

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 15 OF 2023

ABID ALLY SYKES alias ABID ALLY KLEIST SYKES

T/A AFRINET SOLUTIONS PLAINTIFF

VERSUS

M-PESA LIMITED..... DEFENDANT

RULING

Date of last Order: 08/11/2023

Date of Ruling: 07/02/2024

Gonzi, J.;

The Plaintiff filed the present suit against the defendant claiming from the defendant a sum of TShs. 146,686,428/18 (Shillings One Hundred Forty Six Million, Six Hundred Eighty Six Thousand Four Hundred Twenty Eight shillings and Eighteen cents only) being entitlement as commission of 0.30% arising out of the business of recruiting merchants to transact through M-Pesa, commonly known as M-Pesa “lipa kwa simu” for the period of May 2021 up to and including November 2021 plus interest on that sum at the governing commercial bank rate of 17% from December 2021 to the date of Judgment plus costs of the suit and interest at the court rate of 7% from the date of

judgment until payment in full. The Defendant disputed the claim and duly filed a written statement of defence.

The pleadings were completed whereupon the parties conducted the first pretrial conference. Upon failure of mediation, the parties convened the final pretrial conference on 4th August 2023. The Court on that date directed both parties to file witness statements pursuant to the Rules. The Defendant filed its witness statements on 17th August 2023 whereas the Plaintiff filed his witness statements on 18th August 2023. On 21st August 2023, the Defendant's Counsel Gasper Nyika and Libent Rwazo raised and filed in Court *a preliminary objection that:*

"That to the extent that the Final Pre-Trial Conference was conducted on 4th August 2023 and the Court ordered the parties to file their witness statements in accordance with the Rules, the Witness Statement of one Abid Ally Sykes filed on 18th August 2023 is hopelessly time barred in terms of Rule 49(2) of the High Court (Commercial Division) Rules of Procedure, GN. No.250 of 2012 as amended by GN.No.107 of 2019."

The Defendant's Counsel therefore prayed that the witness statement by one Abid Ally Sykes, the Plaintiff, to be struck out and consequently the

commercial Case No. 15 of 2023 be dismissed with costs for want of prosecution.

The Court (Hon. Nangela, J.) directed that the preliminary objection be disposed of by way of written submissions and gave a schedule which both sides have complied with. The Defendant was represented by Mr. Gasper Nyika and Libent Rwazo learned advocates while the Plaintiff was represented by Mr. Joseph Rutabingwa, learned Advocate. I am thankful for the counsel for their useful submissions.

It was submitted for the Defendant in support of the preliminary objection that the preliminary objection seeks to strike out a witness statement of one Abid Ally Sykes for being filed out of time contrary to Rule 49(2) of the High Court Commercial Division Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019. The Counsel for the defendant argued that in terms of Rule 49(1) evidence in chief shall be given by a statement on oath or affirmation and that under Rule 49(2) the statement shall be filed within fourteen days of the completion of the final pre-trial conference and served as directed by the court. They submitted that the 14 days time is reckoned from and inclusive of the date of the final pre-trial conference. The learned counsel for the defendant relied on a number of decisions of this

court to the effect that the 14 days include the date of the final pretrial conference. These include **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others (2012); Akiba Commercial Bank PLC vs UAP Tanzania Company Limited (2018); Africarriers Limited versus Shirika la Usafiri Dar es Salaam Limited and another (2019) Kenafric Industries Limited versus Lakairo Investment Company limited (2018)**. The Defendant's counsel argued that as the Final Pretrial conference was held on 4th August 2023, the witness statements were supposed to have been filed by 17th August 2023 that is within 14 days. They argued that as the witness statement of the Plaintiff was filed on 18th August 2023, the same was filed outside the legally prescribed time and hence ought to be struck out.

