

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 541 OF 2022

(Originating from the High Court of Tanzania, Dar Es Salaam District Registry in Civil Case No. 184 of 2022)

JOSEPH ROMAN SELASINI..... APPLICANT

VERSUS

JAMES FRANCIS MBATIA..... RESPONDENT

RULING

17/01/2023 & 10/02/2023

BWEGOGE, J.

The applicant above named has lodged an application in this court praying for an extension of time within which the same may file a written statement of defence in Civil Case No. 184 of 2022, among others. The application is purported to have been brought under s. 95 and Order VIII, rule (3) of the Civil Procedure Code [Cap. 33 R.E. 2019].

The application lodged hereto is supported by an affidavit deponed by the applicant. The facts deponed by the applicant are recounted as follows: The applicant is currently the National Vice Chairman- Tanzania Mainland of the

National Convention for Construction and Reform – Mageuzi, commonly known by its acronym as “NCCR-Mageuzi” and claims in the plaint in Civil Case No. 184 of 2022 are connected to and, or relate to the discharge of his duties as the party’s leader. On 28th October, 2022, the applicant was served with summons for an order instructing him to file the written statement of defence in Civil Case No. 184 of 2022. Being the layperson and facing financial constraints, he sought to engage a lawyer for drafting his defence and represent him in the said suit which is pending before this court.

Further, it is deponed by the applicant that it was until on 22nd November, 2022 when he was able to engage an advocate namely, Novatus Michael Muhangwa. And upon going through the plaint and a copy of the summons, the above mentioned advocate advised him as thus:

- i) The time within which he was supposed to file defence had already elapsed; hence, required to seek the extension of time to file the same.
- ii) This Honourable Court lacks jurisdiction to entertain the matter herein and the suit is incompetent.
- iii) At this stage of the suit, the point of law on jurisdiction and competence of this court can only be raised in the defence intended to be lodged upon being granted leave by this court

In tandem with the above, the applicant deponed that the delay in filling the defence was occasioned by the financial constraint he was facing. And, if this prayer is refused, he would be condemned unheard as he would be denied the right to be heard.

The applicant concluded by deponing that the respondent would not be prejudiced by the grant of this application. And, that it is in the interest of justice that prayers in the chamber summons be granted.

The applicant herein is represented by Messrs Novatus Michael Muhangwa and Hassan Luhanywa, learned advocates, whereas the respondent hired the services of Mr. Hudson Mchau, learned advocate. During the hearing of this matter, the counsel of both parties herein prayed the affidavit and counter affidavit filed herein which supports their pleadings to be part of their submissions made in this court.

The counsel for the applicant, Mr. Novatus Muhangwa, in substantiating this application submitted that in the application herein the applicant prays for extension of time so that he may file defence out of time in respect of Civil Case No. 184 of 2022 in which he is the defendant. That the essence of delay to file defence has been explicitly deponed in the affidavit filed hereto. In substance, the applicant needed the advocate to

represent him and he had no sufficient funds to employ the same until on 22/11/2022 when the time to file defence had elapsed, as the statutory time had expired on 17/11/2022, having received the summons for order on 28/10/2022. The counsel contended that apart from the above, there is a jurisdiction issue which cannot be raised unless the applicant is granted leave to file defence.

Further, the counsel submitted that if the application herein is disallowed would deny the applicant his constitutional right to be heard under Art. 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977 (as amended) and it would be against the principle of natural justice which guarantees the right to be heard before a party in the case is condemned. And, the counsel opined that the applicant had not delayed to take action to exercise his right to be heard. And, it is their take that if this court grants this application, the respondent would not be prejudiced in any way, as he still can procure evidence and prosecute his case in pursuit of his right.

In tandem with the above, the counsel for the applicant submitted that they have gone through the counter affidavit filed by the respondent in contesting this application, specifically paragraph 5 of the counter affidavit, whereas it is contended that the applicant should have sought

legal aid to prepare his defence. He contended that this argument has no substance as the applicant is not a pauper to seek legal aid at the legal aid clinic; had the applicant sought legal aid he would have contravened the law as the applicant is not an indigent person. The counsel further argued that the alleged wanting retainer agreement doesn't vitiate the facts deposed in the affidavit filed herein. That it is not a statutory requirement to have a written retainer agreement as the agreement may be entered verbally as provided under s.54 of the Advocates Act (Cap. 341 R.E 2019).

