

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

MISC. CIVIL APPLICATION NO. 36 OF 2023

(Arising from Civil Case No. 06 of 2022)

NAILE LEAF TANZANIA COMPANY LIMITEDAPPLICANT

VERSUS

SIKONGE DISTRICT COUNCIL.....RESPONDENT

RULING

Last Order: 14/12/2023

Ruling date: 1/3/2024

MANGO, J

The Applicant filed this application seeking for extension of time to file revision application in respect of judgement of the District Court of Tabora in Civil Case No. 06 of 2022. In brief, the Respondent, Sikonge District Council filed a summary suit against the Applicant, Naile Leaf Company Limited before the District Court of Tabora. On 10th February 2023, the Applicant was served with summons to file Written Statement of Defence. Instead of filing a Written Statement of Defence, the Applicant filed an application seeking leave to appear and defend the suit instituted against him. The application was registered as Misc. Civil Application No. 03 of 2003. Unfortunately, the Application was assigned to a different Magistrate and parties did not bother to inform the trial Magistrate on the existence of the application for leave to appear and defend the suit that was filed by the

Applicant. As a result, on 22nd March 2023, Hon. Trial Magistrate determined the suit by granting the uncontested prayers contained in the Plaint.

Despite such determination of the main suit parties proceeded to appear in the application until 3rd August 2022 when the Applicant learnt from Mr. Silinde, learned State Attorney that, the suit had already been determined since 22nd March 2022. The information was revealed during hearing of the application. The Applicant was aggrieved by the decision of the trial Court and decided to file the application at hand. The application is by way of chamber summons, supported by an affidavit sworn by Alex Kagesya, a Principal Officer of the Applicant Company. The Respondent contests grant of orders sought in the chamber summons and he filed a counter affidavit to that effect.

The Applicant was represented by Advocate Akram William Magoti while the Respondent was represented by Gureni Mapande learned State Attorney. On 8th November 2023, the Court ordered hearing of this application to proceed by way of written submission. I am grateful to the counsels who represented parties in this application for their compliance with the schedule of submission and their lucid submissions.

In his submission in support of the application, advocate Magoti highlighted some factors that have been considered by the Court to be sufficient grounds for granting extension of time to pursue further legal reliefs. He referred the Court to the decision of the Court of Appeal in the case of **Murtaza Mohamed Raza Virani & Another vs Mehboob Hassanali Versi** (Civil Application No. 448 of 2020) [2023] TZCA 6 (7 February 2023).

On the grounds that moved the Applicant to file the application at hand, the learned counsel pointed out illegality in the decision sought to be challenged. He submitted that, the proceedings of the trial Court are tainted with three categories of illegality. First, the court determined a summary suit during pendency of an application for leave to appear and defend the case filed by the Defendant herein the Applicant. He explained that, the trial Court erred in law by proceeding to hear and determine Civil Case No. 6 of 2022 which was instituted in the form of a summary suit during the pendency of Misc. Civil Application No. 03 of 2023. He argued that, by the time the court determined Civil Case No. 6 of 2022, the Applicant had already filed an application for leave to appear and defend in the case. The Application which was registered as Misc. Civil Application No. 03 of 2023 was filed in the District Court of Tabora on 3rd March 2022 while the main case, Civil Case No.6 of 2022 was determined on 22nd March 2022.

Advocate Magoti argued that, the trial court ought to have satisfied itself that the Applicant who was the defendant in Civil Case No. 6 of 2022 has not filed an application for leave to appear and defend the case before proceeding to award the remedies sought by the Respondent. He referred the court to the decision of the Court of Appeal in the case of **Prosper Paulo Massawe & Others vs Access Bank Tanzania Ltd** (Civil Appeal 39 of 2014) [2021] TZCA 321 (22 July 2021) to back up his submission regarding the procedure to be followed by the court in determining summary suits in absence of the Defendant.

The second category of illegality that was pointed out by the learned counsel is failure to issue the Applicant with a proper summons. In this he argued

that, the Applicant was served with summons to appear and file his defence instead of summons explaining the procedure to be followed by the Defendant in case he wishes to appear and defend the suit. He argued that, it was the duty of the Court to serve the Applicant with a summons informing him of the requirement to seek and obtain leave to appear and defend in the suit and consequences of failure to obtain such leave. Unfortunately, the Court did not issue a proper summons to the Applicant.

The third category of illegality is failure to afford the Applicant with the right to be heard. The learned counsel is of the opinion that, by determining the case during pendency of an application for leave to appear and defend in the suit, the trial court condemned the Applicant unheard. He is of the view that the highlighted illegality is sufficient to move the Court to grant extension of time so that the same can be addressed and cleared by the Court. To fortify his arguments, he cited the case of **Principal Secretary Ministry of Defence and National Services versus Devram P. Valambhia** [1992] T.L.R 387 in which the Court held that, illegality is a sufficient ground for extension of time.