The Defendant's counsel submitted that in **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others (2012)** it was held and insisted at page 14 thereof that:

"The witness statement filed by Mr. Ishengoma was filed out of time and hence in contravention of not only the Court order dated 29th March 2022 but also the provisions of Rule 49(2) of the High Court (Commercial Division) rules of Procedure, GN.No.

250 of 2012 as amended by GN No.107 of 2019. Consequently, there being a contravention of that mandatory rule, nothing can be relied on to rescue the situation but that the witness statement stands struck out and I hereby strike it out from the record."

The Defendant's counsel further submitted that the consequences of failure to file a witness statement of the Plaintiff and where there is no other witness statement to rely upon, is dismissal of the suit for want of prosecution in accordance with the holding in the Petrofuel case at pages 14 and 15 thereof where this Court held that:

"The various cases I relied on herein above are very clear. Since there is no other witness statement which can be relied on to substantiate the allegations in the Plaint, it means that the Plaintiff case has not been prosecuted... the present suit cannot stand anymore but be liable to dismissal."

Hence the Defendant invited the court to follow suit like in the Petrofuel case above by striking out the witness statement of the Plaintiff and then proceed to dismiss the case at hand with costs.

In his reply submissions, the learned Counsel for the Plaintiff Mr. Rutabingwa submitted that the witness statement of Mr. Abid Ally Sykes was not filed

outside the prescribed time and therefore that the preliminary objection is unfounded. He argued that the period of time to file the witness statement is not inclusive of the date when the final pretrial conference is held, rather it starts to run the next day. He argued that in terms of Section 60(1) (b) of the Interpretation of laws Act, Cap 1 of the Laws of Tanzania, 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. Further, he submitted that under section 19(1) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania, in computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded. Mr. Rutabingwa argued that the Commercial Court Rules 2012 is a subsidiary legislation and as such it cannot be interpreted to contradict and defeat the principal legislation. He relied on section 36 (1) of the Interpretation of Laws Act that a subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made or of any Act. Otherwise, the subsidiary legislation will be void to that extent. He cited the case of **Nkunze and another versus Republic** (2000) EA. 204 to support his argument that where a subsidiary legislation is inconsistent with an Act of parliament, the Act of parliament shall prevail.

Mr. Rutabingwa submitted further that the term “day” according to Black’s Law Dictionary is a clear day and not a fraction of a day. He submitted that 14 days cannot be computed inclusive of the 4th August 2023 when the final pretrial conference was held because by the time the parties left the court it was already 4:00pm that day. To count it as the first day would elongate a 24hours period up to 3:00pm the next day instead of midnight. Therefore, he argued that a day should be counted from past midnight of the particular date. Hence, he submitted that in this case a full day started on 5th August 2023 and not on 4th August 2023.

Mr. Rutabingwa submitted that in the case of **Pritan Kaur versus Srussell and sons Ltd** (1973) QB 336 to the effect that the words “after” and “within” used in statutes have the same meaning and that nothing turns on the difference of wording. The period is the same in either case. The first day is not counted. He further relied on the case of **Peter Mathew and 5 others versus Barrie Sedman and 2 others** (2019) EWCA GV 475 where the Court in England held that:

“There is a rather remarkable lack of authority on this point. Indeed, there has been no case which has directly decided the point under the Limitation Act

1939, but there has been a number of authorities dealing with other Acts in which the parliament has made statutory provision of somewhat similar character....the general rule in cases in which a period is fixed within which a person must act or take the consequence is that the day of the act or event from which the period runs should not be counted against him...."

Taking cue from the foregoing authorities, the learned counsel for the Plaintiff submitted that there is no way there can be a fraction of a day and that a day must be counted in full. He submitted that the same principles as enumerated from the English decisions above apply to Tanzania. He therefore argued that the witness statement of the Plaintiff was filed in time if the 14 days are counted as from the next day after the final pre-trial conference.

