

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

**MISC.COMMERCIAL APPLICATION NO. 248 OF 2017
(Arising from Commercial Case No. 152 of 2016)**

NEW WAVE ADVANCED CAPITAL (PTY) LTD APPLICANT

VERSUS

**1. KEC INTERNATIONAL LIMITED 1st RESPONDENT
2. AZANIA BANK LIMITED 2ndRESPONDENT**

RULING

Date of the Last Order: 13/02/2018

Date of the Ruling 26/02/2018

SEHEL, J.

This is a ruling on application for extension of time within which the applicant can file a written statement of defence within ten (10) days from the date of this Court's order dated 4th July, 2017. The application is made under Rule 20 (1), (2), and (3) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter

referred to as "the Rules") and it is supported by an affidavit of Annette Kirethi, counsel for the applicant from Hallmark Attorneys. The main reason advanced in the affidavit is that the principal officer, one Mr. Hugo Knoetze, a resident of Republic of South Africa was sick and diagnosed with a cyst on the brain. A copy of Hugo's hospital discharge prescription and doctor's report dated 12th June, 2017 was attached to the affidavit to support the allegation of sickness.

Upon being served with the application, the 1st respondent filed a counter affidavit and notice of the preliminary objection to oppose the application. The preliminary objection was overruled by this Court on 30th day of October, 2017 and the application has been fixed for hearing.

At the hearing, Jovison Kagirwa; Obed Mwandambo; and Quinne Allen learned advocates appeared to represent the applicant; 1st respondent and 2nd respondent respectively. Counsel Kagirwa notified this Court that the applicant filed a skeleton argument and wished to adopt it in full and will highlight few things.

The issues highlighted are such that the application is brought under Rule 20 (2) and (3) of the Rules; Order VIII Rule 1 and Section 68 (e) of the Civil Procedure Act, Cap. 33 (CPC) which requires the applicant to advance sufficient cause as to why the applicant failed to file its written statement of defence in time. The counsel argued the applicant through Paragraphs 7 .1; 7.2; 7.3; 7.4; and 7.5 of the affidavit of Anneth Kirethi contained sufficient reasons in that the reason of sickness of the person who has capacity of adducing facts which are important in preparing and writing written statement of defence is beyond the control of the applicant. He referred this Court to the case of **Regional Manager, TANROADS Kagera Vs Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (Unreported) that held sufficient reason cannot be laid down by any hard or fast rules. It must be determined by reference to all the circumstances of each particular case. The counsel further contended that the respondent does not dispute the issue of sickness by virtue of court order dated 24th November, 2017 which expunged the Paragraphs in the counter affidavit that opposed the

allegation. The counsel therefore prayed for the application to be granted.

It was replied by counsel Mwandambo that the application is time barred. In expounding the reasons as to why the application is time barred, he submitted that the applicant was served with the third party notice on 23rd June, 2017 and on 4th July, 2017 parties before the judge for necessary orders where the applicant prayed for an extension of time to file the third party written statement of defence. He said, the court ordered the applicant to file their written statement of defence by 31st July, 2017 and fixed the matter for ordered on 14th August, 2017. The counsel further argued the applicant did not file the written statement of defence but filed the present application on 8th August, 2017 which pursuant to Rule 20 (2) of the Rules extension of time can only be for ten days to be counted from the date of the order of the court for extension of time which is 31st July, 2017. Thus ten days expired on 6th August, 2017 as such the filing of the application on 8th July, 2017 was out of time.

~~HHH~~

Regarding, reasons for extension of time, the counsel replied that it is not sufficient as the applicant had knowledge of sickness of Mr. Hugo since June, 2017 as per Paragraph 7 .1 of the affidavit in support of application. He therefore prayed for the application to be dismissed with costs.

Counsel Kagirwa re-joined that the issue of time barred was already determined by this Court and that the summons issued to the applicant on 23rd June, 2017 was summons to appear and not for filing defence thus 21 days start to run from 4th July, 2017. He further insisted that the reason given is sufficient reason for the court to grant the extension of time.

From the counsels' submissions this Court is invited to determine two things. First, is whether the applicant's application is filed within time. Secondly, is whether the applicant has advanced sufficient reason for the Court to extend time.

On issue of time barred, as correctly submitted by the counsel Kagirwa this Court has already pronounced itself on 30th October, 2017 that the application is filed within time. In any event, I have

perused the records in Commercial Case No. 152 of 2016 and noted that indeed the applicant was served with the summons to appear and not summons to file written statement of defence. In compliance with the summons, the applicant appeared on 4th July, 2017 wherein it prayed for time to present its written statement of defence. Thus, the applicant was granted up to 31st July, 2017 to present its written statement of defence. According to Rules 20 (2) and (3) of the Rules which the applicant has invoked, the applicant is required to request for an extension of time within ten days "*from the date of the order of the court for extension of time.*" The Court ordered the applicant to file its written statement of defence on or before 31st July, 2017 thus ten days expired on 10th August, 2017 but applicant filed its application on 7th August, 2017 well within the prescribed ten days period. I therefore see no merit on this ground.

I now turn to the merit of the application. Rule 20 (2) of the Rules provides:

"A Judge or a Registrar, may, upon an 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 Rule, the applicant is required to advance good cause for the Court to exercise its discretionary powers in granting extension of time. What amounts to good cause is not defined in the Rules. However, the Court is enjoined to look at the circumstances of each particular case guided by the principles of justice, equity and common sense. As such, it is not possible nor desirable to lay down and follow any hard and fast rules (See: **Regional Manager, TANROADS Kagera** (Supra) and **Tanga Cement Company Limited v. Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No.6 of 2001 (both Unreported –CAT)).

The question that follows and which this court has to determine is whether according to the circumstances and facts of the case the applicant has advanced good cause for the Court to grant the prayers for the extension of time for filing written statement of

defence. The reasons given by the applicant for the delay are such that the applicant's principal officer was sick as he had short-term memory problems and with certain cognitive issues associated therewith. A medical sheet was attached to the affidavit in support of the application wherein it is shown that the applicant's principal officer, one, Mr. Hugo had "...persistent enhancement of the at abscess cavity, as well as an increase in the perilesional oedema..".

In **John David Kashekya Vs. the Attorney General**, Civil Application No. 1 of 2010 (Unreported) the Court Appeal when dealing with an application for extension of time within which to file notice of appeal and the memorandum of appeal out of time, found the reason of sickness to be sufficient reason when it stated:-

"...there is no affidavit filed in reply to dispute that the applicant was not sick. I am so persuaded because 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 notice of appeal and the memorandum of appeal out of time."

Applying the above holding, in the matter at hand, the details of sickness of Mr. Hugo contained in the affidavit were not countered in the counter affidavit of the 1st respondent since the paragraphs that countered the allegation was expunged by this Court on 24th November, 2017. Thus the averment of sickness of Mr. Hugo remained unchallenged. More so, there is no evidence from the 1st respondent to show that the condition of the applicant's

principal was better at the time it was ordered to file its written statement of defence. Consequently, I find that the applicant's reason of sickness to be sufficient for this Court to extend time. The applicant has to file its written statement of defence within a period of ten days from the date of the delivery of this ruling. Costs shall be in due cause. It is so ordered.

DATED at Dar es Salaam this 26th day of February, 2018.



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

B.M.A Sehel

JUDGE

26th February, 2018