

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: SEHEL, J. A., KENTE, J.A And MASOUD, J.A.)**

**CIVIL APPEAL NO. 149 OF 2021**

**KENAFRIC INDUSTRIES LIMITED .....APPELLANT**

**VERSUS**

**LAKAIRO INVESTMENTS COMPANY LIMITED ..... RESPONDENT**

**(Appeal against the Ruling and Order of the High Court of Tanzania,**

**Commercial Division at Dar es Salaam**

**(Philip, J.)**

**dated the 12<sup>th</sup> day of November, 2020**

**in**

**Commercial Case No. 07 of 2019**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

5<sup>th</sup> February, & 6<sup>th</sup> March, 2024

**KENTE, J.A.:**

On 20<sup>th</sup> January, 2019 the appellant company which is represented in this appeal by Ms. Helena Ignas, learned advocate, instituted a suit in the Commercial Division of the High Court against the respondent accusing her with a breach of contract and seeking reliefs which are not in contention for the purposes of this appeal. Particularly, the appellant pleaded that, sometime in 2013, she entered into a contract with the respondent for the purchase and supply of various types of confectionery products but the respondent failed or refused to pay according to the terms of the contract.

On her part, the respondent company filed her defence on 1<sup>st</sup> March, 2019 disputing the existence of the alleged contract between her and the appellant. She also put in a counter-claim for USD 566,996.00 allegedly being the amount past due and owing for the advance payment she had made to the appellant for the supply of confectionery goods which the appellant had committed, but defaulted to supply.

After completion of the pleadings and, upon going through the mediation process which however, did not lead to a settlement, the matter was scheduled for a final pre-trial conference which was held on 18<sup>th</sup> February, 2020. Subsequently and as required by law, the appellant and respondent were each ordered to file their respective witness statements before the commencement of the trial.

In compliance with the trial court's order, on 3<sup>rd</sup> March, 2020 the appellant filed her witness statements. On her part, contrary to Rule 49 (2) of the High Court (Commercial Division) Procedure Rules (the Commercial Court Rules) which stipulates that the witness statements must be filed within fourteen days of the completion of the final pre-trial conference, the respondent did not file her witness statements until the 28<sup>th</sup> August, 2020. This prompted Ms. Ernestilla Bahati, learned advocate, who appeared for the appellant when the suit was

called for hearing, to urge the trial court to strike out the respondent's witness statements and dismiss her counter – claim.

The learned counsel also prayed for her client to be allowed to prove her claim ex-parte. The prayer by Ms. Bahati was premised on the grounds that, the respondent's witness statements were filed out of the prescribed period without seeking and obtaining an order for extension of time within which she could file them.

In reply, Mr. Leonard Joseph, the respondent's counsel, conceded that indeed, the respondent's witness statements were filed out of time without seeking and obtaining an order of the court enlarging time within which they could be filed. The learned counsel however, beseeched the trial judge to take a slightly more lenient view and allow the parties to prosecute their respective cases on merit. However, the trial Judge could not accept Mr. Joseph's plea for leniency.

In the second onslaught, the respondent's counsel sought to pick holes in the appellant's case. As if he did not know that two wrongs do not make a right, Mr. Joseph submitted that, even the appellant's witness statements were filed out of time because the fourteen days' period within which they should have been filed, started running on 18<sup>th</sup> February, 2020 when the order to file them was made by the trial

court. To that end, the learned counsel for the respondent contended that, by the 3<sup>rd</sup> March, 2020 when the appellant filed her witness statements, the time within which to file them had already expired by one day and likewise, no order for extension of time had been sought and obtained by the appellant.

In reply to the above-mentioned second limb of the respondent's argument, it was submitted on behalf of the appellant that, in terms of section 60 (1) (c) of the Interpretation of Laws Act (Chapter 1 of the Revised Laws), (hereinafter the Interpretation of Laws Act), the period of fourteen days expired on 4<sup>th</sup> March, 2020 while the witness statements were filed on 3<sup>rd</sup> March, 2020 hence within the period prescribed by law.

The trial judge having considered the matter, appears to have been impressed by the arguments marshalled by both counsel. She accordingly held that, the fourteen days' period for filing the witness statements begun to run on 18<sup>th</sup> February 2020 when the final pre-trial conference was completed and expired on 2<sup>nd</sup> March 2020 and not on 4<sup>th</sup> March, 2020 as contended by the appellant's counsel. As to the respondent's position, the learned trial Judge equally held that, her witness statements were filed out of time.

Apparently, taking a more robust and active approach to case management, the learned trial Judge went on striking out the statements filed by both parties and dismissing the appellant's suit together with the respondent's counter-claim with no order as to costs.

Being aggrieved with the decision of the trial court, the appellant filed a notice of appeal as required by law and later on, a memorandum of appeal advancing three grounds of appeal, thus:-

1. That, the trial court erred in law and in fact by holding that section 60 (1) (c) of the Interpretation of Laws Act (Cap. 1 RE 2019) is not applicable to the interpretation of Rule 49 (2) of the High Court (Commercial Division) Procedure Rules 2012 as amended by GN No. 107 of 2019.
2. That, the trial court erred in law and in fact by holding that the applicable provision in interpreting Rule 49 (2) of the Commercial Court Rules, is section 60 (1) (a) of the Interpretation of Laws Act Cap. 1 RE 2019 since Rule 49 (2) partly states "... of completion of final pre-trial conference ..." and not "... from the date of completion of the final pre-trial conference ...".
3. That, the trial court erred in law and in fact in holding that in counting the days within which the witness statements have

to be filed, the date of completion of the final pre-trial conference is included.