Finally Mr. Rutabingwa submitted that in the case of **Winfrida Lwasa versus the Managing Director Lancet Laboratories** (2019) it was held that the matter was referred to CMA within the prescribed 30 days of Rule 10(1) of the Mediation and Arbitration Rules. The Plaintiff's counsel, therefore, wound up his submissions by stressing his point that the witness statement of Abid Ally Sykes was filed within the 14 days as required by the

law. He prayed for dismissal of the preliminary objection and that the suit should proceed to hearing on merits.

In rejoinder, the Defendant's counsel insisted and reiterated their arguments in their submissions in chief. They added that in this case the Commercial Court Rules is a specific law and the Law of limitation Act is a general law and that the specific law should prevail. They relied on the case of **James Sendama versus Republic** (2013) decided by the Court of Appeal of Tanzania. They argued that the Commercial Court rules have already been interpreted by this very court and hence there is no lacunae as to warrant this court resorting to foreign common law decisions cited by the Plaintiff's counsel.

In my view, the issues in this case are very narrow and straightforward. The pertinent question is whether the witness statement of one Abid Ally Sykes was filed in court within the prescribed time under the Commercial Court Rules? If the answer is in the negative, what are the consequences of the only witness statement of the Plaintiff being filed outside the prescribed time?

There is no doubt that the Final Pre-trial conference was held on 4th August 2023 and on that date the Court ordered the parties to file witness statements pursuant to the Rules. The Defendant filed her witness statement on 17th August 2023 and the Plaintiff filed his witness statement on 18th August 2023. The Defendant is alleging that the witness statement of the Plaintiff was filed outside the legally prescribed time under the Commercial court Rule 49(1) and (2). So, the question is whether or not the witness statement of the Plaintiff was filed within the prescribed time under the provisions of the Commercial Court Rules? The parties are divided. The Defendant's counsel are of the view that the Rules were violated while the Plaintiff's counsel is of the view that the Rules were duly complied with. What do the Rules provide?

Rule 49 of the Commercial Court Rules GN.No.250 of 2012 as amended by GN.No.107 of 2019 provides that:

"49(1) In any proceedings commenced by Plaintiff, evidence in chief shall be given by a Statement on oath or affirmation.

(2) The statement shall be filed within 14 days of the completion of the final Pre-trial conference and served as directed by the court. Provided that the

obligation of a party to serve a witness statement shall be independent of the other parties' obligation to file and serve his respective statement."

The slim issue for determination in the present case is whether or not the day of the final pretrial conference namely the 4th August 2023 itself is also included in counting the 14 days within which the Witness statement ought to have been filed. If it is included, then obviously the witness statement of the Plaintiff in this case is filed out of time by 1 day. If the day of final pretrial conference is not included in counting the 14 days, then the witness statement of the Plaintiff was filed within the 14 days prescribed time. On one hand, I have received submissions by the Defendant's counsel that the day of final pretrial conference is included in computing the 14 days. On the other hand, I have received submissions by the Plaintiff's counsel to the effect that the day of the final pretrial conference itself should be excluded when computing the 14 days period under Rule 49(2) of the Commercial Court Rules, 2012.

To determine whether or not the day of final pretrial conference is included in counting the 14 days within which the witness statement ought to have been filed in court, one has to look at the language used in phrasing the

relevant rule. Rule 49(2) of the Commercial Court Rules provides that “the statement shall be filed within 14 days of the completion of the final Pre-trial conference”. In my view, the key words here are “of the completion of the final pretrial conference.”

The said words under Rule 49(2) quoted above have been interpreted by this Court in numerous cases including the case of **Akiba Commercial Bank** where Hon. Magoiga, J., had the following to say:

"The above Rule is literally loud and clear... to my understanding and in my considered opinion, the phrase "of completion of the final pre-trial conference" used in the Rule, is not synonymous to "from". The use of the phrase "of the completion" used in the Rule, means the day which the act was done has to be the starting point to count and, as such is part of the day which the subsequent act has to be done".

