

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL REVIEW NO. 27 OF 2018

ZAMBIA CARGO & LOGISTICS

COMPANY LIMITED.....APPLICANT

VERSUS

TANZANIA TEA BLENDERS (2002)

LIMITED..... 1ST RESPONDENT

YUSUF NAWAB MULLA.....2ND RESPONDENT

RULING

Date of Last Order: 13/6/2019

Date of Ruling: 17/10/2019

S.M. Kulita, J.

This is an application for review filed by the Applicant, ZAMBIA CARGO & LOGISTICS COMPANY LIMITED (Formerly MOFED TANZANIA LIMITED) against TANZANIA TEA BLENDERS (2002) LIMITED (1st Respondent) and YUSUFU NAWAB MULLA (2nd Respondent). It originates from the Land Case No. 49 of 2017. The applicant is represented by the Learned Counsel ELISA ABEL MSUYA – Advocate while the Respondent is represented by the Learned Counsel BENJAMIN MARWA – Advocate. The application has been made under S.78 (b) and O.XLII, r.1(b) of the Civil

Procedure Code [Cap. 33 R.E 2002] hereinafter referred to as CPC.

The prayers sought by the applicant is for this court to review its ruling and order dated 12/8/2018 and set it aside as it is in error.

The source of this application for Review is the Court's order granting the defendants' (respondents') prayer to file their Written Statements of Defence (WSD) out of time after the lapse of 42 days, contrary to O.XLII, r.1 (b) of the CPC.

The matter was disposed of by way of written submissions.

In his written submission the Applicant's Counsel submitted that as per O.VIII, r.1(2) of the CPC the WSD is supposed to be file within 21 days from the date of service of plaint to the Defendant. He said that before expiry of that 21 days period the defendant can pray for extension of time and 21 more days can be granted by the court.

The counsel submitted that the said period for leave should therefore not exceed an aggregate period of 42 days. He said that by the time leave was granted for the Defendant to file a WSD the said period of 42 days had already lapsed. It was therefore not proper for the trial Judge to grant extension.

In the reply thereto Advocate for the Respondents, Mr. Benjamin Marwa submitted that the main suit was filed as a summary suit. On 12/10/2017 the Defendants/Respondents obtained leave to defend the suit. Before the defendants had filed

the said WSD in 21 days from that 12/10/2017 they (Defendants) did file a Misc. Land. Appl. No. 144/2017 on the 20/10/2017. However, the said application was dismissed on 13/8/2018. He said that he did file the said Written Statement of Defence on 27/8/2018. He said that under O.VIII, r.1(2) of the CPC the number of days that had passed after filing of the Appl. No. 144/2017 which is 20/10/2017 and the date that the said application was dismissed, that is 13/8/2018 should be excluded.

On the same date 13/8/2018 when the application was dismissed the Defendant/Respondent sought for leave to file a defence in the on going Land Case No. 49/2017. The said prayer was actually granted that it was to be filed on 27/8/2019 and it was actually filed on that date. The Respondent's Counsel further submitted that the period spent in pursuing the Land Case Application No. 144/2017 should be excluded. He said that even if the computation includes the number of days between the date of filing of the Land Case No. 49/2019 which is 11/7/2017 and the date that the Defendants filed the Application No. 144/2017 that is 20/10/2017 only 8 days has passed. Upon cumulating the said 8 days and that 14 days granted by the trial Judge the total number of days is 22 and not 42 as alleged by the Plaintiff's Counsel. The Advocate also stated that even if that is the case still under O. VIII, r. 1(2) of the CPC the court may extend the period of filing the WSD. He said that it is under the discretionary powers of the court. He added that the Judge has also been empowered to do so under S.14(1) of the Law of Limitation Act [Cap. 89 R.E 2002].

Mr. Benjamin Marwa (Advocate) also prayed for the court to regard the Overriding Objective Rules under S.2B(1) (a) of the CPC as amended by S.3(a) and (d) of the Misc. Amendment Act No. 3 of 2018. He said that for the sake of justice through the Principles of Natural Justice both parties should be heard, that it is the constitutional right. The Respondent's Advocate said that the grant of prayer to file WSD by the defendant does not lead to any miscarriage of justice to the Applicant.

In the rejoinder Mr. Elisa Abel Msuya (Advocate) stated that the procedures are there for the administration of justice, therefore they should be followed. He said that since the WSD is supposed to be filed in 21 days period and in case of extension it should not exceed 21 days as per O.VIII, r.2 the application should not be granted. He further submitted that the Respondents' act of persuading an application for arbitration does not justify that they have to file WSD after the lapse of the prescribed period. It should not be excluded in computation of time for filing WSD. He said that the Respondents should not hide under the umbrella of Oxygen (Overriding Objective) Principle to vitiate the procedures. He said that failure to file the WSD is a fundamental error which goes to the root of the case, hence the overriding objective principle cannot apply.

The essence of this application as per the pleadings and the submissions is that the Applicant objects the Respondents who are the Defendants in the original case (Land Case No. 49/2017) to file WSD. He challenges the order of the trial Judge to allow the

Respondents to file the said pleading while the time for them to do so had expired.

