, and the case to be mentioned on 3.3.93. On this latter date no written statement of defence had been filed, and the Court upon application by counsel for the respondent extended the time for filing the written statement of defence to 16.3.93. The appellant alleged that the respondents failed to comply with the Court order and so he applied to have judgement entered in his favour or for an order to proceed ex-parte against the respondents. The application was resisted and the learned

judge, upholding the submission that the written statement of defence was filed well within time, dismissed the application. The appellant's application to the High Court (Bubeshi, J.) for leave to appeal against the dismissal was refused but was subsequently granted by a Single Judge of this Court (Ramadhani, J.A.).

Before us the appellant appeared and argued the appeal in person while the respondents were represented by Mr. Ndyanabo who took over from Mr. Kisusi who had the conduct of the defence throughout in the High Court and also for some time in this Court.

At the hearing of the appeal Mr. Ndyanabo was unable to press that the written statement of defence was filed within the prescribed time. We think that he took the right stand for reasons which will be apparent later in this judgement.

Mr. Kisusi who, as stated before, conducted the defence before Mr. Ndyanabo took over, vigorously maintained that he filed the written statement of defence on 26.2.93. According to him that was well within the time fixed by the Court i.e. 16.3.93. However a close examination of the record demonstrates that the alleged date of filing the written statement of defence i.e. 26.2.93 was clearly a forgery. First, the appellant said on oath that after the Court had ordered the filing of a written statement of defence by 16.3.93 he constantly inquired from the Court if that order was complied with but was informed that until 16.3.93 no written statement of defence had been filed. The question is: If Mr. Kisusi had filed the written statement of defence on 26.2.93 why was a copy of it not served on the appellant? Why was the appellant not shown the alleged written statement of defence when he frequented the Court and asked if one had been filed?

Secondly, on 3.3.93 when the case was mentioned in Court, one Mr. Lyimo apparently holding brief for Mr. Kisusi, counsel for the respondents, asked for extension of time till 16.3.93 to file a written statement of defence, and the application was duly granted. If Mr. Kisusi had already filed the written statement of defence on 26.2.93 as he claims, why was it necessary on 3.3.93 to ask for extension of time to file the document? And if that document was on the file, why did the Court not see it, in which case it would be superfluous for it to extend time for filing the same document. It is pertinent to note that the said Mr. Lyimo has not sworn any affidavit to explain the circumstances in which he came to ask for extension of time to file a written statement of defence in a case where according to Mr. Kisusi, one was already filed. Nor did Mr. Kisusi himself swear any affidavit to shed some light on the matter. Not only that. Mr. Kisusi has not filed the affidavit of one George Mjema, his clerk, who allegedly presented the written statement of defence at the registry for filing on 26.2.93. In these circumstances it is impossible to think that the written statement of defence was filed on 26.2.93 as Mr. Kisusi asserts.

The worst aspect of this matter is what appears on the exchequer receipt against which the written statement of defence was allegedly filed on 26.2.93. That receipt is numbered A8/5095002 and it purports to be issued on 26.2.93. But the inspection of the counterfoils of the relevant receipt book disclosed that the previous two receipts Nos. A8/509500 and A8/509501 were both issued on 23.4.93, this is some two months later. The question is: How could the subsequent receipt No. A8/5095002 have been issued before those two on 26.2.93? The only conclusion to be drawn is that the exchequer receipt No. A8/5095002 dated 26.2.93 was not issued in the ordinary course of business. It must have

been issued in a fraudulent attempt to show that the written statement of defence was filed on 26.2.93 and that this particular exchequer receipt was issued in respect thereof.

The next question which arises is: Who committed this misconduct? It is plain that the member of the registry staff who accepted the written statement of defence and issued the exchequer receipt with a forged date on it was involved. But such a member of the registry staff acting alone could not do it because there would be no motive for doing so as there is nothing to suggest what interest he or she had in the matter, or what advantage he or she stood to gain in so acting. On the other hand it is apparent that the misconduct was committed on the instructions of Mr. Kisusi, and the reason for this view is as follows:- For the reasons stated earlier, it is quite apparent that Mr. Kisusi failed to file the written statement of defence by 16.3.93 as ordered by the High Court. As intimated before, Mr. Ndyanabo who appeared before us rightly conceded to this when he said that the written statement of defence cannot have been filed on 26.2.93 as it purports to show, and as was maintained by Mr. Kisusi when he was having the conduct of the defence in this case. Thus, following such failure, Mr. Kisusi would then appear to have made deliberate effort calculated to mislead the High Court into holding that the written statement of defence was filed within the time fixed by that Court and, indeed he succeeded to do so. Mr. Kisusi would have every reason to do this because he was trying to make good his default of filing the written statement of defence.

We wish to observe that such misconduct by counsel as appears to have taken place in this case, was most unfortunate, to say the least. This is so not only because the misconduct was calculated to deceive

and mislead the court and hence to pervert the course of justice, but also because it was designed to induce others including the court registry staff into committing misconduct. We feel duty bound to strongly discourage such conduct by counsel in the future, especially in this time when there is a growing number of allegations of corruption and other malpractices being made against the legal profession.

With that said, we now conclude this matter by holding that the learned High Court Judge wrongly found that the written statement of defence was filed within the time fixed by the Court. On the evidence he should have found that the respondents had failed to file a written statement of defence. Accordingly that Ruling is set aside.

The appellant in his chamber application to the High Court had asked for judgement in default of filing a written statement of defence or for an order that the case proceeds ex-parte against the respondents. Although the appellant did not say so expressly, it is clear that he was relying on the provisions of Order 8 Rule 14 of the Civil Procedure Code. Had the trial judge not been misled, he would have found, that the respondents had failed to present a written statement of defence, in which case he would have proceeded to make the necessary order or direction under the above cited Rule following such default. Accordingly the matter is remitted to the High Court with a direction that that Court now proceeds to make the necessary order/direction under Order 8 Rule 14 of the Civil Procedure Code.

The appellant is to have his costs of this appeal.


DATED at DAR-ES-SALAAM this 7th day of September, 1999.

R.H. KISANGA
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(A.G. MWARIJA)
DEPUTY REGISTRAR