

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 18 OF 2000

**HAASE GENERAL ENTERPRISES LTD PLAINTIFF
VERSUS**

**1.FREEDY W. RWE GASIRA }
2.INTERSTATE OFFICE SERVICE CO.LTD} DEFENDANTS**

R U L I N G

NSEKALA, J.

This is an application brought under section 14 (1) of the Law of Limitation Act, 1971 and Order VIII Rule 1 (1) and (2) of the Civil Procedure Code, 1966. The applicants/defendants are, inter alia, seeking the following orders –

" (a) That the applicant be granted leave to file an application for extension of time to file a written statement of defence out of time.

(b) The applicant be granted leave to file a written statement of defence out of time."

The applicant has filed two affidavits in support of the application, one sworn by the learned advocate for the applicant, Mr. Rweyongeza and the second one affirmed by the Registry Officer in this court one Mr. Rashidi Abdalla. The applicant himself has not filed an affidavit in support. Before I proceed to consider and determine the merits or demerits of this application, I shall narrate a brief factual background to the main suit. The respondent/plaintiff filed this suit on the 18.5.2000 and on the 19.5.2000 in the absence of the parties, I ordered that summons be issued to the applicants/defendants in terms of Order V rule 1 of the CPC. On the 9.6.2000 the suit came before me and this time Mr. Rutabingwa learned advocate for the

respondent/plaintiff entered an appearance on behalf of his clients. The applicants/defendants did not enter appearance. Mr. Rutabingwa informed the court that the 1st applicant/defendant, one Freddy W Rwegasira, had refused to accept service of summons and therefore prayed that service of summons upon the applicants/defendants be effected through publication in the newspapers. I acceded to this prayer and ordered that the defendants be served with summons by substituted service by publication in both an English and Swahili newspaper. Before making this order, I had satisfied myself that the 1st applicant/defendant, the said Freddy W Rwegasira, had twice personally refused to accept service of summons upon him on the 29.5.2000 and the 5.6.2000. This information is contained in affidavit of service of a process server, Mustafa O. Nyumbamkali. The first appearance of the summons was on the 11.6.2000 in the Sunday News and Mzalendo newspapers. Thus in terms of Order V rule 20 (2) of the CPC, this is the date when the defendants were served with the summons. The nature of the summons was to the effect that the written statement of defence should be filed within twenty one days of service of notice upon them. The twenty one days expired on 1.7.2000, which was a Saturday. By this time the written statement of defence had not been filed. I should also point out that in the summons as published, the applicants/defendants were informed that the suit was to be mentioned on the 27.6.2000. On this date, Mr. Rutabingwa dutifully entered appearance but the applicants/defendants did not show up whereupon Mr. Rutabingwa made an application to proceed ex parte. I reserved my Ruling which was delivered on the 18.7.2000. On the 5.7.2000, the applicants/defendants filed a chamber summons under Order IX rule 7 of the CPC seeking, inter alia, the following order –

"(a) The order to proceed ex parte against the defendants dated 27th June, 2000 be set aside."

This application was set down for hearing on the 28.7.2000 and Mr. Rweyongeza learned advocate, entered appearance on behalf of the

applicants/defendants and Mr.Rutabingwa for the respondent/plaintiff. It dawned upon Mr. Rweyongeza that on the 27.6.2000 there was no order made for the respondent/plaintiff to proceed ex parte. As a result, Mr. Rweyongeza withdrew the application and on the 2.8.2000, the current application was filed. With this factual background, I now reproduce part of Mr. Rweyongeza's affidavit in support of the application. It provides as follows –

" 2. That on 15.6.2000 the applicants/defendants instructed me to defend them in Commercial Case No.18 of 2000 for which they had been served through publication in the uhuru Newspaper of 12.6.2000....

3. That the said summons required them to file a written statement of defence within 21 days from the date of the said service of notice, which period when computed from the date of publication was to expire on 2nd June 2000 which was a Sunday.

4. That the applicants did not have a copy of the plaint, and I made arrangements to get a copy of the plaint so that I could prepare a written statement of defence before the mentioned date.

5. that before I could get a copy of the plaint I had to travel to Dodoma on 19.6.2000 to attend the sitting of the Court of Appeal of Tanzania where I had been summoned to appear from 20th day of June to 26th of June 2000.

6. That when I came back from Dodoma on 28.6.2000 I prepared a joint written statement of defence for filing on 30.6.2000 as period date for filing a defence was expiring on 2.7.2000 was not a working.

7. That the joint written statement of defence was presented on 30.6.2000 but I was informed by Mr. Rashid Abdallah, the Registry Officer and Mr. Mtei that the matter was pending before the trial Judge for a ruling and as to whether the case would proceed ex parte or not and that under such circumstances the filing of the written statement of defence should wait for the Ruling of the Honourable Judge.

