

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MROSO, J.A., MSOFFE, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 34 OF 2003

BETWEEN

**NATIONAL BANK OF COMMERCE LIMITED.....
APPELLANT**

VERSUS

**PARTNERS CONSTRUCTION CO. LTD.
RESPONDENT**

**(Appeal from the Ruling and Order of the High Court
of Tanzania at Dar es Salaam)**

(Luanda, J.)

dated the 5th day of July, 2002

in

Civil Case No. 149 of 2002

JUDGMENT OF THE COURT

KAJI, J.A.:

On 29th April, 2002, the respondent, PARTNERS CONSTRUCTION COMPANY LIMITED, filed a suit against the appellant, the NATIONAL BANK OF COMMERCE LIMITED, claiming *inter alia*, for the release of a bag alleged to have been retained by the appellant since around 1985.

On 4th June, 2002, the appellant was served with a summons for orders requiring the appellant to file written statement of defence within twenty one days of the date of service.

On 25th June, 2002, the appellant filed written statement of defence which was objected to by Mr. Kalunga, learned counsel for the respondent, on the ground that it was filed out of time without leave by the court. Mr. Kalunga submitted that the appellant was required to file written statement of defence within 21 days of the date of service, that is, within 21 days from 4th June, 2002 when the appellant was served. He maintained that time started to run from 4th June, 2002, and that the period of 21 days expired on 24th June, 2002. In that respect, he submitted, when the appellant filed the written statement of defence on 25th June, 2002, it was out of time by one day. He called upon the Court to expunge it from the court record, and the hearing to proceed ex parte.

On his part, Mr. Mujulizi, learned counsel from IMMA (Advocate) who was representing the appellant at the trial submitted that time started to run a day after service, that is, on 5th June, 2002. In that respect, he submitted, the period of 21 days expired on 25th June, 2002, and therefore the written statement of defence was filed in time. In the alternative, the learned counsel applied orally for extension of one day within which to file it.

The learned trial judge accepted Mr. Kalunga's

submission that time started to run from the date of service, that is, on 4th June, 2002, and that when the written statement of defence was filed on 25th June, 2002, it was out of time by one day. However the learned judge did not consider the appellant's oral application for extension of time on the ground that, in his view, an application for extension of time must be made during the period of 21 days when the defendant is required to file his written statement of defence, and that a court has no jurisdiction to entertain such an application made after the expiration of that period. He cited as authority the decision of this Court in **TANZANIA HARBOURS AUTHORITY V. MOHAMED R. MOHAMED** - Civil Appeal No. 80 of 1999 (unreported), and the proviso to ORDER VIII Rule 1(2) of the Civil Procedure Code, 1966 as amended by GN No. 422 of 1994. In the end result, the written statement of defence was expunged from the court record and the hearing was ordered to proceed ex parte under ORDER VIII Rule 14 (1) of the Civil Procedure Code. The appellant was dissatisfied; hence this appeal.

Before us the appellant was represented by Mr. Ishengoma, learned counsel from IMMA (Advocate). The respondent was advocated for by Mr. Kalunga, learned counsel.

Two grounds of appeal were presented and argued before us. They are as follows:-

1. That the learned judge erred in law in holding that the defendant's written statement of defence filed on 25th June, 2002, after service of the plaint upon the appellant on 4th June, 2002 was out of time, and therefore expunging the same from the court record.
2. That after holding that the written statement of defence was filed out of time, the trial judge erred in law in holding that the defendants were also out of time to apply for extension of time to file the written statement of defence out of time.

In elaborating the first ground of appeal Mr. Ishengoma contended that, in computing the period, the date of service should be excluded as provided for under Section 19 (1) of the Law of Limitation Act, 1971. In that respect, it was his submission that, when the written statement of defence was filed on 25th June, 2002, it was within time.

On the second ground of appeal, the learned counsel submitted that, an application for extension of time within

which to file a written statement of defence, can be made by the defendant after the expiration of 21 days within which he was required to file his written statement of defence. In that respect, the learned counsel submitted that, the learned trial judge erred when he held that such an application can only be made before the expiration of the 21 days when the defendant is required to file his written statement of defence.

On his part, Mr. Kalunga submitted that the Law of Limitation Act does not apply in respect of summons or specific order by a judge. He argued that, the Law of Limitation Act applies only in respect of proceedings in matters specified in the schedules thereat.

A summons, he said, is not a proceeding as defined in Section 2 of the Act, nor is it specified under any of the schedules to the Act. He reiterated what he had submitted earlier on that time started to run from the date of service, that is, from 4th June, 2002, and that when the written statement of defence was filed on 25th June, 2002, it was out of time by one day.

