

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL CASE NO. 348 OF 1998

RICHARD AUGUSTINE ZUBERI PLAINTIFF

Versus

ALLY MONDOMA DEFENDANT

RULING:

The defendant (Applicant) represented by Mr. Mkondya, Advocate, having failed to file a written statement of defence by 31/3/98 applied and was granted extension of time in which to so act up to 14/4/98. This indulgence notwithstanding the defendant did not act till 28/5/98 when he stealthily paid fees and caused the written statement of defence to be slotted into the court record. Realising that the going ahead would not be easy Mr. Mkondya proceeded and filed a chamber summons supported by an affidavit praying for leave to have the written statement defence filed out of time, and for that matter retrospectively, on 28/5/98. The chamber summons was filed on 8/6/1998.

As the Applicant's affidavit is very interesting when related to the court record, even at the danger of making this ruling unnecessarily long let me reproduce it substantially,

- "2. That on several occasions the Advocate for the Respondent herein above mentioned, had been asking me whether the Civil Registry had served me with the relevant summons to which I replied in the negative,
3. That I accepted service of the summons on a date I do not remember as the summons was handed over to me while I was hurrying to another court here at the high Court,
4. That I remember to have requested Mr. Nyanduga to hold my brief for the Defendant at one time,

5. That I sincerely believed that I was to file the defence if any by 28th May 1998 as the case was to come on the 29th May 1998.
6. That I had handed over a copy of the plaint to my client on the 3rd April 1998 and was awaiting his comments on the same.
7. That there is no communication between me and my client at all whether by telephone or otherwise except by physical visits.
8. That it is thus prayed that the period for the presentation of the written statement of defence be extended to the 28th May, 1998 or that the written statement of Defence filed be accepted.” This Affidavit is sworn by Mr. Mkondya.

Mr. Nyanduga for the Respondent challenged this application on various grounds including that it violates O.8, Rule 14 (1) and (2) CPC as amended by GN. 422 of 1984 as they are mandatory provisions and that s. 43 (f) and 46 of the Law of limitation affects O. 8, Rule 2 CPC once time has started running. He also refers to s. 3 of the same Act. The supporting counter affidavit also insists that when Mr. Mkondya asked Mr. Nyanduga to hold brief for him he also handed him a note showing that the written statement of defence would be filed by 14/4/98. A copy of this note was made an annexure to the said counter affidavit and its authenticity has not be challenged.

In the reply to the counter affidavit the Applicant argues that if his advocate had not “volunteered to be served with plaint in March” the matter would have delayed further and that it is not true to say that it is illegal to extend twice time within which to file a written statement of defence.

When I was about to quote the affidavit by Mr. Mkondya, Advocate, I observed that it is interesting. I so stated because Mr. Mkondya acts as if he was not aware of what had been taking place in court when the record tells the contrary. On 11/3/98 both Mr. Mkondya and Mr. Nyanduga were before Mr. Mshote, District Registrar, High Court when it was ordered that the written statement of defence be filed by 31/3/1998. On 1/4/98 only Mr. Nyanduga appeared but he submitted,

“Mr. Mkondya prays for extension of time to file written statement of Defence by 14/4/1998.” The prayer was granted and the matter was fixed for mention on 15/4/98. This is corroborated by Annexure 1 to the counter affidavit which was not challenged. This annexure is Mr. Mkondya’s note to Mr. Nyanduga, indeed indicating his prayer that the defence be filed by 14/4/98 while mention should be on 15/4/98. In the face of all this, it is very unfortunate that this learned counsel could come out with an affidavit alleging contents as quoted above, among others, claiming that he believed that the written statement of defence was to be filed by 28/5/98. That apart, if he was already instructed by 11th March, 1998, how could he hand over a copy of plaint to his client on 3/4/1998 (as per para 6), and any case it is an advocate who should advise a client as to court schedules and their implications and cannot leave him to act at his whims as para 7 also seems to confirm.

Clearly therefore the applicant offers no reason at all for his failure to file the written statement of defence in time.

As regards Mr. Nyanduga’s argument that the law does not in the circumstances, permit second extension of time, I respectively go with him. Order 8, Rule 2 of the Civil Procedure Code was amended by GN 422 of 1984 by among others, deleting the proviso to sub 2 of Rule 1 (and replacing the same) which permitted the court to extend time within which to file a defence generally. I think the idea behind was to arrest the uncontrolled adjournments and dilly dally by parties in filing defences on flimsy grounds or none at all as is the case here. The current proviso 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.”

This means the Applicant has to apply within 21 days of his failure to file a written statement of defence. It means therefore, while the court has discretion to entertain the application, the mandatory requirement must be met first: that is, an application must be made within the 21 days of default. In the present case the first application was proper for while the written of defence was required to be filed by 31/3/98 and it was not, the application for extension of time was applied for and granted on 1/4/98 (just a day later). The present application however is not – it is deplorably out of time. The

Applicant could apply for further extension of time within 21 days from 14/4/98 – on this score I don't subscribe to Mr. Nyanduga's interpretation that extension cannot be done twice. It can, provided the application is made within 21 days of default. I am on all fours with him however that in this situation the court would have no power to extend the time even if applicant had adduced reasons for his failure. Even if we take 28/5/98 (when he stealthily slotted in the record the written statement of defence) as the date of the application (the present application was filed on 8/6/98) he would still be out of time by over 20 days.

On the whole therefore, the application is hereby dismissed with costs for:-

- (a) failure to adduce any reason at all explaining why the written Statement of defence was not filed in time, and
- (b) admitting it would be contrary to law as the application was filed outside the further extension of 21 days period (Order 8 (1) Civil Procedure Code).

L. B. Kalegeya
JUDGE

Delivered today the 12th October, 1998, in the presence of Mr. Mkondya for Applicant and Mr. Nyanduga for Plaintiff/Respondent.

L. B. Kalegeya
JUDGE
12/10/1998