

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

**MISCELLANEOUS COMMERCIAL CAUSE NO. 76 OF 2015
(Arising from Commercial Case No. 36 of 2012)**

**NATIONAL INVESTMENTS CO. LTD (NICOL) APPLICANT
VERSUS**

**BANC ABC
NELSON MSUYA
LEONARD MUSUSA** } **RESPONDENTS**

10th & 31st August, 2015

RULING

MWAMBEGELE, J.:

Mr. Herbert Herme Hezekiah Nyange, learned counsel for the applicant, filed an application in this court seeking this court to grant the applicant leave to appeal against the ruling of this court dated 20.03.2015. When this matter was called on for necessary orders on 22.06.2015, Mr. Sinare, learned counsel for the respondent, told the court that he was served on 19.05.2015 and prayed that he be allowed to file a counter-affidavit by the following Friday. Mr. Nyange, learned counsel, rose to tell the court that the law required that the counter affidavit should be filed within 21 days from the date of service. Mr. Nyange seemed to argue that the respondent having been served on 19.05.2015, ought to have filed the counter-affidavit within 21 days of service

if he wished to contest the application. As he did not file the same within the time prescribed by law, Mr. Nyange seemed to argue, the learned counsel ought to have prayed for extension of time within which to file the same. The court ordered the learned counsel for the parties to address it on the point and scheduled 10.08.2015 for that purpose.

On the said 10.08.2015, the learned counsel for the parties addressed the court as ordered. It was Mr. Nyange for the applicant who set the ball rolling. He submitted that he filed the application for leave to appeal under rule 45 (a) of the Court of Appeal Rules, 2009 (henceforth "the CAT Rules") which requires that where an appeal lies with leave of the High Court, an application for leave may be made informally at the time the decision is made or by chamber summons according to the practice of the High Court within 14 days of the decision. The application, he submitted, has to comply with Order XLIII rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"), which means that the chamber summons must be supported by an affidavit. Once the chamber summons is issued by the Registrar it becomes a command to the parties to appear for the hearing of the application, he submitted. Mr. Nyange, learned counsel, added that for purposes of the CPC which rule 45 of the CAT Rules refers to a chamber summons is a Civil Proceeding and therefore a suit. On this stance he cited ***Tanzania Cigarette Co. Ltd Vs Mastermind Tobacco (T) Ltd***, Civil Appeal No. 7 of 2005 which was approved by this court ***John Okoth Nyanga Vs Mediterranean Shipping Co. Ltd.***, Miscellaneous Commercial Cause 61 of 2009 (unreported). For that reason, the learned counsel submitted, the provisions of the CPC applicable to the filing of the Written Statement of the Defence apply *mutatis mutandis* to the present application. The learned

counsel clarified that the respondent had 21 days from 19.05.2015 and when he appeared before the court, he appeared for hearing not for mention and if he had not filed a counter-affidavit, he should have prayed for extension of time to file one. Thus the application for leave to file it was improperly made unless the learned counsel for the respondent applied for extension of time.

In response, Mr. Sinare for the respondent, submitted that it was not correct to say that the application was made under order rule 45 (a) of the CAT Rules; it was made under section 5 of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002. He went on to submit that the court is governed by its Rules and where it happens that there is *lacuna*, a resort is made to the CPC. Under Order XLIII rule 2 of the CPC, every application has to be made by a chamber summons supported by an affidavit. There is nowhere under the CPC that requires the respondent to file a counter-affidavit. Equally, there is nowhere under the CPC to suggest that a counter-affidavit is equivalent to the Written Statement of the Defence. As per Order VI Rule 1 of the CPC, a Written Statement of Defence is defined as among pleading. The learned counsel for the respondent distinguished the decisions cited by the learned counsel for the applicant stating that they were not relevant to the present application in that in the ***Mastermind*** case, there was nowhere the Court of Appeal said an application is a suit; the appeal was against the decision of a taxing master on objections proceedings and the ***Nyanga*** case was a matter under section 231 of the Companies Act.

Mr. Sinare argued that a counter-affidavit is not equivalent to a Written Statement of the Defence. He added that the statement to the effect that once a chamber summons has been issued by the court requiring the parties

to appear for hearing and that the case would be for hearing and nothing else; may appear attractive but the practice of the court has always been that where the respondent intends to object the application will appear on the date that the chamber summons indicates, will have to seek leave to file a counter-affidavit if he intends to counter the application. As regards the written statement of defence, the learned counsel argued, there has to be summons to the party to file a Written Statement of the Defence. It is different from a summons to appear, a chamber summons is like a summons to appear; it does not tell the respondent to file a counter-affidavit, he submitted. Mr. Sinare, learned counsel for the respondent, stressed that there is no provision under law which requires a counter-affidavit to be filed within 21 days and in such absence of the law, to suggest that a counter-affidavit is equivalent to a Written Statement of the Defence should be disregarded.