I find no reason to depart from the above interpretation of the rule. I accept it as the correct interpretation thereof and I will stand by it. I am not convinced to accept the argument given by the Plaintiff's Counsel that the rule should be interpreted in line with the provision of section 60(1)(b) of the Interpretation of Laws Act as to exclude the day of the final pre-trial

conference. The Plaintiff's Counsel argued that under section 60(1)(b) of the Interpretation of Laws Act, Cap 1 of the Laws of Tanzania, 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. I reproduce section 60(1) (b) of the Interpretation of Laws Act for ease of analysing the argument by the learned advocate for the Plaintiff.

60.-(1) In computing time for the purposes of a written law-

(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;

It is clear that the words used under Rule 49(2) of the Commercial Court Rules, 2012 do not fit under section 60(1)(b) of the Interpretation of Laws Act, Cap 1 because there is no use of the words "from" or "after" in the crafting of Rule 49(2). Hence, any attempt by the Plaintiff's counsel to rely on section 60(1)(b) of the Interpretation of Laws Act, is futile simply because the phrasing of Rule 49(2) of the Commercial Court Rules does not bring that Rule within the ambit of section 60(1)(b) of the Interpretation of Laws Act, Cap 1 of the Laws of Tanzania. Any attempt to apply the meaning of the words "from" and "after" which are under section 60(1)(b) of the Interpretation of Laws Act, is unjustified. That section does not make

reference to or interpret the word "of" which is the relevant operative word in Rule 49(2) of the Commercial Court Rules. That is why I decline the invitation by the learned Counsel for the Plaintiff to interpret Rule 49(2) of the Commercial Court Rules in line with section 60(1)(b) of the Interpretation of Laws Act, Cap 1 of the Laws of Tanzania.

I have also keenly considered the argument by the learned Plaintiff's counsel that the court be convinced to rely on the precedents from England in an attempt to define Rule 49(2) of the Commercial Court Rules, 2012. I see no reason to resort to the aid of common law while there is no lacunae in the laws of Tanzania in this aspect. As shown herein, there is a string of consistent persuasive precedents by this very court specifically interpreting the very provision of Rule 49(2) of the Commercial Court Rules. These include the decision in **Akiba Commercial Bank** (supra) as per Hon. Magoiga, J., and **Petrofuel case** (supra) as per Hon. Nangela, J., where the local content of the relevant law in the present issues is adequate and thus I see no reason to resort to foreign case law in interpreting the local statutory provision. Actually, the foreign precedents cited by Mr. Rutabingwa, learned advocate for the Plaintiff, appear to have dealt with the law of limitation in general by making reference to the Law of Limitation Act of

England. The drafters of the Commercial Court Rules intended a departure from the general law and that is why they enacted the Commercial Court Rules in 2012 although the Law of Limitation Act Cap 89 was in existence. They did not amend it to add new provisions. They enacted a specific law to specifically deal with the exigencies of the commercial disputes in the Commercial Division of the High Court of Tanzania. Prudently, the interpretation of this specific law cannot be done with reference to the general law from which a departure was specifically intended. As regards the cited Tanzanian case law in respect of time limits to file labour disputes at CMA, I hold the view that the same is not relevant to the case at hand as it did not specifically deal with the Commercial Court Rules.

Mr. Rutabingwa has argued that the provision of Rule 49(2) is in conflict with the Interpretation of Laws Act and the Law of Limitation Act and hence void. Logically, this argument in itself, is an acknowledgement of or a concession to the fact that the true and correct interpretation of Rule 49(2) of the Commercial Court Rules includes the day that the event happened when computing the 14 days. That is why the Plaintiff has made an argument that it goes contrary to what is prescribed in the Interpretation of Laws Act and the Law of Limitation Act which, under the provisions cited by the Plaintiff,

prescribe otherwise. Whereas this might not be the suitable forum to determine the issue of illegality of the rule, I must say that, sincerely, I find no conflict between the Rule 49(2) of the Commercial Court Rules on one hand and section 60(1) (b) of Interpretation of Laws Act or section 19(1) of the Law of Limitation Act, on the other hand.