We have considered and appreciated the appellant's grounds of appeal. The question we are called upon to determine in this appeal is essentially one. That is whether or not, the trial Judge was correct to hold as she did that, the appellant's witness statements were filed out of time because the day when the order to file them was made, ought to be included in reckoning the fourteen days' period prescribed by Rule 49 (2) of the Commercial Court Rules. This in essence is the crux of the appellant's complaint against the decision of the trial court.

At the hearing of the appeal, Ms. Ignas placed reliance on the appellant's written submissions and made brief oral submissions expounding on them. The learned counsel appeared to place great importance on section 60 (1) (b) of the Interpretation of Laws Act and invited us to hold that, the 14 days' period within which the appellant's witness statements were to be filed, started running on 19<sup>th</sup> and not on 18<sup>th</sup> February, 2020 as erroneously held by the trial Judge.

For his part, Mr. Joseph countered the submissions made by Ms. Ignas by briefly arguing that, the applicable law is section 60 (1) (a) of the Interpretation of Laws Act which the trial Judge had, in his view,

correctly interpreted. He thus implored us to dismiss the appeal allegedly for lack of merit.

Clearly, a consideration of the above rival positions which were respectively taken by the learned counsel, raises an issue regarding the applicable law. Whereas Ms. Ignas relied on section 60 (1) (b) the Interpretation of Laws Act, Mr. Joseph was of the quite different view. The thrust of Mr. Joseph's argument was that, in terms of section 60 (1) (a) of the same Act, the learned trial Judge was on firm ground when she held that, in counting the fourteen days within which the witness statements were supposed to be filed, the date of completion of the pre-trial conference was to be included.

We have carefully gone through the record of the proceedings before the learned trial Judge that culminated in the ruling and order of 12<sup>th</sup> November, 2020 which is the subject of this appeal. We have as well analysed the arguments that both counsel presented before us with the ultimate aim of persuading us one way or the other.

In determining which law was applicable in the circumstances of this case, we have found it apposite to start by reproducing Rule 49 (2) of the Commercial Court Rules which reads as follows:

"49(2) The statements shall be filed within fourteen days of the completion of the final

pre-trial conference and served as directed by the court”.

On the other hand, section 60 (1) (a) and (b) of the Interpretation of Laws Act, provides as follows:

- (1) In computing time for the purposes of a written law -
  - (a) Where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period; .
  - (b) Where a period of time is expressed to be reckoned from, or after a specified day, that day shall not be included in the period.

Coming back to the present case, it must be plain that the fourteen days period within which the parties were supposed to file their respective witness statements, was computable from a specified day, that is, the 18<sup>th</sup> February, 2020 which was the day of completion of the final pre-trial conference. That being the case, we would agree with Mr. Joseph but for one thing.

It appears to us that, whereas the position of the law as stated in the case of **National Bank of Commerce Limited V. Partners Construction Company Limited**, Civil Appeal No. 34 of 2003 (unreported) remains settled, the problem in the instant case is much more connected with the wording of the trial court’s order rather than the law itself.



For ease of reference, the said order appearing at page 602 of the record of appeal, reads as follows:

*"The parties are ordered to file their witness statements within 14 days as from today as per the rules of this court".*

While the law appears to be settled as briefly alluded to herein above, the appellant might have interpreted it differently from what was implicitly ordered by the trial judge. This is more so in view of the complex and likely interplay between the two phrases deducible from the order of the trial Judge, thus:

*"The witness statements were to be filed either (a) within 14 days as from 18<sup>th</sup> February. 2020 or (b) within 14 days as per the rules of the Commercial Court ."*

With due respect to the trial Judge, we cannot find that the above paraphrased order was sufficiently plain, clear and unambiguous regarding the first day out of the 14 days within which the witness statement were supposed to be filed. Was it from, and inclusive of 18<sup>th</sup> February 2020 as argued by Mr. Joseph or simply within 14 days as per the rules of the Commercial Court?

We must also be emphatic in stating that, it is not open to this Court to cut the Gordian knot so as to say with any degree of certitude

what was the learned trial Judge's manifest intention given the convoluted order which she made regarding the actual day from which the 14 days within which the parties were supposed to file their respective witness statements would be computed. This may have been the reason the respondent's counsel kept quiet until he remembered, almost as an afterthought, to say, after he was caught flat-footed, that, the appellant's witness statements were equally filed out of time.

For these reasons, and, without recourse to some other arguments canvassed by the learned counsel which were, however, not relevant to the determination of this appeal, we find no reason to sustain the trial Judge's decision that the appellant's witness statements were filed out of time. We accordingly invoke our revisional jurisdiction in terms of section 4 (2) of the Appellate Jurisdiction Act Chapter 141 of the Realised Laws and proceed to quash and set aside the order of the trial court dated 1<sup>st</sup> February, 2020 together with the subsequent proceedings thereto including the ruling of the trial court which is the subject of this appeal.

We order for the matter to be remitted to the trial court for a trial to be conducted as expeditiously as possible. Although the respondent never cross-appealed to challenge the decision of the trial

court striking out her witness statements and dismissing her counter-claim, in view of what we have decided hereinabove, we direct for both parties to be given another opportunity to refile their respective witness statements. This means in effect that, the trial court shall avail the parties another fourteen days period within which to file witness statement before the commencement of hearing.

Each party shall bear own costs.

**DATED at DAR ES SALAAM this 5<sup>th</sup> day of March, 2024.**

B. M. A. SEHEL  
**JUSTICE OF JUSTICE**

P. M. KENTE  
**JUSTICE OF APPEAL**

B. S. MASOUD  
**JUSTICE OF APPEAL**

The Judgment delivered this 6<sup>th</sup> day of March, 2024 in the presence Ms. Hellena Ignas, learned counsel for the appellant, also holding brief for Mr. Sivlanus Joseph, learned counsel for the Respondent is hereby certified as a true copy of the original.



  
W. A. HAMZA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**