IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. CIVIL APPLICATION NO. 10 OF 2021

(Originating from Civil Case No. 2 of 2021)

BETWEEN

MUFINDI TEA AND COFFEE LIMITED.....APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

Date of Last Order: *22/02/2022*
Date of Ruling: *17/03/2022*

MLYAMBINA, J.

On the 20th April, 2021 the Applicant filed the current application praying for orders that this Court may be pleased to grant an order for extension of time to file an application for leave to defend *Civil Case Number 2 of 2021*. The application is brought under *Section 14 of the Law of Limitation Act* and is supported by the affidavit and supplementary affidavit of Eunice Mgore. The gist of the application is based on the provisions of *Order XXXV Rule 2 (1) and (2) of the Civil Procedure Code Cap 33 [R.E. of 2019]* which states that:

> *Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform*

the Defendant that unless he obtains leave from the Court to defend the suit, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the Judge or Magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the Plaintiff shall be entitled.

Paragraph 4 of the supporting affidavit raises the issue whether the Applicant was served with the application out of time and therefore could not file leave to defend against the summary suit.

However, as replied by the Respondent, it is clear on the record that the Plaint was filed in the High Court of Iringa on 13th January, 2021. The Applicant was served with the Plaint and summons on 8th March, 2021. Though there are no explanation from the Plaintiff (Respondent) as to why he did not serve the Respondent on time, there are also no good reasons advanced by the Applicant as to why she did not file her application for leave within time after been served on 8th March, 2021. Therefore, the Applicant's contention that she was already out of time lacks any scintilla of merits.

It is undenied by both parties that this Court has unfettered discretion to extend the time for which the Applicant may file an application to defend against summary suit. This discretion, however, is exercised judiciously and upon good cause being shown by the Applicant and it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily. This was the position discussed in the case of **Lyamuya construction company limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No.2 of 2010 (unreported) which laid down the following guidelines: (a) The Applicant must account for all the period of delay (b) The delay should not be inordinate (c) The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. In the cited case of **Tanzania Revenue Authority v. Yusuph Juma Yusuph**, Civil Application No. 2 of 2004, Court of Appeal of Tanzania at Zanzibar (unreported) at page 2, the Court held:

> *What constitutes good cause cannot be laid down by any hard and fast rule. This depends on the prevailing circumstances of each particular.*

The reasons advanced by the Applicant in support of the application for the Court to exercise her discretion and extend time include; improper service, diligence exhibited by the Applicant and illegality.

It has been stated by the Applicant that, as soon as they were served, the Applicant exhibited diligence. The Applicant did not seat idle but engaged an advocate who filed an application for extension of time on the 6th May, 2021.

Later on, the Applicant realized there some defects of affidavit. The Applicant prayed before the Court on the 5th August, 2021 to file supplementary affidavit, which was then filed on the 19th August, 2021 and served to the Respondent on the same date. The Applicant cited the case of **Mchome Mbambo and Another v. Mbeya Cement Company Limite**d, Civil Application No. 271/01 of 206 Court of Appeal of Tanzania at Dar es Salaam (unreported), in which it was held that:

> The sequence of events and prompt steps taken by the Applicants till when they lodged the instant application positively account for the delay. To shut the door will in the circumstances, cause injustice. Diligence in search of justice was in the case of **Royal Insurance Tanzania Limited v. Kimengue Stand Hotel Limited**, Civil Application No. 111 of 2009 considered to be one of the factors which can lead the Court to exercise its discretion to grant extension of time. In that case the Court stated that:
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> We are satisfied that the Applicant has diligently and persistently been in and out of the Courts corridors in search for justice particularly after discovering the defect himself and attempting to cure it before anybody else.

Further to the foregoing, the Applicant submitted that; she had initiated perusal of the Court file in *Civil Application Number 2 of 2021* which has led to the birth of the current application, the perusal letter at the High Court

of Iringa which also stands to prove the diligence by the Applicant in pursuit of remedies before the Court.

As found earlier on and as replied by the Respondent, in the case of **Kalinga v. NBC** [2006] TLR 233 Nsekela J.A. clearly states that:

> Where there is inaction or delay on the part of the Applicant, there ought to be some kind of explanation or material to enable the Court to exercise the discretion given by Rule 8 of the Court of Appeal Rules...
>
> This Court has discretion to extend time but such extension, in the words of Rule 8 can only be done if sufficient reason has been given. The problem which often arises is what amount to sufficient reasons...

Rule 8 of the Court of Appeal Rules referred above is similar to *Section 14 (1) of the Law of Limitation* cited by the Counsel for the Applicant as both are dealing with extension of time.

It follows, therefore, true that the reasons stated are just words from the dark clouds and not actual and true facts. The days for leave to defend a plaint of a summary procedure, begin to run from the date of service of summons and not from the date upon which a case was filed in the Court of law. In the case of **Cable & Satellite Consultancy Ltd v. Wananchi Group Tanzania Limited,** Civil Case no. 94 of 2017 (unreported), it was stated that:

> 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.