In a short rejoinder, Mr. Nyange, learned counsel for the applicant, reiterated what he stated in his submissions in chief. He added that it was not correct to peg the definition of pleadings as provided for in the CPC as the case of ***James Funke Gwagilo Vs Attorney General*** [2004] TLR 161, the court referred to an affidavit as a pleading. A pleading is therefore not limited to the one provided for in the CPC, he submitted. He reiterated that when the learned counsel for the applicant appeared on 22.06.2015, his obligation was to apply for extension of time; not for leave to file a counter-affidavit because they were within the second period of 21 days. As to the argument that a Chamber Summons is akin to a summons to appear, the learned counsel for the applicant that a chamber summons is not a summons to appear and as per Order VIII rule 1 and Order IX rule 1 of the CPC, a summons to appear is

not an excuse to file a Written Statement of the Defence. The law applicable to the filing of Written Statement of the Defence, is applicable to counter-affidavit as well, he reiterated.

I have listened well to the contending arguments by both learned counsel for the parties. I think there is only one issue to be answered at by this ruling; this is, whether the law applicable to the filing of written statements of defence is applicable to the filing of counter-affidavits. It is the argument of Mr. Nyange, learned counsel for the applicant that the law applicable to filing of the written statement of defence is applicable *mutatis mutandis* to the counter-affidavit. To Mr. Nyange, a party who wishes to oppose an application must file a counter-affidavit within 21 days after service. Should he fail to file the same within 21 days, he must apply for extension of time to file the same. Mr. Sinare for the applicant is of a different view; that that law relating to filing written statements of defence is not applicable to counter-affidavits. Mr. Nyange's stance seems to hinge on the definition of a suit as held in the **Mastermind** and **Nyanga** cases (supra). I am in agreement with Mr. Nyange, learned counsel on the cases that they indeed defined what a suit is. In **Mastermind** the Court of Appeal was seized with an issue whether the proceedings in the High Court which were initiated under rule 5 of the Advocates' Remuneration and Taxation of Costs Rules, 1991 – GN No. 515 of 1991 amounted to a suit, and, relying on the definition of the term in **Black's Law Dictionary**, **Oxford Learners' Dictionary of Current English** and **Osborn's Concise Law Dictionary** as well as the definition of the term in **the Honourable Attorney General Vs Reverend Christopher Mtikila**, Civil Appeal No. 20 of 2007 (unreported), concluded that those proceedings were a suit.

Likewise, in **Nyanga**, the Petition which was filed in court under section 233 (1) of the Companies Act, Cap. 212 of the Revised Edition, 2002 was also held to be a suit.

However, as rightly pointed out by Mr. Sinare, learned counsel for the respondent, the decisions cited by Mr. Nyange, learned counsel for the applicant, do not appear to have a bearing on the matter at hand. It is provided nowhere in those cases suggesting that the law applicable to written statements of defence is also applicable to counter-affidavits.

It is the practice of courts in this jurisdiction that once a party receives a chamber summons, if he wishes to challenge the application, he either files a counter-affidavit right-away or prays to court to file one on the date he is summoned for hearing. The respondents have therefore been filing counter-affidavits either *suo motu* or by praying to court to file one on the date indicated in the chamber summons and the courts have been allowing the filing of counter-affidavits in both instances. I am aware that the chamber summons tells the party to come for hearing and that the word "mention" does not appear in the CPC. It is just the practice – see: **Attorney General Vs Amos Shavu** [2001] TLR 134. However, after ample research, and having not able to come across any authority, I find difficulty in following Mr. Nyange's proposition to the effect that the law applicable to written statements of defence is applicable to counter-affidavits *mutatis mutandis*. The situation is exacerbated by the fact that the authorities brought to the fore by Mr. Nyange, learned counsel, do not appear to answer the question.

When bringing the objection on 22.06.2015, Mr. Nyange, learned counsel for the applicant told the court that there were Court of Appeal decisions to the effect and promised to bring or cite them at the hearing. At the hearing, the learned counsel did not walk the talk. None of the authorities cited or supplied discussed the point at issue and my research has not revealed any. A lot of fuel in terms of time and energy has been burnt for something non-existent. This is an unfortunate situation.

I therefore surmise that in an application, once the respondent is served and wishes to counter the application, time allowing, he must file a counter-affidavit outrightly or file it after praying to court so to do on the date when the matter is called on for hearing; the date normally indicated in the chamber summons. The timeframe applicable to filing written statements of defence in suits is not applicable to the filing of counter-affidavits.

At the end of it all, I would allow the respondent to file a counter-affidavit as prayed on 22.06.2015. The same should be filed within seven days from the date of this order. As no counsel pressed for costs, no order is made as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 31st day of August, 2015.

J. C. M. MWAMBEGELE
JUDGE