

IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

LAND CASE NO. 14 OF 2013

**FRANCIS ADRIAN KASOYAGA t/a
GREEN POINT LODGE.....PLAINTIFF**

Versus

SCHLUMBERGER SEACO INC.....DEFENDANT

Date of last Order: 12/11/2015

Date of Ruling: 26/11/2015

R U L I N G

Twaib, J:

The plaintiff Francis Adrian Kasoyaga filed the instant suit against the defendant, Schlumberger Seaco Inc., claiming *inter alia*, for payment of Tshs. 203,336,476.17 being an outstanding rent and costs of several merchandise supplied to the defendant. The defendant filed her WSD disputing the plaintiffs' claim. Upon being served with the WSD, the plaintiffs filed a preliminary objection on point of law, avowing that the defendant's Written Statement of Defence (WSD) was filed out of time without leave of the court.

The preliminary objection was heard by way of written submissions. The plaintiffs was represented by Mr. Mpoki, learned advocate, while the defendant was represented by Mr. Gide Magila, learned Advocate.

Submitting in support of the preliminary objection, the plaintiff's counsel referred the court to Order VIII Rule 1 (2) of the Civil Procedure Code Cap. 33 (R.E. 2002), which provides that 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 summons upon him present to the court a written statement of his defence.

Counsel states that in the instant case, the summons to file WSD were served on the defendant on 14th November, 2013 and thus 21 days expired on 4th December, 2013. He added that the court record shows that the defendant filed his WSD on the 10th December, 2013, beyond the time stipulated by law. He also cited the case of **National Bank of Commerce Limited v Partners Construction Co. Ltd**, Civil Appeal No. 34 of 2003 (unreported) which held that the defendant is required to file his WSD within twenty one days from the date of service. He further cited the proviso to Order VIII Rule 1 (2) of the Civil Procedure Code which provides:

"...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."

He went on submitting that there is no evidence on the record which show that the defendant did apply for an extension of time within the stipulated 21 days. He viewed that since the defendant failed to comply with Order VIII Rule 1 (2) of the Civil Procedure Code, he is now barred from filing his defence and the case should proceed *ex-parte* against the defendant as provided for under the provision of Order VIII Rule 14 (2) (b) of the Civil Procedure Code Cap. 33 2002 and as was decided in the Case of *MIC Tanzania Limited v Hindow Cellular*

Phonex Limited, Civil Appeal No. 86 of 2007 (unreported). Though the defendant may be free to appear at the hearing of the suit, argued counsel, he will not have a right to cross examine the plaintiff or his witnesses or be heard in defence. He referred the court to the decision in the case of *Kalyango Construction and Building Contractors Ltd. v China Chongqing International Construction Corporation (CICO)*, Civil Appeal No. 85 of 2009 (Unreported) which held that:

"The defendant although could be present, had no right to cross examine the plaintiff or his witnesses or be heard in defence. The trial court should have heard the plaintiff ex-parte. Its (the defendant's) participation vitiated the trial proceedings"

On the strength of these submissions and the cited authorities, the plaintiff prayed for the suit to proceed *ex-parte* against the defendant.

Responding to the above submissions the defendant's counsel relied on two points. His first limb of submissions is that summons to file WSD was not served on the defendant on 4th November, 2013 as alleged. According to the plaintiff records, someone allegedly attempted to serve summons on 15th November, 2013 at the defendant's base in Mtwara. The base Manager was not around when this attempt was made, and the person did not leave any documents. On the 18th November 2013, a notice in respect of the mentioned date with a copy of the plaint were brought to the Defendant's base in Mtwara and they were served to the base Manager.

He submitted further that although there are summons in the court file purporting to show that the defendant received on 14 December, 2013, the same do not bear an acknowledgement of receipt in the form of name and address of the person served or even the stamp of the defendant. That the