

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

**MISC. COMMERCIAL APPLICATION No.161 of 2019
(Arising from Commercial Case No.132 of 2019)**

PUMA ENERGY TANZANIA LTDAPPLICANT

VS

KARIM AZIZ BHANJIRESPONDENT

RULING

*Last Order, 17/2/2020
Ruling, 28/2/2020.*

NANGELA, J.:

This application arises from Commercial Case No.132 of 2019 (referred hereafter as **the main suit**) filed by the Respondent/Plaintiff and is still pending in this Court. The current application is by way of a Chamber Summons supported by an affidavit of one, Baraka Misana, Advocate, working with the FB Attorneys, a Dar-es-Salaam based legal firm, duly instructed to defend the Applicant in the main suit.

The current application is made under Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended) and Section 95 of the Civil Procedure Code (CPC), Cap.33 [R.E. 2002].

Section 20 (2) of the High Court (Commercial Division) Procedure Rules allows for possible extension of time to file Written Statement of Defense, while section 95 of the CPC is declarative of the inherent powers of the Court.

Under section 95 of the CPC that provision, the inherent powers of the Court may be exercised to make orders as may be necessary in the ends of justice. Such powers of the Court are unlimited since the very purpose every Court is to do justice according to law. The Court, therefore, possess, as a necessary consequence and as inherent in its very constitution, all such powers as may be necessary to enable it to do that which is right, and to correct all that which is wrong, in the course of the administration of justice. The inherent powers of the Court, however, are exercised in a manner that such exercise does not conflict with the sound principles of general law or other special law.

It is in light of the above two provisions that the Applicant has filed this Chamber application praying for the following orders of this Court:

1. That, this honourable Court be pleased to make a finding that, there exists good cause for it to grant orders prayed for in this application.

2. That, this honourable court be pleased to to order the Respondent to supply the Applicant the missing document(s) referred in the Respondent's Plaint in Commercial Case No. 132 of 2019 as Annex.KAB -6.
3. That, this honourable court be pleased to grant the Applicant an extension of time to file Written Statement of Defense in Commercial Case No 132 of 2019.
4. That, this honourable court be pleased to grant the Applicant an extension of time to file Written Statement of Defense in Commercial Case No 132 of 2019 beyond the prescribed limitation of time.
5. Any other orders or relief(s) as this Court may deem fit and just to grant.
6. Costs of this Application.

On 17th February 2020, when this application was called for mention before me, the Applicant was represented by Mr. Baraka Msana, learned Advocate while the Respondent enjoyed the services of Mr. John Kamugisha, learned advocate.

Since Mr. Kamugisha had not been served with the application, this Court made an order that the Respondent be served with the document relevant to this application promptly, on the same day. The Respondent was directed to file its counter affidavit on or before 24th February, 2020.

The application was thereafter scheduled for mention on 28th February 2020 at 11.00 am.

On the 28th February 2020, when this application was placed before me, the parties were represented by same advocates. Mr. Kamugisha informed the Court that after perusing the documents served upon him in relation to this application, the Respondent does not see the need to file a counter- affidavit. Instead, he made a prayer that the Court should allow the Respondent to supply the missing document to the Applicant as it was not intentionally withheld by the Respondent. It was only inadvertently not attached to the copy of the Plaint served upon the Applicant, and, that, with the permission of the Court, the Respondent was ready to supply it even on this same date.

Mr. Kamugisha further prayed that the Respondent should not be condemned to cost since the non-attachment of the document which the Applicant is seeking from the Respondent was a human error and that, this was not the only reason why the Applicant was seeking for extension of time within which to file his Written Statement of Defence in respect of the main case pending in this Court.

For his part, Mr. Baraka had no objection to Mr. Kamugisha's prayers. He also submitted that, the Applicant has not been able to file

the Written Statement of Defence in respect of the main case pending in this Court because , apart from the fact that there was such a missing document, the delay was also occasioned by the fact that one of the officer who was conversant with the matter had gone on vacation. Since he is back, Mr. Baraka submitted that the Applicant would, if allowed, file its Written Statement of Defence.

I have listened to the submissions by the learned counsel for both parties. In this application, the Court is called upon to consider two pertinent issues:

- (i) whether there has been good cause disclosed by the Applicant to warrant this Court to grant the application and,
- (ii) whether time within which a Written Statement of Defense should be filed can be extended beyond what is prescribed under Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended).

Under Rule 20 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended)it is provided that:

"Where a summons has been served in accordance with rule 14 to the defendant and the defendant wishes to defend the suit, that defendant **shall**, within twenty-one days from the date of service,

of the summons file to the Court a Written Statement of Defense."
(*Emphasis added*).

What needs to be stressed from the above rule 20 (1) is that, the defendant is required or directed to file his defense **within twenty-one days** from the date of service. It is worth noting, however, although the word "**shall**" has been used in this provision, and its use thereof is ordinarily indicative of the mandatory nature of the provision, nevertheless, having regard to the fact that the particular High Court Rules are procedural rules, the word "**shall**", properly construed, is rather "**directory**" and not "**mandatory**" in nature.

