

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
[IN THE DISTRICT REGISTRY OF ARUSHA]  
AT ARUSHA**

**CIVIL CASE NO. 14 OF 2022**

**KENNEDY HOUSE LIMITED trading as**

**KENNEDY HOUSE INTERNATIONAL SCHOOL.....PLAINTIFF**

***VERSUS***

**EDWARD JOHN MROSSO @ EDWARD MROSSO.....1<sup>ST</sup> DEFENDANT**

**LILIAN BISAMA MROSSO @ LILIAN BISAMA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**03/11/2022 & 25/01/2023**

**GWAE, J**

This ruling emanates from a preliminary objection raised by Mr. Robert Mgoha, the learned advocate for the plaintiff that, the defendants' prayer for extension of time within which to file a joint written statement of defence out of time was made out of time and contrary to Order VIII Rule 1 of the Civil Procedure Code, 2019 (CPC).

Initially, the plaintiff physically filed his suit on 10<sup>th</sup> May 2022 and on the 19<sup>th</sup> August 2022 the defendants were duly served with a copy of the plaintiff's plaint. On 3<sup>rd</sup> day of November 2022 when this suit was called for necessary orders, Mr. Njooka, the learned counsel for both defendants sought for leave to file defendants' written statement of defence out of

time. Mr. Robert vehemently objected the prayer by the defendants' counsel as earlier explained.

Praying for the grant of leave to file WSD out of the prescribed period, Mr. Njooka argued as follows. That, upon expiry of 21 days within which the defendants were to file their written statement of defence, on 30<sup>th</sup> September his colleague, Mr. Mbando appeared and sought leave to file WSD out of time but the one Acting Deputy Registrar of the Court directed that, the same prayer be made before trial court. He invited the court to invoke provisions of section 3A (2) of the CPC which allows this court in exercising its powers under this Act to give effect to the principle of overriding objective under sub-section (1) of section 3A of the Code and urged this court to hear the suit on merit instead of being tied by legal technicalities.

Resisting this defendants' prayer, Mr. Mgoha argued that, the provisions of the law regarding filing of written statement of defence are clear. The time to file WSD is 21 days and extra days is only seven days. He added that if Mr. Mbando had made a prayer before Msoffe, Ag DR, yet the application or prayer for leave is time barred.

Mr. Robert also invited this court to refer to the cases of **Mohamed R. Mohamed** (2003) TLR 76, at page 77 where rules of procedure were said to be adhered to strictly. Another case law is **Mount Meru Flowers**

**Tanzania LTD vs. Box Board Tanzania**, Civil Appeal No. 260 of 2018 and **NBC ltd vs. Partners Construction Co. Ltd**, Civil Appeal No 260 of 2018 (unreported-CAT). He finally sought an order dismissing the defendants' prayer and the suit be heard ex-parte under Order VIII Rule 14 (1) of CPC. Mr. Robert went on arguing that, if the defendants made a formal application he would not contest it all.

In his retort, the defendants' counsel stated that, their prayer is grantable due to the following reasons; **firstly**, that, the defendants through their counsel have been diligently in handling the matter. **Secondly**, that, the plaintiff will not be prejudiced if the leave is granted and **thirdly**, that, by extending time to file their defence out of the prescribed period the defendants shall be afforded an opportunity to be heard which is in conformity with rules of natural justice.

Since the controversial issue between the parties is centered on the applicability of Order VIII Rule 1 (1) and (2) of the Civil Procedure Code (supra), I think it is apposite to have provisions of Order VIII Rule of the Code quoted herein under;

*"1 (1) Where a summons to file a defence has been served in accordance with Order V and the defendant wishes to defend the suit, he shall within twenty-one days from the date of service of the summons, file to the court a written*

*statement of defence and enter appearance on the date specified in the summons.*

*(2) The provisions of rule 1 of Order VII shall apply mutatis mutandis in respect to filing a written statement of defence.*

*(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.*

*(4) The extended ten days under sub-rule (3) shall be counted from the date of the order of the court for extension of time.\**

According to the above clear quoted provisions of the law, it is my considered view that, a defendant who wishes to defend shall present his written statement of defence within 21 days from the date of service. It is also clear that, if the defendant may apply for extension to file his written statement of defence before expiry of the time fixed or after expiry of the period of 21 days upon service but the same must be made with seen days from the date of expiry. Thus, extension of time is grantable when an application by the defendant is made prior to expiry of 21 days or after expiration of 21 days but within 7 days.

