

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE No.231 OF 2022

PRIMI ALOYCE MUSHI..... PLAINTIFF

VERSUS

KASINDE SAID MZEE..... DEFENDANT

RULING

17/03/2023 & 05/05/2023

POMO, J

The plaintiff, Primi Aloyce Mushi, on 15th December,2022 filed the present suit against the Defendant claiming for refund of Tshs 85.196,799/- advanced to the defendant as a loan, Tshs 166,843,731/- as simple interest out of the said loan; 25% interest per year from the date of filing till judgment, general damages for breach of contract to be assessed by the court, interest on the decretal sum at the court rate from the date of judgment till payment in full and lastly, costs of the case.

On 16/12/2022 this court, in its initial orders, ordered the defendant be served with summons to file the written statement of defence (the WSD) and thereby setting the suit to come for mention on 27/2/2023.

According to the case file record, on 24/2/2023 one Rogers Robert Katundu, the court process server, vide ERV No. 25004405 dated 24/02.2023, filed in court affidavit of proof of service of summons to the Defendant

On 17/3/2023 when the suit came for mention, the plaintiff appeared through Ashiru Lugwisa, learned advocate while the defendant appeared through Jesca Felichism, also learned advocate.

Ms. Jesca, made an oral prayer to this court that the defendant be extended time to file WSD out of time. Reason advanced being, the defendant engaged their legal service on **22/2/2023** and told them that his children were on **January 2023** served with court summons on a date he doesn't remember. That, the documents the defendant brought to them do not show as to when they were received a reason for them now to apply for extension of time to file WSD. The learned counsel cited section 14 of the Law of Limitation Act, [Cap 89 R.E.2019] and section 3A(1) of the Civil

Procedure Code, [Cap.33 R.E.2019] as the enabling provisions to move the court for the prayer sought and then asked her prayer to be granted.

The prayer was resisted by Mr. Ashiru, the plaintiff's counsel on the ground that, in terms of Order VIII Rule 1(1)&(3) of the CPC, this court doesn't have jurisdiction. That, the WSD ought to have been filed within 21 days of service or else apply for extension of time within seven (7) days from the date 21 days of filing WSD ended.

That, according to the process server's affidavit on proof of service of summons, the defendant was served on 2/1/2023 through his son one Said S. Fundi. That, the 21 days within which to file WSD ended on 23/1/2023 and the additional 7 days within which to apply for extension of time to file WSD out of time ended on 31/1/2023. That, beyond the 31/1/2023 this court has no jurisdiction to grant the prayer sought. In the end, it was Mr. Ashiru's submission that overriding objective envisaged under section 3A (1) of the CPC to which reliance is sought cannot be applied in violation of mandatory procedural law so is Order VIII Rule 1(3) of the CPC arguing that the defendant's prayer be rejected and the plaintiff be allowed to prove *ex parte* the suit.

I have given due considerations the rival submissions in support and opposing the prayer for extension of time made by the defendant to file out time the Written Statement of Defence (the WSD). Admittedly, section 14 of the LMA can not move the court for the prayer sought due to the fact that specific provision of the law exists to move the court to file the WSD out of time. In my view, as correctly submitted by Mr. Ashiru, the applicable law is Order VIII Rule 1(1)&(3) of the CPC. The provisions provide as follows: -

"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 summons, file to the court a written statement of defence and enter appearance on the date specified in the summons

*(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 the 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".*

From both parties submissions, it is not in dispute that service of summons to the defendant was in January, 2023 but according to the affidavit deposed by the process server and filed in court on 24/2/2023, which is not disputed by the defendant, service of summons was effected on **2/1/2023** and as correctly submitted by Mr. Ashiru, in my view, time to file WSD ended on **23/1/2023**. The seven (7) days envisaged under subrule 3 of Rule 1 of Order VIII of the CPC ended on 31/1/2023. Beyond 31/1/2023 this court lacks jurisdiction.

