

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 476 OF 2022

(Originating from Civil Case No. 78 of 2020)

AFRICAN SERVICE AND MAINTANANCE.....APPLICANT
VERSUS

TANZANIA PORTS AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last order: 14/03/2023

Date of ruling: 05/04/2023

E.E. KAKOLAKI, J.

The applicant herein is seeking an extension of time within which to file a Written Statement of Defence to the Defendants' Counter Claim. The application is preferred under the provisions of section 14 (1) of the Law of Limitation Act, [Cap. 89 R.E 2002] (the LLA) and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC), and is supported by the affidavit of applicant's advocate one Capt. Ibrahim Mbiu Bendera. When served with the application, the respondents strenuously resisted it through the Counter affidavit dully sworn by Ms. Careen Masonda, State Attorney.

During the hearing of the matter both parties who appeared represented were heard viva voce, as Capt. Ibrahim Mbiu Bendera, learned advocate represented the applicant while the respondent enjoyed the services of Mr. Daniel Nyakiha and Frida Mollel, both learned State Attorneys.

Briefly in the main suit Civil Case No. 78 of 2020, the respondents/defendants prayed and were granted with leave to file an amended WSD together with the Counter Claim by 30/08/2022 and serve them to the applicant/plaintiff who was also to file her reply to the WSD and the respondents/defendants' WSD to the Counter Claim by 13/09/2022. She however managed to file the reply to the respondents' WSD within time, but failed to file WSD to the Counter Claim by the respondents, hence the present application seeking for extension to time within which to file the same out of time.

In a bid to demonstrate sufficient or good cause warranting this Court grant the sought prayers, Capt. Bendera for the applicant, having adopted his affidavit pointed out three reasons justifying applicant's delay in filing the said WSD to the respondents/defendants' Counter Claim as, **one**, delayed service of the said Counter Claim, **second**, sickness of the applicant's advocate and **thirdly**, difficulties in securing clarifications timely from the applicant in support of the WSD to the Counter Claim as the applicant is the

foreign company registered in Kenya. He said, while the applicant was to be served with the amended WSD and Counter Claim on or before 30/08/2022 which was the last date of filing by the defendants, she was served six (6) days passed on 05/09/2022 and managed to file only a rely to defendants' WSD, but failed to file the WSD to defendants/respondents' Counter Claim as her advocate Capt. Bendera fell sick between 13-16/09/2022 after being diagnosed with acute bronchitis and got treated at Massana Hospital (MHS) while under bed rest and isolated. It was further contended the advocate was unable to secure clarifications from the applicant to enable him answer the Counter Claim that had raised new issues and facts. He relied on the letter from the MHS – Masana Hospital dated 13/09/2022 and an extract of company registration from the Registrar of Companies in Kenya. In his further submission Capt. Bendera attacked respondents' counter affidavit on the averments that, when appeared in Court on 15/09/2022 one advocate Zakaria did not mention anything concerning applicant's failure to file the WSD to the counter claim timely terming it misleading, as it is the same advocate Zakaria who on 20/10/2022, prayed and granted with leave of the Court to file this application which was filed on the 28/10/2022. It was his

submission that the application is justified and therefore prayed for its grant plus other orders as this Court deems it fit and just to do.

Having heard the submission by the applicant and adopted the counter affidavit, Mr. Nyakiha for the respondents submitted that, there is no sufficient reasons advanced by the applicant warranting this Court grant her extension of time as she has failed to tell why she delayed to file the WSD to the Counter Claim timely. He argued that, despite the contention by the applicant in paragraph 2 of the affidavit that, the WSD and Counter Claim were served to her five (5) days after 30/08/2022 and that, her deadline for filing the counter claim ended on 19/09/2022, still she failed to bring the application for extension of time to file the WSD to the respondent's Counter Claim until 20/10/2022 when leave of this Court was secured to file this application. To him, the applicant failed completely to account for 30 days delayed either in filing the said WSD or this application timely, before leave to file this application was obtained. He relied on the case of **Omary Ally Nyamalege (As Administrator of the estate of the late Seleman Ally Nyamalege) and 2 Others Vs. Mwanza Engineering Works**, Civil Application No. 94/08 of 2017 (CAT), where the Court of Appeal observed that, it is settled that, in an application for enlargement of time, the applicant

has to account for each and every day of delay. On the basis of that authority and the fact that the applicant failed to account for the delayed period from 19/09/2022 to 20/10/2022, he submitted, this Court cannot exercise its discretion in granting the sought prayers by the applicant, hence prayed the Court to dismiss the application with costs.