The counsel insisted that the respondent has failed to show how he would be prejudiced if the application herein is granted.

In respect to the contention raised in the counter affidavit that the applicant has failed to account for all the days of his delays, commencing the date of service, on 28th October, 2022 to the date of filing of this application on 24th November, 2022; the counsel contended that this contention is unmerited as the statutory time expired on 17/11/2022. That the provision of Order VIII, rule 3 of the Civil Procedure Code and Order VIII, rule 21 of the same enjoins the party with the right to file his defence within 21 days and upon failure, to file an application for leave to file defence within clear 7 days from the date of expiry of the period. The

counsel cited the case of **African Banking Corp. (T) LTD vs George Williamson Ltd**, Civil Application No. 349/ 01 of 2018 CA to validate the point. The counsel concluded his submission by praying this court to exercise its discretion to allow the application herein for the interest of justice.

On the other hand, Mr. Mchau, counsel for the respondent, opened his submission by contending that the submission made by the counsel herein in countering the facts deponed in the counter affidavit, to the effect that the applicant is not a pauper, is the submission from the bar, as it was not deponed in the affidavit filed by the applicant. Hence, it should not be accorded weight by this court. Further, the counsel charged that the application herein is brought under Order VIII rule 3 and S. 95 of the Civil Procedure Code which do not support the same. That the valid provision should have been Order VIII rule (1) (3) of Code. And, since there is a specific provision of the law for applying for the extension, S. 95 of the Code is inapplicable as well.

It was also contended by counsel for the respondent that paragraphs 3 and 5 of the affidavits supporting the application concede that the applicant received summons for order on 28th October, 2022. And it is not in dispute that the time for filing defence had expired prior to 22nd

November, 2022. The counsel cited the case of **Adam Hassan Kifile vs Frida Jumanne Mahimbo**, Misc. Civil Application No. 288 of 2022 HC whereas this court ruled that each and every day of delay should be accounted for to substantiate the application for extension of time. That the ground advanced by the applicant to justify the application herein in that he had been faced with financial constraint is not a valid ground for grant of extension of time. The cases of **Alois Thadeo vs Richard Banda Semi**, Misc. Land Application No. 118 of 202, HC and **Violet Malabe vs Agha Khan Education Service Tanzania, Misc. Application No. 69 of 2021**, HC were likewise cited to buttress the point that a party who faces financial constraint should seek legal aid, and the applicant failed to take this step.

In the same vein, the counsel charged that the applicant has failed to depone what exact amount of money he failed to pay/needed to have, to engage the advocate. Therefore, the financial constraint, as a ground to support this application, was misconceived. This court was referred to the cases namely, **Faraja R. Kundyia versus Mina Alpha Kundyia and Another Misc. Application No. 219 of 2020**, HC and **Wambele Mtumwa Shabani vs Mohamed Hamis**, Civil Reference No. 08 of 2016 CA in an attempt to substantiate the point.

Apart from the above, the counsel contended that the affidavit filed by the applicant, the same invoked the right to be heard as a ground for an extension of time; and averred that the respondent would not be prejudiced by the grant of extension. The counsel opined that the deponed facts are misconceived as well. That the right to be heard is not absolute, but subject to those conditions and limitations provided by the law. This right to be heard, he opined, is not good cause for grant of an extension. This court was referred to the decision in the case of **Wambele Mtumwa Shabani** (supra) to bring the point home.

Further, the counsel opined that the provision of Order VIII rule, 1 (3) of the Civil Procedure Code, necessitates showing good cause for grant of an extension. The case of **Ondiek Nundu versus Wilson Kasuku Saronge**, Civil Application No. 339 of 2020 CA was cited to validate the argument.

Lastly, the counsel reiterated that the law cited by the applicant to support this application is inapplicable in this case. Therefore, he prayed this court to dismiss this application in its entirety for want of merit with costs and the main suit to proceed exparte.

In rejoining what was submitted earlier, from the outset, the applicant's counsel conceded the fact that the proper provision to have been cited was Order VIII rule 1 (3) of the Civil Procedure Code not order VIII, rule (3) of the Code. However, he contended that wrong citation is no longer the bar for the court to entertain its jurisdiction. The court was referred to s. 3A of the Civil Procedure Code to validate the argument.

