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C **TANZANIA HARBOURS AUTHORITY *v.* MOHAMED R MOHAMED**

D COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Makame, Ramadhani and Lubuva, JJ.A.)

E CIVIL APPEAL No. 80 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Bubeshi, J. dated 23 June 1999, in Civil Case No. 7 of 1999)

F *Civil Practice and Procedure – Applications – Application for extension of time to file a written statement of defence – Whether extension can be made at any time or is restricted to within 21 days after expiry of the time provided – Section 93 and Order VIII, rule 1(2) of the Civil Procedure Code 1966.*

G After the respondent had filed his plaint the appellant was ordered to file a Written Statement of Defence by 25 March 1997. The appellant delayed to file the Written Statement of Defence by 98 days. On the day it filed the Written Statement of Defence the appellant applied for an extension of time to file the Written Statement of Defence
H to the date it was filed. The respondent successfully raised a preliminary objection to that application and the Written Statement of Defence was struck out. The appellant appealed against that decision of the High Court and argued that Order VIII, rule 1(2) of the Civil Procedure Code 1966, which restricts the application for extension
I of time to within 21 days, is against the provisions of section 93 of the same Code.

Held: (i) While section 93 of the Civil Procedure Code 1966, imposes no restriction whatsoever in the court's discretion in extending time, the proviso to Order XIII, rule1(2) imposes limitation on the discretion of the Court to extend the time within which the defendant can file a Written Statement of Defence and requires an application to extend time must be made within 21 days of the expiry of the time set for the lodging of the Written Statement of Defence;

(ii) This Court has said in a number of decision that time would be extended if there is an illegality to be rectified; however, this Court has not said that time must be extended in every situation;

(iii) In this case the defence has been grossly negligent and surely cannot be heard now to claim that there is a point of law at stake;

(iv) This Court is duty-bound to see that Rules of Court are observed strictly and cannot aid any party who deliberately commits lapses because to do so, as in the present case, would defeat the whole reasoning behind amending the Civil Procedure Rules in 1994.

Appeal dismissed

Statutory provisions referred to:

(1) Civil Procedure Code 1966, Order VII, rule 1(2), Order XIII, rule 1(2)

(2) Civil Procedure Code section 93

Mr Mnzava, for the Appellant

Mr Magesa, for the Respondent

JUDGMENT

(Dated 6 April 2001)

Ramadhani, J.A.: The respondent filed a plaint on or about 13 February 1997 and the appellant was ordered to file a Written Statement of Defence (WSD) by 25 March 1997. That was not done and instead the Written Statement of Defence was filed on 2 July 1997, that is, after 98 days. On the same day of lodging the Written Statement of

Defence, the appellant applied for an extension of time to file the Written Statement of Defence to the date it was filed. The respondent raised a preliminary objection to that application and sought the Written Statement of Defence to be struck out. That preliminary objection was upheld by Bubeshi, J. and the Written Statement of Defence was struck out.

The learned judge said:

> What the defendant ought to have done was to ask for extension of time before filing their Written Statement of Defence. There is no legal provision which allows the Court to grant extension of time retrospectively for filing a Written Statement of Defence. The application is hereby refused and done so with costs.

The appellant has come with this appeal. Before this Court Mr Mnzava, learned counsel represented the appellant and Mr Magesa, learned advocate, appeared for the respondent. Mr Mnzava had four grounds of appeal. First, he said that the learned judge erred in holding that extension of time cannot be done retrospectively. The learned advocate argued that extension of time is always retrospective. Secondly, Mr Mnzava relied on section 93 of the Civil Procedure Code 1966 which provides for extension of time at any time. He submitted that Order VIII, rule 1(2) restricts the application for extension of time to be within 21 days and that this is against the provisions of section 93. Thirdly, the learned advocate contended that there is ample authority of this Court that if there is a point of law involved in a litigation then the Court would extend time and that it would not allow an illegality to persist. Lastly, Mr Mnzava submitted that the respondent is not going to be prejudiced in any way if time is going to be extended for filing the Written Statement of Defence.

