

IN THE HIGH COURT OF TANZANIA
AT MBEYA

CIVIL CASE NO. 21 OF 2001

1. JONAS MGOKA)
2. ELIA KAMONG'ONYA MWATEBA) PLAINTIFFS
VERSUS
A. SINGH, t/a DEOL LIMITED DEFENDANT

R U L I N G

MREMA, J.

I have engaged a little time to painstakingly delve into the documents filed by the Learned counsel for the Applicant - Respondent Mr. Mushokorwa in his endeavour to lure this court to acceding to the Applicant's prayer for extension of time to file Written Statement of Defence. Equally time has not been wasted, in the course of my administering justice, to peruse the documents filed by the adverse party, i.e. Mr. Mkumbe, Learned counsel for the Respondent, opposing the application.

It is not in dispute, as per the Applicant's articulation in the affidavit filed by his advocate Mr. Mushokorwa on his behalf, and admitted by the opposite party, that the Respondent instituted Civil Case No.21/2001 against the Applicant - Defendant on 10/11/2001. Also as per the Applicant's affidavit (Mr. Mushokorwa's) summons for orders reached the Applicant in Ndola, Zambia, on 29/7/2002 by postal service as evidenced by annexure "A" to the Chamber Summons.

The reasons for the delay to file the W.S.D. have been supplied in the Applicant's affidavit, the material ones being that:

- (a) That the Applicant has no local agent in Tanzania, hence he needed time to make enquiries and managed to come into contact with the Learned Applicant's Counsel Mr. Mushokorwa whom he instructed to handle his briefs. That was sometime in August, 2002.
- (b) Having been instructed beyond the prescribed 21 days it took the counsel's time to study the documents filed by the Respondent-Plaintiff, then he had to prepare defence and dispatch them to Ndola, Zambia, for verification. The documents were then returned and the counsel received them on 5/9/2002.

In those circumstances, according to Mr. Mushokorwa, the delay was inevitable, hence the justification for this application for leave to enlarge the time to file the Defence out of the prescribed period of limitation.

When this matter came before me on 30/10/2002 for an appropriate Order, at first the Learned counsel for the Respondent-Plaintiff Mr. Mkumbe informed this court that on behalf of his client he did not file counter affidavit as they did not intend to oppose the application. But upon a query by this court as whether the application for extension of time to file W.S.D. out of time was within the requisite period of limitation, Mr. Mkumbe quickly reacted and suggested as follows:

"My Lord, let the Law takes its course (and he referred to the case of J.K. MWANGUKU and 2 OTHERS v. THE GENERAL MANAGER INCAR TANZANIA & OTHERS — CIVIL CASE NO.163/1996, UNREPORTED - DAR-ES-SALAAM REGISTRY)"

Admittedly it was an error apparent on the face of the record when this Court directed the parties to file written submissions either to support or oppose the application before the Respondent-Plaintiff filed counter-affidavit, according to Law, because submissions by advocates or parties do not constitute evidence in Law, either to admit or oppose facts deposed to by either of the parties in his/her verified affidavit. Be that as it may, since the material issue in the instant application is not based on fact but on point of Law, I think the Respondent's Omission to file Counter affidavit has not occasioned a failure of justice. The point of Law concerned was properly addressed by both the counsel and my role here is to consider and decide on both the views as to which one ^{is} sustainably maintainable in the circumstances.

After going through both the submissions filed by the two Learned Counsel I find it not gainful to deliberate on each assertion, especially on the fact that the bone of contention is quite lucid and transparent. The sole material question is whether the said application is within the prescribed time.

The relevant provisions to look at and invoke in this application are Order VIII rule 4(2) the Proviso, as amended by CIVIL PROCEDURE CODE

AMENDMENT OF SCHEDULES) RULES, 1994 - G.N. NO. 422/1994, and Order XLIII rule 6, as amended by G.N. No. 422/1994.

