

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

COMMERCIAL CASE NO. 37 OF 2007

**STANBIC BANK TANZANIA LIMITED PLAINTIFF/RESPONDENT
VERSUS**

- 1. WEST KILIMANJARO FLOWER
PARK LIMITED1ST DEFENDANT/APPLICANT,**
 - 2. FELIX GAMALIEL MOSHA2ND DEFENDANT/APPLICANT**
 - 2. MRS. FELIX MOSHA3RD DEFENDANT/APPLICANT**
-

RULING

LUANDA, J.

This is an application for enlargement of time so as to enable the defendants/applicants file their Written Statement of Defence. The application has been made under Sections 14(1) of the Law of Limitation Act, Cap 89 and Sections 93 and 95 of the Civil Procedure Code, Cap 33.

The historical background of this application is to this effect:- The respondent/plaintiff filed this suit in this Court against the defendants/applicants. The Court issued summons to file a defence. It is not disputed that the summons were duly served upon the defendants/applicants. They were served on 15/6/2007.

On the 21st day after service i.e. 6/7/2007 the advocate for the defendants/applicants one Ms Shiyo in absence of the plaintiff/respondent prayed for extension of time to file the Written Statement of Defence. The prayer was granted. The defendants/applicants were ordered to file their Written Statement of Defence by 24/7/2007. The case was to come for First Pre Trial Conference or Mention on 2/8/2007.

On 2/9/2007 Mr. Ringia learned counsel for the defendants/applicants informed the Court that they had filed an application for extension of time to enable them file Written Statement of defence. The application was filed on 1/8/2007 vide ERV 29056401. But on that same date i.e. 2/8/2007 the plaintiff/respondent was yet to be served with the application. The court ordered the plaintiff/respondent to be served on the same day. Counter affidavit to be filed by 13/8/2007 and reply if any by 17/8/2007. The application was fixed for hearing on 17/9/2007.

On 17/8/2007 the 2nd defendant/applicant filed a reply to the counter affidavit. Not only that on that same day Mr. Nyange learned counsel for the defendants/applicants also filed a supplementary affidavit. The course taken by Mr. Nyange was opposed by Mr. Kesaria learned advocate for the plaintiff/respondent and rightly so in that the filing was done without any leave of this court. Mr. Kesaria

asked the court to expunge the same from the court record. I entirely agree with Mr. Kesaria. The course taken by Mr. Nyange is not proper. The Supplementary affidavit is hereby expunged from the court record. Back to the application.

Mr. Nyange first started by stating that the application is made under Section 14(1) of the Law of Limitation Act and Section 93 of the Civil Procedure Code, Cap. 33. In case the two are not applicable then Section 95 of the Civil Procedure Code, Cap. 33 should salvage the situation. He then went on to the merits of the application. He adopted the affidavits of Felix Gamaliel Mosha the 2nd defendant/Applicant who is also the Director of 1st defendant/Applicant; that of Anna Mosha – wife of the 2nd defendant/Applicant who is also the Director of the 1st defendant/Applicant and Cecylia Shiyo, advocate. For ease reference, I reproduce the contents of the said affidavits.

Affidavit of Mr. Mosha:

1. That a (sic) Director of the 1st applicant/Defendant herein and the 2nd Defendant herein thus conversant with facts I am about to depone to.
2. That on the 15th June 2007 I was served with a plaint for the above mentioned case while on preparations for a business trip to Singapore.