In a short rejoinder Capt. Bendera resisted the submission by the respondents contending that there is no provision in the Law of Limitation Act, allowing the applicant to seek extension of time to amend Court's orders for filing the reply to WSD and WSD to the respondents' counter claim which were issued by this Court on 09/08/2022. To him, it is superfluous for the respondents to submit that time was lost and therefore unaccounted for by the applicant while awaiting for court's leave to allow her to file this application. He was insistent that, the application is meritorious and invited this Court to disregard the submission by the respondents and proceed to grant the prayers as sought.

I have taken time to chew out and internalise the fighting submissions from both parties as well as perused and considered the evidence as adduced in the affidavit, counter affidavit and reply to counter affidavit. It is settled law under section 14(1) of LLA that, this Court may extent time to the applicant

upon good or sufficient cause shown. Though there is no fast and hard rule on what amounts to sufficient or good cause, numerous court pronouncements have been defining it to include all reasonable causes that prevented the applicant from performing his action within the prescribed time limit. See the cases of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) and **Jumanne Hussein Bilingi Vs. Republic** (Criminal Application No. 20 of 2014 [2015]TZCA 342 (21 July 2015); www.tanzlii.org.tz). In establishing that good cause a number of factors are considered such as whether or not the application has been brought promptly; the absence of any or valid explanation for the delay and lack of diligence on the part of the Applicant. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 and **CRDB (1996) Limited Vs. George Kilindu**, Civil Appeal No 162 of 2006 (all CAT-unreported). It is also worth noting that, while assigning good cause the party among other reasons has to account for the period delayed, as even a single day of delay counts. See the cases of **Bushiri Hassan Vs. Latina Lukio, Mashayo,**

Civil Application No. 3 of 2007 and **Tanzania Coffee Board Vs. Rombo Millers Ltd**, Civil Application No 13 of 2015 (all CAT-unreported).

In this matter there is no dispute that, the applicant was to file the reply to WSD and WSD to the respondents' counter claim by 13/08/2022. It is also uncontroverted fact that, she managed to timely file the reply to respondents' WSD, save for the WSD to the counter claim subject of this application, despite of being served by the respondents on the same date on 05/09/2022 with both WSD and counter claim. As alluded to above the applicant raised three reasons to justify her failure to file the said WSD to the counter claim within time. In this ruling therefore I am intending to determine first the first and third reasons before reverting back to the second one.

To start with the first and third grounds, the applicant is contending that, there was delayed service of the said counter claim by the respondents to her and that, since the counter claim contained new facts and issues it was impossible for the applicant's advocate to answer them and file the WSD timely as the advocate needed clarifications from the applicant's head office located in Kenya, hence failure to comply with the Court's order as the remaining period of almost nine (9) days ending on 13/09/2022, was too

short for him to accomplish all the necessary preparations. This assertion is challenged by the respondents who averred in paragraph 6 of their counter affidavit that, the applicant had 21 days up to 26/09/2022 to file her WSD, for being served on 05/09/2022 and after seeking clarifications from her office in Kenya, but failed to utilize that opportunity. And that, on 15/09/2022 when the suit was called on for mention, the applicant while under representation of Mr. Zakaria Kegoro, learned advocate neither raised the issue of seeking clarifications from Kenya nor requested for extension of time.

It is true and I unreservedly subscribe to the respondents proposition that, the applicant's advocate despite of being lately served by five (5) days had ample time to seek for clarifications from the applicant and still file the WSD timely, but never did so. I so view as a close and deep eye to the Court proceedings of 15/09/2022, conspicuously indicate that, Ms. Careen Masonda, State Attorney for the respondent notified the Court of applicant/plaintiff's failure to serve them with WSD to the counter claim, but Mr. Zakaria Kegoro, advocate for the applicant chose to remain silent and mentioned not any efforts made to gather for information or clarification from the applicant's head office Kenya pending filing of the said WSD. As

there is no reason advanced as to why the applicant's advocate chose to remain mute on 15/09/2022, I hold the applicant's attempt to seek for extension of time now, within which to file the WSD to the respondents' counter affidavit, on pretext of late service and the need to seek clarifications from the applicant's office in Kenya is afterthought and has no any legal justification. I therefore dismiss the two grounds.

