

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 72 OF 2020**

**(C/F CIVIL CASE NO. 25 OF 2019)**

**OGILVY TANZANIA LIMITED .....APPLICANT/THIRD PARTY**

**VERSUS**

**AIRTEL TANZANIA .....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**IVANNA FELIX TERI.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

**20/11/2020 & 11/12/2020**

**GWAE, J:**

This ruling stems from the 2<sup>nd</sup> respondent's preliminary objection when opposing the applicant's application for enlargement of time. The Preliminary objection is on the following points;

1. That the purported Misc. Civil Application No. 72 of 2020 is bad in law, it being an abuse of court process and serious derogation to the principle of sanctity of court records.
2. In terms of the provisions of Order I Rule 17, 21 and Order VIII A Rule 1 (3) of the Civil Procedure Code [Cap 33 R.E. 2019] the applicant's application for extension of time to file its Written Statement of Defence is hopelessly time barred.

At the outset, the applicant filed an application under order VIII (B) Rule 23, Order I Rule 17 and section 95 of the Civil Procedure Code R.E. 2019 and Section 14 (1) of the Law of Limitation Act, Cap 89 R. E 2019 for the orders;

1. That this court be pleased to depart from the scheduling order dated 06<sup>th</sup> June 2020 for interest of justice.
2. That this court be pleased to extend time within which the applicant can lodge her written statement of defence against the third-party notice filed by the 1<sup>st</sup> respondent.

The facts leading to this application are best captured in the affidavit of Mr. Jimmy Mnene, applicant's Legal Manager. According to the sworn affidavit, the applicant and the 1<sup>st</sup> respondent are in a contractual relationship where the applicant provides advertisement and communications services to the 1<sup>st</sup> respondent. The applicant's affidavit is further to the effect that the 2<sup>nd</sup> respondent instituted a Civil Suit against the 1<sup>st</sup> respondent claiming to unjustly enrich herself by using the 2<sup>nd</sup> respondent's images in promoting her services. The 1<sup>st</sup> respondent filed her written statement of defence where she claimed that all promotions and advertisement services were carried out by the applicant and that she is not liable from the claims arising from the said undertakings. Accordingly, the 1<sup>st</sup> respondent lodged a third-party notice to the applicant where she would be required to indemnify the 1<sup>st</sup> respondent in the event the claims by the 2<sup>nd</sup> respondent are granted by the court.

The applicant through paragraph 11 of the sworn affidavit states that the said notice was neither served to the applicant nor was it delivered to the office of the applicant herein, consequently, she was unable to respond thereto. The applicant further averred that due to the global pandemic of Covid-19 which was followed by lockdown leading to the closure of the applicant's headquarters, the applicant's operations were also closed until mid- June 2020 when the applicant opened her offices and it was at that time when the applicant became aware of the said notice. By the time the applicant became aware of the said matter the period of twenty one (21) days required for filing defence had expired and also the 1<sup>st</sup> scheduling conference had been held and mediation already commenced before the mediator judge. The applicant is therefore praying to be allowed to file his written statement of defence out of time as she also believes that she has arguable defence against the 2<sup>nd</sup> respondent's claims with highest possibility of success.

The respondents herein opposed the applicant's application and each respondent filed her counter affidavit. The respondents despite opposing the application, both raised a concern with regard to the irregularities appearing between the applicant's application filed online/electronically and the application which was filed physically which is actually in the court file. It is also at this juncture where the 2<sup>nd</sup> respondent supported his counter affidavit with a notice

of preliminary objection. The said applications were attached to the counter affidavits of the respondents.

With the leave of the court, the preliminary objection together with the main application were to be argued by way of the written submissions. Parties above enjoyed legal services from the learned advocates, namely; **Mr. Wilbard J. Massawe, Mr. Robert Mgoha** and **Mr. Richard V. Massawe** for the applicant, 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent respectively.

