

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 171 OF 2017

(Originating from Commercial Case No. 61 of 2016)

MASOUD SELEMAN KIKULA

.....

APPLICANT

Versus

JALUMA GENERAL SUPPLIES LIMITED

.....

RESPONDENT

RULING

Date of the Last Order: 18/05/2018

Date of the Ruling 05/07/2018

SEHEL, J.

This is a ruling on application for extension of time within which the applicant can file its written statement of defence. The application is made under Order VIII Rule 1 (2) of the Civil Procedure Act, Cap.33 (hereinafter referred to as "CPC") and Rule 20 (2) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 (hereinafter referred to as the "Rules").

The facts that led to the present application are such that on the respondent, Jaluma General Supplies Limited, filed Commercial Case No. 61 of 2016 under summary procedure against the applicant claiming for payment of Tshs. 100,000,000.00 being monies which the applicant has made to the respondent through cheques, but which cheques have been dishonoured by the applicant's bank. The respondent also prays for general damages; interests; and costs of the suit.

The applicant after being served with the summons successfully applied for leave to appear and defend the summary suit whereby on 5th day of May, 2017 this Court ordered the applicant to file its written statement of defence within twenty one days and the main suit was fixed to come for orders on 2nd day of June, 2017. On 2nd day of June, 2017 the counsel for the applicant, Thobias Kavishe notified the Court that they failed to file written statement of defence because they needed some necessary documents from the applicant whom they managed to get in touch with him after the expiry of 21 days. He said the applicant was hospitalized for a

week as he was suffering from hypertension. He therefore made an oral prayer for extension of time.

The oral prayer was strongly resisted by counsel Bwana who appeared to represent the respondent. He requested for the applicant to file a formal application so that the respondent can have an opportunity to counter the allegations of sickness. From these submissions, the Court ordered the applicant to file a formal application within fourteen days. Thus the present application was filed on 9th day of June, 2017.

The application is supported by an affidavit of one Masoud Seleman Kikula, the applicant and the main reasons are contained under Paragraphs 4; 5; 6; 7; 8; and 9 of the affidavit and they read as follows:

"4. That seven days before the expiration of time prescribed I suffered from hypertension in which I was recommended that I be excused from any duty for seven days from 21st to 27th May, 2017 by Hindu Mandal Hospital at Dar es Salaam. Copy of the hospital discharge document is attached herewith and marked

annexture LRK-1 the Applicant crave leave that it forms part of this affidavit.

5. That I further state that there were important documents in my possession which I left at Morogoro which were to be reviewed by lawyers so that they could respond sufficiently to the plaint filed by the Respondent owing to the circumstance that the documents were not in my immediate possession since I left them at my another office at Morogoro I could not travel due to my ill condition.

6. That I further state as I could not move around I could not send money to my lawyers for filing the written statement of defence as all the money at hand was used to pay for the medical services at Hindu Mandal Hospital.

7. That I understand that my lawyer is allowed to sign the documents on my behalf, I asked him that I

needed to read them before the same being filed and there were also documents that I wanted him to read first so that he could have further knowledge regarding the dispute at hand but due to the circumstance that the documents were in my possession which are very crucial for the determination of the case at hand the written statement of defence could have not been filed without the said documents being read first.

8. That there are serious illegalities in the case filed by the Respondent regarding the amount claimed purportedly on cheques which the Respondent claims to have never been issued by me while in essence I never issued any cheque in favour of the Respondent.

9. That owing to the said illegalities if the suit proceeds in the

absence of the Applicant the Respondent would get unfair and illegal benefit basing on documents which have never been issued by the Applicant".

The oral hearing was set on 23rd day of April, 2018. At the hearing date only the counsel for the applicant, Thobias Kavishe appeared. Neither the respondent nor the counsel for the respondent entered appearance and there was no notice of their absence. Therefore, the counsel for the applicant prayed to proceed ex-prate against the respondent and the Court granted the prayer.