The truth is that the wording of Rule 49(2) of the Commercial Court Rules is not captured by section 60(1)(b) of the Interpretation of Laws Act. The Interpretation of Laws Act is an interpretational aid to other laws. In this case the interpretation of the word "of" used in Rule 49(2) of Commercial Court Rules, is different from the interpretation of the words "from" or "after" which are used in section 60(1)(b) of the Interpretation of Laws Act. This is not a conflict between the two laws. The fact that the two provisions of the law do not align, brings a clear conclusion that the wording of Rule 49(b) of the Commercial Court Rules 2012 does not entail the meaning ascribed to by the Plaintiff's counsel in reliance of section 60(1) of the Interpretation of Laws Act.

The Plaintiff's counsel has submitted that Rule 49(b) of the Commercial Court Rules conflicts with section 19(1) of the Law of limitation Act Cap 89 of the

Laws of Tanzania which excludes the day of happening of the event in computation of time.

Section 19(1) of the Law of Limitation Act provides:

19.-(1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.

After due consideration, I find that the argument by the Plaintiff's counsel does not hold water. In the first place, the Law of Limitation Act does not apply to regulate the time limit for filing witness statements. It regulates suits, appeals and applications as shown in the schedule thereto. Secondly, even if the Law of Limitation Act were to apply in the issue of witness statements, an issue for which there is a specific law namely the Rule 49(2) of the Commercial Court Rules, yet section 43(f) and section 46 of the Law of Limitation Act Cap 89 give precedence to the specific law over the Law of Limitation Act. I reproduce sections 43(f) and 46 of the Law of Limitation

Act: ***43. This Act shall not apply to-***

(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46.

46. Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law,

and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act.

It is clear therefore that where there is a special written law prescribing limitation of time, the Law of Limitation Act does not apply. This is in terms of section 43(f) of the Law of limitation Act. Even where it applies, then it applies only to the extent of adopting the period of limitation thereby prescribed by that other written law as if it had been prescribed by the Law of Limitation Act itself. Therefore, there is no possibility that a written statutory provision that prescribes a time limit, be it subsidiary or Principal, can become incompatible with the Law of Limitation Act Cap 89 of the Laws of Tanzania, leave alone being invalid or void, as argued by the Plaintiff's counsel. Therefore, I repeat for the sake of emphasis, that the Law of Limitation Act does not apply to the time limits of filing witness statements. Even if it were to apply it wouldn't contradict with nor prevail over the specific Rules of the Commercial Court. Therefore, any attempt by the Plaintiff to adopt the Law of Limitation Act in an attempt to bring a contradiction with Rule 49(b) of the Commercial Court Rules, 2012, and thereby salvage a witness statement unilaterally filed out of time, is futile. I reject that argument as it does not hold water. I accept the submissions by the

Defendant's Counsel Gasper Nyika and Libent Rwazo who argued in their rejoinder submissions that the Law of Limitation Act is a general law while the Commercial Court Rules are a specific law regulating procedure in the commercial Court. The rule is that specific law prevails.

The Plaintiff's Counsel has argued that if, in this case, the day of Final Pretrial Conference is taken into account as inclusive in computing the 14 days period within which to file the witness statement, then there will, in effect, be a fraction of a day as the final Pre trial Conference was concluded on 4th August 2023 at around 3:00pm. The Plaintiff's counsel has argued that to have a full day, the counting should start when a new day starts just past midnight. This means that the Plaintiff's counsel would want to have the 5th August 2023 as the starting day to count the 14 days within which to file the witness statement. The Plaintiff's Counsel has attempted to substantiate his arguments by relying on definition of a day in Black's Law Dictionary. On my part I find this line of argument by the Plaintiff's counsel flouted and defeats logic. Under Rule 49(2) of the Commercial Court Rules, the 14 days within which to file witness statement are counted in relation to and connection with an event in the case calendar, in this case in relation to the conducting of the Final Pretrial Conference. It is after the final pretrial conference is