3. That soon thereafter I traveled to Singapore on Official business and therefore I did not have an opportunity to instruct an Advocate in the sense of briefing him/her all the facts together with availing the Advocates all documentary evidence I would have liked to be used in Court.
4. That while in Singapore, I thought about this matter but because I did not have telephone numbers of Advocates in Tanzania I could not call the desired Advocate Colman Ngalo. The only cellphone number I had is that of Cecylia Shiyo, my sister in law. A copy of my passport with details of the said trip is annexed hereto marked annexure **"FM"** and forms part of this affidavit.
5. I called Cecylia Shio and asked her to attend to receive orders because I had intended after my return from Singapore to instruct Colman Ngalo Advocate to handle the matter instead of my sister in law, Cecylia Shio to avoid possible conflict of interest.
6. That the nature of the conflict of interest that involved Cecylia Shio is that I was married to her Sister before my present wife, Mrs. Anna Mosha, the 2nd Defendant/Applicant herein and although at personal level I still enjoy cordial relationship with my former in-laws. My wife, the 3rd defendant did not feel comfortable being represented by sister in law of my former wife.
7. That I returned from Singapore on 7th July 2007, on 10th July 2007 I sent the documents to Colman Ngalo Arusha for his perusal. On 12th July 2007, we had a guest former Nigerian President Gen. Olusegun Obasanjo, for NICO, which organization I am the Chairman. This exercise was so involving as it included liaising with Government thus I could not get in touch with Colman Ngalo.

8. That on 20th August 2007 I saw a letter from Ngalo & Company Advocates, signed by Michael Ngalo, Advocate, informing me that they could not handle this case as they are Lawyers of STANBIC Bank, thus could be a conflict of interest. A copy of the said letter is annexed hereto marked annexure **"FM"** and forms part of this affidavit.
9. [Blank]
10. That on 30th July 2007 instructed Nyange, Ringia & Company to handle and defend this case. Apparently the date for filing the defence had lapsed hence this application.
11. That I am the custodian of all documents related to the project and this banking Facility in particular under lock and keys in my office thus no other person could have access to the same.
12. Further that I humbly pray for the extension as in my defence I will demonstrate that none of the Applicants herein received the amount claimed in this case.

Affidavit of Anna Mosha:

1. That I am the 3rd Defendant Applicant herein thus conversant with facts I am about to depone to.
2. That in Mid July, 2007, I was contacted by Mrs. Cecylia Shio concerning this matter that there is a defence to file.
3. That I told Mrs. Cecylia Shio that all documents were under the custody of my Husband, Felix Mosha and I further informed the said Shio that I could not be comfortable if she represents me and the 1st defendant as my Husband had previously been married to her sister.

Affidavit of Mrs. Cecylia Shiyo:

1. That I am an advocate of the High Court of Tanzania and Courts subordinate thereto except the primary court. That I am also a retained advocate for the National Investment Company (NICO).
2. That on 4th of July 2007 at night I received a call from Mr. Felix Mosha who is the NICO Chairman to appear for the defendants and pray for extension of time to file a written statement of defence which I did.
3. That there was no problem appearing for the 1st and 2nd defendant. The problem was with the 3rd defendant Mrs. Anna Mosha who is Mr. Mosha's wife because of my relationship with Mr. Mosha's late wife who was my sister.
4. Further that apart from the foregoing, I could not file the written statement of defence as Mrs. Anna Mosha, 3rd Defendant, informed me that all records on this matter were under the custody of Mr. Mosha, 2nd defendant, and further that she would not be comfortable being defended by me.
5. That from the foregoing, I advised Mr. Mosha to seek services of another Advocate.

Mr. Kesaria learned counsel who advocated for the plaintiff/respondent countered the above mentioned affidavits. I reproduce the contents for ease reference.

