

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO 1 OF 2019

(Originating from Land case no. 31 of 2017)

KIKO RAJABU KIKO.....1ST APPLICANT

**KIKO RAJABU KIKO (As Legal representative
of the Late Rajabu Kiko Mgalla)..... 2ND APPLICANT**

VERSUS

BAKARI RAJABU KIKO RESPONDENT

RULING

MUTUNGI, J.

The applicants have preferred the instant application under section 14 of the Law of limitation Act Cap 89 R.E 2002 and section 95 of the Civil Procedure Code Cap 33 R.E 2002. The gist of the application is as hereunder: -

a) That, this honourable court be pleased to grant the applicants extension of time to file written statement of defence out of time.

b) Costs be provided for

c) Any other reliefs this honourable court may deem fit and just to grant.

In the corresponding affidavit duly deposed by the first applicant and the written submission by both applicants, it has been revealed that they are defendants in Land case no. 31 of 2017 before this court. Upon receipt of the plaint (from the Respondent in this application) they were not able to file their written statement of defence on time. As a result, they filed application no. 77 of 2018 praying for extension of time to file the written statement of defence however the same was struck out on technicalities.

They have now knocked at the doors of this court praying that, they be once again entertained and extension be granted to them, to file the same out of time. The major reasons being: -

1. Failure occasioned by the advocate engaged by the applicants to file the written statement of defence within the prescribed time.
2. Striking out of the first application by the applicants for extension of time to file the written statement of defence on technicalities.

The applicants further pray that, if granted the extension they will be given a right to defend the Land case. They have in their submission called upon the court to do away with technicalities in light of the written laws (Miscellaneous Amendment) Act no. 8 of 2018 which now requires the court to have due regard to substantive justice. This was laid down in the case of **YAKOBO MAGOIGA GICHERE.V. PENINA YUSUPH CIVIL APPEAL NO. 55 OF 2017 (unreported)**.

The court of Appeal in that case applied the overriding objective principle to arrive at its decision.

In order to hammer their points home, the applicants have in the written submission prayed to the court to invoke the provisions of the constitution of the United Republic of Tanzania, Article 107A (2)(e) as amended from time to time. The same directs the court to dispense justice without being tied up with technicalities.

On the basis of their submission and the strength of the authorities cited, they prayed that their application be granted. The Applicants have further prayed that the court invokes section 93 of the Civil procedure code (supra) to grant them the extension to file their written statement of defence.

On the other side of the coin, Mr Kipoko, learned advocate representing the respondent submitted that, it is not true that the applicant's advocate was the defaulting party. The reason being that, by the time the said advocate was engaged one hundred and eighty (180) days had already

elapsed and no written statement of defence filed. It is on record that, their advocate made her first appearance on 21/6/2018.

The counsel further contended that, the reason application no. 77 of 2018 was struck out on technicalities does not help the applicants in any way. The same was bound to fail having been filed more than forty-two (42) days later and in that regard this application is untenable under the law. The learned counsel cited the case of **NATIONAL BANK OF COMMERCE LIMITED.V. PARTNERS CONSTRUCTION CO. LTD (CAT DSM) CIVIL APPEAL NO. 34 OF 2003** to support his stance.

Commenting on section 93 of the Civil Procedure Code Cap 33 R.E 2002, the learned counsel argued the same does not deal with enlargement of time fixed by statute but that which is fixed by the court.

Be as it may the counsel elaborated, the applicants were served with the plaint in November 2017 and they lodged application no. 77 of 2018 on 29/10/2018 (more than ten months). This period is not accounted for and cannot be excluded. The delay is inordinate and no reason for such delay has been adduced. It is the duty of an applying party in an application for extension of time to account for delay of even a single day as was decided in the case of **BUSHIRI HASSAN.V. LUKIO MASHAYO CIVIL APPLICATION NO. 3 OF 2007 (unreported)** and the case of **MOTO MATIKO MABANGA.V. OHIRI ENERGY PLC & TWO OTHERS CIVIL APPEAL NO. 463 /01 of 2017.**

The learned counsel further contended that, it is wrong for one to think that the requirement to file a written statement of defence within the prescribed time is a mere technicality which can be dispensed under the principle of overriding objective. The counsel invited the court to the cases of **MONDOROSI VILLAGE COUNCIL & 2 OTHERS.V.**

TANZANIA BREWERIES & 4 OTHERS CIVIL APPEAL NO. 66 OF 2017 (CAT-ARUSHA) (unreported), PRAYGOD MBAGA.V. GOVERNMENT OF KENYA CRIMINAL INVESTIGATION DEPARTMENT, THE HONOURABLE ATTORNEY GENERAL OF TANZANIA, CIVIL APPLICATION NO. 484/01 of 2017 (CAT) (unreported) and DISTRICT EXECUTIVE DIRECTOR KILWA DISTRICT COUNCIL.V. BOGETA ENGINEERING LTD CIVIL APPEAL NO. 37 OF 2017 (unreported).