Next for determination is the reason of sickness in which the applicant's advocate Capt. Bendera in paragraph 5 of the affidavit, relies on the letter from MHS – Massana Hospital dated 13/09/2022, to claim that was suffering from bronchitis from 13 to 16/09/2022 and that, was on complete bed rest and isolated, hence unable to file the WSD to the counter claim timely when the main suit was called for necessary orders on 15/09/2022. In response the respondents vide paragraph 5 of the counter affidavit, recanted Capt. Bendera's contention stating that, on that date it was advocate Kegoro who proceeded in Court with full instruction and never disclosed of Capt. Bendera's medical condition, hence the contention is an afterthought as even the annexed letter is neither a hospital certificate nor a medical chit disclosing the diagnosis.

Having a glance of an eye to the proceedings of this Court of 15/09/2022 in Civil Case No. 78 of 2020, I find no reason to disagree with the respondents contention that, truly Mr. Kegoro appeared in Court on that day with full instruction to proceed but never informed the Court of Capt. Bendera's alleged medical condition if any existed nor did he mention that, he was holding his brief on that day. For that matter it was unnecessary for Capt. Bendera to be present in Court on that day as the plaintiff was fully represented. That aside, on a further look of the alleged letter from MHS dated 13/09/2022, the same does not support Capt. Bendera's assertions of suffering from bronchitis and that out of that condition he had bed rest while isolated. In support of this Court's views, I find it imperative to quote the excerpt from said letter of 13/09/2022:

13th September, 2022

RE: Athorization of work absence for Mr. Ibrahim Mbiu Bendera.

Refer to the heading above.

*The above named **patient was excused from work from 13th September 2022 to 16th September 2022** under medical advice and as part of his treatment plan in order to encourage sufficient rest so as to facilitate and improve the patient's general heath and recovery from illness.*

From the bolded part of the excerpt of the letter above referred, it is suggestive that, when the latter was written on the 13/09/2022, the patient had already been excused from work, though the reason for so doing is not clearly disclosed. Second, the same does not disclose the diagnosis made, in which Capt. Bendera was striving to prove in paragraph 5 of his affidavit, that he was suffering from bronchitis and had a complete bed rest while isolated, hence prevented from attending court session. Even when this Court is to believe his version which is not the case, still I would have held the applicant was fully represented in Court on 15/09/2022 by Mr. Zakaria Kegoro, thus there was no reason for him not notify this Court of applicant's intention to file the WSD to the counter claim after being reminded by ms. Masonda, so that leave could be granted instead of waiting until 20/10/2022, more than one month passed. As the applicant failed to so do, I also find no merit in this reason and proceed to disregard it as she has to account for such period of delay.

Lastly is on whether the applicant accounted for the period delayed to file the WSD to the counter claim from 13/08/2022 when he was ordered to file the same until 20/10/2022 when he obtained leave of this Court to bring this application. Capt. Bendera is of the view that, there is no law requiring the

party to seek extension of time for him to amend court's order. I agree with him that there is no such law. However, the law requires that when the time for performing a certain function or actions is given and the same lapses then extension of time must be sought for performing it and in so doing the delayed time must be accounted for. In this matter I am at one with Mr. Nyakiha that, the applicant completely failed to account for the delayed period of more than one month from 13/09/2022 when she was required to file the WSD up to 20/10/2022, when leave of this Court to file this application was obtained. I so find as it is within that period as stated above advocate Zakaria Kegoro appeared in Court on 15/09/2022 but never mentioned anything concerning applicant's intention to file the said WSD to counter affidavit nor the need of Capt. Bendera's presence before the WSD is filed. It was stated in the cases of **Omary Ally Nyamalege** (supra) **Bushiri Hassan** (supra) and **Tanzania Coffee Board** (supra), that even a single day of delay counts, hence the same must be accounted for. In this matter since the said period of more than one month which to me is inordinate, is not accounted for, I am satisfied that no good cause has been shown by the applicant warranting this Court exercise its discretion judiciously to justifiably grant the sought prayers.

In the premises, this application is devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED at Dar es salaam this 05th April, 2023.



E. E. KAKOLAKI

JUDGE

05/04/2023.

The Ruling has been delivered at Dar es Salaam today 05th day of April, 2023 in the presence of Capt. Ibrahim Bendera, advocate for the applicant, Ms. Hosana Mgeni, State Attorney, for the 1st and 2nd respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

05/04/2023.

