

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

MISCELLANEOUS APPLICATION NO. 46 OF 2021

(Arising from Civil Case No. 05/2021)

NATIONAL BANK OF COMMERCE1ST APPLICANT

HARVEST TANZANIA LIMITED.....2ND APPLICANT

VERSUS

RAMADHANI SALUM KIMOLO..... RESPONDENT

RULING

04/08/2022 & 12/09/2022

KAGOMBA, J

This is a ruling on an application filed by NATIONAL BANK OF COMMERCE and HARVEST TANZANIA LIMITED (the "applicants") vide a chamber summons made under section 93 of the Civil Procedure Code [Cap 33 R.E 2022] (the "CPC") seeking extension of time to enable the applicants file their Written Statement of Defence (WSD) in Civil Case No. 05 of 2021, in compliance with the law.

The application is supported by an affidavit of Rashida Jamaldin Hussein, an Advocate from Locus Attorneys. The applicant also prays for any other relief this court may deem equitable and just to grant as well as costs of this application.

In the supporting affidavit, the deponent has averred that they received instructions to defend the matter with an attachment of summons to file WSD within 21 days of service. She states however, that in the course of preparation of their defence, it came to their attention that some annexures were missing from the plaint, namely Annexure "RSK1", "RSK2" and "RSK3". It is therefore averred that, for that reason they could not prepare and file a meaningful defense, as they had to indulge in follow up and cross-checking with the court's file to verify missing documents. Thus, a technical delay ensued.

The respondent, filed his counter-affidavit, pointing out that the 1st applicant was duly served on 21/10/2021, hence he had to file its WSD by 11/11/2021. He opposed the application on account of the applicants not accounting the time after 11/11/2021 to the date of filing this application. He also vehemently opposed the application for not telling the date when it came to their knowledge that purported annexures were missing.

On 28/6/2022 the court ordered the hearing of the application to proceed by way of written submissions as prayed by Ms. Luciana Nyondo, learned Advocate who appeared, on brief, for the applicants. Both sides complied with the scheduling orders as verified on 04/8/2022. Mr. Mazoea Africa, learned Advocate, drew and filed the written submission in chief in support of the application as well as the rejoinder submissions. Mr. Ezekiel Amon Mwakapeje, also a learned Advocate drew and filed the reply submissions for the respondent.

In the applicants' submission in chief, Mr. Africa explored the provision of section 93 of the CPC, stating that the court has been given discretionary powers to extend time under the cited provision of the law. He added that, in so doing, there is no any hard and tight law and principles for the court to consider, apart from the requirement that the applicant has to show reasonable or sufficient cause. In this connection, he argued that the court has to look the reasons adduced in the supporting affidavit. On this position he cited the case of **Enock Kalimbwana vs. Ayoub Ramadhani & 2 Others**, Civil Application No. 491/17 of 2018, CAT at DSM.

To expound on what was averred in the affidavit supporting the application, the learned Advocate submitted that the applicant was served with the plaint for Civil Case No. 05/2021 by the plaintiff on 25/10/2021 whereby annexures 'RSK1', "RSK2" and "RSK3" but none of those annexures were served. He added that despite the follow up made, the same have not been served up to the date of filing the submission in chief. Hence, the delay was a technical one, not resulting from the fault of the applicant but from Respondent's failure to endorse the list of documents as required by Order VII rule 9 of the CPC. He argued that for this reason it was difficult for applicant to prepare the WSD. He also cited the case of **Fortunatus Masha vs. William Shija & Another** (1997) T.L.R 154 on the distinction between real or actual delay and technical delay. He prayed the application to be granted with costs.

Replying to the above submissions, Mr. Ezekiel Amon Mwakajeje for the respondent was emphatic on opposition to the application for being preferred under a wrong provision of the law. He argued that for the said

reason the court cannot grant the orders sought in the applicant's chamber summons.

To expound on the above, Mr. Mwakapeje argued that section 93 of the CPC cited by the applicant is only applicable after expiration of time which had already been fixed or granted by the court, whereby the applicant would be seeking time enlargement and not otherwise. He added that the appropriate provision is Order VIII rule 1(3) of the CPC.