The Court of Appeal when confronted with a similar situation before Order VII Rule 1(3) of the CPC was amended by reducing from 21 days to 7 days time from which the defendant can apply for extension of time to file WSD out of time, in **Kalyango Construction and Building Contractors Ltd vs China Chongqing International Construction Corporation (CICO), Civil Appeal No.85 of 2009 CAT at Tabora (Unreported)** had this to state, at page 7: -

“On the issue of the written statement of defence being filed out of time, our starting point is Order VIII of the Civil Procedure Code, 1966, as amended by GN 422 of 1994. It reads as follows: -

"(1) Where a summons to appear has been issued, the defendant may, if so required by the court, shall within seven days before the first appearance, present a written statement of defence.

(2) - where a summons to file a defence has been issued and the defendant wishes to defend the suit he shall, within twenty one days of the date of service of the summons upon him present to the court a written statement of defence.

Provided that the court may, within twenty one days of expiration of the prescribed period, grant an extension of time for the presentation of the written statement of defence on application by the defendant".

Having reproduced the above provision of the law, the Court of Appeal went on to state thus: -

"A plain meaning of this rule is that if a defendant fails to file a written statement of defence within twenty one days, the court may only extend time if the defendant applies for it within twenty one days after the expiration of the prescribed period".

Applying the above interpretation of Order VIII rule 2 (now Order VIII rule 1(3) of the CPC) to the facts of the case before it, the Court of appeal stated thus: -

*In the present case, the record reflects that when the appellant appeared in court in the person of Mr. Long Yu – on 5/10/2004, he informed the court that he was served with summons to file a written statement of defence, on 21/9/2004. By a quick reckoning, the first twenty one days expired on 12/10/2004. **The defendant had until 2/11/2004, within which to make an application for extension of time. However, it was on 3/11/2004 when the defendant’s counsel, Mr. Ngatunga appeared and asked for and was granted extension of time to file his written statement of defence.** A perusal of the original records shows that the defence was filed on the same day, 3/11/2004. **In our view, after the expiration of the next twenty one days, the defendant was shut out from filing his defence or apply for extension of time.** Mr. Ngatunga has suggested that, the learned judge might have used his powers under section 93 and 95 of the Civil Procedure Code. We do not think that he had those powers. **Section 93 could only be applied if the period of limitation was set by a court in its judicial capacity** (see **PATEL V. SINGH [1956] EACA 209**). Similarly, **the discretionary powers under section 95 cannot be used to defeat limitation.** (See **AUTO GARAGE v. MOTOKOV [1971] HCD n.338**). In this case the time of filing the written statement of defence and within which to apply for extension is clearly set out in Order VIII r.2 of the Civil Procedure Code. **The court was deprived of any discretion in the matter.***

Now, applying the above stance of the court of appeal to the scenario at hand, since this application is being made beyond the seven days allowable after the expiration of twenty-one days of filing WSD, in terms of Order VIII rule 1(3) of the CPC the defendant is shut out to apply for extension of time and likewise this court is *functus officio* to grant the extension of time to file WSD out of time.

The defendant has raised concern that this court be pleased to apply the overriding objectives enshrined under section 3A (1) of the CPC. The settled law is that the same cannot be applied where there is mandatory procedural law as was so held in **see mondoroso village council and 2 Others Vs Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 of 2017 CAT at Arusha (Unreported)** where the Court of Appeal had this to state at pp. 11 – 15: -

*"Regarding the overriding objective principle, **we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the suit**".*

Having so observed, I reject the defendant's prayer made beyond the seven days of the deadline of applying for extension of time to file WSD out of time since this court lacks the requisite jurisdiction

Upon so determining, what then is the way forward to the suit? As correctly suggest by Mr. Ashiru, the learned counsel for the plaintiff, Order VIII R.14(1) of the CPC come into play in that the suit have to proceed *exparte* against the defendant. This position, again, gains support from what was decided in the case of **Kalyango Construction** (supra) (see pp.11 – 12).

That said and done, the prayer made to extend time to file written statement of defence is hereby rejected and the suit is hereby ordered to proceed *exparte* against the defendant.

It is so ordered.

Dated at **DAR ES SALAAM** this 5th day of May, 2023.



MUSA K. POMO

JUDGE

05.05.2023

Ruling delivered in absence of both parties but in presence of Joshua Reuben Marwa, Learned Advocate holding brief of Jesca Massae the advocate for the Defendant.



MUSA K. POMO

JUDGE

05.05.2023