In our instant suit, it is certainly clear that, the defendants were served with summons to file defence on 19<sup>th</sup> day of August 2022, thus, the last date of its expiration was 9<sup>th</sup> day of September 2022. Hence, when Mr. Njoka appeared before me on 3<sup>rd</sup> September 2022, the period of 21 days set by the law within which to file WSD had not lapsed. Nevertheless, on 30<sup>th</sup> September 2022 when the parties' advocates appear before the Acting Deputy Registrar, seven days had already elapsed.

I am alive of the sound principle of law with effect that, in the event the defendant fails to appear and or file his written statement of defence within the prescribed period or fails to file his WSD within the time so extended by the court, the hearing of the suit may proceed ex-parte against the defendant pursuant to Order VIII Rule 14 of CPC as correctly argued by the learned counsel for the plaintiff. This position was equally stressed by this court in **Sharifa Swaibu vs. CRDB Bank PLC**, Civil Appeal No. 92 of 2020 (unreported).

However, carefully looking at our instant suit, I find some exceptional circumstances namely; that, on 30<sup>th</sup> August 2022, the defendants' counsel entered his appearance and sought leave to file his WSD out of the time but the prayer was not granted on the ground that, time within which to file the same was yet to lapse. More so, on 30<sup>th</sup> September 2022 when the defendants' counsel (Mr. Mmbaga) appeared before the Acting Deputy

Registrar of the Court who according to the defendants' counsel did not grant leave. I have also taken into account that, on 30<sup>th</sup> September 2022 I was on the other court's duty (conducting inspection in Manyara Region). Hence, it was not the fault of the defendants but that of the court which could not justify blameworthy on part of the defendants. I am sound of the principle that, parties should not be punished for errors committed by the court (See **AG vs. Ahmad R. Yakut and 2 others**, Civil Appeal No. 49 of 2004 (unreported-CAT). The principle in Ahmad's case is more applicable in this case since the defendants were initially refused leave by the court on 30<sup>th</sup> August 2022 on the pretext that, the defendants were still with ample time to file their WSD. The former order of the court (**Gwae, J**) was followed by the unjustifiable order of refusal to grant leave by the Deputy Registrar of the Court to extend time in favour of the defendants.

Similarly, I am quite aware of the principle of overriding objective which requires the courts to dispense justice by looking at substantial justice rather than mere technicalities. I would like to subscribe my holding in **Mount Meru Flowers Tanzania Limited vs. Box Board Tanzania**, Civil Appeal No. 260 of 2018 (unreported-CAT at Arusha) where it was stated inter alia that;

*"...It is settled law that courts should encourage matters to be determined on merit, unless under exceptional circumstances, they cannot.*

The Court of Appeal went on holding that


*"We also associate ourselves with the principle that, justice is better than speed".*

Circumstances of the case at hand, in my firm view, do not justify this court to refuse the sought leave in favour of the defendants to file their written statement of defence out of the prescribed period. It must also be known that each case should be determined in accordance with its set of facts and that, not all applications for extension of time to file written statement of defence or counter affidavit out of the time set by the law must be formally made as doing so will not encourage expeditious resolution of disputes.

In the upshot, the application for leave to file written statement of defence out of the prescribed time is granted. The defendants are given **ten (10)** days from the date of this ruling within which to file their written statement of defence. No order as to costs is made.

It is so ordered.



  
**M. R. GWAE**  
**JUDGE**  
**25/01/2023**