

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT ARUSHA**

MISC. COMMERCIAL APPLICATION NO. 5 OF 2023

(Arising from Commercial Case No.2 of 2023)

M/S BONDENI SEEDS LIMITED.....APPLICANT

VERSUS

M/S BLUEWAVES HOLDINGS LIMITED..... RESPONDENT

Date of Last order: 21stAugust 2023

Date of Ruling: 28thAugust 2023

RULING

NANGELA, J.

On the 20th day of April 2023, the Applicant herein filed an application in this Court by way of a chamber summons supported by an affidavit of one, Rakesh Yoginder Kumar Vohora. The application was brought under Rule20(2) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended by the G.N.No.107 of 2019.

The Applicant is seeking for the following orders of the Court:

1. That this Honourable court be
pleased to extend time within
which the Applicant can file

defense to the Plaintiff in
Commercial Case No. 2 of 2023.

2. Costs of this application be
provided for.

On the 21st day of August 2023, when the parties appeared before me, they prayed that this matter be disposed of by way of written submissions. A scheduling order for the filing of their respective submissions was given. The parties have duly complied with that order. This ruling is, therefore, a culmination of my deliberations regarding those submissions.

In terms of the appearances, Mr. Rogers Godfrey Mlacha, learned advocate, argued this application on behalf of the Applicant while the Respondent enjoyed the legal service of Mr. Abdallah Issa Alli, learned advocate.

Submitting in support of the prayers sought, Mr. Mlacha adopted the contents of the Applicant's supporting affidavit as well as the reply to the counter-affidavit. He contended that; since this application is premised on rule 20(2) of the High Court (Commercial Division) Procedure Rules, 2012 (as

amended), the law is such that, where a party required to file defence fails to do so, he/she may, before the expiry of the period provided for filing the defence or within seven days after expiry of that period, apply to the court for extension of time, provided good causes are shown regarding why he/she failed to file his/her defence in time.

According to Mr. Mlacha, as of now, parties are at one that, this application was filed within the prescribed time and, that, the only part remaining is to establish whether the applicant has shown good cause regarding why there was a failure to act in time.

Mr. Mlacha submitted, however, that, what constitutes a good cause for extension of time is undefined and, that, the decision to grant lies within the discretionary powers of the Court, guided by the existing principles, including the reasons for delay and degree of prejudice which the Respondent is likely to suffer if the application is granted.

To strengthen his submission, Mr. Mlacha relied on the case of **Stephen Ngalambe vs. Onesmo Ezekia Chaula**

& Songea Municipal Council, Civil Appeal No. 27 of 2020 (unreported).

In his further submission, he contended that, in this respective application the Applicant failed to file defence on time because the summons to file defence was served upon the Applicant's Director who, at the time, was the only director present in Tanzania. Mr. Mlacha contended that, according to the Company's Article of Association (attached to the supporting affidavit of the Applicant as **Annexure B-3**), a minimum of two directors is the quorum required for transacting any of the business touching on the Company.

Mr. Mlacha submitted that, given the above circumstance, the remaining single director had to convene zoom meetings and, in between the meetings, they approved the need to respond to the claims.

Mr. Mlacha contended, however, that, the remaining director had to start seeking for a lawyer who could analyze the case and defend it in court. It was his submission, therefore, that, the prescribed time for filing defence lapsed during those processes of getting consent and finding a

lawyer as it was shown in the affidavit from paragraph 1 to 20. In his view, based on those reasons, the Applicant managed to establish the good cause for her delay.

On the other hand, it was also Mr. Mlacha's submission that, as a matter of law, what constitutes sufficient reason for extension of time is not confined only to the delay, but the court can also consider the weight and implications of the issue involved in the intended action and whether the same is *prima facie* maintainable.

To support that view he relied on the cases of **Reuben Lubanga vs. Moza Gilbert Mushi and 2 others**, Civil Application No. 533/01 of 2021 (unreported) and **Republic vs. Yona Kaponda and others** [1985] TLR 84.

Submitting on whether the Respondent will be prejudiced if the application is granted, Mr. Mlacha submitted that, the Respondent will not be prejudiced in any way possible since the Applicant has the right to defend her case.

He contended that, even in her counter affidavit, the Respondent has not been able to disclose how she may be prejudiced or suffer if the application is granted. He has

urged this court, for the reasons stated, to grant the application and allow the Applicant to file her defence.

In his response, the Respondent's counsel urged me to dismiss this application with costs. Adopting the contents of the counter affidavit filed in opposition to the application, Mr. Alli, the advocate for the Respondent, started by questioning the legal propriety of this application before this court. His question was basically one questioning the filing time of this application.

However, I do not find it appropriate to start reopening that which has been closed or laid to rest. I hold that stand because, as the record would show, the Respondent elected to withdraw from this court a notice of preliminary objection which he had earlier filed in respect of the same argument he would wish me to look at. Having done so, he cannot come in through a back door of his submission to raise the same point urging this court to struck out the application.

