

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**HIGH COURT OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND CASE NO. 04 OF 2022**

**1. MAKOA FARM LIMITED**

**2. ELIZABETH STEGMAIER**

**3. DR. LASZLO GEZA PAIZS**

.....**PLAINTIFFS**

**VERSUS**

**UDURU MAKOA AGRICULTURAL AND**

**MARKETING CO-OPERATIVE SOCIETY**

**LIMITED (UDURU MAKOA AMCOS) .....DEFENDANT**

**RULING**

Date of Last Order: 18.10.2023

Date of Ruling : 30.11.2023

**MONGELLA, J.**

This is a ruling pertaining the defendant's prayer for extension of time to file her written statement of defence (WSD). Briefly, this matter relates to the prayer for amendment of Plaintiff made by Mr. Denis Maro, advocate, who held a brief on behalf of Mr. Qamara for the plaintiffs on 13.07.2023. following the prayer, I made the following orders: amended

Plaint to be filed on or before 20.07.2023; amended WSD and any incidentals to be filed on or before 27.07.2023 and necessary orders to be made on 03.08.2023. The amended Plaintiff was duly filed on 20.07.2023. WSD was not filed on the date fixed.

On the date fixed for necessary orders, Mr. Engelberth Boniphace, counsel for the defendant addressed the court that he was bereaved and had to travel to Bukoba rendering him not able to file the WSD as scheduled by the court. In that respect, he prayed for extension of time to file the WSD. Mr. Maro prayed for the guidance of the court and for Mr. Boniphace to furnish proof of his travel to Bukoba and bereavement. The matter was thus adjourned to 06.09.2023. On this date, the matter had to be again adjourned because Mr. Elisante Kimaro, who was holding brief for Mr. Boniphace, failed to bring the documents which he claimed to have been sent to him by Mr. Boniface, but failed to print. The matter was again adjourned to 18.10.2023 whereby Mr. Boniphace claimed to have the death certificate, but lost his flight tickets.

Following the request of Mr. Emmanuel Chengula, counsel for the plaintiff, that the defendant makes a formal application or the matter to proceed *ex parte*, I ordered the parties to argue the application for extension of time to file WSD, by written submissions. Mr. Boniphance's submission was to the effect that; **one**, the plaintiffs never served them with the amended Plaintiff as ordered by the court and thus he was forced to follow up on the same and eventually collected the same at the registry on 24.07.2023, while

the due date was 27.07.2023. That, in the span on 3 days, he could not prepare the WSD as on the same day he collected the documents, he received news of the demise of his paternal aunt and her husband and had to travel to Bukoba for burial. He argued that the copies of the relevant death certificates had been furnished to this court.

**Two**, citing **Order VIII Rule 1 (3) of the Civil Procedure Code** [Cap 33 RE 2019]. Mr. Boniphace argued that counting from the day he was served the Plaint, the 7 days within which to file the WSD had thus not expired. That, on 03.08.2023 he did approach the court seeking for extension of time to file WSD which was a prayer made within 7 days after the scheduled date had lapsed and thus well within the requirement of **Order VIII Rule 1 (3) of the Civil procedure Code** [Cap 33 RE 2019]. He argued that courts ought to deal with substantive justice and do away with technicalities, a stance he supported with the decision in **Yakobo Magoiga Gichere vs. Penina Yusuf** (Civil Appeal No. 55 of 2017) [2018] TZCA 222 TANZLII. He thus asked for the court to do away with technicalities and continue to grant his prayer for extension of time to file WSD.

He argued further that given that the defendant also has a counter claim as the matter is on breach of contract, if he is denied the right to file his defence, he would be denied justice as he has more than 700 members. He claimed to have never missed a court date, but was only incapable of filing the WSD due to the death of his paternal aunt and her husband. He asked the court to grant his

prayer for extension of time on the reason that the defendant should not be punished to great loss for the conduct of his counsel.

On reply, Mr. Chengula disputed Mr. Boniphace's assertion on the amended Plaintiff not being served to him. He averred that the defendants were served by court process whereby on 20.07.2023 when the amended Plaintiff was filed in court, the defendant's counsel was informed by the court clerk that his copy of the amended Plaintiff was at court and he should obtain the same.

He added that on 03.08.2023 when the matter was scheduled for necessary orders, Mr. Boniphace told the court that he had failed to file the WSD because he had been bereaved and had travelled to Bukoba via plane for burial. He was ordered by the court to present proof of the travel but no proof was produced on 06.09.2023 the date fixed by the court for the proof to be provided. He further challenged Mr. Boniphace's argument that he was not served on the ground that the allegation was never raised in any of his attendances before this court. He had the stance that Mr. Boniphace acted negligently by failing to follow up on the amended Plaintiff while he had been duly informed on the same being filed.

As to the reason that he attended the burial of his aunt and her husband in Bukoba, he averred that Mr. Boniphace failed to furnish proof of his travel and even if the same was the case, he was always assisted by Mr. Kimaro, who also appears in court records,

and should have thus procured his services to comply with the scheduling order.

Citing the case of **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII, he averred that Mr. Boniphace failed to account for each day of the delay, gave no sufficient reason for his delay, his reasons were only an excuse for his negligence while he was required to show diligence and not apathy, negligence or sloppiness. He was of the view that the overriding objective principle could not be invoked to rescue the situation. That the principle cannot cure all technicalities that arise, especially those that the law has clearly provided for procedures, but negligently ignored, especially by an officer of the court.