In reply Mr Magesa supported the learned judge that there is no provision allowing retrospective extension of time for a Written Statement of Defence. The learned advocate pointed out that because of delays in the transaction of cases an amendment to the Civil Procedure Rules was done by GN 422/94 restricting the extension of time to

file a Written Statement of Defence to within 21 days of the expiry of the time. Mr Magesa submitted that if section 93 of the Civil Procedure Code is going to be enforced without the limitation of 21 days then Order VIII, rule 1(2) is rendered superfluous. He pointed out that this is the first case after that amendment of the rules. Mr Magesa submitted further that retrospective extension of time for filing Written Statement of Defence is only available if an application is made within 21 days of the expiry of the given time. The learned advocate argued that the authorities cited by his learned friend regarding merits of a case as a consideration of extending time are irrelevant. He pointed out that the appellant was grossly negligent in the handling of this matter.

With due respect to the learned judge we think that in most cases extension of time is retrospective. Maybe she meant that the law does not provide for the extension of time retrospectively after the expiry of 21 days as Mr Magesa submitted. Be that as it may, the question before us is whether extension can be made at any time as provided by section 93 or is restricted to within 21 days after the expiry of the provided time under Order VIII, rule 1(2).

Section 93 of the Civil Procedure Code provides:

> Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Admittedly, and as submitted by Mr Mnzava, that section imposes no restriction whatsoever in the court's discretion in extending time. However, the proviso to Order VIII, rule 1(2) prescribes as follows:

> Provided that the Court may, within twenty-one days of expiration of the prescribed period, grant an extension of time for presentation of the Written Statement of Defence on application by the defendant.

Here the limitation is imposed on the discretion of the Court to extend the time within which the defendant can file a Written Statement

of Defence. The application must be made within 21 days of the expiry of the time set for the lodging of the Written Statement of Defence. Before the amendment, that proviso read as follows:

> Provided that the Court may extend the period for the presentation of the Written Statement of Defence on application by the defendant or on receipt of a notice in writing of the plaintiff's consent to such extension.

Two things are glaring to the eye in the new proviso: one, an application has to be within 21 days of the expiry of the time for filing the Written Statement of Defence; and two, the consent of the plaintiff to an extension of time is dispensed with. Now, this is not without significance and we agree with Mr Magesa that this Court cannot ignore the new proviso. The appellant was late for about 187 days after the time given by the Court for filing the Written Statement of Defence. This, to say the least, is inordinate delay.

Admittedly, this Court has said in a number of decisions that time would be extended if there is an illegality to be rectified. However, this Court has not said that time must be extended in every situation. Each situation has to be looked at on its own merits. In this case the defence has been grossly negligent and surely cannot be heard now to claim that there is a point or law at stake. Besides the point of law given by Mr Mnzava is that the suit is time barred. The lower Court can deal with that matter *suo motu*.

The reason given by Mr Mnzava to explain the delay is that the Tanzania Legal Corporation was waiting for some records from the appellant before drafting the Written Statement of Defence. But if that was so, and if they were mindful of this proviso, they ought to have applied for an extension of time much earlier even before the expiry of the period within which a Written Statement of Defence was to be filed. But the appellant just did not bother so much so that the lower Court had this to say on 14 May 1997:

> Tanzania Harbours were served on 24 February 1997. They have never filed their Written Statement of Defence to-date nor is there any appearance.

This Court is duty-bound to see that Rules of Court are observed strictly and cannot aid any party who deliberately commits such lapses. To do so, in the present case, would defeat the whole reasoning behind amending the Civil Procedure Rules in 1994.

We do not think that it is necessary to go into the other issues raised by the appellant. What we have said above is enough to determine the appeal which we hereby dismiss with costs.