IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 302 OF 2015

(Arising from Commercial Case No. 41 of 2015)

YUSUF NAWAB MULLA

LUSHOTO TEA COMPANY LIMITED..... APPLICANTS

VERSUS

FBME BANK LIMITED ..... RESPONDENTS

15th June & 27th October, 2016.

RULING

MWAMBEGELE, J.:

The applicants Yusuf Nawab Mulla and Lushoto Tea Estates have filed the present application against the respondent FBME Bank seeking for, *inter alia*, that this court may be pleased to extend time for the applicants to file their written statement of defence in Commercial Case No. 41 of 2015.

The background story to this application is that the respondent filed a suit against the applicants together with one Lupembe Tea Estates who is not a party to this application. It happened that the applicants had filed their joint written statement of defence which was not compliant with the law. Upon a concession by Mr. Majembe, learned counsel, to a preliminary objection by

Mr. Welwel, learned counsel, the joint written statement of defence by the applicants was struck out on 12.11.2015.

Following that, the applicants have filed the present application so that the court allows them to file their defence out of time. The application has been made under the provisions of Order VIII rule 1 (2), Order LXIII rule 2 and section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 and rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules"). It is supported by an affidavit of Ndurumah Keya Majembe, the applicants' counsel. The application is countered by a counter-affidavit of Mr. Daniel Bernard Welwel; the respondent's counsel.

The application was argued before me on 12.06.2016 during which the parties were represented by their learned counsel as they did in the main suit; Mr. Majembe for the applicants and Mr. Welwel for the respondent. The present ruling was supposed to have been delivered on 03.08.2016 but as I was out of the station for a special assignment upcountry which special assignment ended on 22.09.2016, it could not be delivered as planned.

The main reason for the delay brought to the fore by Mr. Majembe in the eight-paragraph affidavit supporting the affidavit is mainly that the applicants have a strong defence against the plaintiff in the main suit and that they have not been negligent in defending their rights. If I understood well Mr. Majembe, learned counsel, he argues that the applicants have been defending the case diligently until 12.11.2015 when their defence was struck out. The learned counsel thus prays that the interest of justice would demand that the present application be allowed.

To support their proposition, the applicants have relied on ***Allison Xerox Sila Vs Tanzania Harbours Authority***, Civil Reference No. 14 of 2002 ***Isaack Sebegele Vs Tanzania Portland Cement Co. Ltd***, Civil Appeal No. 25 of 2002; both are unreported decisions of the Court of Appeal and ***A/S NOREMCO Construction (NOREMCO) Vs Dar es Salaam Water and Sewarage Authority (DAWASA)***, Commercial Case No. 47 of 2009; an unreported decision of this court.

On the other hand, Mr. Welwel for the respondent states in the counter-affidavit that the applicants have no strong case against the respondent in the main suit and that the interests of justice will be served best if the application is refused. He argues that the applicants have not shown sufficient reason for the grant of extension of time within which to file the written statement of defence. The learned counsel adds that the affidavit of the learned counsel supporting the application contains hearsay in that the affidavit of person or persons who caused the delay ought to have been filed. The learned counsel is referring to the affidavit of the first applicant and of Nawab Abdulrahim Mulla; the Managing Director of the second applicant who are alleged by the applicant to have been in South Africa on a family emergency at the time the defence was supposed to be timely filed. He also submits that the documents evidencing the alleged travel ought to have been produced. On this take, the learned counsel relies on the ***Sebegele*** case supra.

The learned counsel also submits that the application cannot be entertained because the provisions of rule 20 (2) of the Rules require that an application for extension of time within which to file a written statement of defence must be made "before the expiry of the period provided for filing defence or within seven days after the expiry of that period". The learned counsel also submits

that the application has been made out of time and should therefore not be entertained. To buttress this proposition, the learned counsel relies on ***Richard Augustine Zuberi Vs Ally Mandona***, Civil Case No. 348 of 1998 (unreported).

In his skeleton written arguments, the learned counsel for the respondent raises a point in the form preliminary objection to the effect that the applicants have cited wrong provisions in support of the application because the provisions of rule 2 (2) of the Rules require that a resort should be made to the CPC only in situations of lacunae in the Rules. In the present instance, he argues, the relevant rule for the application is rule 20 (2) of the Rules. Thus the learned counsel submits that, in so far as the application makes reference to provisions of the law other than rule 20 (2) of the Rules, it (the application) should be struck out for wrong citation.