8. That the Ruling was delivered on 18th day of July 2000 and the respondents prayers were dismissed."

I would like to make a few comments on this affidavit. First, as pointed out earlier the 1st applicant/defendant, on two occasions refused to accept the summons on the 29.5.2000 and on the 5.6.2000. If he had accepted service of summons, he would have been given a copy of the plaint and would have known that the suit was coming up for mention on 9.6.2000. Second, the first appearance of the summons in the newspapers was on the 11.6.2000 and not the 12.6.2000. If the date of summons is reckoned from 11.6.2000, the written statement of defence should have been filed at the latest on the 1.7.2000, but it was a Saturday, so section 43 of the Interpretation of Laws and General Clauses Act, 1972 would come into play. It reads as follows –

" 43. In computing time for the purposes of any Act, unless the contrary intention appears –

- a)*
- b) if the last day of the period is a Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the following days, not being an excluded day;*
- c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time. If it is done or taken on the next day following, not being an excluded day."*

As stated above, the last day within which the applicants/defendants were supposed to file the written statement of defence was 1.7.2000 which apparently was a Saturday. Section 43 (b) above does not mention "Saturday" I think at that time it was a working day. It is common knowledge that Saturday is nowadays not a working day and it must therefore be deemed to be an excluded day as well under section 43 (b). On

the facts of this suit, the applicants/defendants should have, at the latest, filed the written statement of defence on the 3.7.2000, which was not an excluded day. Instead of filing the written statement of defence on that date, the learned advocate instead on the 5.7.2000 filed an application I have referred to earlier on seeking to set aside a fictitious order dated 27.6.2000 apparently based on information from Mr. Rashid Abdallah and Mr. Mtei.

On the facts as they stand, can I grant the orders sought by the applicants/defendants? Mr. Rutabingwa learned advocate for the respondent/plaintiff has strenuously resisted the application. He submitted that Order VIII rule 1 (2) of the CPC was amended by GN No.422 of 1994. By that amendment an applicant has only an extra twenty one days to apply for an extension to file a written statement of defence and that section 14 (1) of the Law of Limitation Act, 1971 cannot be invoked to bail out the applicants/defendants from their inaction or Mr. Rweyongeza's inaction to file the defence according to law. Let me start with an examination of Order VIII rule 1 (2) of the CPC. It is in the following terms –

" 1(1)

(2) where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty one days of the date of service of the summons upon him present to the court a written statement of his defence:

Provided that the court may, within twenty-one days of expiration of the prescribed period, grant an extension of time for presentation of the written statement of defence on application by the defendant."

As discussed above, the first twenty-one days expired on the 3.7.2000. Under the proviso the next twenty-one days within which an application had to be made by the applicants/defendants expired on the 24.7.2000. There was no such application before the court. This application was filed on 2.8.2000, clearly out of time. In order to salvage this seemingly hopeless situation, Mr. Rweyongeza has invoked section 14 (1) of the Law of Limitation Act, 1971. It provides as follows –

" 14 (1). Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."

This section should however be read together with sections 43(f) and 46 of the same Act. I reproduce them hereunder: -

" 43. This Act shall not apply to –

(a).....

(b).....

(c).....

(d).....

(e).....

(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46.

Pausing here for a moment, since Order VIII rule 1 (2) has provided for a period within which a defendant can file his written statement of defence, then the Law of Limitation Act, 1971 is inapplicable but save to the extent provided for in section 46 which provides –

" 46. Where a period of limitation for any proceeding is prescribed by any other written law, then unless the contrary intention appears in such written law, and subject to section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."

As explained before in this Ruling, under Order VIII rule 1 (2) as amended by GN 422 of 1994, a written statement of defence must be filed within twenty-one days of the date of service of summons upon the defendant. In the instant suit, substituted service was effected on the 11.6.2000 and therefore the date of expiration for filing the written statement of defence was the 3.7.2000. If the applicants/defendants were desirous of seeking an extension of time to do so, they had an extra twenty-one days to make an application to the court to that effect as reckoned from the 3.7.2000, and this

period expired on the 24.7.2000. The chamber summons was filed on the 2.8.2000, clearly out of time. This then attracts section 46 quoted above. Order VIII rule 1(2) has shown a contrary intention by prescribing its own period of limitation for a defendant to file a written statement of defence. It is my considered view that the cumulative effect of sections 43 (f) and 46 of the Law of Limitation Act that the period of limitation prescribed under Order VIII rule 1 (2) should be incorporated into the said Act as if it was prescribed in the First Schedule. This then will attract section 14 (1) of the Law of Limitation Act, which gives discretion to the court to enlarge time if the applicants/defendants can show "*any reasonable or sufficient cause.*"

There are two affidavits in support of the application, the first by Mr. Rweyongeza, learned advocate for the applicants/defendants and the second one by Mr. Rashid Abdallah. For what it is worth, perhaps I should point out that the 1st applicant/defendant did not swear an affidavit. This time, I reproduce in part Mr. Abdallah's affidavit in support. It provides as follows –

" 4. That during the pendency of the ruling M/S R.K. Rweyongeza & Co. Advocates presented a joint written statement of defence on the 30th day of June 2000 on behalf of the defendants.

