

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

**LAND CASE NO. 135 OF 2021**

**SUNIL ZAVERCHAND CHOHA**  
**HEMALI SUNIL CHOCHAN** } .....**PLAINTIFFS**

**VERSUS**

**DAVID WILFREM MWAKITWANGE (as the legal  
personal representative of PAULINE DAUDI  
MWAKITWANGE.....1<sup>ST</sup> DEFENDANT**

**DIANA MWAKITWANGE (as the legal personal  
representative of PAULINE DAUDI  
MWAKITWANGE.....2<sup>ND</sup> DEFENDANT**

Date of Last Order 22/11/2021

Date of ruling 22/12/2021

**RULING**

**DR MWENEGOHA – J**

The plaintiffs have filed this suit claiming for, among other things, specific performance of the sale agreement by transfer of the suit property on Plot No. 2055, Msasani Peninsula, situated within Kinondoni Municipality, Dar es Salaam with Certificate of Title No. DSM T1010386. While being served with the written statement of defence, the plaintiffs raised a Notice of Preliminary Objection on points of law that the written statement of defence has been filed out of time and without leave of the Court.

Hearing of the preliminary objection was by way of written submission where plaintiffs were represented by Mr. Deogratias John Lyimo Kiritta, advocate while the defendants were unrepresented.

Submitting on the preliminary objection Mr Lyimo stated that the defendant as evidenced by the Court Process Server's affidavit were duly served with the plaint and summons to file their Written Statement of Defence (Defence) within 21 days from the date of service of the said summons and the plaint and to appear in Court on 3<sup>rd</sup> September, 2021. The suit was scheduled for mention on 27<sup>th</sup> September, 2021. On date of mention only 1<sup>st</sup> defendant appeared and explained the reason for non-appearance of 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant applied for extension of time to file their Defence beyond the statutory 21 days and the application was granted and were ordered to file on or before 8<sup>th</sup> October, 2021. However, the defendants did not comply and instead filed the said defence on 11<sup>th</sup> October, 2021 without leave of the Court.

He submitted further that under Order VIII Rule 1 and Rule 1 (3) of the Civil Procedure Code (CPC) provides for requirement of filing the Defence. The defendants however, in total disregard of the law and Order of the Court and without leave of the Court decided to file the Defence on 13<sup>th</sup> October, 2021. He submitted this is tantamount and cited the case of **Sharifa Swaibu vs. CRDB Bank Plc, Civil Appeal No. 92 of 2020 (unreported)** where it was held that *"it is the requirement of the law under Order VIII rule 1 of the CPC that, upon receiving summons to file a defence, the defendant shall within 21 days file his WSD."* Having showed that the defendants' failure to file Defence within time is as good as failure to file the said Defence, he invited the Court to apply rules provided under Order VIII Rule 14 of the CPC that the Court should struck

out the Defence filed out of time and proceed ex parte and fix date of hearing of plaintiffs' claim.

In their brief reply, the defendants submitted that the Defence was filed within time that the deadline for filing the said defence was not working day to wit Saturday where the Court registry was closed. Hence, defendants filed their defences the following working day Monday. They submitted that the raised preliminary objection is highly misconceived and unfounded and prays to dismiss the same for want of merit with costs.

In rejoinder Mr Lyimo reiterated what he submitted in his submission in chief and further contended that the defendants were supposed to file their Defence within 21 days from 3<sup>rd</sup> September, 2021 which is the date they were duly served with the summons to file WSD. On 27<sup>th</sup> September prayed and granted extension of time to file Defence out of time on or before 08<sup>th</sup> October, 2021. The last date granted for the defendants to file the Defence was Friday which is a working day and without leave of the Court they filed Defence after expiry of date set by the Court to file Defence. He emphasized that the Defendants' Defence should be struck out of the record with costs.

Having gone through submission from both parties, the main issue is whether the preliminary objection as raised by the plaintiffs' counsel has merit.

The plaintiffs' counsel has submitted that the defendants filed their defence out of time specified by the Court which is on or before 8<sup>th</sup> October 2021 after they were granted extension of time to file defence out of time. Defendants have submitted they have complied with Court Order and filed their defence within time. It is in record that the case

came for first mention on 23<sup>rd</sup> August 2021 and it was adjourned till 27<sup>th</sup> September 2021 for mention. When the matter came on 27<sup>th</sup> September 2021 1<sup>st</sup> defendant was in person while 2<sup>nd</sup> defendant was absent with notice. The 1<sup>st</sup> defendant prayed for extension of time to present his defence and the prayer was granted with the Order that WSD should be filed by 8<sup>th</sup> October 2021 and rejoinder if any by 15<sup>th</sup> October 2021. I have gone through the Written Statement of Defence and it is clear that the Defence was filed on 11<sup>th</sup> October 2021. The defendants have contended that the deadline of filling said defence was not a working day to wit a Saturday and that is why they had to file on Monday. This averment is not true and defendants are misleading the Court as 8<sup>th</sup> October 2021 was Friday and therefore a working day. There is no reason given by the defendants as to why they have not filled within the time given after the extension of time had been granted. The law is very precise under Order VIII Rule 14(1) of the CPC that failure to file written statement of defence within the specified period, the court shall proceed ex parte and fix date for hearing the plaintiff's claim. The said provisions read as follows;

*"Where any party is required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte, fix the date for hearing the plaintiff's evidence on the claim."*

On 27<sup>th</sup> September 2021 1<sup>st</sup> defendant was present in Court and gave notice of 2<sup>nd</sup> defendant that she is sick. The Order of this Court was that the written statement of defence should be filed on or before 8<sup>th</sup> October

2021 after the defendants have prayed for extension of time and the prayer being granted. Since the Order to file the WSD on 8<sup>th</sup> October 2021 was given in presence of the defendant then failure to do so has its consequences.

Parties have to bear in mind that court orders are for compliance. This position has been underscored in numerous decisions among others the decision in the case of **TBL V. Edson Dhobe, Misc. Application No. 96 of 2006 (Unreported)** where it was observed;

*"Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur. Always Courts should exercise firm control over proceeding."*

The rationale behind compliance with Court orders had been illustrated in the case of **Mobrama Gold Corporation Ltd V. The Minister for Energy and Minerals & Others (1998) TLR 425**, where Mapigano J; had this to say;

*"The rationale behind observance of rules of the Court which are devised in the public interest to promote expeditious dispatch of litigation and that the prescribed time limits are not targets to be aimed at or expression of pious hope but requirement to be met This principle is reflected in a series of rules giving the Court discretion to dismiss on failure to comply with a time limit"*

From the above excerpt, I will expunge the written statement of defence as filed by the defendants on the 11<sup>th</sup> October 2021. As prayed for by the

plaintiffs' counsel the written statement of defence is struck out and hearing of the suit will proceed ex parte for the plaintiffs to proof their claim. The preliminary objection is sustained. Defendants are ordered to pay costs.

It is so ordered.



  
**T. MWENEGOHA**  
**JUDGE**  
**20/12/2021**