

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 127 OF 2019

(Arising from Commercial Case No. 105 of 2019)

**STANDARD CHARTERED BANK TANZANIA LIMITED.....APPLICANT
VERSUS**

INCAR TANZANIA LIMITED.....1ST RESPONDENT

SHIVA IMAGES TANZANIA LIMITED.....2ND RESPONDENT

SHIVACOM TANZANIA LIMITED.....3RD RESPONDENT

RULING

B.K. PHILLIP, J

This ruling is in respect of an application for extension of time to file a written statement of defence. It is made under the provisions of rule 2(2), 4 and 20(2) of the High Court (Commercial Division) Procedure Rules, 2012, (the "Commercial Court Rules"), read together with the provisions of Order VIII Rule 1(3) of the Civil Procedure Code Cap. 33 Revised Edition, 2002 ("the CPC"), as amended by the Civil Procedure Code (Amendment of the First Schedule) Rules, 2019 Government Notice No. 381 of 2019 (the 'CPC Amendment Rules').

The application is supported by an affidavit sworn by the applicant's advocate, Mr. Sylvatus Sylvanus Mayenga of FK Law Chambers, Advocates. The learned advocate Michael Joachim Tumaini Ngalo filed a counter affidavit in opposition to the application. An affidavit sworn by the

learned Advocate Mr. Edward Nelson Mwakingwe of FK Law chambers was also filed in court in reply to the counter affidavit sworn by Mr. Michael Ngalo.

The reasons for the delay in filing the written statement of defence are stated in the affidavit in support of this application, in which the deponent stated that the plaint was served to the chief legal Counsel, Mr. Walarick Nittu on 17th September, 2019. The applicant was also served with an application for temporary injunction which was filed under certificate of urgency, the same was handed over to FK Law chambers, Advocates who prepared the counter affidavit and filed it in time. Furthermore, the deponent stated as follows; That on 30th September 2019, the plaint was handed over to the applicant's advocate, FK Law chambers (henceforth "the firm") for the purpose of preparing the written statement of defence. Upon receiving the plaint, the law firm assigned Dr. Erasmo Nyika and Hadija Kinyaka to prepare the written statement of defence and find Mr. Wallarick for signing the same. That on 8th October 2019, in the evening both Dr. Nyika and Hadija tendered their oral resignation from the firm and it was on that day the firm became aware that the written statement of defence in respect of this case was not yet filed. By that time the efforts to secure Mr. Walarick Nittu the applicant's chief counsel who started his block leave on 23rd September 2019, for signing the written statement of defence proved fruitless. Moreover, the deponent stated that the applicant has a genuine defence, thus, if this application is granted the respondents will not be prejudiced in anyway.

In the affidavit in opposition to the application the deponent stated as follows; That the applicant has not given any sufficient cause for delay in filing the written statement of defence. The company is run by more than one director thus, there was no justification for waiting for Mr. Nittu only to sign the written statement of defence and no explanations have been given as to why the advocates from firm did not sign the written statement of defence and file the same in court in time instead of waiting for Mr. Nittu who was on leave as deponed by Mr. Mayenga. That it is inconceivable that both Dr. Nyika and Hadija tendered their resignation at the same day and time. Furthermore, the deponent stated that it is inconceivable that Mr. Nittu the chief counsel of the applicant did not hand over the plaint to firm for preparation and filing of the defence until 30th September 2019 when the same was handed over to the firm by a person whose name is not disclosed. Moreover, the deponent stated that the applicant's failure to file the defence within the prescribed time is due to the inaction of applicant's counsels and that the way the firm handled the case exhibits lack of diligence.

In the affidavit in reply to the counter affidavit the deponent reiterated most of the contents of the affidavit in support to the application. He stated that there is no any inaction or any exhibition of lack of diligence on part of the applicant since the applicant did file the counter affidavit in respect of the application for temporary injunction timely. That Dr. Nyika and Ms. Kinyaka resigned from FK Law chambers on 8th October 2019 and on 12th October 2019 the company reliazed that the written statement of

defence was not yet filed. Moreover, the deponent stated that the affidavit in support of the application has disclosed sufficient reasons for granting this application.

