

TANZANIA / JUDGMENT

20120716 TZHC Dar es Salaam

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TZHCDECIDED
16 July 2012

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE Nd. 345
OF 2009 I EASTERNESRS COMPANY LIMITED PLAINTIFF I VERSUS I '
MICHAEL LU PIANA I..... 1ST DEFENDANT SAIDI M.
MAKUMULI I..... 2ND DEFENDANT II

RULING

B.R. MUTUNGI, J. The ruling is based on a very interesting scenario whereby each party is blaming the other for failure of filing the relevant pleadings on time. It all started with Mr. Malamsha the plaintiff's counsel who made a prayer for extension of time to file a defence on a counter-claim as it was filed long after they had filed their plaint. Professor Fimbo in response representing the defendant strongly objected to the prayer as they were never late in filing their written statement of defence. This is from the fact that they had served the plaintiffs with the written statement of defence on 14/4/2011 which contained a counter-claim. The plaintiffs filed their reply to the written statement of defence on 16/11/2011 which contained a defence to the counter-claim. It is this piece of document which was definitely out of time as it was filed well out of the 21 days required by law as envisaged by order VIII Rule 14 (i) of the Civil Procedure Code (RE: 2002). It follows therefore that the defendant is to be granted judgment on the counter-claim and Prof. Fimbo referred the court to the case of JOE M. RUGARABAMU Vrs. TANZANIA TEA BLENDERS (1990) TLR 24 the decision of the court of appeal. The learned counsel proceeded to enumerate the claims in the counter-claim as 2,000,000/= being arrears of rent and mense profit, specific damages for waist and general damages together with interest. It is upon the above submission that Mr. Malomsho learned counsel shifted the blame on the defendant that they had no locus to file their written statement of defence 2 ' .. ' ' .

- • I as they had not sought for leave. This is on the reason that I they had filed their case on 22/12/2009 whereas upon being duly notified the defendant filed their written statement of 1 I defence on 11/4/2011 well out of the prescribed time frame envisaged by law. It follows therefore as a matter of procedure the defendant was to first seek for leave to file the same out of time. The only remedy left for this court is to I strike out the written statement of defence and order the I matter to proceed Ex-parte. Professor Fimbo reacting Or) the submission made by Mr. Malamsha learned counsel that the prayer of late filing of the written statement of defence had once been made by the plaintiff and the plaintiff was

ordered to make a formal prayer which he forfeited as the formal application I by way of written submissions was never made and so the I plaintiff cannot be heard to make one at this point in time. In the alternative the plaint was filed on 23/12/2009 and summons to appear was issued on 8/2/2010 yet they were not served. 3 , In determining the above I have had to peruse through the file to as certain as to the sequence of events. Reading from the record it is apparent that the matter was placed before Chinguwile, J for the first time on 30/12/2009 whereby no party was in attendance until the 9th August, 2010 when Malamsha learned counsel appeared for the plaintiff. On 7/2/2012 the plaintiff's counsel informed the court that the defendant had been served on 4/2/2011 but was yet to file his written statement of defence. On 7th June, 2012 Proffesor Fi'mbo appeared in court for the first time representing the defendants and the case was mention.ed to another date. On 2/8/2011 the plaintiff's counsel made a prayer to the effect that the written statement of defence filed by the defendant should be ignored as the same had been filed out of time and the defendant's counsel who was present in court countered Othe submission by the learned counsel by submitting that they had just been served with a notice of mention but not the summons to appear. 4 "" The trial judge by then Chinguwile, J, as she was not feeling well adjourned the matter on orders that the submission made by the plaintiff's counsel should be made formally and proceeded to make a schedule for the submission; These were to start from 19/8/2011 for filing of the formal application up till the 9/9/2011 when the re- joinder would be filed. To the time I am writing this ruling the same was never submitted by the plaintiffs. In the sequence of events that I have elaborated it is clear that Mr. Malamsha. Plaintiff's counsel had indeed objected as to the filing of the written statement of defence and the same is now subject of an objection by the defendants in allowing the plaintiffs to file a r~ply to the written statement of defence and counter-claim. It is surprising that Mr. Malamsha did not proceed to file a formal objection as against the filing of the written statement of defence as was ordered by the court on 2/8/2011 instead has waited and made a different turn all together of praying to reply on the same written statement of defence he had earlier objected to. 5 It is my settled opinion had the plaintiff's counsel proceeded with his formal objection then the present situation facing the court would not have arisen. I would like to state in block and white that indeed as submitted by Professor Fimbo the plaintiff has forfeited his right to object as to the written statement of defence filed as being filed out of time but this by itself does not make it proper before the law. I have th_us moved suo motto in determining the same as it has already caught the attention of my eyes. If I may go a step backwards to 2 /8/2011 when the plaintiff was objecting as to the admission of the state_ment of d_efence, the plaintiff was admitting to have been served on 4/2/2011 of which I find was the position from the court's records but the written of statement of defence was filed on 11/4/2011 which was two months over and above the time the defendant's had been served. The written statement of defence was hopelessly out of time and in order to fil~ the same the defendants should have sought leave to file out of time. They never prayed for leave before the court to do the same. It follows therefore that the plaintiff's objection 6 . :t that . the written statement of defence should not be considered carries a lot of weight. As day follows night then even the objection that is . l being brought forward by the de:tendant

that the plaintiff should not be allowed to reply to/ the written statement of defence and consequently the counter-claim holds no water as from the offset there is no written statement of defence filed in court in the eyes of the law. It then follows that there can be no reply to the same before the court. In deed as laid down by the Civil Procedure Code one has to seek leave for extension of time to file the written statement of defence belatedly. I proceed to reject the one to be found on record. In conclusion as the defendant had been served but did not file his written statement of defence on time and no leave for extension was sought then the matter is to proceed Ex-Parte of which I hereby proceed to order accordingly. I make no orders as to costs. 7 I B.R. MUTUNGI JUDGE 16/7/2012 Read this day of 16/7/2012 in presence of Prof. Fimbo for 1st and 2nd defendants and in absence of Plaintiffs duly notified. B.R MUTUNGI JUDGE 16/7/2012 8

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