

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 94 OF 2017

CABLE &SATELLITE CONSULTANCY LTD.....PLAINTIFF

VERSUS

WANANCHI GROUP TANZANIA LIMITED.....DEFENDANT

RULING

20 & 31 July, 2018

DYANSOBERA, J:

The parties to this suit have raised preliminary objections. In the Written Statement of Defence, the defendant's preliminary objection is on grounds that:

The plaint is incurably defective for not complying with the provisions of the Civil Procedure Code.

The plaintiff, on the other hand, in his reply to the written statement of defence, raised a preliminary point of objection that:

1. The defendant's written statement of defence has been filed out of time without leave of this Honourable Court contrary to the mandatory provisions of Order VIII rule 2 of the Civil Procedure Code, Cap. 33 R.E.2002
2. The defendant's written statement of defence is fatally defective for contravening the mandatory provisions of rule 8 (2) of the High Court Registries Rules of 2003.

While the defendant is silent on what then should the court do in case it upholds the preliminary objection, the plaintiff prays the court to strike/expunge the written statement of defence by the defendant from the records with costs.

The preliminary objection was argued by way of written submissions which same were duly filed as per the time frame ordered by this court.

As far as the plaintiff's preliminary objection is concerned, on the first ground of the preliminary objection, counsel for the plaintiff

submitted that on the 7th day of June, 2017, the defendant was served with a copy of the plaint and summons for orders requiring the defendant to file written statement of defence within twenty one (21) days of the date of service. It follows therefore pursuant to Order VIII rule 1 (2) of the Civil Procedure Act and a summons served to the defendant, the defendant was mandatorily required to file their defence within 21 days of the date of service, that is within 21 days from 7th June, 2017 when the defendant was served. Counsel for the plaintiff further submitted that time for the defendant to file their defence started to run from 7th June, 2017 and that in that respect, when the defendant filed their written statement of defence on the 28th day of June, 2017, it was out of time by one day. This court was therefore, called upon to be pleased to expunge the written statement by the defendant from the court records with costs because it was filed out of time and without leave of the court and the hearing proceed ex parte. According to Mr. Issa Rajab, the word used is shall which means that it is mandatory. In support of the first limb of preliminary objection, counsel for the plaintiff relied on the case of the **National Bank of Commerce v. Partners Construction Co. Limited**, Civil Appeal No. 34 of 2003 (unreported) where the Court of Appeal of

Tanzania at page 7 ruled that a written statement of defence is required to be filed within 21 days of the date of service, and the time starts to run from the date of service and ruled that written statement of defence filed with a delay of one day, was filed out of time.

On the second limb of preliminary objection, Mr. Issa Rajab contended that the written statement of defence is fatally defective for contravening the mandatory provisions of Rule 8 (2) of the High Court Registries Rules, 2005. He explained that the defendants in their written statement of defence wrote **IN THE HIGH COURT OF TANZANIA**, contrary to the provision of Rule 8 (2) of the High Court Registries Rules of 2005 which provides that:

(2) Where any cause or matter whether original or appellate has been entered in a District Registry, it shall be entered:

“IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA”

“IN THE DISTRICT REGISTRY AT.....”

Criminal Appeal, Civil Appeal, Civil Case, Miscellaneous Civil Cause, Bankruptcy Case, Matrimonial Case as cause may be.

Counsel for the plaintiff further contended that the provisions are mandatory as the word used is “shall” which under section 53 (2) of

the Interpretation of Laws Act, Cap 1 R.E.2002 means “Must.” This court was referred to the case of **Kassim Urassa & Edith Boniface Kanango as administratrix of the estate of the late Paulo T. Silayo v. Mahmoud Ahmed Karia**, Miscellaneous Application No.37 of 2016 in which Hon. Mwingwa, J. dealt with a similar situation whereby the applicant did not cite the name of the court and its registry as Rule 8 (2) of the said rules require and upheld the preliminary objection and struck out the defendant’s written statement of defence.

In reply, Mr. Audax K. Kameja, learned counsel who drew and filed the written submission for the defendant sought to distinguish the case of **National Bank of Commerce v. Partners Construction Co. Limited** (supra) from the present case. He submitted that the court’s computation of time as per its interpretation of the phrase “within twenty one days of the date of service’ in Order VIII Rule 1 (2) of the CPC, was made contrary, and without due regard, to the provisions of the Interpretation of Laws Act, Cap1 which governs the interpretation of laws in Tanzania. The court was referred to section 60- (1) of the Act which provides, in part as follows:

“60-(1) in computing time for the purpose of a written law-

- (a) Where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period;
- (b) Where a period of time is expressed to be reckoned from or after, a specified day that day shall not be included in the period.

It is contended that the court's computation of the twenty one days should have been made in accordance with the provisions of section 60 (1)(b) of the Act; that is to say the computation should have excluded the specified day, which is the day of service. According to counsel for the defendant, the provision of section 60 (1)(b) of the Act were not brought to the attention of the Court, otherwise, the Court would have come to a different conclusion and it would not have included the date of service in its computation of time. Counsel for the defendant maintained that the written statement of defence was filed in time, albeit on the last day.