Mr. Chengula prayed for the defendant's prayer for extension of time to file WSD to be dismissed with costs as Mr. Boniphace acted negligently and reasons adduced do not amount to good cause for grant of extension of time.

I have considered the submissions of both parties' counsels. It is well settled that granting extension of time is the discretion of the court. However, the same has to be exercised judiciously. In **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (supra) the Court of Appeal presented a guideline to be observed in granting extension of time. The Court expounded that:

“As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated: -

- (a) The applicant must account for all the period of delay
- (b) The delay should not be inordinate
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

Being an application for extension of time to file WSD, the same is governed under **Order VIII Rule 1 (3) of the Civil Procedure Code** which states:

“(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.”

It is not disputed that Mr. Boniphace's prayer for extension of time was advanced on 03.08.2023 and thus within the 7 days from 27.07.2023, the date he was to file the WSD. He has advanced two reasons for his delay to file the WSD and I will herein scrutinize the same.

First, he averred that he was not served with the amended Plaintiff which had to be filed on or before 20.07.2023 thereby forced to collect the same from the court on 24.07.2023. After making such remark, he again claimed he was served on the alleged date of 24.07.2023. Despite this minor contradiction, it seems his correct assertion was that he collected the amended Plaintiff on 24.07.2023. On the other hand, Mr. Chengula averred that the court clerk informed Mr. Boniphace that he should collect the copy from the court on the same day it had been filed, that is on 20.07.2023.

It is unclear as to what method the parties had opted to serve each other the necessary documentation. However, being an officer of the court, I believe, it was only reasonable for Mr. Boniphace to be diligent in following up on the documents in court, since he was aware of the fixed schedule. The amended Plaintiff was duly stamped on 20.07.2023 by the registry showing that the same was received on the said date. Mr. Boniphace could have followed up on the same any day from the 20.07.2023 and would have been in the position to collect the same earlier. His argument is insufficient. It has been advanced as a mere excuse on his part given that there are also allegations that he had been informed on the amended

Plaint being filed, which he did not bother to address as he did not file his rejoinder.

On the 2<sup>nd</sup> reason, that he was bereaved, contrary to arguments by Mr. Boniphace, the death certificates were never presented in this court. Even if they had been furnished and received, the same are only proof of death and not of his travel to Bukoba as he had alleged. Mr. Boniphace never furnished any proof showing that he had travelled to Bukoba. It is hard, to simply believe that his plane tickets had somehow vanished into thin air. The same documents that he led the court to believe existed and which Mr. Kimaro claimed they existed as they were sent to him, he failed to print. As an officer of the court, Mr. Boniphace's duty include, among others, the duty to act honesty, which he clearly failed to firmly hold.

Evidently, Mr. Boniphace failed to advance sufficient reasons for this court to grant him extension of time to file the WSD. He has on the other hand displayed lack of diligence, sloppiness and negligence.

However, Mr. Boniphace desperately made a prayer for this court to not punish his client for his mistakes and allow the defendant to file the WSD. It has been discussed by this court in multiple instances that extension of time due to advocate's negligence can only be granted in peculiar circumstances. See: **Mohamed Suleiman Ghona vs. Mahmoud Mwemus Chotikungu** (Civil Reference No.7 of 2021) [2023] TZCA 17488 TANZLII and **Francis Konas & Others vs. Felix**



**Shirima** (Civil Application No. 1/17 of 2022) [2023] TZCA 17792 TANZLII. In the former, the Court of Appeal stated:

“Much as we agree that in some of our previous decisions, we have observed that negligence of an advocate should not be to the detriment of a party, that is the case only in exceptional circumstances.”

Peculiar circumstances discussed in **Nkini & Associates Ltd vs. National Housing Corporation** (Civil Appeal 72 of 2015) [2021] TZCA 73 TANZLII whereby the Court of Appeal reasoned:

“Considering that the appellant had a right of representation, we think, this is a situation where the appellant cannot be blamed for being inactive. In the case of **Yusufu Same and Another** (supra) the Court refused to condone the respondent's counsels' negligence or lack of diligence to be a sufficient cause for extending time. More importantly, the Court considered some circumstances under which it cannot punish the client. The Court stated as follows:

“... there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the advocate as was held by a single Judge of the Court (Mfalila, J.A as he then was) in **Felix Tumbo Kisima v. TTC Ltd and Another**, - CAT, Civii Application No. 1 of 1997.” (unreported)”

I believe in the circumstance of this case; the defendant was not at all to blame for the delay in filing the WSD. As a cooperate body, she had hired a counsel to follow up on the case. She trusted her counsel with the important task of drafting the WSD, but he clearly failed to do so for reasons known to himself. For interest of justice to the defendant and considering that the case is still at its infant stage, I grant the extension of time sought. The defendant is herein given 21 days, from the date of this Ruling, to file her WSD.

However, since the entire ordeal was clearly a result of Mr. Boniphace's negligent acts and dishonesty to the court, I hereby order that he pays attendance costs to the plaintiff's counsel win all the scheduled dates from 03.08.2023 to the date of this Ruling. It is so ordered.

Dated and delivered at Moshi on this 30<sup>th</sup> day of November, 2023.



X

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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA