

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

MISCELLANEOUS CIVIL APPLICATION NO.4 OF 2015
(Originating from Civil Case No. 05 of 2014)

DB SHAPRIYA & CO. LTD.....APPLICANT

VERSUS

**SINOMA INTERNATIONAL ENGINEERING CO. LTD
(TANZANIA).....RESPONDENT**

Date of last order: 04/10/2016

Date of Ruling: 17/11/2016

R U L I N G

Twaib, J:

On 24th November, 2014, the plaintiff (respondent herein) Sinoma International Engineering Co Ltd. filed a suit (Civil Case No. 5 of 2014) in this court against the defendant (applicant), DB Shapriya & Co. Ltd., claiming *inter alia*, for a sum of Tshs 96,450,000/= allegedly being money owed to the respondent pursuant to an agreement for the supply of aggregates executed by them on 1st April, 2014. A summons to appear attached with the relevant plaint was served on the applicant on 8th December, 2014.

After several adjournments of the main case, on 17th April, 2015, the defendant (applicant) lodged this application under section 93 of the Civil Procedure Code Cap. 33 (R.E. 2002), seeking extension of time within which to file its Written

Statement of Defence. The application is accompanied by an affidavit sworn by one Lewis Mcharo, Principal Officer of the applicant. The respondent filed a counter affidavit resisting the application.

In this court, the applicant was represented by Mr. Godwin Muganyizi, learned Advocate, while the respondent enjoyed the services of Mr. Sospeter Tyeah learned Advocate. Hearing of the application was done by way of written submissions.

In his submission in support of the application, Mr. Muganyizi submitted that it was not in dispute that on 8th December, 2014 the plaint was served to the applicant through its branch office in Mtwara, and that upon receiving the plaint the Defendant instructed Mr. Dadaya, Advocate, to represent him in court. However, the learned advocate never filed any written statement of defence.

It was counsel's further submission that in law, extension of time can be sought within 42 days following service of the plaint, and that the first 21 days for filing the defence expired on 29th December, 2014 and the second 21 days expired on 19th January, 2015. During this time, he stated, the court was on vacation and there was no judge to entertain an application for extension of time. The matter called up for the first time on 24th February, 2015 before the Deputy Registrar, who had no power to extend time, thus the applicant decided to file a formal application.

Counsel further submitted that he is aware of Order VIII Rule 1 (1) and (2) of the Civil Procedure Code, which requires an application for extension of time to be made within 21 days after expiry of the first 21 days. He also admitted that

the instant application was filed after the lapse of the said 21 days. It was however his submission that the court's discretion to extend time even after expiry of the second 21 days was not vitiated by that general rule. He was of the view that like any other general rule, exceptions are permissible upon showing good cause.

Counsel supported this view with a number of decisions, including the cases of **Salem Advocate Bar Association v Union of India**, AIR 2003 SC (2003) and **Kalailash v Nanhku and Others**, AIR 2003 SC 189 (2003) cited in an article by Amit Sachdeva "*Delay in filing Written Statement, an Analysis of Order VIII Rule 1*". As for the position in Tanzania, he relied on the case of **Umoja wa Wakulima Wadogo wa Bonde la Kisere v Noble Motors Ltd**, Civil Case N. 49 of 2011 (unreported) where this Court held, *inter alia*:

The rule that the Court's discretion to extend time cannot be exercised after the second twenty one days have passed is only a general rule. And, like any general rule, exceptions are permissible."

Counsel maintained that there are good reasons to support the application, one reason being that the summons which was served to the defendant was a summons for appearance in court on 24th February 2016 and not a summons requiring the defendant to file its defence. He submitted that the word "appearance" was defined in the case of **EAP & TV M/S Terrazo Paviours** (1973) LTR as follows:

Appearance under the code means attendance in person or by advocate in court on the day stated in the summons which is also a date of hearing.

Once the defendant is present either in person or by advocate when the case is called up that is sufficient appearance.