1. I am the Advocate for the Plaintiff/Respondent and fully familiar with the facts deposed hereinbelow:

2. The Summonses for appearance and filing Written Statement of Defence accompanied with the Plaints were served upon the Defendants on 15th June 2007. This means that the prescribed period for filing the Written Statement of Defence expired on 6th July 2007. the Defendants did not file their Written Statements of Defence by that date.
3. Instead, on 6th July 2007, the Defendants represented by Advocate Shiyo entered appearance and prayed for and were granted extension of time to file their Written Statements of Defence by 24th July 2007. Yet again the Defendants failed to file their Written Statements of Defence by the extended date.
4. Any applications for further extensions of time in which to file their Written Statements of Defence should have been made by the Defendants by not later than 27th July 2007. This was not done. The present application was filed on 1st August 2007.
5. A copy of the second Defendant/Applicant's passport exhibited to his Affidavit does not disclose the date on which he traveled to Singapore as deposed by him in paragraph 3 of his Affidavit. It however shows that he returned to Dar es Salaam on 7th July 2007, i.e. in good time before the extended date of 24th July 2007 within which the Defendants were required to file their Written Statements of Defence. Even the letter dated 18th July 2007 (Exhibit FM1 to the Affidavit of the second Defendant/Applicant) was received by him on 20th July 2007, in good time before the deadline of 24th July 2007 for the filing of Written Statements of Defence. The second Defendant's averment at para. 8 of his Affidavit is clearly false as the endorsement on the letter from Ngalo and Company shows that the second Defendant received the said letter of 20th July 2007 and not 20th August 2007 (we have not even reached that date in the calendar).

6. Even after receiving the letter from Ngalo and Company Advocates on 20th July 2007, the Defendants had a further 4 days within which to file their Written Statements of Defence and a further seven days in which to make a further application for extension of time.

And Mr. Mosha alone made a reply to Mr. Kesaria's counter affidavit. The following is the reply,

1. Paragraph 1 is not denied nor is paragraph 3. However, the complication as explained in paragraphs 3 and 4 of the affidavit of Cecylia Shiyo, Advocate and that of Mrs. Anna Mosha in paragraphs 2 and 3 occurred after the advocate had contacted Mrs. Mosha who declined to be represented by the said advocate hence the said advocate could not even proceed to file a "Holding" statement of defence.
2. I believe Mrs. Mosha has the right to have her own legal representation. Moreover she did not have access to all the necessary documents.
3. The defendants' failure to file a written statement of defence after the extension was granted on 6th July, 2007 is accounted for by my frequent absence from Dar es Salaam and Tanzania, the conflict of interest, inaccessibility of documents to the 3rd defendant/Applicant and failure to secure the services of Ngalo and Company Advocates whom I had instructed to take over the matter from Advocate Shiyo.
4. That I received the letter from Ngalo & Company Advocates on 20th July, 2007, a Friday. I had to start the search for legal representation afresh as opposed to a continuous process when one had already secured one. I could not do anything between

Friday and Sunday as it was already a weekend and all Advocates recommended to me were unavailable or had connections with the respondent.

5. That I finally secured the services of Nyange, Ringia & Company Advocates on 24th July, 2007. It took a time to brief Advocate Deogratias Ringia as the matter is complex and the fact that his partner Mr. Nyange Advocate was away in Moshi for the burial of a relative. There arose another hitch as the 3rd Applicant was not in Dar es Salaam to swear the affidavit.
6. About my return from Singapore and paragraph 5 of the Counter Affidavit, I do not deny that it was in good time but then the matter moved from Ms. Shiyo to Colman Ngalo Advocate who declined to take instructions and due to the weekend, unavailability of Advocates, complexity of the matter and unavailability of Advocates, complexity of the matter and unavailability of the 3rd applicant in Dar es Salaam, it was a non starter.
7. About the endorsement of the letter from Ngalo & Company Advocates the date is 20th July, 2007 not August, 2007 the month in paragraph 8 of my affidavit is an accidental mistake.
8. I was not negligent nor was I idle. If it was not for the situation with Ngalo and Company Advocates, the Written Statement of Defence would have been filed in good time.

Responding to the law applicable, Mr. Kesaria said, Section 14(1) of the Law of Limitation Act, is not applicable. He submitted

that the application is not for an application nor an appeal; it is to file Written Statement of Defence. The application is vague.

Referring to Section 93 of the Civil Procedure Code, Cap 33, Mr. Kesaria said that the section should not be read in isolation. It does not override the amendment made in the Civil Procedure Code, vide GN 422/1994. The court has no powers to entertain the application.

As to the merits of the application, Mr. Kesaria said the application has no merits. Of course this should have been made in the alternative.