Supporting the first point of the preliminary objection Mr. Richard submitted that the applicant's application is an abuse of the court process and a serious embarrassment to the administration of justice. The applicant in this application filed in court electronically one application and after filling, she had an afterthought so she physically filed in court substantially different application with the one in court. If that is not enough, the applicant served to the 2<sup>nd</sup> respondent the whole new application which does not resemble neither the electronically filed application nor the physical one filed.

The counsel went on submitting that if the said application is allowed, the court on top of having different records of the same case will not be placed in a position to determine the rights of parties in the main application for the simple reason that, there are three different applications. The counsel went on

elaborating the variance in the applications and for the purpose of this ruling I will reproduce that part of the submission hereunder;

"All the three applications by the applicant differs substantially, the following are the particulars of differences

- i. 2<sup>nd</sup> prayer to the chamber summons in an electronically filed copy does not resemble with the one which was served to the 2<sup>nd</sup> respondent.
- ii. Paragraph 8 of the affidavit of JIMMY MNENE electronically filed by the applicant does not resemble with paragraph 8 of the physical copy filed in court and the one served to the 2<sup>nd</sup> respondent.
- iii. Paragraph 11 of the electronically filed affidavit of JIMMY MNENE by the applicant clearly admits service of the 3<sup>rd</sup> party notice on 21<sup>st</sup> April 2020 while paragraph 11 of the physical copy filed in court and the one served to 2<sup>nd</sup> respondent the same JIMMY MNENE under oath strongly denied services of the 3<sup>rd</sup> party notice.
- iv. Paragraphs 14, 15 and 21.12 of the electronically filed copy does not resemble paragraph 14 of the physical copy filed in court and the one served to 2<sup>nd</sup> respondent.
- v. Paragraphs 21.13 appear in physical copy filed in court but does not feature in an electronically copy filed in JSDS system.
- vi. The electronic affidavit in an electronic filed application was verified at Arusha on 15<sup>th</sup> July 2020 while the physical copy filed in court was verified on 17<sup>th</sup> July 2020

- vii. The other defect is that, an affidavit filed electronically was by JIMMY MNENE which was attested by ASELLA G. MSANDO while the copy physically filed in court is attested by STEVEN D. MUSHI"

Mr. Richard further made reference to the law applicable in electronic filing in which is the Judicature and Application of Laws (Electronic Filing) Rules, 2018. The counsel cited Rule 14 (1) which presupposes that the electronic filed document should resemble with the one filed in ordinary or conventional way since both serve the same purpose. The Counsel further cited Rule 9 which is to the effect that the electronically filed copy shall be the official record of the court and Rule 17 which makes it mandatory for a party who has filed electronic document to produce original and prove their authenticity.

Having submitted so, the applicant is of the view that what the applicant did was not done bonafidely and the same is just trifling with the court, the instant application is with no basis and the same should be dismissed with costs.

On the second point of the preliminary objection the learned counsel argued that time frame for filing written statement of defence by a third party is guided by Order I Rule 17 of the CPC, however this rule has to be read together with Rule 21 of the same order and according to the counsel the rules applicable to the defendant shall equally be applicable to the 3<sup>rd</sup> party (applicant herein) and it is at this point which brings into play the rule limiting time frame for action for defendant/3<sup>rd</sup> party, as provided by Order VIII A Rule 1 (3). The counsel

went on stating that if at all Order VIII A Rule 1(3) is to be applied then the applicant's application is time barred for the reason that the Order requires written statement of defence to be filed within 21 days and before expiry of the period provided for filing a written statement of defence or within 7 days after expiry of that period and upon defendant showing good cause for failure to file such statement of defence, extend time within which the statement of defence has to be filed for another 10 days.

The counsel is of the view that the applicant herein did not comply with the requirement of Order VIII A 1 (3) and therefore he strongly believes that the applicant's application is hopelessly time barred.

Replying on the first point of the preliminary objection the applicant's counsel Mr. Wilbard argued that on the issue of disparities existing between the application served to the parties, the one in court and the one in JSDS, he had informally informed the counsels that he shall modify the last prayer to read as such when the matter shall come for hearing. The counsel is further of the view that the disparity complained by the respondents in terms of wording on the last prayer are not fundamental to warrant the action sought by the counsel for the second respondent.

The learned counsel went on submitting that the discrepancies cited by the 2<sup>nd</sup> respondent are due to an error in the course of uploading the converted

document in which the unfinished, but saved PDF converted version of the application was inadvertently annexed as opposed to the final version. The final version is what was filed in this honourable court and it is what was served to the respondents and that is what is in this court's physical file subject to corrections made as alluded. The counsel urged this court to draw an inspiration from Order 8 (1) (1) of the Kenya Civil Procedure Rules and Order 6 (20) of the Uganda Civil Procedure Rules to hold that the modification of the last prayer prior to serving the respondents was not substantial and that it required no leave and that the objection be ignored to pave way for substantial justice.

Submitting on the second point of the preliminary objection, Mr. Willbard stated that the applicable provision in filing defence by a third party is Order I Rule 17, however the said order leave a lacuna on time limitation within which a third party can lodge an application for extension of time to file a defence and this calls into play section 14 (1) of the Law of Limitation Act read together with item 21 of the schedule thereto which a period of limitation is sixty (60) days. The counsel went on submitting that since Order I rule 21 invoked applicability of the Law of Limitation Act therefore Order VIII A (1) (3) as alluded by the 2<sup>nd</sup> respondent's counsel can not be meant to apply to a third party.

The counsel submitted further that third party procedure is governed by Order I (b) therefore to tie the third party into Order VIII A (1) (3) which

specifically governs defence by actual defendant in suits defeats logic and common sense. To buttress this argument cited the case of Zafran vs. Duncan and other (1969) H.C.D No. 163 where it was observed that a third party is not a defendant unless the plaintiff decides to make him one.

Lastly, the counsel invited this court to apply the principle of overriding objective which is aimed at determining disputes with a view of arriving at substantive justice.

The 2<sup>nd</sup> respondent counsel filed a rejoinder where he stated that the fact stated by the applicant's counsel that the changes made to the last prayer in the chamber summons were consented by respondent are not true and after all that cannot be a procedure, the learned counsel should have known better that when changes are made to the copies of the respondents and not a copy before the court, the court and the respondents cannot be at one as the court will be determining an application which the respondents do not have.

The counsel also submitted with regard to the applicability of the Law of Limitation Act, where he is of the view that there is no lacuna in the Civil Procedure Code which necessitates the recourse to the Law of Limitation Act since the provision of Order VIII A (1) (3) are very clear. He further commented on the principle of overriding objective as submitted by the applicant's counsel

where he stated that the oxygen principle cannot be invoked when clear provisions have not been complied with especially in relation to time limitation.

Having analyzed the submissions by the learned counsels, let me start addressing on the competence of the preliminary objection raised by the 2<sup>nd</sup> respondent counsel. The applicant's counsel in his submission stated that the position on preliminary objections is well settled by the case of **Mukisa Biscuit Manufacturing Co. Limited vs. Westend Distributors Limited** (1964) E. A 696 where it was stated that;

"A preliminary objection is in the nature of what used to be a demurrer. It raises pure point of law which when argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

Much as I agree with the applicant's counsel that preliminary objections should be on pure points of law, I find the case at hand to be distinguishable from the arguments of the counsel that the preliminary objection attract proof of evidence. I am of the considered view that, in order to determine the preliminary objection raised herein the court is guided by the pleadings filed by the parties herein and not evidence. This court finds that there is a clear-cut distinction between pleadings and evidence.

I shall now turn into the first limb of the preliminary objection raised by the 2<sup>nd</sup> respondent, the respondent is challenging the application filed by the applicant in the sense that the applicant had presented three different versions of his application, one filed electronically, the second filed in court and the third served to the respondents. The parties' counsel submitted in length on this point of a preliminary objection together with supporting authorities to back up their submissions, in fact, I commend them for their industrious work.