As correctly submitted by Mr. Mkumbe, Learned counsel for the Respondent, the central aim that led to the enactment of the provisions contained in the G.N. No. 422/94 is to speed up trials of Civil Cases, hence the necessity to limit or curtail certain periods required to process and prosecute litigations, or applications. Also, with respect, I agree with Mr. Mushokorwa, Learned Counsel for the Applicant that before the enactment of the G.N. No. 422/1999 a defendant who faulted to present his Written Statement of Defence within twenty one (21) days of the date of service of the summons could upon application, with leave of the Court, present his W.S.D. for a longer period than forty two (42) days, but upon showing good or sufficient cause for the delay to comply with the 21 days rule. But the situation now is different, in that the words "such longer period as the Court may direct in the Summons" (had the effect of providing unlimited powers to the court) were abrogated by G.N. No. 422/1994. It ^{is} needless to emphasize that the proviso to subrule (2) of rule 1 of Order VIII was amended in order to curtail the Court's unlimited powers to grant an extension of time for the presentation of the Written of defence upon application by the defendant. The new proviso to sub-rule (2) of rule 1 of Order VIII, as amended, is couched in the following words:

"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".

Although the new proviso retained the court's discretion to grant extension of time to a defendant applicant to file his Written Statement of Defence after the first prescribed twenty one days have elapsed it nevertheless curtailed its (the court) long enjoyed unlimited discretion to enlarge unspecified periods to enable a defendant to file his Written Statement of Defence out of time. Under the new Law, therefore, a trial Civil Court has no power to grant more than twenty one days extension of time within which

to file the Written Statement of Defence after the first twenty one days have expired. This is exactly what this court (Kaji, J..) had in mind in the case of J.K. MWANGUKU and 4 OTHERS Vs. THE GENERAL MANAGER INCAR TANZANIA AND ANOTHER, CIVIL CASE NO. 163/1996, DSM. REGISTRY (Unreported) at page 3 of the typed judgement, when he observed as follows:

"GN 422 of 1994 did not remove the powers of this court to grant extension of time within which to file a W.S.D. What it did was only to limit those powers. The limitation is that an application for extension of time to file a W.S.D. must be made within 21 days from the expiration of the prescribed period. If such an application is made more than 21 days from the expiration of the prescribed period, then this court has no powers to grant".

Indeed, with approval, I think that is the correct proposition. The question here is whether the Applicant-Defendant's application is within the twenty one (21) days period beyond which the court is seized of no jurisdiction to enlarge the time enabling the defendant to file his Written Statement of Defence?

As correctly sworn to by the Deponent Mr. Mushokorwa in his affidavit, at paragraph 3, the Applicant-Defendant received the said summons on 29/7/2002. And by virtue of Order VIII rule 1(2) of the C.P.C, 1966, as amended by G.N. 422/1994, the Applicant-Defendant ought to have filed his Written Statement of Defence on or before 19/08/2004.

According to Mr. Mushokorwa, his client, who is residing in Ndola, Zambia, was unable to instruct him within the first 21 days prescribed period; and that the Learned Counsel having been instructed beyond the 21 days prescribed limitation period, it took him (i.e. the advocate) time to study the documents filed by his adverse party in court and then prepare the necessary defence and then caused the same to be verified in Zambia.

With respect, the court's problem is not what the Applicant did after the receipt of the summons for filing the defence, but its main consideration is whether the defendant, after receiving the summons for filing Written

Statement of Defence and defaulted to comply with Order VIII rule 2, did comply with the Proviso to Order VIII rule 1 (2) (cited above)?

I have examined very meticulously the alleged postal service document which is attached to Mr. Mushokorwa's affidavit. It is a photostatic copy and the same is not certified by a Commissioner of Oath to be a manufactured copy of the original document. Mr. Mushokorwa's affidavit does not explain why the document has to be a secondary copy and also why the same could not be certified according to Law. Worse than that the name of the addressee is not legible sufficiently to satisfy this court that the person allegedly served with the summons is not anybody else but the defendant A. SINGH t/a Deol Limited. The name of the addressee on the photo copy of the postal document appears vague or illegible, thus, in my opinion, providing doubt as whether he is the proper defendant to whom the summons was intended to be served. It is not the function of the court to "fish" around to ascertain the correct name of the addressee. With this doubt, it may be possible to argue for the Respondent-Plaintiff that the name of the addressee in annexure "A" to Mr. Mushokorwa's affidavit is not that of the Applicant-Defendant. I am not prepared to speculate as what are those names appearing at the space provided for the addressee in annexure "A".