Counsel further submitted that there are legal faults in the respondent's suit which makes it necessary for the applicant to be given an opportunity to raise them through filing its defence. He mentioned the faults as, among others, that the contract upon which the suit has arisen is defective, and that the special damages claimed in the plaint have not been particularized. On these grounds, he prayed for the application to be granted.

Responding to these submissions, the respondent's counsel began with a point of law, arguing that section 93 of the Civil Procedure Code is not a proper provision for moving the court to grant the prayers sought. He relied on the case of **Umoja wa Wakulima Wadogo Bonde la Kisere** (*supra*) for the proposition that section 93 of the CPC is inapplicable. In that case, *inter alia*, this Court held that section 93 can only be invoked to grant extension of time where the period had been fixed or granted by the court.

Mr. Tyeah is right. It is not disputed that the applicant was never granted extension of time by this court to file its defence. That means that section 93 of the CPC cannot move the court to grant the prayers sought. He opined that wrong citation or incomplete citation of the enabling provision renders the application incompetent. He supported this position of the law with the holding in the cases of **Chama cha Walimu wa Tanzania v Attorney General**, Civil Application No. 152 of 2008 (Unreported); **Citibank Tanzania v Tanzania Telecommunication Company Limited and 4 others**, Civil Application No. 64 of 2003 (Unreported); **Mussa M. Shoka v Sinoma International Engineering**, Labour Revision No. 18 of 2015 and **The Project Manager ES-**

KO International Inc. Kogoma v Vincent J. Ndungumbi, Civil Appeal No. 22 of 2009 (Unreported).

Counsel submitted further that the proper section which the applicant ought to have cited is Order VIII Rule 1 (1) or Order VIII Rule 1 (2) of the Civil Procedure Code Cap 33 R.E 2002 and not section 93 of the Code.

On the merits of the application, the learned counsel responded that neither the applicant's affidavit nor his submission discloses reasons for the delay. Even the assertion that the applicant fully instructed Advocate Dadaya to defend this case and failed to do so, the same was no good ground for extension of time. He supported his argument with the decision in **Alhaji Abdalah Talib v Eshakwe Ndoto Kimani Mushi** (1990) TLR 108. Also the decision of **Calico Textile Industries Ltd v Pyraliesmail Premji** (1983) TLR 28 which held that failure on the part of an advocate to check the law is not sufficient ground for allowing appeal out of time.

Furthermore, responding to the complaint by the applicant that he was not served with a summons to file a written statement of defence, the respondent's counsel argued that the facts on record are against this complaint. It was his view that the court cannot grant extension of time to file written statement of defence because the statutory period for this court to exercise such discretion has expired. He referred to the decision in the case of **National Bank of Commerce Limited v Partners Construction Co. Ltd**, Civil Appeal No. 34 of 2003 cited with approval in **Rostam Aziz v The Editor Mwanahalisi & 3 Others**, Civil Case No. 53 of 2008 (unreported) in which it was held:

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 expiration of the prescribed period of twenty one days or his application cannot be entertained.

On the complaint that the contract under which the claim is based is defective and that the claim of damage was not particularized, the respondent's counsel argued that the issues are prematurely raised at this stage as they go to the root of the main suit and therefore cannot form good reason for the present application. Ultimately, the respondent prayed that the application be dismissed with costs.

In his rejoinder, the applicant reiterated his earlier submission and argued further that an objection on citation of wrong provisions of law had to be raised by notice and ought to have been determined before hearing of the application. He however commented on the reliance on section 93 of the CPC, saying that the court has discretion to grant extension of time under that provision in view of the decision in the case of **Umoja wa Kulima Wadogo Bonde la Kisere** (*supra*).

Having heard submissions from rival counsel, the issues for determination are mainly two: Whether the applicant's application is incompetent for wrong citation; and if the first issue is answered in negative, whether the applicant's application has merits.

It is true, as argued by the applicant's counsel, that an objection on point of law such as the one at hand (on wrong citation) ought to have been raised by a

notice served in advance on the other party. It is also true that the respondent has not filed a prior notice of preliminary objection, but simply raised the point in his written submissions. However, the purpose of notice is to give time to the opponent to consider the point raised so that he may not be taken by surprise when the matter comes up for hearing. It is also the practice for such a notice to be raised at the earliest possible opportunity. But in certain cases, such as those touching upon the jurisdiction of the court or limitation of time, objection may be raised at any stage, provided that the other party is given an opportunity to respond thereto.