I have also had enough time to go through the pleadings together with the written submissions by the parties, I think the first issue is to ascertain as to the existence of such documents alleged by the 2<sup>nd</sup> respondent to be in variance. Through the counter affidavit of the respondent's advocates they all raised such a concern that the applicant's application is not the same throughout. The counsel further attached the chamber summons and the affidavits to their counter affidavits to support the same which I went through.

Indeed, and with no doubt the chamber summons and the affidavit of the Legal Manager, JIMMY MNENE is not the same throughout in the following manner;

Going by the chamber summons I have noted that the copy that was served to the respondents on the second prayer, the last line is annotated so as to remove some contents. The prayer reads as follows;

“That this Honourable court be pleased to extend time within which the applicant can lodge her written statement of defence”

This part of the prayer looks a bit different comparing to those appearing in copies that were filed on line and that which was filed physically in court, reading from the copies filed electronically and that which was filed conventionally it appears that some words were added in the second prayer on the last line to wit; “against the third-party notice filed by the 1<sup>st</sup> respondent herein”.

The interpretation that one gets from the above documents is that the applicant filed his application properly in court electronically for admission, then for the best reasons known to him in the course of serving the respondents he annotated the second prayer on the last line by removing some contents.

I now wish to point out that, the disparities on the impugned affidavits as pointed out earlier, I agree with the 2<sup>nd</sup> respondent’s counsel that there is serious divergence between some paragraphs on the affidavit that was filed electronically (JSDS) and that which was filed physically as it manifestly appears in court record. I wish to point the said disparities as hereunder;

Paragraph 8 of the affidavit filed electronically reads as follows;

“That in sequel to the foregoing on 3<sup>rd</sup> April, 2020, the 1<sup>st</sup> respondent herein lodged in this honourable court a third party

notice in which she moved the court to issue third party notice to the applicant.”

On the contrary, the same paragraph on the affidavit in court records reads as follows;

“That in sequel to the foregoing and without notification to the applicant on 3<sup>rd</sup> April, 2020, the 1<sup>st</sup> respondent herein lodged in this honourable court a third-party notice in which she moved the court to issue third party notice to the applicant herein.”

Likewise, paragraph 11 of the affidavit filed electronically states as follows;

“That the said notice was served to the applicant herein through an email to our marketing officer one Glenn Vidali on 21<sup>st</sup> April 2020 who then forwarded the same to our headquarters in Kenya.”

Whereas the same paragraph on the affidavit physically filed in court avers as hereunder;

“That the said Notice was never served to the Applicant and neither delivered to the office of the Applicant herein and consequently the Applicant was unable to respond thereto.”

Moreover paragraph 14 of the affidavit filed online reads as follows;

“That due to the said closure, the operations of the applicant herein were reduced significantly and hence failed to make timely response to some of the correspondences including the said notice which had been shared by the applicant herein.”

Yet the same paragraph on the affidavit filed in court physically states as follows;

“That due to the said closure, the operations of the applicant were halted hence failed to make timely response to some of the correspondences including the said notice.”

Worse still, even the Commissioner for oath who administered the said affidavits as well as the dates appears to be different whereas the former which was filed electronically was commissioned by Asella Msando on 15<sup>th</sup> July 2020 the later that was filed physically was commissioned by Stephen D. Mushi on 17<sup>th</sup> July 2020.

This court has thoroughly considered the above-mentioned disparities to be intentional, rejuvenated by the ill motive of the applicant’s counsel. Such impulsive and inconsiderate acts cannot be condoned by this honourable court as the same will lead to a very bad precedent. The arguments by the applicant’s counsel the same can be cured by overruling objective are very myopic in my considered view in fact the essence of the overriding objective principle is to cure mild technicalities which cannot defeat the substantive justice to the parties.

