

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

MISC. CIVIL APPLICATION NO 514 OF 2019

(Originating from Land Case No. 30 of 2019)

AZANIA BANK LIMITEDAPPLICANT

VERSUS

INCAR TANZANIA LIMITED.....1ST RESPONDENT

TANIL KUMAR CHANDULAL SOMAIYA.....2ND RESPONDENT

RULING

MASABO, J,L.:-

This court was moved by the chamber summons supported by an affidavit deposed by Andrew Rutaihwa who is identified as Principal of the Applicant Bank. The applicant Bank is seeking for leave for extension of time within which to file its written statement of defence in respect of Civil Case No 38 of 2019. The application was sternly disputed by the Respondents through a counter affidavit deposed by Jerome Joseph Mwemwa, whose relationship with the Respondents is not disclosed in the counter affidavit.

The application was heard in the presence of Pendaël Mziray Counsel for the Applicant Bank and Mr. Jerome Msemwa counsel for the Respondents.



The background of the application is that, sometimes between 2014 and 2016 the Respondents obtained credit facilities from Bank M Tanzania PLC whose assets and liabilities were vested in the Applicant Bank by the Bank of Tanzania on 15th January 2019. Upon taking over the liabilities and assets of Bank M Tanzania PLC the Applicant bank sought to realize the outstanding loans, the credit facility extended to the Respondents being among them. In that respect on the Applicant issued a default notice in which it named the Respondents as defaulters. Aggrieved, the Respondent herein institutes a suit against the Applicant Bank for having been wrongly named as defaulters and for having indicated a wrong sum on the said notice. Upon the case being filed, on 23/8/2019 this Court issued a summon directing the Defendant (the Applicant Bank to file its written statement of defence by 17/9/2019. The Applicant Bank did not file the defence on the stated date hence this application which was filed in this court on 23rd September 2019. In the affidavit accompanying the application it was deposed that the Applicant Bank effectively took over the operations of the Bank M Tanzania PLC on 2nd August 2019 and that they have continued to receive the support of BOT in recovery of the loans due to Bank M Tanzania PLC. That, at the time they were served with the plaint, they had not obtained all the documents from BOT and that in the course of preparation their WSD they noted that some of the documents containing information vital to the suit had not been availed to them by the Bank of Tanzania which had the custodian of all documents of the then Bank M Tanzania PLC. They requested

to be supplied with the documents but the same were not supplied to them hence the delay in filing the WSD.

During the hearing Mr. Mziray for the Applicant submitted that at the time the Applicant Bank was served with the plaint, the files containing information of the loan facility advanced by Bank M Tanzanai PLC was still under the possession of the Bank of Tanzania hence they could not prepare the WSD timely as it did not have sufficient details to prepare written statement of defence. Mr. Msemwa vehemently resisted the application on the grounds that the ground advanced by the Applicant lacks merit as they were supplied with the notice of BOT on 2/8/2018 instructing the Applicant Bank to take over the operations of Bank M Tanzania PLC hence it is clear that at the time they were served with the plaint on 28/8/2019 they had all the necessary documents. He further argued that the law requires the applicant to demonstrate a good course and to account for each day of delay. In the rejoinder Mr Mziray submitted that for a written statement of defence to be properly filed it needed to be accompanied by the loan agreement which was not in their custody at the material time and that they were not in possession of the files they only had defaulters list.

I have considered both parties submission and I have found that the issue to be determined by the court is whether the applicant has shown reasonable and sufficient cause to be granted extension of time to file written statement of defence. It is a trite law that the defendant after receiving summons the defendant must present a written statement of defence within 21 days as

per Order 8 Rule 1(1) and (2) of the Civil Procedure Code Cap 33 R.E [2002]. According to paragraph 6 of the applicant's affidavit the plaint of the Land Case No 38 of 2019 was served on the Applicant Bank on 28th August, 2019. Thus, 21 days lapsed on 18th September, 2019 and this application was filed on the 23rd September, 2019. However, the court is vested with powers to grant extension of time for presentation of defence.

I entirely agree with Mr. Msemwa that in application for extension of time the applicant must demonstrate a good cause. As held in the case of **Peter Mabimbi v The Minister for Labour and Youths Development & 2 Others**, Civil Application No. 88/08/2017, Court of Appeal of Tanzania at Mwanza (unreported) and other authorities on this area, in exercise its discretion to extend time the court must consider such factors as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, the applicant's diligence etc. In other words, as held in **R. V. Yona Kaponda and 9 others** (1985) TRL 84 (CAT)

"In deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there are sufficient reasons" not only for the delay but also " sufficient reasons" for extending the time"

In the instant case since the date for filing of the WSD expired on 17th September 2019 and this application was filed on 23rd September 2019, the

delay, is in my considered view, not inordinate. Regarding the ground for delay, the applicant has advanced only one ground namely, delay in obtaining the vital documents from the BOT. It is vivid from the affidavit and the documents appended there to that, the Applicant's Bank effectively took over the operations Bank M Tanzania PLC on 2nd August 2019 whereas the plaint was served on them on 28th August 2019 which is only 20 days after the Applicant bank effectively took over the operations of Bank M Tanzania PLC from the Bank of Tanzania. Under the premise, the fact that at the material time the Applicant Bank may not have received all the files and documentations from the Bank of Tanzania is not farfetched. Under the circumstances, I find the reasons advanced by the Applicant Bank is a good reason hence warrants the exercise of the discretion of this court.

I am well alive to the requirement to account for each day as contained in different authorities hence in this case, the Applicant Bank had to account for each of the five days. The circumstances of this application, however, draws my imagination closer to the holding in **Castellow v. Somerset County Council** [1993] 1 All E.R. 952 which was cited with approval in by the Court of Appeal in Peter **Mabimbi v The Minister for Labour and Youths Development & 2 Others (supra)**, in which the court stated the following with regard to the discretion of the court to extend time:

"The first is that the rules of Court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time



limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the Court a discretion to dismiss on failure to comply with a time limit. It is also reflected in the Court's inherent jurisdiction to dismiss for want of prosecution. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. [emphasis added]

The principle is in my view, argues well with the principle of overriding objective provided for under Section 3A (1) of the Civil Procedure Code Cap 33 R.E 2002 as amended by the Written Laws Miscellaneous Amendment Act No 3 of 2018; which as a principle is to be applied on the case to case basis. The Applicant Bank having recently assumed the administration of the Bank M Tanzania Limited, does in my considered view deserve a lenience of this court to allow it an opportunity to exercise its right to be heard and defend the claims laid by the plaintiff. I am also convinced that the Respondent herein does not stand to be prejudiced anyhow by the extension of time. In fact the extension, will be advantageous on both parties at it will accord them equal opportunity upon which to present their respective cases and thereby assist the court in dispensation of justice fairly and justly.



Accordingly, the application is allowed. The Applicant Bank is to file its written Submission in respect of Civil Case No 38 of 2019 within 10 days from the date of this ruling. The Applicant Bank being responsible for the delay leading to this application shall bear the costs for and incidental to this application.

DATED at DAR ES SALAAM this 28th day of February 2020.



J.L. MASABO

JUDGE

Ruling delivered this 28th day of February 2020 in the presence of Ms. Upendo Mbaga, counsel for Applicant and Scarius Mkagire for the Respondent.



J.L. MASABO

JUDGE