As regards the second limb of preliminary objection, while admitting that the words "**UNITED REPUBLIC**" are missing, counsel for the defendant contended that the omission of the words from the title of the written statement of defence is not fatal as rule 8 (2)

provides for the format/title to pleading and the deviation in the written statement of defence is not fatal and does not go to the root of the pleadings and as such cannot attract drastic measures proposed by the plaintiff. It is an error curable by way of amendment. On the argument that the said irregularity cannot render the document invalid, counsel for the defendant relied on the case of **Calico Textiles Ltd v. Zenon Investment Ltd & 2 others** (High Court) Misc. Civil Cause No. 10 of 1998 (unreported). In that case, a preliminary objection was raised that the applicant's chamber summons and affidavit were defective for failure to comply with the prescribed form whose compliance therewith was mandatory. The court was then invited to strike out the chamber summons and affidavit or contravening the rules prescribing formats. Hon. Mackanja, J. dismissed the preliminary objection stating, at p. 11 as follows:

I am not persuaded, however, that deviation from a court format used in India per se would constitute a ground which could lead to the rendition of a proceeding as being invalid. In this connection, I uphold the submissions of Prof. Zebron Steven Gondwe, learned

counsel for the applicant, who argues that the objective of the various forms cited by learned defence counsel is no more than the promotion of coherence, certainty and flow in preparing pleadings”.

On this authority, counsel for the defendant submitted that the deviation in the defendant’s written statement of defence from the prescribed format of the title of the pleadings does not affect the substance of the defence and should not, per se, render the written statement of defence fatally defective as contended by the plaintiff.

Comparing the decision of Mwingwa J in the case of **Kassim Urassa & Edith Boniface Kanango as administratrix of the estate of the late Paulo T. Silayo** (supra) and Mackanja, J in **Calico Textile Industries Ltd** case (supra), counsel for the defendant explained that the decision in the case of **Calico Textile Industries Ltd** is more objective and in conformity with the dispensation of justice.

I have considered the preliminary objection and the written submissions on both side. There is no dispute that the defendant was served with a summons together with a copy of the plaint on 7th day of June,2017 but he filed the written statement of defence on 28th

day of June, 2017. Order VIII Rule 1 (2) of the Civil Procedure Code [Cap.33 R.E.2002] provides:

“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 defence”.

As correctly submitted by counsel for the plaintiff, the defendant’s written statement of defence was filed out of time by one day. This fact has been conceded to by the defendant through his counsel’s submission. It was, however, explained on part of the defendant that the written statement of defence was filed in time because in view of the provision of section 60 (1) of the Interpretation of Laws Act [Cap.1 R.E.2002], in computation, the day of service is excluded. I think the defendant has gone off-tangent. The meaning of Order VIII Rule 1 (2) of the Civil Procedure Code [Cap.33 R.E.2002] was succinctly given and elaborated by the Court of Appeal of Tanzania which is the highest court of land in the case of **National Bank of Commerce v. Partners Construction Co. Limited**, Civil Appeal No. 34 of 2003 (unreported) referred to me by counsel for the

plaintiff. In that case whose facts are similar to those of the present case, the appellant was at the trial High Court, on 4th day of June 2002, served with summons for orders requiring him to file a written statement of defence within twenty-one days of the date of service. On 25th day of June, 2002. The written statement of defence was objected to by counsel for the respondent on the ground that it was filed out of time and without leave of the court. The trial High Court upheld that limb of preliminary objection. On appeal to the Court of Appeal, one of the issues was whether the day of service was excluded. The Court answered this issue in the negative and observed:

“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 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.

Counsel for the defendant submitted that that decision was made *per incuriam*; contrary and without due regard to the provisions of section 60 (2) of the Interpretation of Laws Act. That may be so, but with unfeigned respect, a court decision, though its correctness may be questionable remains an enforceable court's order and in this case binding, unless and until appropriate steps have been taken to set it aside if it is in fact defective.


There was no attempt by counsel for the defendant to show that the said decision of the Court of Appeal was held to have been made *per incuriam* and the same Court therefore, departed from it. The hands of this court are, therefore, tied.

Since the written statement of defence was filed out of the prescribed time and without leave of the court and on the authority of the Court of Appeal discussed above, the first limb of preliminary objection is upheld. In view of that I see no wisdom of discussing the second limb of preliminary objection.

The defendant's written statement of defence is hereby expunged from the court's record and the suit should proceed ex parte.

Cots to be in the main cause.




W. P. Dyansobera

JUDGE

31.7.2018

Delivered this 31st day of July, 2018 in the presence of Mr. Issa Rajab, learned advocate for the plaintiff and Mr. Francis Kamuzora, learned counsel for the defendant.




W. P. Dyansobera

JUDGE