Let me start with the complaint by the respondent's counsel to the effect that the application has been filed under wrong provisions. As already alluded to above, the present application has been made under Order VIII rule 1 (2), Order LXIII rule 2 and section 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 and rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules"). I agree with Mr. Welwel, learned counsel for the respondent that in view of the fact that the Rules have a relevant provision which caters for the situation, in terms of rule 2 (2) of the Rules, a resort to the provisions of the CPC was not necessary. And, after all, the provisions of section 95 of the CPC regarding inherent powers of the court can only be brought into play in situations when there is no provision which can cater for any particular matter at hand - see: ***Aero Helicopter (T) Ltd Vs F.N. Jansen*** [1990] TLR 142 and ***Bunda***

District Council Vs Virian Tanzania Ltd [2000] TLR 49. However, I am not in agreement with Mr. Welwel on his contention that the application is prone to being struck out for wrong citation because it refers to provisions other than rule 20 (2) of the Rules. As the learned counsel for the applicants has, *inter alia*, cited rule 20 (2) of the Rules and which Mr. Welwel concedes to be the correct provisions, I am of the view that the application has enough legs on which to stand in this court. In the premises, Mr. Welwel's prayer to have the application struck out for wrong citation is refused.

Next for consideration is the question whether the application should not be entertained because it was filed out of the prescribed timeframe as provided for by rule 20 (2) of the Rules. The provisions of sub-rule 2 of rule 20 read:

> "A Judge or a Registrar, may, upon an application by the defendant before the expiry of the period provided for filing defence or within seven (7) days after expiry of that period showing good cause for failure to file such defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered promptly."

I think the sub-rule caters for a situation when the defendant has failed to file the relevant Written Statement of Defence (WSD) within 21 days as provided for by sub-rule (1) of the rule. The sub-rule is not applicable in situations, like in the present case, when the WSD was initially properly filed under the sub-rule and later struck out as happened. The learned counsel for the respondent has relied on the cases of ***Richard Augustine Zuberi Vs Ally Mandona***, Civil Case No. 348 of 1998 and ***Liason Tanzania Limited Vs***

AAR Insurance Tanzania Ltd, Commercial Case No. 80 of 2010, both unreported decisions of this court, in support of this point; that the instant application has been made well out of time and should not be entertained by this court. In the ***AAR*** case for instance, it was held that an application for extension of time to file a Written .. atement of Defence must be made within 21 days from the expiration of the prescribed period. If such an application is made more than the 21 days from the expiration of the prescribed period, then the court has no powers to grant.

Having read the cases cited by the learned counsel for the respondent, I have no hesitation to state that they are distinguishable. They do not cater for a situation like in the present case when the defendant filed the WSD well in time but later struck out. The two cases are therefore not applicable to the present situation.

In the case at hand the suit was filed on 15.04.2015 and Mr. Welwel, learned counsel told the court on 12.05,2015 that the applicants were served on 06.05.2015. The joint WSD was filed on 26.05.2015 well within time but on 12.11.2015, the same was struck out upon concession of a preliminary objection raised by the respondent in the Reply to the WSD. In the circumstances, what is required of the applicants is to explain why there was delay in filing the same.

Following for determination is the issue whether the applicants have shown sufficient reason on which the court can grant the orders sought. The reasons advanced, as can be gleaned in the affidavit in support of the application and as already stated above, is that the WSD was struck out after a preliminary objection was raised by counsel for the respondent and hence the present application filed. I think the applicants have sufficiently explained

away the delay; that they were busy defending their case under a mistaken but bonafide belief that the WSD filed was in order. The WSD having been unveiled defective, the applicants promptly filed the present application on 20.11.2015 as they could not file the same straight away because they were already out of the 21 plus seven days provided for by rule 20 (2) of the Rules.

Agreeably, in order for an application of this nature to succeed sufficient reason must be given by an applicant so as to grant the extension sought for. Indeed, there is no yard-stick what amounts to sufficient reason. As was held in ***Abdalla Salanga & 63 Others Vs the Tanzania Harbours Authority (THA)***, Civil Application No. 4 of 2001, (unreported):

> "... This Court in a number of cases has accepted certain reasons as amounting to sufficient reasons. **But no particular reason or reasons have been set out as standard sufficient reasons.** It all depends on the particular circumstances of each application ... Sufficient reasons means reasons which **convincingly explain away the delay** ..."
> [Emphasis supplied].

To decide whether or not an applicant has reasonably explained away the delay, each case should be looked at in its own facts, merit and circumstances, by looking at all the circumstances of the case before arriving at the decision whether or not sufficient reason has been shown for extension of time – see ***Citibank (Tanzania) Ltd. Vs TTCL, TRA & Others***, Civil Application No. 97 of 2003 (CAT unreported).

In the case at hand, all facts, merit and circumstances considered, I am satisfied that the applicants have sufficiently explained away the delay to warrant this court grant the orders sought.

In the final analysis, this application for extension of time within which the applicants can file a joint written statement of defence is granted. The same should be filed within ten (10) days reckoned form the date hereof. The circumstances of the present application do not attract any order regarding costs. No order is therefore made as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 27th day of October, 2016.

J. C. M. MWAMBEGELE
JUDGE