I have also noted from the applicant’s counsel submission that he has argued that he informally notified the respondent counsels on the changes of the second prayer in the chamber summons that was served to the respondents’ counsels. This court find two anomalies on the said argument of the applicant’s counsel, foremost the argument that he has used to buttress his proposition are not reflected in the affidavit of the applicant’s legal manager one Jimmy Mnene

and this is contrary to the well settle rule that submissions are not evidence. See the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 CAT (unreported).

Second, even if this court assumes for the purposes of argument that the same was stated in the affidavit it is still not the court procedure and practice for advocates to make decisions on their own and communicate the same to their learned colleagues in isolation of the court. The proper procedure is that all prayers must be directed to the court and it is only the court that grants the said prayer and give directives and not otherwise.

I have also extensively gone through the law governing electronic filing to wit the Judicature and Application of Laws (electronic Filing) Rules 2018 in particular rule 14 (1) and rule 17 which provides as;

"14 (1) Affidavits which are filed in court using the electronic filing system may be used in all proceedings to the same extent and for the same purposes as per affidavits filed in court."

"17. A party who has filed electronic documents shall be responsible for producing the originals of such documents and proving their authenticity."

From the wordings of the cited provisions of the law I wish to state without any hesitation that the applicant's counsel has enormously failed to adhere to wants of the above cited law.

The applicant's counsel is seeking for the indulgence of this court to determine an application for extension of time, the next fundamental question that this court asks itself is which documents are supposed to be considered by the court in assisting it to arrive at a just decision. The answer to this question is simple that the documents are vague and equivocal hence leaving this court in limbo rather than giving it a direction paving a way to a just decision.

For the purposes of this ruling, I feel compelled to address also on the 2<sup>nd</sup> point of the preliminary objection raised by the 2<sup>nd</sup> respondent's counsel that, the applicant's application for extension of time is time barred in terms of provisions of Order 1 Rule 17, 21 and Order VIII A Rule 1 (3) of the Civil Procedure Code (supra). I have considered the rival submissions of the parties' advocates which I need not repeat. I think the question to be resolved is whether filing of defence by the third-party is governed by Order 1 rule 17 and 21 or Order VIII A 1 (3) of the Civil procedure Code. I am of the considered view that the law is very clear and precise on Third Party Procedure, in particular Order I (b) whose heading is "*Third Party Procedure*" therefore since there is a specific provision of the law governing third party procedure I do not find it prudent to invoke Order VIII A Rule 1 (3) as alluded by the 2<sup>nd</sup> respondent counsel.

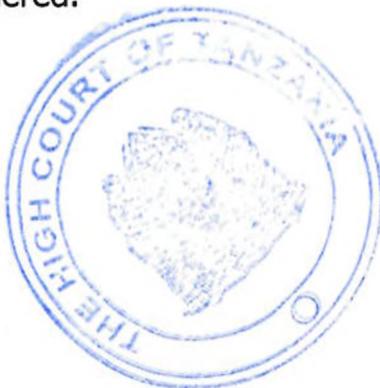
It follows that, the time for filing defence is governed by order 1 Rule 17 which reads as follows;

“17. Where a third party notice has been served on the third party, the third party shall, if he wishes to dispute the plaintiff’s claim in the suit against the defendant presenting the third party notice or his own liability to the defendant, within twenty-one days of the service of the third party notice upon him or such longer period as the court may have directed or as the court may, on the application of the third party, direct, present to the court a written statement of **his defence** (emphasis is mine)”

In the event the applicant’s application cannot be said to be time barred as the above provision of the law has not provided for a time limit to which the applicant may file an application for extension.

From the foregoing discussion, the 1<sup>st</sup> point of the preliminary objection is sufficient to dispose of the applicant’s application. Accordingly, the applicant’s application is struck out. The applicant’s is at liberty to bring a fresh application within **seven (7)** days from the date of this ruling. The intended application to be in conformity with the rules governing electronic filing as explained above. Costs of this application shall be borne by the applicant.

It is ordered.



  
**M.R. GWAE**  
**JUDGE**  
**11/12/2020**