In the matter at hand, as elaborated earlier, the Plaint was filed on 13th January, 2021 and it was served to the Defendant on 8th March, 2021. The Applicant (Defendant) had enough time to file leave to defend but she slept on her right. There is no good explanation as to why the Applicant did not file an application for leave to file her WSD on time. Instead, she remained silent up to 20th April, 2021 when she preferred this application.

Another ground advanced by the Applicant is of illegality. She argued that; it has been held in number of decisions that once illegality has been raised, it is sufficient reason for extension of time even if no reasonable ground has been raised to account for the delay. On that point, the Applicant cited the case of **Mrs. Mary Kahama (Attorney of Georgia George Kahama) and Another v. H.A.M Import & Export (T) Limited and 2 Others,** Court of Appeal of Tanzania at Dar es Salaam at page 10. It was alleged by the Applicant that; in the plaint by the Respondent herein, there is a filed document which is not signed. The Applicant cited the provisions of *Order VI rule 14 of the Civil Procedure Code Cap 33 [R.E 2019].*

It was the view of the Applicant that the fact that the plaint is not signed, it was wrongly accepted by the Court Registry and if the orders sought are not granted will prejudice the Applicant as she will not have opportunity to file

her defense embedded with a preliminary objection and challenge injustice. The Applicant cited the case of **Mrs. Rafiki Hawa Mohamed Sadik v. Ahmed Mabrouk and 2 Others,** Civil Application No.179/01 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 16 in which the Court held:

> Therefore, for two reasons, that the Applicant has established that she has an arguable point of illegality or misdirection in the proceedings and Ruling of the High Court, and also that she was diligent in pursuing the matter after that Ruling, I grant her application for extension of time with costs.

Further to the foregoing, it was the Applicant's submission that; the illegality in this matter if left untouched and the orders sought are not granted, is as good as breaching ones right to be heard which is a fundamental constitutional principle which cannot be alienated. The same is supported by the case of **The Registered Trustees of Shadhily v. Muhfudh Salim Omary Bin Zagar (Administrator of the Estate of the Late Salim Omary),** Civil Application No. 512/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was held that:

> The claim here is that the dismissal order was made in breach of the Constitutional and Fundamental right to be heard. In my view a point involving alleged breach of the right to be heard is undoubtedly not insignificant to be **Principal Secretary, Ministry of Defence and**

National Service v. Duram P. Valambhia [199] TLR 182, the Court of Appeal at page 387 held that:

> In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right.

I have had time to go through the record herein. I did not see the alleged illegality. The Plaint is well signed by the Principal Officer of the Plaintiff. Even if there could be such illegality, the Applicant has not established her diligence. She has not accounted for each day of delay from the time was served with the Plaint under Summary Procedure, that is on 8th March, 2021 to 20th April, 2021 when the Applicant filed this application.

Another point advanced by the Applicant was that; service was done out of time. It was the Applicant's view that service of the plaint should have been done earlier and not on the 8th March, 2021 which was already out of time. The Applicant cited the provisions *of Order V Rule 10 of the Civil Procedure Code Cap 33 [R.E. 2019]* which provides for time of service. Therefore, it was the view of the Applicant that; service by the Respondent was illegal and unfair as in the case of **Mohamed Nassoro v. Ally Mohamed** [1991] TLR 134, in which it was held that:

> As there was no proper service, the trial magistrate should have set aside the ex-parte judgment as of right.

The Applicant submitted that; the breach of mandatory rules of procedure such as *Order V Rule 10 and Order VI Rule 14 (supra)* cannot be cured by applying the oxygen principle. The Applicant cited the decision of the Court of Appeal in the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 2 Others**, Civil Appeal No. 66 of 2017 Court of Appeal of Tanzania at Arusha in which it was held:

> We are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case...The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...

Alternatively, the Applicant told the Court that; she wishes to honor the debt as it is statutory. Also, the Respondent has initiated an amnesty which waves all penalties the Applicant intends to make effective use of the same. Thus, filing defense would pave way for the Respondents.

Though, I agree with the Applicant that the breach of mandatory rules of procedure such as *Order V Rule 10 and Order VI Rule 14 (supra)* cannot be cured by applying the oxygen principle, I find the application is devoid of merits for not accounting each day of delay.

Indeed, though I second the move by the Applicant of honoring the statutory debt, I still find, as submitted by the Respondent, the Applicant's application for an extension of time is an escapist style of liability with intent to abuse Court processes.

In the end, therefore, the Application is dismissed with costs for lack of merits.

Y.J. MLYAMBINA

JUDGE

17/03/2022

Ruling pronounced and dated 17th March, 2022 in the presence of learned Counsel Happiness Kessy for the Applicant and in the absence of the Respondent. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

17/03/2022