Whatever the position, from what I have summarized above, there is no dispute that the nature of the application sought namely for extension of time to file Written Statement of Defence is made under the Civil Procedure Code. And the Civil Procedure Code has its own time limit for such application. Once it is shown that there is time in other laws, then the Law of Limitation Act, Cap 89 does not apply. This is provided for under Section 43 (f) of the said law. The section reads:-

43. The Act shall not apply to –

(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.

From the clear provision of the above quoted section, it follows therefore that Section 14(1) of the Law of Limitation Act, Cap. 89 does not apply. Mr. Kesaria is right.

As regards to Section 93 of the Civil Procedure Code, Cap 33 I understood Mr. Kesaria argued that this court has no powers to entertain the application as by doing so it tantamount to overriding the amendment of the Civil Procedure Code affected by GN 422/1994. However, Mr. Kesaria did not go further in propounding his argument. Be that as it may, Section 93 of the Civil Procedure Code reads:-

93. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

When you read this section in isolation you get the impression that there is no restriction whatsoever to the court's discretion in extending time. However, there are some restrictions as I will soon show. Order VIII, Rule 1(2) of the Civil Procedure Code, Cap 33 as amended by GN 422/1994 imposes restrictions. The rule reads:-

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.

And in Tanzania Harbours Authority V. Mohamed R. Mohamed Civil Appeal No. 80/1999 CAT (Unreported) the Court of Appeal of Tanzania underscored the need of the requirement of filing an application for extension of time to file a Written Statement of Defence should be made within 21 days of the expiry of the time set for the lodging of the Written Statement of Defence notwithstanding Section 93 of the Civil Procedure Code, Cap 33 cited supra.

In our case the facts are quite different as narrated earlier in that the applicants/defendants are requesting for yet another extension of time so that they be allowed to file their Written Statement of Defence after the first extension had elapsed. The question is whether this court has power to grant the prayer.

I have gone through the Civil Procedure Code, Cap 33; I was unable to trace any provision permitting such course. However, the amendment affected by GN 422/1994 was aimed at speeding up trials by strictly following the time frame. Now if the time for making an application has been put in place i.e. must be made within 21 days after the expiry of the time set for the lodging of the Written Statement of Defence, then the court has no power to grant the prayer.

reason does not entitle a party to invoke Section 95 of the Civil Procedure Code, Cap. 33.

In view of what I have tried to explain above, I am of the considered views that this court has no power to entertain the application.

Assuming for the sake of argument that it has, are the reasons advanced meritorious. I have read the affidavits in support of the application. Para 3 of the affidavit of the 2nd applicant/defendant reproduced earlier for instance does not indicate exactly when he left for Singapore.

Indeed even the extract from his passport does not bail him out – there is no date of departure. The 2nd applicant/defendant further deponed in Para 4 that while in Singapore he intended to use the services of Mr. Colman Ngalo, advocate. He could not do so because he had no cellphone of Mr. Ngalo. He thus contacted Cecylia Shio. If he managed to get Cecylia Shiyo and he really intended to engage Mr. Colman Ngalo, common sense dictates that he would have asked Cecylia Shiyo to find for him the cellphone number of Mr. Colman. He did not say why he failed to do that.

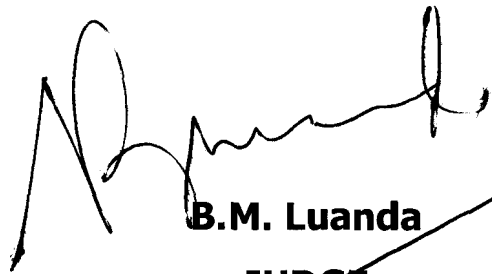
Last but not least the 2nd applicant/defendant contradicted himself as to the date he engaged a law firm of Nyange, Ringia and

Company. In his affidavit he said on 30/7/2007 (See Para 10) whereas in a reply to a counter affidavit he said on 24/7/2007 (See Para 5). Which is which?

From above therefore, it is clear that the reasons adduced are not sufficient either.

In fine the application is dismissed with costs. Order accordingly.




B.M. Luanda
JUDGE
3/11/2007.

3,313 words.