Before going to the submissions I went through order XLII, Rule 1 of the CPC which provides the circumstances under which the review may be entertained. The provision states:-

"(1) any person considering himself aggrieved :-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed,

and who, from a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistaken or error apparent on the face of record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of the judgment to the court which passed the decree or made the order.

(2).....not applied....."

The above cited provision has been clarified in a case of **ALFRED ANASA SHARA V. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED, Misc. Civil Cause No. 151 of 2007, High Court at DSM District Registry (unreported)** in which the case of **KARIM KYARA**

V.R, Criminal Appeal No. 4 of 2007, CAT at Dodoma (unreported) was cited. The court said;

*"The principle underlying review is that **the court would have not acted as it had if all the circumstances had been known.** Therefore review would be carried out when and where it is apparent that-*

*First, there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly **that there is a manifest error apparent on face of the record.** He will have to prove further, **that such an error resulted in injustice** (see *Dr. Aman Walid Kabourou Vs. The Attorney General and Another, Civil Application No. 70 of 1999 – unreported*).*

Second, the decision was obtained by fraud.

Third, the application was wrongly deprived the opportunity to be heard.

*Fourth, the court acted without jurisdiction (see *C.J. Patel V.R Criminal Application No 80 of 2002*)" (**emphasis is mine**)*

The issue to be determined here is whether the WSD by the Defendants was filed out of time and whether the trial court was wrong or overlooked to grant the prayer for having no jurisdiction.

First of all I would like to make it clear that the applicant's

submissions that the Judge has no jurisdiction to grant the prayer for extension of time is a misconception. Had that been the case Advocate for the applicant was to mention the court or a person to whom those powers have been vested. I think it was enough for him to say that the Judge/Court had overlooked by granting the said prayer. Therefore the issue of jurisdiction does not stand.

This application originates from the Land Case filed in a form of a Summary suit Under O.XXXV of the CPC. Basically there is no WSD in the summary suit unless the Defendant seeks leave to the trial court and the same is granted. As the prayer for that purpose was made on 13/8/2018 and on the same date the court ordered it to be filed by 27/8/2018, that is within 14 days period. That order was actually complied by the Defendant by filing the WSD on that 27/8/2018.

The Applicant's Counsel submitted that the Defendants delayed to file the WSD for over 42 days contrary to O.VIII, r. 1(2) of the CPC whose remedy is the judgment to be entered in default as the Defendant has no more chance to lodge the WSD. He further said that even in the exclusion of the period used to entertain the Misc. Land Application No. 441/2017 which was dismissed on 13/8/2018 still the Respondent is out of time for over 42 days which is the maximum period for filing the WSD after the lapse of the first 21 days. However, as rightly submitted by the Respondent's Counsel that upon excluding the period used to entertain the Misc. Land

Application No. 44/2017 the number of days had passed before the court had granted the order for Respondents to file WSD is 14 days, that is from 13/8/2018 (date of order) to 27/8/2018 (date of filing). Therefore there is no delay of over 42 days. Even if we add the eight days from 12/10/2017 the date that the Respondents were for the first time ordered to file WSD before they had lodged the Misc. Land. Application No. 441/2017 on 20/10/2017 as an alternative to filing the said reply (WSD), the total number of days becomes 8 plus 14 which is 22 days.

All in all the fact that the prayer to file a defence(WSD) by the Respondents (Defendants) was made on the 13/8/2018 and the same was granted on the same date that they were to file it in 14 days period, it means that was rightly regarded by the court as it's initial order for that purpose. That being the case the previous order to file WSD issued on 12/10/2017 before the Misc. Land Application No. 441//2017 being filed on the 20/10/2017 was overtaken by event. The said application had come to substitute that order as it's aim was to stay the original case (Land Case No. 48/2017) pending determination of the dispute between the parties through arbitration as per their lease agreement that had been entered between the parties.

In that sense there was no need for the Defendants to lodge the WSD. That's why the records in that Land Case No.

49/2017 do not show any claim by the plaintiff (Zambia Cargo & Logistic Company Limited) that the Defendant was yet to file the WSD so that he could be served and file a Rejoinder (Reply to WSD) thereto. Instead the Applicant came up to raise it when the Respondent's (Defendant's) Counsel informed the court on 13/8/2018 that he intends to file WSD for that summary suit regarding failure of their application No. 441/2017 on that same date. It therefore comes into my mind that the idea of objecting the Respondents/Defendants to file WSD by the Applicant/Plaintiff is an afterthought.

As I have already pointed out that O.XLII, r.1 of the CPC expresses the circumstances under which a review may be entertained and the cases of **ALFRED AWASA SHARA V. TANZANIA TELECOMMUNICATIONS COMPANY LIMITED (Supra)** and **KARIM KYARA V. REPUBLIC (Supra)** made the thorough interpretation of that provision.

Having carefully gone through the said provisions and the cited cases I have noticed that the sought review does not solicit this court to rectify any manifest error on the face of the record which resulted in a miscarriage of justice, or address fraud or that the applicant was wrongly deprived the opportunity to be heard and or that the court acted without jurisdiction in respect of the Land Case No. 49 of 2017.

In upshot I find this application does not fulfil the

mandatory requirements for review according to the law. It is therefore dismissed with costs.

S.M. Kulita
JUDGE
17/10/2019