Both counsels filed their skeleton arguments, pursuant to rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 as amended.

Submitting in support of the application, Mr. Mayenga started by adopting the contents of the affidavit in support of this application and the skeleton arguments in which it is stated that the applicant has always been diligent in handling this matter and that the respondents' claims as they appear in the pleadings are tainted with illegality thus the intervention of this court is important. To cement his arguments he cited the case of **Transport equipment vrs Valambia (1993) TLR 91**. In his skeleton arguments the applicant's advocate also pointed out that this application was filed seven days after the expiry of the time for filing the written statement of defence which is in line with the provisions of Order VIII Rule 1(3) of the CPC and that the applicant has shown sufficient reasons to warrant the grant of the application. To cement his arguments Mr. Mayenga cited a number of cases including the case of **Republic Vrs Yona Kaponda and 9 others (1985) TLR 84**, in which the court said the following;

"...as I understand it, "sufficient reasons" here does not refer only and is not confined to delay. Rather it is sufficient reasons for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding

circumstances, and the weight and implications of the issue or issues involved..."

and the case of **Amani Center for street Children Vrs Viso Construction Company Limited Civil Application No.105 of 2013**, in which the court said the following;

"...good cause" will usually consist of some good reason why that which is sought should be granted. It does not have to be exceptional.....But no particular good cause or reason have been set out as standard good cause(s) .It all depends on the particular circumstances of each case..."

In addition to the above, the skeleton arguments contains arguments to the effect that this court has wide discretion to extend the time for filing the applicant's written statement of defence. To cement his arguments, the applicant's advocate cited the case of **Kalunga and Company Advocates Vrs National Bank of Commerce Ltd (2006) TLR 235**, in which the court said that "*Under Rule 8 of the Court of Appeal Rules 1971 the court has a wide discretion to extend time where the time has already expired, but where there is inaction or delay on the part of the applicant, there ought to be some kind of explanation or material upon which the court may exercise the discretion given"*

Moreover, Mr. Mayenga urged this court to apply the principle of overriding objectives. Mr. Mayenga was of the view that this court should

not confine itself to strict procedural technicalities and for the interests of justice should allow this application. To cement his arguments he referred this to the case of **Yakobo Magoiga Gichere Vrs Peninah Yusuph, Civil Appeal No. 55 of 2017**, (Unreported) in which the court of Appeal applied the principle of overriding objective.

Mr. Mayenga proceeded to submit that this court has to be lenient enough and grant the application since the applicant has never being idle. To cement his arguments he referred this court to the case of **Zanzibar Shipping Corporation Vs Mkunazini General Trade, Civil Application No.3 of 2011**, in which Hon. Msoffe, JA as he then was, while granting an application for extension of time to apply for restoration of an appeal said the following;

"I have gone through the entire application. In the end, and very briefly, I am inclined to grant it for two main reasons. One, as the above background shows it is apparent that the applicant has all along been diligent in taking various steps in the matter. He was never idle. In this regard, I think, justice demands that in the circumstances of this case the applicant's diligence ought to be rewarded".

Mr. Mayenga also cited the case of **Standard Chartered Bank (Tanzania) Ltd Vrs Bata Shoe Company (T) Ltd , Civil Application No 101 of 2006**, in which Hon. Kimaro, JA, as she then was while granting an application for extension of time to serve record of appeal she cited with approval the decision of the Court of Appeal in the case of

Michael Lessani Kweka Vrs John Eliafye (1997) TLR 152, in which Hon. Kisanga , J.A as he then was said the following;

".....Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such pleas in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

Furthermore, Mr. Mayenga submitted that the applicant has a genuine defence since there is a breach of the statutory duty on part of the respondents. He contended that even if it is assumed that the applicant's advocates were negligent in handling this case, the position of the law is that courts of law are not supposed to punish litigants for the mistakes committed by their advocates. To cement his arguments he referred this court to the case of **Ghania Kimambi Vrs Shedrack Ruben Ng'ambi Ltd, (HC) Misc Labour Application No.692 of 2018**, (unreported) in which the court said that it sounds unfair and inequitable for a party to a civil litigation to be punished for an error committed by the advocate. Mr. Mayenga was of the view that if this application is not granted , there is a likelihood that the applicant will suffer more than the respondents.

In rebuttal, Mr. Ngalo, like Mr. Mayenga, started by adopting the contents of the respondents' counter affidavit and his skeleton arguments. In his skeleton arguments Mr. Ngalo cited that case **Lyamuya Construction**

Company Limited and Board of trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010

(unreported) in which the court of Appeal said the following ;

"As a matter of general principle it is in the discretion of the court to grant extension of time. But that discretion is judicial and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however' the following guidelines may be formulated:-

- a. the applicant must account for all the period of delay*
- b. the delay should not be inordinate*
- c. the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- d. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

Elaborating on the points stated in his skeleton arguments, Mr. Ngalo submitted that the applicant has admitted that he was served with the plaint on 17th September 2019 and there is no dispute that the last date for filing the written statement of defence was on 8th October 2019, and the affidavit in support of this application shows that Mr. Nittu, applicant's chief counsel, started his leave on 23rd September 2019. Mr. Ngalo contended that if at all is true that the written statement of defence was prepared, then there was no need to wait for Mr. Nittu to come back from his holiday so that he could sign the written statement of defence, since the applicant

is a body corporate which functions through its numerous directors. Furthermore, Mr. Ngalo argued that the applicant's lawyers were capable of signing the written statement of defence and file it in court within the time prescribed by the law. He contended that it appears the written statement of defence was not prepared, since no copy of the written statement of defence has been attached to this application to prove this allegation, despite the fact that in the affidavit in support of this application it is stated that a copy of the written statement of defence is attached thereto.

As regards the alleged resignation of Dr. Nyika and Ms. Kinyaka, Mr. Ngalo submitted that, the same is doubtful and not substantiated since no affidavits sworn by those Advocates alleged to have resigned have been filed in court to prove that allegation. He invited this court to draw adverse reference against the applicant for failure to file in court the affidavit of the two advocates alleged to have tendered abrupt resignation. To cement his arguments Mr. Ngalo referred this court to a number of cases among them are; **John Chuwa Vrs Anthony Ciza (1992) T.L.R 233** in which the court said that it is important to file in court an affidavit of a person so material in evidence / case , **Hemedi Saidi Vrs Mohamed Mbilu, (1984)T.L.R 113,** in which the court held that where for undisclosed reasons , a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests and **Phiri M. K. Mandari and others Vrs Tanzania Ports authority, Civil**

Application No.84 of 2013 (unreported) in which the court said the following;

"It is a trite law that in considering whether to invoke its discretionary powers and grant (or not grant) extension of time , a court of law should take into account the following factors:

- *The length of the delay. In the instant application, the delay is about five years, an inordinate long period.*
- *The reason for the delay – was it caused or is a result of a dilatory conduct of the applicant? In the instant application, the reasons advanced are, in my view not good cause. They should have been supported by affidavital evidence – particularly the delays arising from consultations with Prof. Kanywanyi and Madame Kashonda (supra). An affidavit of a person material to a case has to be filed, failure of which may lead to a dismissal of the application. (see John Chua vs Anthony Ciza, (1992) TLR 233 adopted)."*

Furthermore, Mr. Ngalo submitted that there is a contradiction between the affidavit in support of this application and the affidavit in reply to the counter affidavit, on the date when the applicant's advocate became aware that no written statement of defence was filed in court. In paragraphs 8 and 10 of the affidavit sworn by Mr. Edward N. Mwakigwe, it is stated that Dr. Nyika and Ms. Kiyanka resigned on the 8th October 2019 without proper handing over and on 12th October 2019 the firm discovered that the written statement of defence was not yet filed, while in the affidavit in

support of this application sworn by Mr. Mayenga it is stated that on 8th October 2019 when Dr. Nyika and Ms. Kinyaka tendered their abrupt resignation, that is when the firm learnt that the written statement of defence in this case was not yet filed.

