

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 0000005510 OF 2024

(Arising from Civil Case No. 000025519 of 2023 at High Court of Tanzania at Musoma)

BETWEEN

ZUMBI MUSIBA APPLICANT

VERSUS

THE OFFICE OF ATTORNEY GENERAL RESPONDENT

RULING

8th & 17th April, 2024

M. L. KOMBA, J.

The applicant in this application is seeking for an order to be allowed to appear and defend a summary suit filed by the respondent herein. Parties in the main suit are **Tarime District Council and Attorney General** who are plaintiffs versus **Kiribo LTD** who is defendant, the same parties appear in chamber summons and affidavit which accompanied this application. It was the submission of the counsel for the applicant that they encounter difficulties while filing application in ECMS and end up with those names which were admitted in the system. Because chamber summons

and affidavit which was attached had correct names, this court proceeded with hearing of the matter.

In the main suit respondent informed this court that they served the applicant with plaint but they did not received notification that there is an application for leave. They inquired if there is one and were informed of the application with different names on the first page but attachment has the names of above parties and were ready for hearing of the application.

In a nutshell, respondent has filed a civil suit against the applicant (Kiribo LTD) demanding for payment of service levy as per law from 2010 to March 2021 payment which is calculated to the tune of 174,582,771.32. Apart from the fact that applicant was served with demand notice, he did not honor the claim by respondent hence the civil suit was filed under Order XXXV of the Civil Procedure Code. It is trite that defendant has no automatic right to defend in a such type of case unless there is satisfaction to the need to do so in a separate application, which is the one I handle.

Chamber summons which initiates this application was filed under Order XXXV Rule 3(1) (b) of the Civil Procedure Code [Cap 33 R.E 2019] supported by affidavit of **Kebacho Monata**, Director of the applicant.

During the hearing of this application the applicant was represented by Mr. Samson Samo, the learned Advocate and on the other hand, the learned State Attorneys, Mr. Anesius Kamugisha, Mr. Abdalah Makulo and Frank Kashonda all being State Attorney representing respondents.

In his submission, Mr. Samo informed this court that they filed application on 15 March 2024 because they encountered complications which were beyond their control while filing and acknowledged that they were supposed to file before or on 03/3/2024. He further submitted that errors on parties was due to the system and prayed to withdraw the application without costs with leave to refile so that they can correct names of parties. For the sake of justice, he prayed this court under section 3A of the Civil Procedure Code to do away with technicalities as the system was not in operation.

Resisting the application, Mr. Kamugisha submitted that applicant was supposed to file the application within 21 days as stipulated in summons which end up on 01/3/2024 the fact which he did not deny. Surprisingly, he submitted that instead of applying for time to file application out of time counsel applied to withdraw with leave to refile with correct names. It was his submission that there is no application before this court as it is filed out

of time and argue me to dismiss the matter as counsel has nothing to refile. Mr. Kamugisha registered his prayers with costs on the ground that application was filed by an advocate.

While rejoining Mr. Samo insisted that the problem was caused by the system and prayed to withdraw without costs.

I am called upon to decide whether there is a leave to defend and if there is triable issues warranting the grant. I shall start by issue of jurisdiction. The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In my considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and I must assure on jurisdictional position at the commencement of the matter. This is possible by looking at pleading. The issue of jurisdiction is important as it is risky and not safe for the court to proceed with the trial or hearing of any matter on the assumption that the court has jurisdiction to adjudicate upon the case. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction

when it is proved later that the court was not properly vested with jurisdiction.

Jurisdiction is a creature of the statute, and a bedrock of the court's authority. See, **The National Bank of Commerce Limited vs National Chicks Corporation Limited & 4 Others**, Civil Case No. 129 of 2015, **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (both unreported) and **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda & 2 Others** [1995] TLR 155. In the case at hand, the question was, and still is, whether the application is properly before this court and what recourse was the applicant supposed to take.

The application was filed out of time and was not disputed. For it be out of time is as good as there is no application in court. That is to say, this court lacks jurisdiction to entertain application which was filed out of time. As rightly submitted by Mr. Kamugisha it is like there is no application before me. From practices of our courts, applicant was supposed to apply for extension of time to file application for leave as provided under section 14 (1) of the Law of Limitation Act, Cap 89. That is the procedure.

So far as the application was filed out of time, applicant has nothing to withdraw and under section 3 of Cap 89 the remedy is dismissal as I hereby do. I find there is no need to analyse if there are triable issues to warrant applicant to defend in summary suit as there is no application in this court. For reasons I decline to order costs.

DATED at **MUSOMA** this 17th day of April, 2024.



Nk
M. L. KOMBA
Judge