Submitting on the reason for opposing the granting of this application, Mr. Alli submitted that, the Applicant must account for each day of his delay to act. He relied on the

case of **Patrick John Butabile vs. Bhakresa Food Products Ltd**, Civil Appeal No.61/2019 (CAT)(unreported), and that of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, [2011] TZCA 4.

Mr. Alli submitted that, the Applicant has not been able to demonstrate in her supporting affidavit, in which country the other directors were at the time he received the Complaint. He contended that, given the current state of technology, the Applicant cannot take refuge on the reasons she has stated in her affidavit as the cause of her delays.

He contended that, the delay is purely a matter of laxity, lack of due diligence, negligence, sloppiness, and lack of respect for court orders (summons). He thus urged this court to disregard the reasons offered. As regards whether the Respondent will be prejudiced or not, Mr. Alli submitted that, what the Applicant's counsel stated was a mere submission from the bar and which cannot be relied upon.

To support his point, reliance was placed on the case of **Transafrica Assurance Co. Ltd vs. Cimbria (EA)**

Ltd[2001]2 E.A as well as **Republic vs. Donatus Dominic @Ishengoma and 6Others**, Criminal Appeal No.262 of 2018. In those two cases, the court made it clear that, statement of facts made by counsels from the bar cannot constitute evidence and, hence, should be ignored.

Finally, Mr. Alli contended that, the submission made by the learned counsel for the Applicant to the effect that the orders sought must be granted based on existence of a *prima facie* case worth of being determined by the court is a misconceived argument. He therefore urged this court to dismiss the application with costs.

The issue which I am called upon to address is whether this court should grant the prayers sought by the Applicant. As correctly submitted by the Applicant's legal counsel, an application as this one is granted where the Applicant has shown good cause for the delay. What constitutes good cause is not given legal definition in statutes.

It is also a settled position of the law that, an Applicant who knocks the doors of the court at late hours with a view to be given audience must account for each day of his delay.

The cases of **Iddi Nyange vs. Maua Saidi**, Civil Appl. No.132/01 of 2017 (CAT) (unreported) and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Appl. No.3 of 2007, (unreported), are all relevant to that point.

In this present application, the Applicant has contended that the delay to file his written statement of defence was because there was only one director who could not have responded to the claims on his own without first having convened a board meeting involving the rest of directors as per the requirements of the Articles of Association of the Applicant.

In paragraph 5 of her supporting affidavit, the Applicant indicates that she received the summons requiring her to file her written statement of defence (referred hereafter as "**WSD**") on the 22nd of March 2023. It means, therefore, that up to the 11th day of April 2023 the Applicant ought to have filed the WSD. However, for reason that there was only one director (Mr. Vohora), it was impossible to for such a director to have acted promptly.

It is also noted in the supporting affidavit what Mr. Vohora did as efforts to call for a zoom meeting of the board of directors as per the Articles of Association and the resolve they had to engage with a legal mind to guide them, that being as well a matter of right. It is stated in the affidavit that, up to the date when the WSD was supposed to have been filed the Applicant was looking for a legal firm to assist her in court.

The supporting affidavit does also show that on 14th of April 2023 Dexter Attorneys were picked and thus engaged to represent the Applicant. It is also stated that, on the 15th of April 2023 to 16th April 2023, the Applicant was involved in the signing of the minutes and Board resolution and on 17th of April 2023 formally engaged Dexter Attorneys to act for her in court. As I stated herein, a right to legal representation cannot be denied to a party who has elected to be represented.

See, for that matter, the case of **Pascal Kitigwa vs. Republic** [1994] T.L.R 65 (CAT) where the Court of Appeal was of the view that:

“It is more pertinent as it happened in the instant case where the party concerned had engaged the service of an advocate.”

In this present application, the Applicant has averred in the supporting affidavit that she was late also because she had to look for an advocate who would represent her in court.

As once stated in the **Lyamuya’s case** (supra) and many others, the circumstances which may constitute good cause are open ended. Consequently, where a party is late because, partly, he was looking for a suitable legal mind to represent him/her in court, that fact does also constitute a good cause which can warrant condonation of the delay.

Taking all such matters into consideration, I find, in my view that the Applicant has demonstrated and reasonably accounted for the delay. That being said, I see no cogent reasons as to why I should not grant this application. This court, therefore, proceeds to grant the application and settle for the following orders:

1. That the time to file the written statement of defence is hereby extended and the Applicant is ordered to file her defence in respect of Commercial Case No 2 of 2023 on or before the 06th of September 2023.
2. The Respondent shall file any reply to the WSD filed by the Applicant on or before 11th day of September 2023.
3. This application is allowed with no orders as to costs.

It is so ordered.

**DATED AT ARUSHA ON THIS 28TH DAY OF AUGUST
2023**



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DEO JOHN NANGELA
JUDGE