In his submission, counsel Kavishe adopted the affidavit filed in support for the application and it was his opinion that the affidavit discloses sufficient grounds for this Court to extend time. He argued that the Court of Appeal of Tanzania in its various decisions held that what amounts sufficient cause has not been defined but depends on circumstances of each case. He pointed out that under Rule 20 (2) of the Rules, an application for extension of time to file written

statement of defence has to be filed within seven days after expiry of twenty one days. He said order for filing written statement of defence was made on 5th May, 2017 thus twenty one days expired on 26th May, 2017. He said on 2nd June, 2017 he appeared before the Court and made oral application but he was instructed to file formal application within fourteen days from 2nd June, 2017 therefore the present application was made within the prescribed time of seven days. He concluded his submission by praying for the application to be granted.

As I have hinted herein above the applicant preferred the present application for extension of time to file its written statement of defence under Order VIII Rule 1 (2) of CPC and Rule 20 (2) of the Rules. It be noted that the invocation of the provisions of CPC can only be made where there is a lacuna in the Rules (See Rule 2 (2) of the Rules). Therefore, the applicant has cited a superfluous provision of the law in its application. Citing a superfluous provision of the law does not make the application incompetent.

In **Abdallah Hassani Vs Juma Hamis Sekiboko**, Civil Appeal No. 22 of 2007 (Unreported) Court of Appeal of Tanzania when dealing with an appeal against a revisional order issued by the High Court, noted:

"The application for revision was purportedly made under Section 44 (1) (a) and (b) of the Magistrates Court Act, No. 2 of 1984 read together with Section 95 of the Civil Procedure Code."

After noting the same, it stated:

"We have gone into details of the provisions of section 44 because we are satisfied that the appellant's application for revision was wrongly entitled. He should have indicated section 44 (1) (b) only. Although the court should not be made to swim in or pick and choose from a cocktail of sections of the law simply heaped up by a party in an application or action, in the present situation we are satisfied that citing subsection (a) as well was superfluous but that did not affect competency of the application for subsection (b) is clearly indicated."



It follows then that the applicant ought to have cited Rule 20 (2) of the Ruler only and not Order VIII Rule 1 (2) of CPC.

Rule 20 (2) of the Rules provides:

"A judge or a Registrar, may, upon application by the defendant before the expiry of the period provided for filing defence or within seven (7) days after expiry of that period showing good cause for failure to file such defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered promptly."

From the above provision of the law, the Court is enjoined to extend time for filing written statement of defence upon an application being made within seven days after the expiry of twenty one days and the extension to be granted shall not exceed ten days.

As correctly submitted by the counsel for the applicant, twenty one days upon which the applicant was required to file its defence expired on 26th day of May, 2017 therefore application for extension

of time had to be made by 2nd day of June, 2017. The applicant did make its oral application on 2nd June, 2017 when the matter was called for necessary orders but the respondent requested for the applicant to make a formal application hence an order for filing formal application was made. In that respect, this Court takes that the initial oral application made by the applicant is the time within which the applicant preferred its application which was then later on followed with the formal application upon the request made by the respondent. Therefore, I concur with the applicant's counsel that the present application is made within time.

Coming back to the merits of the application, the main reasons advanced are such that the applicant was suffering from hypertension; he was granted seven days sick leave from 21st May, 2017; important documentation were not in his possession, they were at Morogoro; he had no enough money for filing defence; and the applicant needed to review the defence before filing. In essence the sickness of the applicant resulted into failure of filing the defence in time. The respondent on the other hand doubted the incapability

of the applicant of filing defence due to sickness. In its counter affidavit, it stated that the applicant was excused from duty for seven days and not hospitalized therefore it cannot be a ground for failing to file written statement of defence as the applicant had 21 days for filing the same.

In the case of **John David Kashekya Vs The Attorney General**, Civil Application No. 1 of 2012 (Unreported-CAT), the Court of Appeal of Tanzania had this to say about sickness:

"..sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for check up for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to

come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to file..."

In the present matter, the applicant deponed in his affidavit that he could not move around and as held by the Court of Appeal of Tanzania, sickness is a condition which is experienced by the person who is sick and it is the sick person who can express his/her condition on his strength to move then I am satisfied that the applicant has advanced sufficient reason for his failure to file the written statement of defence in time. The applicant is therefore granted the requested extension of time and he should file the written statement of defence within a period of ten days from the date of the delivery of this ruling. Costs shall abide to the main suit. It is so ordered.

Dated at Dar es Salaam this 5th day of July, 2018.



A handwritten signature in blue ink, appearing to read "B.M.A. Sehel".

B.M.A Sehel

JUDGE

5th day of July, 2018