It was the contention of Mr. Ngalo, that the applicant's failure to file the defence is due to inaction and lack of diligence on part of the applicant and his counsels which is clearly shown by how the matter was handled, for instance, Mr. Nittu, the applicant's chief counsel decided to go on leave on 23rd September 2019 without making sure that the plaint that was served unto him on 17th September 2019 was handed over to the firm for preparation of the written statement of defence. The senior advocates in the firm did not make close follow up on the preparations and filing of the written statement of defence until 8th October 2019, when Dr. Nyika and Mr. Kinyaka resigned, that is when the firm knew that the written statement of defence was not yet filed in court. To buttress his argument Mr. Ngalo cited the case of **Tanga Bohora Jamaat (1997) T.L.R 305** in which Hon. Samatta JA as he then was said the following;

*"Those who come to courts of law must not show unnecessary delay in doing so, **they must show great diligence**"*

(Emphasis is added)

Mr. Ngalo proceeded to argue that the applicant in this application has not shown any diligence in handling this case. Citing the case of **Lyamuya** (supra), Mr. Ngalo contended that the applicant has failed to account for

each day of delay from 17th September 2019 when the plaint was served to the applicant to 30th September, 2019 when the plaint was handed over to the firm, and from 8th October 2019 when the applicant's advocate allege to have reliazed that the written statement of defence was not yet filed to the date of filing this application (i.e 15th October 2019). Mr. Ngalo further submitted that the principle of overriding objective cannot be applicable in the circumstances of this case. He invited this court to dismiss the application with costs.

In rejoinder, Mr. Mayenga, submitted that, Mr. Nittu handed over the plaint to FK Law Chambers before the expiry of the time for filing the written statement of defence and that Mr. Nittu was the only one who was conversant with the facts of the case, thus the written statement of defence could not be signed by any other officer in the plaintiff's company except him.

As regards the lack of affidavit of Dr. Nyika and Ms. Kanyika, Mr. Mayenga submitted that the fact that the two advocate tendered an abrupt oral resignation shows that the firm had no good relationship with them, thus it was impossible to get any affidavit from both of them.

As regards the contradiction in the affidavits filed by the applicant's advocates, Mr. Mayenga submitted that, there is a clerical error in the affidavit sworn by Advocate Mwakingwe. He insisted that the correct date when the firm learnt that the written statement was not yet filed is 8th

day of October 2019 not 12th October 2019. In the alternative, Mr. Mayenga requested this court, pursuant to the provisions of Order XIX rule (1) (2) of the CPC, to summon Mr. Mwakingwe to appear in court for the purpose of clarifying the contents of his affidavit regarding the proper date on which the law firm relied that the written statement of defence was not yet filed.

Furthermore, Mr. Mayenga submitted that the delay in this case is not an inordinate delay, the application has been filed seven days after the expiry of the prescribed time for filing the written statement of defence. Mr. Mayenga was of the view that the applicant has been diligent in handling this matter and his diligence is demonstrated in the way he has been honouring all court orders. He was of the view that this is a fit case for the application of the principle of overriding objectives. He concluded his rejoinder by reiterating the prayers in the chamber summons.