Moreover annexure "A" to Mr. Mushokorwa's affidavit is nothing more than evidence that the summons sent to the Defendant for filing defence was duly served on the Defendant. But to my surprise the Learned Applicant's Counsel never annexed the purported served summons on the Applicant-Defendant to his affidavit so that the court would know the date the Summons was signed as an acknowledgement of receiving the same by the Defendant. In the absence of the copy of the summons allegedly served on the Defendant, my judgement is that it is difficult to believe that annexure "A" to Mr. Mushokorwa's advocate is the very postal EMS document that served as evidence of service of the said summons on the Defendant. It could be a different document served on the Defendant other than the court summons under discussion in this matter.

But as regards the summons, even if it were accepted that there was proper service on the defendant, but which I have refused to agree, the application in this matter for extension of time was filed on the last expiry date of the Last twenty one days, which was on 6-09-2002. The Proviso to Order VIII rule 1 (2) (as amended) very clearly empowers the court to grant extension of time for presentation of the Written Statement of defence "within twenty one days of expiration of the prescribed period". Now, if the Applicant brought his application on the very Last date of expiration of the prescribed period, would that have been also what the Law contemplated during its enactment even if the application could not have been entertained and granted on that same date of its being filed? In my inclined view I am not persuaded to agree that the Legislature intended the Law to be so. My interpretation of the Proviso is that for a court to exercise its discretion to grant extension of time under that rule it must do so within twenty one days of the prescribed period, upon an application by the defendant. And again, in my view, the court can only do that if the application can be brought within reasonable time and within the twenty one days prescribed period so that the other party to the suit or matter could be given notice to appear and exercise his option either to oppose or accede to the application. In the present circumstances of the case, therefore, I am satisfied, it was not possible to avail opportunity to the Respondent-Plaintiff to appear and defend the application on the same date which was also the expiry date (i.e. 6/9/2002).

I can conceive nothing material from the facts deposed to by Mr. Mushokorwa in his affidavit which would justify this court believe and be satisfied that the applicant had good and sufficient cause that prevented him from not filing his Written Statement of Defence between 29/7/2002 and 6/9/2002. Forty two days period were, in my view, sufficient period to enable the applicant comply with what the Law intended him to do. To allow otherwise, I think, it would be circumventing the mischief that led to the

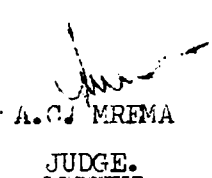
enactment of the Government Notice No. 422/1997 and thereby resulting to its defeat through the back door. This, with respect, I am not prepared to create a precedent which at the end of the day will be unimplementable.

I have also had opportunity to examine Order XLIII rule 6 of the C.P.C, 1966, as amended by G.N. 422/94, which both the counsel discussed at length. For avoidance of doubt and ease of reference Order LXIII rule 6 (as amended) provides as follows:

"LXIII r. 6. The Court may extend the time limited by the rules contained under the First and Second Schedule herein for the doing of an act authorized or required by such rules. Provided that an application for extension of time is made by the party concerned within twenty one days of the expiration of the prescribed time, unless otherwise provided by the relevant rule".

In my considered view, if application for extension of time cannot be placed before the Court within twenty one days of the expiration of the prescribed period and the same be heard and decision given within that period or twenty one days then the court would not have jurisdictional power to entertain such application outside the twenty one days limited period. The extension of 21 days extension of time must have taken into account the time to be taken (from when the application for enlargement of time is filed) to serve the Respondent to exercise his right of option to defend the application. I am not prepared to incline to the view that the Legislature intended that an application for leave to file Written Statement of Defence outside the prescribed time could be presented even on the Last date of the expiration of the prescribed time. That could only be possible if the application could be filed on that same date, both parties notified, heard on the same day and decision given. In the present circumstances, therefore, I am unable to conceive any good cause on the part of the Applicant-Defendant that made him unable to file his defence with a period of forty two (42) days of the date of the service of ~~the summons for filing~~ Written Statement of Defence.

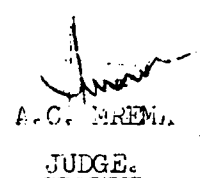
In the result I find this application unmeritorious and it is hereby dismissed with costs. Accordingly it is so ordered.


A.C. MREMA

JUDGE.

10/12/2003.

At Mbeya, in the presence of
Mr. Mushokorwa, Learned advocate for the
Applicant-Defendant, and Mr. Mkumbe, Learned
advocate for the Respondent-Plaintiff.


A.C. MREMA

JUDGE.

10/12/2003.

ACM/krm