Essentially, as per Rule 20 (1) above, the filing of a Written Statement of Defense is at the option of the Defendant if he wishes to do so. It is from such a construction, therefore, that, Rule 20 (2) proceeds as an exception to the general requirement to have the Written Statement of Defense filed within 21 days.

Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012, upon which this application is partly anchored, provides as hereunder:

"A Judge or a Registrar, may, upon an application by the defendant before the expiry of the period provided for filing defense or within seven (7) days after expiry of that period

showing good cause for failure to file such defense, extend within which the defense has to be filed for another ten days and the ruling to that effect shall be delivered promptly."

As it may be noted from the above, Rule 20 (2) provides an exception to the general rule under Rule 20 (1) of the High Court (Commercial Division) Rules, 2012, and, provides for the possibility of extending the time limit within which a Defendant may file his Written Statement of Defense.

The granting of such an extended time, however, is a matter requiring the exercise of this Court's discretion which discretion is to be exercised judiciously upon disclosure of "**good cause**" for failure, on the part of the Applicant/Defendant, to file such a defense within the prescribed time limit.

In other words, the Applicant/Defendant cannot put in a Written Statement of Defense unless he is allowed to do so, and, if the case is one in which the Court had already afforded the Applicant/Defendant such extended period and the latter failed to act within such time, then, the consequences, entailed by Rule 22 (1) (as amended by GN.No.107 published on 1st February 2019), must be suffered.

Under Rule 20 (2) cited herein above, an application by the Applicant/Defendant to extend time within which to file its Written

Statement of Defense can be made **before** such time has expired or within **seven days after** the expiry of this time. That being said, has the applicant exhibited "good cause" to warrant a grant of this application?

As per the affidavit filed in support of the Chamber Application, the Applicant has contented that there are good causes for the granting of the orders sought in this application. It is disclosed, in Paragraph 2 of the affidavit in support of the application, that, the Court summons, together with the copy of the Plaintiff (Respondent herein) filed in this Court on 14th November, 2019, in respect of Commercial case No.132 of 2019, were served upon the Applicant, as a defendant in that case, on 29th November 2019, requiring the Applicant/Defendant to file its Written Statement of Defense if it so wishes, within 21 days of service of the summons.

Such 21 days ended on 20th December, 2019, and, noting that the applicant would not be able to file its Written Statement of Defense within the prescribed time limit, the Applicant approached this Court on 18th December, 2019, two days before the expiration of the prescribed time, requesting for an extension of such time within which to file the Written Statement of Defense.

According to the Applicant's supporting affidavit of Baraka Msana, it is averred, as reasons for failure to meet the deadlines in filing the WSD and hence the application, that, the Plaint served upon the Applicant had one missing attachment marked **KAB-6**. The Applicant has included in its prayers in the Chamber Summons as one of the documents upon which an order of this Court is sought to compel the Respondent to avail such missing document to the Applicant/Plaintiff.

Besides, it is stated in Paragraph 5 of the Affidavit in support of the Chamber Application, that, the service of the summons made to the Applicant/Defendant, was made at the time when one of the Applicant's officers conversant with the case, one Mr. Godluck Shirima, had proceeded to his annual vacation, on 26th November, 2019 and was to be expected back sometime early in January 2020. The Applicant further alluded to the fact that the Court had also proceeded for its vacation commencing on 15th of December 2019 and ending on 31st January 2020.

While it is indeed true that the Court vacation started on the 15th of December 2019 and ending on 31st January 2020, I do not think that alone can constitute "a good cause" to warrant non-filing of a Defendant's Written Statement of Defense within the time stipulated under Rule 20 (2) of the High Court (Commercial Division) Rules, 2012.

It is indeed well known that, when the Court proceeds to its annual vacation, it never closes its registry doors. Even, at times, certain businesses of the Court are kept alive, including hearing of applications or cases filed under certificates of urgency. So, the Applicant's argument that the Court had proceeded on its vacation is a weak and unreliable one.

But, what about the missing document mentioned in the Plaint served upon the Applicant/Defendant and the fact that the Applicant's officer conversant with the case had proceeded to his vacation at the time when service of the summons was made? Do these reasons constitute good cause to warrant granting the Applicant the prayers to have the Written Statement of Defense filed beyond the prescribed time limit?

As noted earlier regarding rule 20 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended), the filing of Written Statement of Defense may be made outside the prescribed time provided that there are good causes to do so. The room to act outside the prescribed time was created, in my view, because, primarily, each party in a case has a right to appear and plead or defend his cause, and, that being so, where there has been lapse of time to file a party's statement of defense, the defendant as a party to the case should not be deprived of

its right, and, in fact the Court has no option to refuse that right, provided that "good causes" exist regarding why there was a failure to act within time.