In respect of the argument that financial constraint is not sufficient ground for grant of extension of time, the counsel countered that each case should be determined by its own circumstances. That most of the cited cases in support of the argument raised here don't fit the circumstances of this case, as some of them were in respect of the extension of time to file an appeal or application, not for filing defence. He reiterated that the applicant is not an indigent person to have relied on legal aid. That it is their take that filing defence is a technical process needing the expertise of the legal practitioner. Thus, he asserted, a layman, with financial constraints cannot file defence on his own. The counsel further expounded that in the case of **Wambele Mtumwa Shabani** (supra) the court was of the opinion that the applicant was not constrained to seek the expertise of the advocate based on the nature of the case as opposed to the nature of the case facing the applicant herein.

Otherwise, the counsel conceded the fact that the right to be heard is not absolute; but, the circumstances of this case command that the right to be heard for the applicant is imminent. That the same has taken steps to take legal action to exercise his right to be heard, of which is a constitutional right. And, he reiterated that it is uncontroverted fact that the respondent shall not be prejudiced if this application is granted.

In concluding his rejoinder, the counsel contended that the applicant is supposed to account for the days of delay only, not the whole period of the statutory time available to file defence. The counsel, once again, prayed that this application be granted in the interest of justice.

The issue for determination is whether the application herein is merited.

From the outset, I would like to clarify that, as conceded by the counsel for the applicant, the proper provision to have been cited in bringing this application is not Order VIII rule (3) of the Civil Procedure Code. The proper provision ought to be Order VIII, rule 1 (3) of the Code. However, I am on all fours with the counsel for the applicant in that the wrong citation is not fatal in contemporary legal practice. Obviously, it was a slip of the pen on part of the counsel for the applicant to have cited the provision providing for specific denial instead of the relevant provision for

extension of time. The overriding principle under s. 3A and 3B of the Civil Procedure Code may be invoked to cure the defect. Likewise, the anomaly can be cured by the insertion of proper provisions relevant to the matter at hand. See in this respect the case of **Beatrice Mbilinyi vs. Ahmed Mabkhut Shabiby**, Civil application No. 475/01 of 2020 CA (unreported).

In the same vein, I fully subscribe to the submission made by counsel for the respondent in that it is now well settled that the financial constraint is not the valid ground to be fronted for grant of the extension of time. There are numerous decisions supporting this principle namely, the cases of **Ondiek Nundu vs Wilson Kasuku Saronge** (supra), **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra), **Yusufu Same and Another vs. Hadija Yusufu**, Civil appeal No. 01 of 2002 and an olden case of the defunct East Africa Court of Appeal of **Zabitis Kawuka vs Abdul Karim**, [EACA] Civil Appeal No. 18 of 1937, among others, speak volumes in this respect. However, in special circumstances, there is an exception to this general rule. In the case of **Yusufu Same and Another vs. Hadija Yusufu** (supra) the superior court aptly held:

"We are aware that financial constraint is not sufficient ground for extension of time... But the circumstances of this case at hand, where the respondent was a widow, depending on legal aid, her plea of financial constraint cannot be held to be insignificant."

Likewise, I join hands with counsel for the respondent in that the right to be heard is not absolute. The right to be heard is exercised within certain ambits of the law. See the case of **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra).

I now revert to the substance of the application herein. The provision of Order VIII, rule 1 (3) of the Civil Procedure Code, enjoins this court with discretionary power, on the application by the defendant, to extend time for the defendant to file the written statement of defence upon the same furnishing good cause. The law further instructs that the application may be lodged before the expiry of 21 days provided forth for filling defence or within seven days after the expiry of the statutory time.

The discretion to grant extension of time enjoined to this court is a judicial one, which is exercised in accordance with the rules of reason and justice. See the case of **MZA RTC Trading Company LTD vs Export Trading Company LTD**, Civil Application No. 12 of 2015, CA (unreported) in this respect. Thus, it is a legal requirement that the application for extension of time can only be granted for good cause. See the case of **African Banking Corp. (T) LTD vs George Williamson Ltd** (supra),

Wambele Mtumwa Shahame vs Mohamed Hamis (supra) and **Attorney General vs Oyster Bay Villas Limited and Kinondoni Municipal Council**, Civil Application No. 299/16 of 2016 CA (unreported) among others.

And, I find it pertinent to state that what amounts to good cause depends on the circumstances of the case. However, some of the factors to consider are such as: the length of delay (delay should not be inordinate), reasons for the delay, and the degree of prejudice to the other party, if granted, among others. See **Wambele Mtumwa Shahame vs Mohamed Hamis** (supra).

