

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

MISC. CIVIL APPLICATION NO. 79 OF 2021

(Originating from High Court in Civil Case No. 40 of 2018)

LEWIS MUHUJILO ----- 1ST APPLICANT
INNOCENT ALBINUS ----- 2ND APPLICANT
BARTAZARY MALAMSHA ----- 3RD APPLICANT
QELESH SULE ----- 4TH APPLICANT

VERSUS

EPHRAIM JOSEPH MKENDA ----- RESPONDENT

Date of Last Order: 20/06/2021

Date of Ruling: 01/10/2021

R U L I N G

MGONYA, J.

The Applicants herein made this Application under **Order VIII Rule 14 (2), Order VIII Rule 1(3)** and **Section 95** of the **Civil Procedure Code Cap. 33 [R.E. 2021]**. Basically, the Applicants are before this Honorable Court seeking for the following orders:

- 1. That, this Honorable Court may be pleased to set aside its order to proceed Ex parte against the Applicants, and this Court be pleased to allow***

the Applicants enter appearance in Civil Case No. 40 of 2018; and

2. That after having set aside the Ex parte order may this Honorable Court be pleased to extend time upon which the Applicants may file their written statement of defense out of time.

The Application is taken in the instance of **WHITE LAW CHAMBERS ADVOCATES** accompanied by an Affidavit sworn by one **NICKSON LUDOVICK**, learned Advocate. The Respondent on the other hand is represented by Mr. Mwitasi, learned Advocate. In determining this matter, this Court ordered the parties to file their respective written submissions for and against the Application.

Having intensively gone through the pleadings and submissions of the parties herein of which I intend not to reproduce, but will take consideration of the same from here; I proceed in determining the Application for the orders prayed for by the Applicants.

In reference to the Affidavit as attached to the Application under paragraph **4, 5, 6, 7, 8** and **9** appears the reasons which caused the Applicants to seek for the orders of setting aside the *Ex parte* order and an extension to file the Written Statement of Defence.

The Respondent, in countering the Application in their Counter Affidavit challenged the Application as reiterated under paragraph **3, 6, 7** and **8**.

Having expounded on the submission of the party in records, it was the Applicants' submission that **Civil Case No. 40 of 2018** was undergoing settlement out of Court of which the same was promising. The Applicants believed that the matter would be successful since the parties are Civil Servants and the claim had emanated from the cause of employment. Efforts of the matter being settled out of Court were promising and the parties so believed the same would workout positively. All these efforts were not kept from the Court but were communicated to the Court hence the Court was aware of the same.

Opposing the Applicants' Application, the Respondent's Counsel submitted that, the application is meritless and quite against the law. The Applicant aims at confusing the administration of justice in the principle that litigations must come to an end. It is the Respondent's argument that the reasons set out by the Applicant to set aside the *Ex parte* order is baseless since the same is not sufficient reason as it contravenes the rules of procedure, and that the Applicant ought to have filed their Written Statement of Defense despite the efforts to settle the matter out of Court. He stated that,

the settlement cannot be reason for not taking legal steps in Court proceedings.

Having regards with what has been submitted above by the learned Counsel for both parties, I have gone through both submissions. It is in the records of the Court in **Civil Case No. 40 of 2018** that the above parties were parties to the said case. The Applicant herein while pursuing his rights was shown or was exposed to settlement of the matter out of Court.

Being of interest and finding that the same would favor both parties and since there existed chances of success, it is then that the Applicants failed to file their Written Statement of Defence. The idea of settlement out of Court were shut after the said Chief Secretary that was holding office was shifted to another office and the presiding one had no interest in the route of settlement out of Court.

I am considerate and aware of the Respondent's view that the decision by the Applicants not to file their defence is not within the rules of procedure nor administration of Court proceedings. Hence the Applicants belief of settlement of the matter out of Court still required the Applicant to have filed his Written Statement of Defence.

It is my yearning that legal matters filed in Court be heard on merits and come to an end as it has been reiterated by the

Respondent in his submission. **Civil Case No. 40 of 2018** if heard *Ex parte* would not result in the matter to have been heard on merits since one party would not have the chance to be heard in defending one's rights. Since the Applicant has advanced before this Court reasons as to why they failed to file the Written Statement of Defence in time, this Court finds the same to be sufficient. If the matter would have been settled out of Court the same would have availed both parties to have been heard. Hearing of the case *Ex parte* would not have availed a chance to one party be heard. In the desire to see that **Civil Case No. 40 of 2018** is heard on merit after the reasons being found to be sufficient **this application is hereby granted.**

The Applicants are ordered to file their Written Statement of Defence within 21 days from the date of this Ruling.

It is so ordered.

Each party to bear their own costs.



L. E. MGONYA

JUDGE

01/10/2021

Court: Ruling delivered in my chambers in presence of Mr. Robert Jagad, Advocate holding brief for Advocate Nickson Ludovick for the 1st, 2nd, 3rd and 4th Applicants, Killey Mwitasi for the Respondent and Mr. Richard, RMA.



L. E. MGONYA

JUDGE

01/10/2021