The Applicant's counsel also submitted that, the Applicant acted diligently in filing this application. According to him it took the Applicant 33 days only to file the application at hand after he became aware that the suit was determined ex parte against him. He explained that, the Applicant received such information on 3rd August of 2023 during oral submissions in his application for leave to appear and defend in Civil Case No. 06 of 2022. He filed the application at hand on 6th September 2023. The learned advocate is of the view that, by filing this application 33 day after being informed of

the decision in Civil Case No. 6 of 2022 the Applicant acted diligently. He supported his views with the decision of the Court of Appeal of Tanzania in the case of **Attorney General vs Oysterbay Villas Limited & Another** (Civil Application 299 of 2016) [2017] TZCA 146 (6 March 2017). He then prayed to have the application granted with costs.

In his reply submission, Gureni Mapande learned state attorney challenged competence of this application on the reason that, the Applicant did not exhaust available remedies before approaching this Court with an application for extension of time to file revision application. He argued that, the decision sought to be challenged originates from a summary suit filed by the Respondent under order XXXV Rule 1(e) of the Civil Procedure Code, [Cap. 33 R.E 2022]. The law, Order XXXV Rule 8 provides for a procedure of challenging judgement entered against the defendants in a summary suit. He pointed out that, according to the cited provision, summary judgement can be challenged via an application to set aside the judgement. He is of the opinion that, by his failure to exhaust available remedies, the application has been filed in contravention of Order IX Rule 9 of the Civil Procedure Code and the principle laid down by the Court in a number of cases including the case of **Jaffar Sanya and Another versus Saleh Sadiq Osmsn**, Civil Appeal No. 54 of 1997 and the case of **Paula kweka and Hilary P. Kweka versus Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002.

The learned state attorney submitted also on the merits of this application. He challenged the alleged illegality in the proceedings of the trial Court on the reason that the Applicant was dully served with summon to file defence.

Despite being served with Court summons, the Applicant, for reasons best known to himself, decided not to appear but to pursue the matter in his own ways. He argued that, for illegality to be considered as a ground for extension of time, it should be clearly seen on face of record and must raise on an important point of law. According to him, the alleged illegalities in the proceedings of Civil Case No. 6 of 2022 are not clear on face of record. He insisted that, the Applicant was served with summons but he did not appear nor did he file his defence. Thus, the Court was correct to proceed to determine the case in absence of the Applicant. He cited the case of **Prosper Paulo Massawe & Others vs Access Bank Tanzania Ltd** (Civil Appeal 39 of 2014) [2021] TZCA 321 (22 July 2021) to back up his arguments.

The learned state Attorney challenged also the inaction of the Applicant for 32 days. In this he submitted that, the Applicant did not even account of any of the days of delay after he was informed of the decision of the trial court. He considered the Applicant delay to be a result of negligence, because he did not comply with the court summons. He cited the case of **Umoja Garage National Bank of Commerce** (1997) TLR 109, in which the Court held that, lack of negligence on part of the counsel not sufficient ground for extension of time. Relating the case to the application at hand, he submitted that the Applicant's counsel failed to take due diligence after he received summons.

He concluded his submission by praying to have the application dismissed with costs.

In his brief rejoinder, the Applicant reiterated his submission in chief.

I have considered submissions by both parties and the pleadings filed in respect of this application. From the submission made by the Applicant's counsel the main ground for extension of time is illegality. I agree with the Respondent's counsel that, for the court to be moved to grant an application for extension of time on the ground of illegality, such illegality must be on face of record. This means, it shouldn't require the Court to search for the alleged illegality by analyzing arguments by the parties. The alleged illegality should appear clearly on the face of record.

In the application at hand, I find such illegality on the fact that, the trial Court determined a summary suit during pendency of an application filed by the Applicant seeking leave to appear and defend in the same suit. It is also clear on face of record that, the Applicant was served with a summons to file defence while the suit against him was filed in a form of summary suit. The summons was issued in contravention of Order XXXV Rule 2(1&2) of the Civil Procedure Code, [Cap. 33 R.E 2019]. The provision reads: -

"2.- (1) 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;..."

The cited provision provides for no automatic right of defence in a summary suit. It requires the Defendant to seek and obtain leave of the Court to defend the suit. The same procedure was discussed in the case of **Prosper Paulo Massawe & Others vs Access Bank Tanzania Ltd** cited by the Respondent's counsel. Thus, the Applicant took a proper course by filing an application for leave to appear and defend in Civil Case No. 6 of 2022. The only challenge was his failure to inform the trial court on the pending application.

I would have granted the application, but I noted that the Applicant did not exhaust the available remedies as provided by Order XXXV Rule 8 of the Civil Procedure Code. The provision provides that, the decree in a summary suit can be set aside set aside by the Court which granted it in special circumstances. I noted that the Applicant counsel is of the view that there are no special circumstances in this case, I however find existence of very special circumstance in this matter. The fact that the decree was issued during pendency of an application for leave to appear and defend the suit by the Applicant is in itself enough to move the Court to set aside the decree issued against the Applicant.

For that reason, I find the application at hand has been filed prematurely and it is hereby struck out. Given the fact that what happened in this matter resulted from administrative processes of the Court and, parties' failure to inform the Court on the pending application, I do not award costs.

Dated at Tabora this 1st day of March 2024



A handwritten signature in black ink, appearing to read "Z. D. Mango". The signature is stylized and somewhat abstract.

Z. D. MANGO

JUDGE