As aforementioned, the applicant herein has fronted the time taken to look for legal services from the practitioner for drafting defence and financial constraint, as causes of delay to file defence. Likewise, the applicant invoked the constitutional right to be heard in moving this court to exercise its discretion to allow this application in the interest of justice. The asserted financial constraint, as aforementioned doesn't constitute good cause. Further, as aforesaid, the invoked right to be heard, on its own, doesn't constitute good cause. And, the assertion that there is a jurisdiction issue which cannot be raised unless the applicant is granted leave to file defence, doesn't amount to good cause as well.

However, notwithstanding the wanting retainer agreement between the applicant and his counsel and deponed facts as to the source of instruction fees, yet it remains apparent that the applicant, being a layman, had to seek the services of the legal practitioner in drafting defence. It is uncontroverted fact that the defence was filed belatedly. The question arising herein is whether the delay was inordinate. I purchase wholesale the argument made by the counsel for the applicant in that the applicant seeking extension is obliged to account for the period of delay only, not the whole statutory period available for taking prescribed legal action [**African Banking Corporation (T) LTD vs George Williamson Ltd** (supra)]. It is in record herein that the summons for order was served to the applicant on 28/10/2022. The period of 21 days in which the applicant was obliged to file defence elapsed on 17/11/2022. The said court document was handed to the counsel on 22/11/2022, five days after the lapse of 21 days in which the applicant was obliged to file defence. However, the counsel could not file defence without leave of this court which should have been sought upon appearance in court. Hence, this application was filed on 24/11/2022, within the time prescribed by law for the defendant to seek extension of time for filing defence as per Order VIII, rule 1 (3) of the Civil Procedure Code. Therefore, the applicant had stayed with the court document for 5 days beyond the prescribed period

before he handed the same to his counsel who had promptly worked on it. Thus, it is obvious that the total days of delay is 7 days whereas the applicant has given the general account that he couldn't have drafted the defence himself and, hiring the services of the legal practitioner needed funds which he lacked until later on when he was able to do so. It is an operating principle of law that each day of delay should be accounted for [**Adam Hassan Kifile vs Frida Jumanne Mahimbo** (supra)].

I am of the settled view that the delay of 7 days in which the applicant laboured to seek legal services in making defence against the colossal compensation claim staring at his face, is not inordinate in the circumstances of this case. The principle in the case of **Lyamuya Construction Co. Ltd vs the Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) is to the effect that one of the factors to consider as good cause includes the length of delay not being inordinate. The fact that the applicant has instituted this application in court further establishes that he didn't sit back, but took steps in asserting his right to be heard. Moreso, the respondent has not deposed in his affidavit and, or submission made by his counsel how he will be prejudiced if the extension to file defence is granted.

In tandem with above, I have taken into consideration the fact that, as contended by the counsel for the applicant, all the authorities relied on by the respondent's counsel herein above were applied in cases where the extension of time was sought either for the purposes of lodging an appeal, applications for stay of proceedings, revision, reference and leave to appeal. There is none among the litany of authorities cited by the counsel for the respondent tallying with the nature of the proceedings commenced by the respondent in which the applicant is seeking leave to make defence. Thus, it is apparent that the circumstances of this case are different from those pertaining to the cases cited above.

In the same vein, it is noteworthy that the respondent herein claims a total of three billion shillings (TZS 3,000,000, 000/=) for alleged defamation. If the relevant proceedings were to proceed *exparte*, the applicant is to sit back and let the grass grow under his feet awaiting to satisfy the decree issued by this court if found liable for the alleged defamation. It is obvious, such endeavour would offend reason.

It is the underlying legal principle that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*". In this spirit, proceeding *exparte* against the applicant on the ground that he delayed

to file defence for seven days, in my opinion, would be repugnant to justice.

I have directed my mind to the provision of s. 93 of the Civil Procedure Code, whereas it is provided as thus:

"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."

Based on the foregoing, I am constrained to grant the application herein for extension of time. And, in exercising the power enjoined to this court under the provisions of Order VIII, rule 1 (3) of the Civil Procedure Code, read together with s. 93 of the same, hereby enlarge time within which the applicant may file his defence in respect of the proceedings in Civil Case No. 184 Of 2022. The intended defence is to be filed in clear 7 days from the date of this ruling.

Order accordingly.

Dated at Dar es Salaam this 10th February, 2022.




O. F. BWEGOGÉ

JUDGE