The issue of enabling provisions of the law touches on the powers of the court to entertain an application. It can thus be entertained at any stage, provided the other party is afforded an opportunity to be heard. The applicant's counsel in this case became aware of the point after he was served with the respondent's written submissions. He had sufficient time to respond, and did respond. Hence, the court may rightly proceed, as I hereby do, to entertain the same. The applicant has not suggested that it will suffer any injustice if the Court takes such a course.

The applicant has moved the court under section 93 of the CPC, which reads:

93. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

As rightly pointed out by the respondent's counsel, the above provision is relevant where the expired time was earlier on fixed by court. I made a similar

observation in the case of **Umoja wa Kulima Wadogo Bonde la Kisere** (*supra*). At this point, it is pertinent to quote the holding in that case, which ran thus:

"My reading of this provision tells me that it can only be invoked to grant extension of time where the period had been fixed or granted by the court. In the present situation the period has not been granted or fixed by the court. it is statutorily prescribed. I do not think that it is open for the court, in the circumstances to apply section 93 to extend time fixed by law."

Going by the record in the case at hand, there is nothing indicating that the applicant was ever given time by this court, with which he failed to comply. Hence, section 93 could not be invoked to move the court to extend time in the circumstances of the case. The respondent opines that the proper provision which ought to have been cited is Order VIII Rule 1 (1) or Order VIII Rule 1 (2) of the Civil Procedure Code Cap 33 R.E 2002. Order VIII Rule 1 (2) reads:

*(2) **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: 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. [emphasis added].*

The above provision empowers the court to grant extension of time for filing a written statement of defence where the defendant has been served with a **summons to file a written statement of defence** and failed to do so within

the time specified under the rule. The rule clearly does not apply where a person has been served with a summons to appear. The summons which was served on the applicant on 5th December, 2014 was only a summons to appear and not a summons to file a written statement of defence as envisaged by the rule. Hence, since it is clear, according to the record, that the applicant was not served with a summons requiring it to file its defence, the provisions of Order VIII Rule 1 (2) of the Code are inapplicable.

The respondent's counsel also argued that the applicant could have moved this court under VIII Rule 1 (1) of the Code for an order of extension of time. With all due respect, however, I hold the view that Order VIII Rule 1 (1) of the CPC is only relevant where the defendant fails to present his defence within seven days before the first hearing. It states:

1.-(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.

The main case herein (Civil Case No 5 of 2014) is yet to be fixed for hearing. It thus cannot be said that the applicant has failed to present his defence within seven days before the first hearing as required by Order VIII Rule 1 (1) of the CPC.

Be that as it may, it suffices to state here that since the applicant was served with a summons to appear in terms of Order VIII Rule 1 (1) of the Code, and since it is not in default of the time specified under that rule, it is not time-barred and, therefore, the instant application for extension of time having been filed under irrelevant law is superfluous and misconceived. I hereby strike it out, but

would condemn the applicant to pay the respondent's costs of this application, the same to be taxed, irrespective of the outcome of the main case.

The applicant being not time barred, the provisions of Order VIII Rule 1 (1) of the CPC would still be available for it to file its defence within seven days before the first hearing. However, that would be encouraging further delays, which cannot be good for expeditious and orderly disposal of the case. I would thus order the applicant to file its written statement of defence within 14 days of the date hereof.

One other point needs to be made: It is perhaps high time that the Chief Justice looked at the propriety of retaining sub-rule (1) of Order VIII of the CPC in its present form, in view of the provisions of sub-rule (2) of that Rule. In my respectful view, as it now stands, sub-rule (1) is not in harmony with the current trend which seeks to promote speedy disposal of civil cases, and is largely out of touch with the provisions for pre-trial conferences and mediation as introduced by the 1994 amendments to the CPC.

DATED and DELIVERED at Mtwara this 17th day of November, 2016.

F.A. Twaib
Judge