5. That as the matter was already before the Hon. Judge for ruling we did not accept the said joint written statement of defence and instead we advised them to wait for the outcome of the ruling that had been reserved.

6. The said ruling was delivered on the 18th day of July 2000."

The contents of these paragraphs is more or less the same as those in paragraphs 7 and 8 of Mr. Rweyongeza's affidavit. The responsibility to file a written statement of defence lies squarely on the defendants. I have mentioned before that on two occasions the 1st defendant/applicant refused to accept service of summons upon him. When the applicants/defendants instructed Mr. Rweyongeza on the 15.6.2000, his clients were well aware that

they were required to file their defence within the prescribed period as from 11.6.2000. If the applicants/defendants needed a copy of the plaint before the 15.6.2000, they certainly knew where to obtain it. This piece of information is not contained in any of the two supporting affidavits. This explains my surprise as to why the 1st applicant/defendant did not swear an affidavit. There is no explanation at all as to what happened between the time the plaint was filed in court on the 18.5.2000 to 15.6.2000 when Mr. Rweyongeza was instructed to act for them. The summons was first published on the 11.6.2000 and obviously on the 15.6.2000 the prescribed twenty-one days had not elapsed. The applicants/defendants did not have a copy of the plaint because of their own indifference, if I may mildly put it, to court procedures. Then on the 19.6.2000 Mr. Rweyongeza proceeded to Dodoma for other prior engagements where he stayed until the 26.6.2000, but even then the twenty-one days had not expired. As explained before the cut-off date was the 3.7.2000. Up to then no defence had been filed. Then the problem started since the applicants/defendants had to make an application within twenty-one days within which to file the written statement of defence. This was done on 2.8.2000. What were the reasons now for this delay? Apparently on the 30.6.2000, Mr. Rashid Abdallah did not accept the written statement of defence because I was preparing a ruling. This is baffling to me to say the least. On this date the statutory twenty-one days had not expired. On 5.7.2000 Mr. Rweyongeza filed a chamber summons under Order IX rule 7 of the CPC seeking, inter alia, the following order –

" (a) The order to proceed ex parte against the defendants dated 27th June, 2000 be set aside."

This application was admitted by the Registry headed by the same Rashid Abdallah and by then my ruling had not been delivered. It is my considered opinion that Mr. Rweyongeza cannot take refuge for his inaction and/or negligence in filing the written statement of defence by throwing the blame on

Mr. Rashid Abdallah and Mr. Mtei. On 30.6.2000 the prescribed period had not elapsed and he knew this or should have known this, but instead of relying on his professional knowledge on rules of procedure, he took to heart the gratuitous information from registry officials. At the very minimum, that was the learned advocate's own undoing and he wants this court to accept this reason as " *sufficient cause*." In the case of ***Ratman v Cumarasamy*** {1964} 3 All ER 933, Lord Guest said page 935 –

" The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation." {See also: ***Savil v Southend Health Authority*** [1995] 1 WLR 1254}.

Rules for the filing of pleadings is governed by the Civil Procedure Code. Filing of written statements of defence is governed by Order VIII rule 1 (1) and (2). It is difficult, at least to me, to comprehend how Mr. Rweyongeza a learned advocate of fairly long standing, could swallow information from whatever source, that his filing of the written statement of defence must await my Ruling. The learned advocate on 30.6.2000 should have demanded from Mr. Rashid Abdallah to inspect the case file to find out what exactly was happening. Instead, he ended up filing an application to set aside a fictitious order on the 5.7.2000. Mr. Rweyongeza was not in any way misled by Mr. Rashid Abdallah in ascertaining or computing the period within which to file the written statement of defence. There was inordinate delay in the filing this application and there has been no valid explanation to account for this delay, complete lack of diligence on the part of the learned advocate and indifference by Mr. Freddy W. Rwegasira in refusing to accept summons served upon him. All these factors taken in their totality operate against the exercise of my judicial discretion in favour of the applicants/defendants.

In the result, I am satisfied that no reasonable or sufficient reason has been shown for the enlargement of time to apply for an extension time to file a written statement of defence. The application is accordingly dismissed with costs. It is so ordered.

H.R.Nsekela,

JUDGE.

4.9.2000

7/09/2000

Coram: Dr. J. Ruhangisa, RCC.

For Plaintiff – Mr. Rutabingwa.

For Defendant – Mr. Kannabar/Rweyongeza.

CC: Mtey.

Court: Noted that the matter is coming for ruling. The ruling is delivered in Chambers in the presence of Mr. Rutabingwa for Plaintiff/Respondent and Mr. Kannabar holding brief for Mr. Rweyongeza for the defendant/applicant.

Order: Mention 20/09/2000 at 9.00a.m.



Dr. J. Ruhangisa,

RCC

7/09/200

I Certify that this is a true and Correct
of the original order Judgement Ruling
.....
Registrar
Commercial Court
Dar es Salaam
Dated 07/09/ of 2000