

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

COMMERCIAL CASE NO. 128 OF 2005

PLEXUS COTTON LIMITED.....PLAINTIFF

VERSUS

- 1. USHIROMBO COTTON GINNEY LTD1ST DEFENDANT
2. STANBIC BANK TANZANIA..... 2ND DEFENDANT**

RULING

MASSATI, J.:

In a plaint filed by the Plaintiff through the services of **OCTAVIAN AND CO ADVOCATES**, against the defendant the Plaintiff is claiming for payment of the sum of USD 172,222 being the value of 930 cotton lint bales paid for but un supplied. There is also a claim for general damages for breach of contract, interests and costs.

The plaint was filed on 5/12/2005. When the suit was first mentioned on 13/1/2006 the 2nd defendant was represented by Mr. Kabakama but the 1st defendant did not appear. On 1/2/ 2006 the Plaintiff filed an application for the default judgment against the 1st defendant as she has not filed any written statement of defence.

On 2/2/2006 when the case came up for mention. Mr. Mtafya learned counsel appeared for the 2nd defendant while Mr. Temu appeared for the Plaintiff.

A certain Mr. Benedict Mashibe who described himself as a Director of the 1st defendant appeared in person, whereas Mr. Kamugisha, learned counsel said he appeared for the 1st Defendant's Receiver /Manager.

In the presence of all these, Mr. Temu prayed for default judgment against the 1st defendant for failure to file a written statement of defence within the requisite time (i.e. within the maximum of 42 days) which has now expired. He prayed in the alternative for leave to prove his case *ex parte*. Mr. Kamugisha prayed that as he had just been instructed by the Receiver/Manager he was applying for time within which to respond to the application for default judgment. Asked by the court, Mr. Mashibe admitted that the 1st defendant has been placed under receivership whereas Mr. Kamugisha informed the court from the bar that the deed of receivership was registered by the Registrar of Companies on 16/1/2006.

It was submitted by Mr. Temu that since the deed of appointment of receivership was registered on 16/1/200/2006 and the time for filing of the defence expired on 12/1/2006 the receivership was irrelevant and ought to be ignored.

The issue is, what is the effect of the appointment of a receiver of a defendant company after the time for filing the defence has lapsed?

It is my considered view that since the court was not informed of the appointment of the receiver/manager, and the latter is not yet a party to the present proceedings, it would not be proper for the court to consider him as a party, as he has not applied to be so joined. Besides if the appointment is

true then as an agent of the 1st defendant he cannot divorce himself from the consequences of what his principal has done prior to his appointment. By extension, since the 1st defendant was duly served with the summons to file a written statement of defence on 22/12/2005 and the time for filing the defence first expired on 12/1/2006 and the next 21 days expired on 2/2/2006 the 1st defendant is now time barred to apply for any extension of time within which to file a defence. And so is whoever is the appointed Receiver /Manager. Therefore by virtue of O.VIII r.2 as amended by GN 422/94, and on the authorities this court has no powers to entertain any application regarding extension of time within which to file a defence. The court is duty bound to follow the law and the parties are bound by it whether by themselves or by their agents. With respect therefore I agree with Mr. Temu, that the appointment of a receiver/manager after the expiry of the time for filing of defence and the extension, is of little consequence to the operation of O VIII Rule 2 of the Civil Procedure Code 1966 as amended. The position would have been different if immediately after 16/1/2006 the Receiver would have dashed to the court to apply for extension for by then the next 21 days were still open to him.

In the result, I would disallow Mr. Kamugisha's application at this stage to be allowed to respond to the application for default judgment.

That, however, does not mean that the application for default judgment is to be allowed as presented. In view of the nature of the claim and the stage of the pleadings, I would order that the case against the 1st defendant proceed *ex parte* but the trial shall be together with the 2nd