Having analyzed the submissions of the learned advocates appearing herein, in my considered view, the task before me is to decide whether the applicant has adduced sufficient reasons/good cause for the delay in filing the written statement of defence. There are dozens of cases on the extension of time that have been decided by our courts which all show that an order for extension of time is a discretionary order which is granted at the court's discretion and the courts discretion has to be exercised judiciously. To My understanding in order for this court to grant an order for extension of time, the applicant has to give sufficient reasons/good cause for the delay in filing the document at issue within the time

prescribed by the law. There are no hard and fast rules on what constitutes sufficient reasons/good cause [**sees the following cases; Lyamuya (supra) Yusufu Same and Hawa Dada Vrs hadija Yusufu, Civil Appeal No.1 of 2002, (unreported) and Benedict Shayo Vrs Consolidated Holdings Corporation as Receiver of Tanzania Film Company Limited, Civil Application No. 366/01/2017 (unreported)**]. The case laws also show that our courts have established some guidelines in establishing whether there are sufficient reasons adduced by the applicant. In the case of **Lyamuya Construction (supra)** the Court of Appeal formulated the guidelines which I have quoted herein above. In this ruling I will be guided by the same guidelines too.

Starting with aspect of accounting for each day of delay which to my understanding is of paramount importance, looking at the submissions made by Mr. Mayenga and what has been stated in both affidavits sworn by the applicant's advocates, it is a common ground that the plaint was served to the applicant on 17th September 2019. There are no reasons given leave alone sufficient reasons as to why the applicant did not hand over the plaint to FK Law chambers immediately after being served to him but he decided to keep it until 30th September 2019 when the same it was handed over to FK Law chambers after the chief counsel of applicant Mr. Nittu had gone on leave. Thus, it took the applicant thirteen days (13) to hand over the plaint to the firm so that the written statement of defence could be prepared. Considering the time within which the applicant kept the plaint before handing it over to the firm, it leaves a lot to be desired.

if the applicant's chief legal counsel was aware that he was going to start his "block leave" on 23rd September 2019 as stated in the affidavit in support of this application, the pertinent question here is ; why didn't he make effort to have the written statement of defence done before going on leave, since, according to the submission of Mr. Mayenga Mr. Nittu was the only officer of the applicant who knew the facts of the case and that he was the only one who was supposed to sign the written statement of defence.

Also, no any explanations have been given for failure to prepare the written statement of defence from 30th September 2019 when the plaint was handed over to firm to 8th October, 2019 when Dr. Nyika and Ms. Kinyaka are alleged to have tendered their abrupt oral resignation. In his submission Mr. Mayenga insisted that the aforesaid two advocates resigned in the evening on the last day for filing the defence, but he did not explain what transpired between 30th September 2019 to 7th October 2019, before the resignation of the said advocates. A quick question that would come in the mind of any reasonable person is; Why the firm (FK Law Chambers) did not make any follow up of its counsels to make sure that the defence was prepared and filed in time? After all Mr. Mayenga submitted that the two advocates, tendered their resignation on 8th October 2019 in the evening, that means by that time it was not possible to file the written statement of defence in time and Mr. Nittu who was supposed to sign the defence was on leave. Frankly speaking, looking at what has been submitted by the applicant's advocates, the resignation of the two advocates cannot be an

excuse or good cause for failure to file the written statement of defence in time. The lack of clear and consistent explanations for the delay suggests one answer only, that is, inaction and lack of diligence on part of the applicant and his advocates as submitted by Mr. Ngalo. The fact that the applicant managed to file the counter affidavit for the application for temporary injunction in time does not remove the clear negligence demonstrated by the applicant in handling the case as far as the filing the written statement of defence is concerned. At this juncture I wish to associate myself with the findings the Court of Appeal in the case of **Zanzibar Shipping Corporation** (Supra), in which the court said that it granted the extension of time because the background to the case showed that the applicant had all along been diligent in taking various steps in the matter and was never idle. In the application at hand the background and facts of the case as revealed in the affidavits in support of this application show that the applicant has been idle and did not take necessary steps for filing the written statement of defence within the time prescribed by the law. I have also noted that all cases cited by Mr. Mayenga show clearly that a party to an application for extension of time has to account for each day of delay as well as exhibit diligence in handling the case.