Replying of the merit of the application, Mr. Mwakapeje argued that Order VIII rule 1(3) of the CPC requires that before expiry of the period of 21 days set for filing WSD or within 7 days of expiry of that period, an application for extension of time should have been made showing sufficient cause for failure to file WSD timely. He argued that since the applicant was served on 21/10/2021, he ought to have filed WSD or an application within the 21 days period which was elapsing on 11/11/2021 showing cause why they would not be able to file WSD in time. That, the ground deponed in paragraph 3 of the affidavit could be cited as a reason.

Mr. Mwakapeje argued that since neither WSD nor application for extension of time was filed within 21 days period, i.e by 23/11/2021, the applicants should have filed this application within seven days after elapsing of the 21 days but came to file on 25/11/2021, being more than 25 days from 30/10/2021 which was the last date for filing. For the above reasons, he prayed the court to dismiss the application in entirety for lack of merit with costs. He also prayed that judgment in admission be entered against the applicants.

Rejoining, Mr. Africa submitted that the respondent's advocate has replied like he was arguing a preliminary objection. He argued that preliminary objection cannot be raised in submission stage, as doing that would amount to taking the applicants with surprise. He went on rejoining that non citation or wrong citation of the law does not affect the jurisdiction of the court to grant orders sought. That, it is a minor defect curable under the overriding objective principle. He cited Section 3A and 3B of the CPC together with the case of **Alliance One Tobacco & Another v. Mwajuma Hamisi & Another**, Misc. Civil Application No. 803 of 2018 High Court, Dar es Salaam. He also cited the case of **Attorney General vs. Board of Trustees of the Cashewnut Industry Development Trust Fund**, Civil Application No. 72 of 2015, CAT at DSM (unreported) as well as **Dangote Cement Ltd vs. NSK Oil and Gas Ltd**, Misc. Commercial Application No. 08 of 2020, High Court Commercial Division, DSM.

Rejoining on the rest of the respondent's reply, Mr. Africa stated that the reasons adduced by the applicant were not challenged by the respondent. He stated that paragraph 3 and 4 of the supporting affidavit and paragraph 6 of the submission in chief sufficiently demonstrate that a reasonable cause existed for grant of the application.

Having carefully read the applicants' application with its supporting affidavit, the respondent's counter-affidavit, the written submissions for both side as well as the law governing applications of this nature, it appears to me that the issues for determination are (i) whether the application has met the requirements of the law, and (ii) whether reasonable cause has been adduced to support the merits of the application.

In this application, it's not disputed that the applicants have preferred this application under section 93 of the CPC while the appropriate provision of the law is Order VIII rule 1(3) of the CPC, as correctly submitted by Mr. Mwakapeje. If this is the case, it follows therefore that the application has to be determined by observing the relevant provisions of the law. For this reason, I wish to reproduce rule 1(1) and 1(3) of Order VIII of the CPC as hereunder, for guidance:

"1.-(1) Where a summons to file a defence has been served in accordance with Order V and the defendant wishes to defend the suit, he shall within twenty-one days from the date of service of the summons, file to the court a written statement of defence and enter appearance on the date specified in the summons".

"(3) The court may, on application by the defendant before the expiry of the period provided for filing a written statement of defence or within seven (7) days after expiry of that period and upon the defendant showing good cause for failure to file such written statement of defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered within 21 days. [Emphasis added].

From the above cited provision of the law, we are guided that upon the applicants being served with summons and plaint on 21/10/2021, a date which the applicants wouldn't want to indicate in the supporting affidavit,

they were mandatorily required to file WSD within 21 days if they wished to defend the suit. They were also required to enter appearance on the date shown in the summons. This is the major premise in line with the quoted rule 1(1). Accordingly, they were to file WSD by 11/11/2021.

