

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

COMMERCIAL CASE NO. 21 OF 2022

LONAGRO TANZANIA LIMITED.....PLAINTIFF

VERSUS

GLOBAL AGENCY LIMITED.....DEFENDANT

RULING.

Date of last Order: 8th June 2022

Date of Ruling: 20th June 2022

MARUMA J.

The Plaintiff herein filed a plaint in court on 1st March 2022 and he was able to serve the same to the Defendant who filed written statement of defence on 25th March 2022. On 18th May 2022, the matter was scheduled for parties to appear to ascertain the compliance of preliminary orders issued on 25th April 2022. Mr. Mbuga Jonathan, Advocate for the Plaintiff and Mr. Obadia Kajungu, Advocate for the Defendant appeared in Court.

Mr. Obadia informed the Court that the Plaintiff was served with the plaint on 25th March 2022, however, he had been engaged by the Defendant recently so he had no sufficient time to study the documents. The learned advocate wishes to file a counter claim so, he prayed to for extension of time to file an amended written statement of defence. The prayer not objected by the learned advocate for the plaintiff. The court granted the prayer and the Defendant was given seven days (7) to file an amended written statement of defence that is by 24th May 2022 and serve the Plaintiff on the same date. The Plaintiff was supposed to file a reply by 31st May 2022 and the matter was set for first pre-trial conference on 8th June 2022.

On 8th June 2022 when the matter coming for first pre-trial conference, Mr. Mbuga for the Plaintiff informed the court on the status of compliance on previous Court orders. He notified the Court all orders given on 18th May 2022 were not adhered by the Defendant. He submitted that when the order was issued the former defence was no longer part of the record. So, until now there is no WSD. To support his raised point, he referred this court to the position of the law laid down in the case of **Aikos Namrunjee Verus Method Milambo, Land Appeal No. 258 of 2019.**

At pg 7 where the same matter was discussed. He then prayed for the court to rule out that the Defendant has not filed his defence as ordered by the Court and under rule 22(1) of the High Court (Commercial Division Procedure) Rules as amended, he prayed to file form No.1 for the default judgment.

Replying to the point raised Mr. Kajungu for the Plaintiff, submitted that he was sincerely surprised by the learned counsel's submission on preliminary objection which should come by notice and not a surprise so to allow the other party to prepare. He submitted that the Rules of this court directs if a party intend to file the preliminary objection, he must file an outline of point of argument of preliminary Objection. He further submitted that the point raised is premature as he was the one to submit why he failed to comply with the Court orders instead, the learned advocate served them with a letter addressed to the registrar which is unusual practice.

Submitting on the reason for failure to file written statement of defence, Mr. Kajungu said that they did comply with the order as on 24th May 2022 they were supplied with a control number however, the bank system failed to transfer the money on the same date. He submitted that as a matter of procedure, they could not proceed with the filling and so

they were waiting to pray before the court under section 93 of the CPC. He, tendered a generated for payment issued by the court and submitted that was on the technical failure and not a negligence on their side. He prayed the point raised prematurely and should be dismissed. He also prayed for the court to depart with the previous order and allow extension of time to file an amended written statement of defence because the failure to file for the same was out of the control of the Defendant. The Defendant within time prescribed by the court t did amend and obtained bill from the Court and the Plaintiff has not been prejudiced anywhere except he intends to avoid disposition of rights of parties in merit by this Court.

In his rejoinder Mr. Mbuga, the issue raised is not preliminary objection but an issue of law arising from the proceedings. He submitted that the matter could not continue with first pre- trial conference while pleadings are not completed thus why it was raised. He argued that if the Defendant did not prepare he could seek time to make a reply. On the reason of failure to file WSD he submitted that there is no any formal application that have been made from 24th until today to file this defence. Moreover, he submitted that what the Defendant has shown is the Court dully issued the control number but there is no any evidence as to why he has failed to pay the issued amount. He submitted that may be an

affidavit from the Bank or official would suffice to prove that they could not make payment as ordered in the bill of payment. So, it was their submission that the Defendant willing opted not to pay and not to bring an application as to the same.

On the issue of prejudice, Mr. Mbuga submitted that the Court order should be followed, the learned advocate for the Defendant had seven days but he opted to use the last day which he had failed to file WSD. He further submitted that, this is the second time that the Defendant seeking for amendment of the record which the same consumes both the time of Court and the parties and delayed the matter which is not the spirit of this Court. He also submitted that no sufficient reason is given for the court to depart from the scheduling order dated 18th May 2022.

Having considered the submissions from both sides, the only issue for determination in this application is whether there are sufficient reasons adduced by the applicant in order to be granted an extension of time to file written statement of defence (WSD).

In determining the issue above, the pertinent question follows is non-compliance of the court order is sufficient to grant the prayer for extension of time for the Defendant to file WSD.

Before going to discuss this issue, I would like to respond the argument that the point of law can be raised at any stage of the proceeding as it has been done in this matter. This has been discussed in several cases such of **Saving & Financial Commercial Bank Ltd vs Bideo Oils & Soap Ltd**, Civil Appeal No.48 of 2012 at page 3,4 and 5 and of **NMB Bank Ltd vs Elizabeth Honorat Mbunda**, Civil Case No. 9 of 2017 at page 4 & 5

Bearing in mind that the dispensation of justice is of a paramount importance rather than dealing with technical issues in dispensing of justice timely. Also, the spirit of the court now in our jurisprudence is to deals with the substantive issues of the case and avoid the procedural technicalities as it was held in the case of **YAKOBO MAGOIGA GICHERE VS. PENINA YUSUPH**, Civil Appeal No. 55 of 2017 (Unreported)

"... That courts should give more prominence substantive law/justice to cut back on overreliance on procedural technicalities..."

Based on the scenario in this matter though the Defendant has failed to adduce sufficient reasons for delays in filling the amended plaint as it was ordered in the previous order dated 18th May 2022. There is no any evidence from the bank to prove that there was a system failure to transfer the money from the Bank as alleged.

However, guided by section 95 of the Civil Procedure Code [CAP. 33 R.E. 2019] which states that;

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

From the reasons aforesaid above, I hereby invoke the powers of overriding principle for the purpose of focusing to the substantive justice. I give the Defendant a last chance to file the amended written statement of defence by 22nd June 2022 and serve the other parties on the same date. However, the Defendant counsel should pay a fine of TZS. 150,000/= to the court and to the Plaintiff counsel TZS. 150,000/= for adjournment of the matter. The same should be paid before the next schedule of the matter. It is so ordered.

Dated at Dar es Salaam this 20th day of June 2022.



Z.A.Maruma

JUDGE