In conclusion the learned counsel emphasized, the application is time barred hence this court should not give artificial life to it. Therefore, the same should be dismissed with costs.

What then is the historical background subject of this application? The brief facts leading to the present application are such that, the applicants were served with a plaint on November 2017 but failed to file a written statement of defence within the prescribed time. The

applicant therefore made an application for extension of time to file a written statement of defence on 29th October 2018 which was unfortunately struck out for impropriety and technicalities. The applicants did not stop here hence the reason they have now preferred the present application.

Before dealing with the crux of the matter, it is imperative to address the irregularities in respect of the cited provisions and the remedy preferred by the applicants. The applicants filed the application for extension of time to file a written statement of defence under section 14 of the Law of Limitation Act Cap 89 R.E 2002 which reads thus:

“Notwithstanding the provisions of this Act, the Court may for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or application other than an application for the execution of a decree and an

application for such extension maybe made either before or after the expiry of the period of limitation prescribed for such appeal or application.”

From the above provision it would seem, the applicants have misdirected themselves by seeking extension of time to file a written statement of defence under section 14 of the Law of Limitation Act (supra), such an application ought to be made under Order VIII rule 1(2) of the Civil Procedure Code Cap 33 R.E 2002 which provides that,

“..... Provided that the court may within twenty-one days of expiration of the prescribed period, grant an extension of time for presentation of the written statement of defence an application by the defendant.”

Section 14 of the Law of Limitation Act (supra) primarily deals with extension of time to file an application or institute

an appeal and not for extension of time to file a written statement of defence thus the present application was a misapplication of section 14 of the Law of Limitation Act Cap 89 R.E 2002.

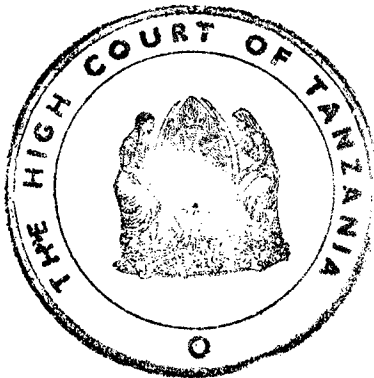
Further, the preferred remedy by the applicants, being an application for extension of time to file a written statement of defence, the same is a misconception as explained below: -


Order VIII rule 1 (2) of the Civil Procedure Code Cap 33 R.E 2002, clearly provides that upon the expiry of the prescribed time to file a written statement of defence, a party can within twenty-one (21) days apply for extension of time to file a written statement of defence, however, in the present case, the applicant is filing for extension of time to file a written statement of defence beyond the prescribed forty-two (42) days. It would seem therefore the appropriate remedy which ought to have been adopted

by the applicant is to seek enlargement of time to lodge an application for extension of time to file a written statement of defence out of time which is granted upon demonstrating sufficient cause for delay as opposed to the present application preferred by the applicant.

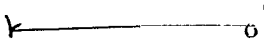
The applicants received the plaint on November 2017 and filed their application for extension of time on 29th October 2018 which was hopelessly out of the prescribed time. This matter cannot be remedied by another application for extension of time to file a written statement of defence rather the applicant is duty bound to seek enlargement of time to file the desired application out of time under section 14 of the Law of Limitation Act Cap 89 R.E 2002. The court cannot therefore grant the orders sought as it would amount into circumventing the required procedure of first filing an application for enlargement of time to do that which the applicants are asking for in the application at hand.

Conclusively, to grant the present application will be similar to placing the cart before the horse. The application is in view thereof struck out with costs.

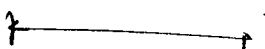



B. R. MUTUNGI
JUDGE
31/3/2020

Read this day of 31/3/2020 in presence of the 1st Applicant and in the absence of the respondent duly notified.


B. R. MUTUNGI
JUDGE
31/3/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
31/03/2020