The next scenario is a requirement that the applicants should have filed this application within the time specified for filing WSD (i.e 21 days of service of summons) showing good cause for not being able to file WSD within time. As correctly submitted by Mr. Mwakapeje, this period for filing this type of application elapsed on 11/11/2021, as above.

The third scenario is a requirement that the applicants, if they failed to file their application within the time specified for filing WSD (i.e 21 days of service of summons) the law still allowed them to file with 7 days after expiry of the 21 days, again showing good cause why WSD was not filed within earlier specified time of 21 days. The 7 days counted from 11/11/2021 elapsed on 18/11/2021. This is the latest date when the applicants could file their application. But as records have it, the current application was filed on 25/11/2021, being 7 days beyond the time under the above cited provision of the law. For this reason, I answer the first issue in the negative.

The second issue dwells on reasonableness of the cause for delay so as to support the merits of the application. Mr. Africa correctly submitted, with authority, that what amounts to good or reasonable cause has not been defined. It depends on the circumstances of the case. See **Munello v. Bank of Tanzania [2006] EA 227**. In this regard, what is stated in the pleading is what the court will consider in determining the application as parties are

bound by their pleadings as it was held in **James Funke Gwagilo v. The Attorney General [2004] T.L.R 161** and in other cases.

I have carefully gone through the affidavit in support of the application. What is stated therein as the reason for delay is not the missing of annexures "RSK1", "RSK2" and "RSK3" but the advocates had to "make several follow up on the missing documents including cross-checking court file to verify missing documents". This is the reason for delay as can be clearly garnered in paragraph 4 of the supporting affidavit.

To reserve energy, the above reason has not convinced this court to grant the application. It cannot justify the delay of 21 days plus 7 days allowable under Order VIII rule 1(3) of the CPC. It wouldn't take all that long to peruse a court file. The applicants should have taken timely action upon finding that there were missing annexures. This was not done. Accordingly, the second issue is answered in the negative too.

Before winding up this ruling, I wish to comment on two matters. Firstly; is the arguments on wrong citation of law. In his rejoinder, Mr. Africa has complained that the respondent's advocate has replied like he was arguing a preliminary objection. He argued that, doing so was tantamount to taking the applicants with surprise.

I feel obliged to clarify the above point of rejoinder. Mr. Mwaipeje didn't submit any preliminary objection before this court. He commented on the provision of the law cited by Mr. Africa in filing this application and its effect. I think, in all fairness, Mr. Mwaipeje had a right to comment on that

provision of the law in his reply submissions. In fact he had a duty to point it out to the Court, him being an officer of the Court. He even suggested the provision of the law which was appropriate to move the court. Even in his prayer, he prayed the court to dismiss the application for lack of merit and not for wrong citation of the law.

Besides, its trite law that a point of law can be raised at any stage of the hearing of the matter. However, this was not the issue here, as the court could proceed to determine the application after ordering an appropriate provision to be cited based on the overriding objective principle.

Secondly; is the way this application has been handled. With due respect to the learned advocate for the applicants, I have found that there has not been enough seriousness in prosecution of this application. Records show that despite the delay in filing the application, as indicated above, and citation of wrong provision of the law to move the court, advocates for the applicants didn't enter appearance three times consecutively i.e on 31/03/2022, 05/05/2022 and 31/05/2022 when the court ordered last adjournment. It was on 28/6/2022 when Ms. Joanitha Paul, learned advocate held brief for Mr. Africa on a date the matter was set for hearing only to pray that the hearing be by way of written submissions, a prayer that was granted. This scenario is not appropriate, as courts should not be taken for a ride.

Having said that, I find no merit in the application and the same is dismissed with costs.


As a consequence, the court is guided by the provision of rule 14(1) of Order VIII which provides:

"14.-(1) Where any party 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".

Since proof of service has been acknowledged by the applicants, based on the above position of the law, the court shall fix the date for hearing of Civil Case No. 5 of 2021 immediately after delivery of this Ruling, if the applicant/plaintiff so orally apply. Order accordingly.

Dated at Dodorna this 12th day of September, 2022




ABDI S. KAGOMBA
JUDGE