conducted and issues are framed that parties are given 14 days to file their evidence in chief by way of witness statements. The final pretrial conference actually happened on 4th August 2023. The learned counsel for the Plaintiff wants the 14 days to start running on 5th August 2023. I have asked myself, if that argument were to be accepted, it would be in relation to what event in the court case calendar that happened on 5th August 2023? The case file and proceedings show that no event took place on 5th August 2023 in the schedule of events in relation to the present suit. So the pertinent question would be the 14 days are counted from 5th August 2023 in relation to what event in the civil case justice process that occurred on that date to which the time could be reckoned to? I find no plausible answer and I reject that argument.

All said and done, I therefore find that the witness statement of Abid Ally Sykes, the Plaintiff in this case was filed outside the statutorily prescribed time. The drafters of the Commercial Court Rules, *inter alia*, intended expediency in the administration of justice in the Commercial Court. The Rules were meant to be complied with, otherwise there wouldn't have been the need to have them. The Commercial Court Rules specifically stated that they were intended to be applied with leniency only during the first year of

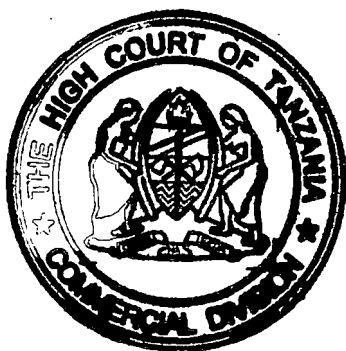
their promulgation. This underscores the intention to have the rules strictly complied with. The time limits set by the Rules, in particular, should be respected. I therefore subscribe to the holding by Hon. Nangela, J., in the case of **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others** delivered on 15th May 2022 where this Court held that:

"it is from the totality of the above discussion I find that, the witness statement filed by Mr. Ishengoma was filed out of time and, hence in contravention of not only the Court Order dated 29th March 2022 but also the provisions of Rule 49(2) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019. Consequently, there being a contravention of that mandatory Rule, nothing can be relied on to rescue the situation but that, the witness statement stands to be struck out and I hereby strike it out from the record."

In the present case therefore, I am left with no option other than to strike out the witness statement of Abid Ally Sykes, the Plaintiff herein, filed on 18th August 2023, for being unilaterally and illegally filed out of the prescribed time. I hereby strike it out from the record.

Having struck out the only witness statement for the plaintiff in this case, the next question is what happens to the case at hand? This is automatic and predictable. Failure by the Plaintiff to file a witness statement tantamount to failure to prosecute his case when it came for hearing of his evidence in chief. The Plaintiff's case in effect is liable for dismissal for want of prosecution. It must be remembered that the High Court Commercial Division Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019 in terms of Rule 49(1) thereof, require that evidence in chief shall be given by a statement on oath or affirmation. The Plaintiff had only one witness statement and the same was filed outside the prescribed time without prior seeking and obtaining an enlargement of time to do so. This is a violation of the law and the order given by the court on 4th August 2023. The Plaintiff's case has therefore not been prosecuted. The present suit cannot stand anymore but be liable to dismissal. I hereby dismiss the suit with costs.

It is so ordered.




A. H. GONZI
JUDGE

07/02/2024

Ruling is delivered in Court this 7th day of February 2024 in the presence of Mr. Rutabingwa, learned Advocate for the Plaintiff and Mr. Libent Rwazo assisted by Mr. Idrissa Juma learned Advocates for the Defendant.

A handwritten signature in black ink, appearing to read "A.H. Gonzi", written over the printed name.

A.H.GONZI

JUDGE

07/02/2024