However the learned counsel conceded that an application for extension of time can be made within 21 days after expiration of the 21 days within which the defendant is required to file his written statement of defence. But in the

instant case, he said, no such application was filed within that period.

We have carefully considered the learned counsel's submissions. We will start with the first ground of appeal, that is, whether the written statement of defence was filed in or out of time.

The written statement of defence was filed pursuant to ORDER VIII Rule 1 (2) of the Civil Procedure Code, 1966 as amended by Government Notice No. 422 of 1994 (hereinafter to be referred to as CPC).

ORDER VIII Rule 1 (2) reads as follows:-

“Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him, present to the court a written statement of his defence.”

That is the position of the law, and both counsel have no dispute on this. They only differ on the computation of those 21 days. While the appellant's counsel is contending that, in computing the period of 21 days, the day on which service was effected is to be excluded by virtue of Section 19

(1) of the Law of Limitation Act, 1971, on the other hand the respondent's counsel is submitting that the computation must include the date of service, and that the Law of Limitation Act does not apply in the instant case where the matter is a summons and not a proceeding.

We have carefully considered these submissions. For ease of reference we hereby reproduce Section 19 (1) of the Law of Limitation Act which reads:-

19 (1) In computing the period of limitation prescribed for any proceeding, the day from which such period is to be computed shall be excluded.

We hasten to say that this provision of the law is not applicable in the instant case. Section 19 (1) refers to proceeding. The word "proceeding" is defined in Section 2 to mean "a suit, an appeal or any application and includes proceedings under the customary law".

We do not have to emphasize that a summons to file written statement of defence does not fall under any of these categories.

After excluding the application of Section 19 (1) of the Law of Limitation Act, we turn our attention to the provision under which the summons was issued, that is, ORDER VIII

Rule 1 (2) CPC. We have already reproduced it above. But here we will examine closely the meaning of the phrase “within twenty-one days of the date of service”. Our understanding of this provision is that the defendant is required to file his written statement of defence within twenty-one days from the date of service. That is, the twenty-one days start to run from the date of service. In other words, the date of service is included in computing the period of twenty-one days. In that respect, in the instant case, time started running from 4th June, 2002 when the appellant was served and ended on 24th June, 2002. Therefore when the written statement of defence was filed on 25th June, 2002, it was out of time by one day.

As far as the second ground of appeal is concerned, the respondent’s advocate has rightly conceded that the proviso to ORDER VIII Rule 1 (2) allows an application for enlargement of time to be made after the expiration of the 21 days when the defendant is required to file his written statement of defence. That provision is very clear. It reads:-

“Provided that the court may, within twenty one days of expiration of the prescribed period, grant an extension of time for presentation of the written

statement of defence on application by
the defendant”

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The meaning of this , in our view, is that, when the defendant fails to file written statement of defence within the prescribed period of twenty-one days, he may apply for extension of time, provided he does so within twenty one days from the expiration of the prescribed period of twenty one days. If he does so more than twenty one days from the expiration of the prescribed period of twenty one days, his application cannot be entertained. The rationale behind it is to limit the discretion of the court to extend the time within which the defendant can file a written statement of defence as was held by this Court in **TANZANIA HARBOURS AUTHORITY V. MOHAMED R. MOHAMED** – Civil Appeal No. 80 of 1999 (unreported).

In the instant case, as we have observed earlier on, the prescribed period of twenty one days expired on 24th June, 2002. But according to the record, on 28th June, 2002, the appellant’s advocate applied orally for extension of time, but his application was not considered on the ground that it ought to have been made within the period of twenty one days when the defendant was required to file written statement of defence. With due respect to the learned trial judge, this was wrong in view of what we have already stated above. On 28 June, 2002, twenty one days had not

yet expired from 24th June, 2002 when the prescribed period of twenty one days expired. The learned judge should have considered that application. Mr. Kalunga has urged us to hold that there was no application because the said application was not made in writing but merely orally. We have considered this. But we are satisfied that this complaint has no merit in view of the proviso to ORDER XLIII Rule 2 CPC which allows oral applications where the court considers fit to do so.

ORDER XLII Rule 2 reads as follows:-

“Every application to the court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

Provided that the court may, where it considers fit to do so, entertain an application made orally -----”

In the instant case, since the oral application was made in time, that is, within twenty one days from the date of expiration of the prescribed period, the learned judge should have considered it.

In the event, and for the reasons stated, we dismiss the first ground of appeal and allow the second ground of

appeal. We hereby refer the record to the trial court to consider the appellant's oral application for extension of time which, as we have already stated, was made in time.

Each party to bear own costs.

DATED at DAR ES SALAAM this 15th day of June,
2005.

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

S.A.N. WAMBURA
SENIOR DEPUTY REGISTRAR