In addition to the above, the contradiction in the affidavit filed by the applicant's advocates that was conceded to by Mr. Mayenga weakens the applicant's arguments as it demonstrates lack of diligence on part of applicant's advocates in handling this matter. I am saying this because by what it is stated in the affidavits sworn by the applicant's advocates it is

not certain whether the firm became aware of the none filing of the written statement of defence on 8th October 2019 or 12th October 2019. This is a clear demonstration of lack of diligence. The prayer made by Mr. Mayenga under Order XIX rule (1) (2) of the CPC inviting this court to summon Mr. Edward Mwakingwe for cross examination on what he deponed in his counter affidavit is not tenable, since that provision of the law cannot be applicable under the circumstances of this application as this is not a hearing of a suit. Moreover, I have also noted as correctly pointed out by Mr. Ngalo in his skeleton arguments, that the affidavit in support of this application it is stated that a copy of the draft written statement of defence is attached to the affidavit in support of this application to show that the same had already been prepared, but the same is not attached to the affidavit. All in all the explanations given by the applicant's are not consistent.

I have considered Mr. Mayenga's alternative argument that even if it is assumed that the applicant's advocates were negligent, then the position of the law is that a party to a case should not be punished for the negligence of his counsel. With due respect to Mr. Mayenga, the correct position of the law on this aspect can be drawn from the decisions of the Court of Appeal. In the case of **Yusufu Same** (supra), the court of appeal said the following :

"..... Generally speaking , an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time..."

In the case **Umoja Garage Vrs National Bank of Commerce , (1997) T.L.R. 109**, Hon. Kisanga, JA , as he then was, while making a decision in an application for extension of time to file a notice of appeal had this to say;

"...It seems plain to me in the instant case lack of diligence on part of counsel, or an oversight as Mr. Lukwaro calls it, would be even more devoid of merit as a plea for extension of time. In the result therefore , I am of the view that no sufficient cause has been disclosed for enlarging the time as prayed"

On the strength of the above cited decisions of the court of Appeal, It is my settled view that negligence of the applicant's advocate cannot be a good reason for granting an order for extension of time. In fact, in this application the applicant and his advocates were both negligent in handling the case. I have said earlier in this ruling that it took the applicant thirteen days to hand over the plaint to his counsel and the same was handed over after the alleged officer who was supposed to sign the written statement of defence had gone on leave.

I have taken into consideration Mr. Mayenga's submission that this application was filed on 15th October, 2019, that is, seven days from the last date of filing the written statement of defence. In my considered view, that alone does not relieve the applicant from his responsibility of showing good cause for delay in filling the written statement of defence within the time prescribed by the law, by accounting for each day of delay. For clarity

let me reproduce here under the provisions of Rule 20 (2) of High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019, which has been cited by the applicant in moving this court to grant this application.

*"20(2) 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.**"*

(Emphasis is mine)

The above quoted provision of the law states clearly that the application for extension of time has to be filed before the expiry of time for filing the defence or within seven days after the expiry of the prescribed time and the applicant has to show good cause for failure to file the defence in time.

I have also taken into consideration the authorities cited by both counsels and wish to point out here that the case of **Transport Equipment** (supra) that was cited by Mr. Mayenga cannot be applicable in this application since the circumstances of this application are different. In this application there is neither any issue of illegality which has been established by the applicant which this court can rely on to grant the application nor any court order which is subject to be corrected for being illegal.

As regards Mr. Mayenga's prayer that this court should invoke the application of the principle of overriding objective, with due respect to Mr. Mayenga, I am inclined to agree with Mr. Ngalo that this is not a fit case for the application of the principle of overriding objective since the principle of overriding objective neither relieves parties of their responsibilities to adhere to the procedural rules nor intended to protect inaction or negligence of the parties in handling their cases. The circumstances of this application are quite different from the scenario in the case **Gichere Magoiga** (Supra) in which the Court of Appeal applied the principal of overriding objective, since the same was not concern with any delay in filing documents in court.

From the foregoing, it is the finding of this court that the applicant has failed to adduce good cause for delay in filing the written statement of defence. In the upshot, this application is dismissed with costs.

Dated at Dar es Salaam this 17th day of March 2020.




B.K. PHILLIP

JUDGE