Essentially, there is no hard and fast rule regarding what amounts to "**good cause**". Rather, in every factual matrix of a given case, the expression "good causes" will largely depend on *bona fide* nature of the given explanation by the defendant regarding his/her failure to act within time. In the case of **B. Madhuri Goud vs B. Damodar Reddy, 2012 (12) SCC 693**, which I find to be persuasive, the Indian Supreme Court was of the view that:-

"If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

As stated herein above, the Applicant in this Application has stated, among others, that, when the Plaint was served upon the Applicant, the same had one of its attachments missing (**referred to in the Plaint as - KAB-6**). The Applicant is even asking for an order of this Court directing the Respondent to avail, to the Applicant, the missing attachment referred to in the Plaint, but which was not made available to the

Applicant/Defendant. Does the Respondent's act of not availing the missing attachment mentioned in the Plaint to the Applicant constitute a good cause for the delay to file the defendant's written statement of defence?

I think it does. Certainly, it is fair enough to state that, where a document, relevant to the case, has not been availed to the other party, such a missing document must be availed to such other party immediately, failure of which will hinder such a party from effectively preparing its case, and, any delay resulting there from, is a sufficient good cause warranting the granting of an extension of time to such other party, particularly where the affected party failed to do something which he ought to have done within a prescribed period.

On the other hand, the fact that the Applicant's officer conversant with the case had gone on his annual vacation when the Plaint was served upon the Applicant, is also a sufficient cause in my view given that he left on 26th November and the summons and its accompanying documents were served on the 29th November, 2019.

While it may be questioned why did the Applicant wait until two days before the expiry of the 21 days (i.e., 18th December 2019) to come up with this application while the summons was received on the 29th

November 2019), it is clear that the applicant was still within time and acted in line with Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended).

It is worth noting, even so, that, **in an appropriate case**, even if the time within which a Written Statement of Defense should be filed has lapsed far beyond what is prescribed under Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended), still the Court may extend such time. This position, however, does not mean that primacy should not be given to the prescribed limits set by the rules, given that, that is the primary rule while the rest falls as exceptions. This means that, while, as a general rule, it is important to respect the time limits set by the rules, a departure may be warranted, but as an exceptional case, provided that there are good causes for the delay to act within the time set by the rules.

In actual fact, it should not be forgotten that, in the adversarial system in which we are part of, affording the parties the opportunity of participating in the process of justice dispensation is the primary goal. For that reason, the drafters of the High Court (Commercial Division) Procedure Rules, 2012 (as amended by GN.107 of 2019), saw it necessary to include, in Rule 4 of the said Court Rules, a requirement that this

Court, when administering the rules governing its procedure, should to pay attention to the principle of overriding objective. As partially expounded in the case of **Yakobo Magoiga Gichere v Peninnah Yusufu, Civil Appeal No.55 of 2017, CAT (Unreported)**, essentially the principle promotes the need to achieve substantive justice, that being the central focus of our courts.

I would even venture to say that, the importance of underlining such a principle is also anchored on the fact the rules of procedure are hand-maid of justice and not its mistress. In an appropriate case, therefore, procedural requirements, when properly weighed, should not be interpreted to undermine the rendering of substantive justice to the parties.

Such reasoning was underscored in the case of **Sangram Singh vs Election Tribunal, Kotah, 1955 AIR (SC) 425**, which I equally find to be relevant and persuasive. In this case, the Indian Supreme Court noted, that:-

"laws of procedure are grounded on a principle of natural justice, which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large,

and subject to that proviso, [...] laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

In short, and broadly speaking, what the Court was emphasizing in the above case is that, Courts should, after all various factors have been taken into consideration and carefully weighed, endeavour to avoid snap or rather *ex parte* decisions, by affording all litigants a real opportunity of fighting out their cases fairly and squarely.

This is necessary, since rules of procedure, as the one under which this application was partly anchored, are made to advance the cause of justice and not to defeat it. Their preferred construction, therefore, should be one that aims at promoting justice and prevents miscarriage of it.

Given the facts and circumstances giving rise to this Application, the reasons disclosed in the Applicant's affidavit, and, in view of the reasoning given herein above, I find it appropriate to grant the prayers for extension of time within which the Applicant/Defendant may file its Written Statement of Defense.

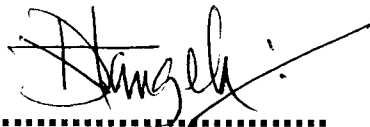
Consequently, this Court orders as follows:

1. That, the Respondent should by this date (**28th February 2020**) supply the Applicant the missing

document(s) referred in the Respondent's Complaint in Commercial Case No. 132 of 2019 as Annexure KAB -6, without failure.

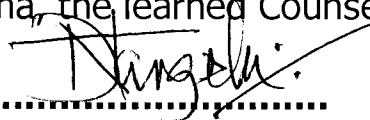
2. That, the Application for extension of time beyond the time prescribed for filing of the defendant's Written Statement of Defense in respect of Commercial Case No.132 of 2019 is hereby granted.
3. The Defendant in Commercial Case No. 132 of 2019 shall promptly, within 10 days from the date of service of the requisite missing document, file its Written Statement of Defense.
4. I make no order as to costs.

It is so Ordered.



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D.J. NANGELA
JUDGE, HIGH COURT OF TANZANIA
(Commercial Division)

Ruling delivered on this 28th day of February, 2020 in the presence of Mr. Baraka and Mr. Kamugisha, the learned Counsel for the Parties.



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D. J. NANGELA
JUDGE, HIGH COURT OF TANZANIA
(Commercial Division)

