

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 98 OF 2023

ZUNA PRINTING SOLUTIONS LIMITED..... PLAINTIFF

VERSUS

INK WORLD LIMITED.....1ST DEFENDANT

VENKADESH KUMAR PADMANABAN.....2ND DEFENDANT

RULING

Date of last order:19/02/2024

Date of Ruling: 23/04/2024

GONZI, J.

On 5th December 2023, Final Pretrial Conference was conducted in respect of this case whereby after engaging the learned counsel for the Plaintiff and the Defendants, the court framed 4 issues for trial of the case. At the end of the Final Pretrial Conference, the Court made two subsequent Orders:

- 1. Witness Statements be filed by 19th December 2023.**
- 2. Hearing of the case on 19th and 20th February 2024 at 10:00 am.**

On 19th February 2024 when the case was called for hearing as scheduled, the Plaintiff appeared through Dr. Aloys Rugazia, learned advocate and the Defendants appeared through Mr. Mozart Hyera, learned advocate. At the outset, before hearing of the cases could start, Dr. Aloys Rugazia, learned advocate for Plaintiff, raised two objections with respect to the Witness Statements of the 2 Defendants' witnesses. He stated that on 5th December 2023, the Court had ordered parties to file their respective Witness Statements by 19th December, 2023 but that the Defendants had filed their Witness Statements in Court on 27th December, 2023 which was way outside the timeframe as ordered by the court and that they did so without seeking and obtaining prior leave of the court for extension of time to do so. He submitted that the Defendants' Witness Statements being filed outside the time frame as ordered by the Court, ought to be struck out and the Plaintiff should be granted an opportunity to prove its case exparte. He relied on the decision in **Equity for Tanzania Limited versus Feme Mining Equipment and Agriculture Limited**, Misc. Civil application No. 99/2020 which at page 6 thereof the Court insisted on the duty for parties and counsel to obey court orders. He also submitted that Rule 21(a) of Order VIII of the

Civil Procedure Code, applies to the scenario and the Defendants should be taken as having failed to defend the suit against them.

The second objection from Dr. Aloys Rugazia was that the witness Statements by the 2 witnesses for the Defendants were not signed by the attesting Officer. He argued that in effect there are no witness statements for the Defendants before the Court. He argued that the purported witness statements for the defendants were not made under oath. He argued further that the witness statements for the defendants are marred with another irregularity in that they are vague as to the enabling provision of the law under which they are made. That is the witness statements merely cite Rule 48(2) without saying of which law. He relied on the same case of Equity for Tanzania (*supra*) to argue that the defendants' counsel should have exercised diligence.

Mr. Mozart Hyera, learned advocate for the Defendants, on his part, submitted in reply that the last order of this court on 5th December 2023 was that the Plaintiff was supposed to file the Plaintiff's Witness Statements by 19th December 2023 and that the Defendants, on the other hand, were ordered to file their witness statement on 20th December 2023. Mr. Hyera submitted that the Defendants had adhered to the Order of the Court

whereby the Defendants filed their witness statement online in the E-Case Management System on 20th December 2023 and that thereafter they brought to court the hard copies of the witness statements for physical filing. He submitted that the Honourable Registrar of this Court directed the Defendants that their hard copies of witness statements would be filed manually after the electronically filed witness statements were admitted in the system. He submitted further that the Electronic Case Management System admitted their witness statements filed online on 21st December 2023 and that online filing event was given reference No.20230814000519886. Mr. Hyera, Learned Advocate for the Defendants produced in Court a print-out of E-case management System Dashboard showing the entry with reference No.20230814000519886 evidencing that the Defendants had filed their witness statement online. Mr.Hyera submitted further that, thereafter, the defendants brought their hard copies of witness statements for physical filing in court. The Defendants' learned counsel Mr. Mozart Hyera, submitted that when the defendants brought their hard copies of witness statements for filing, they were supposed to be issued with control numbers by the system. he submitted that, however, the control numbers were not available in the system. He submitted that the Accountant and the

IT personnel could not provide the Defendants with control numbers on 22nd December 2023 which was Friday and that the next two days namely 23rd and 24th December 2023 were Saturday and Sunday respectively. On Monday 25th December 2023, it was Christmas Holiday and Tuesday the 26th December 2023 was Boxing Day holiday. Therefore, Mr. Hyera argued, the Defendants came back to court on 27th December 2023 where they met the Assistant Registrar of this Court, who, upon their requesting him, waived the need for the defendants to have control numbers. Thus, Mr. Hyera, learned counsel for the Defendants, submitted that the defendants managed to file their Witness Statements manually on 27th December 2023 and served the Plaintiff who has raised issues on it because 27th December 2023 is the physical filing date that appears in the witness statements. He submitted that the online records of the electronically filed witness statements, which he had produced in court, show that there is a pending bill. Therefore, the Defendant's counsel submitted that the delay was occasioned by problems in the electronic case management system and that in the interest of justice, their witness statements be accepted as the delay was not due to their wrongdoing.

On the second objection that there is no signature of the attesting officer in the witness statements and that there is no mention of the law under which the statements were made, Mr. Hyera, Learned Advocate, submitted that the witness statements for the 1st and 2nd defendants were attested and signed by Mr. Augustine Mwanyigu, Advocate on 18th December 2023 collectively. He submitted that the copy of witness statement served upon the Plaintiff might be the only one not signed. He submitted that even if the one in court file is not signed as well, that omission does not affect the merits of the case and that it can be cured under the Overriding Objective principle. On the allegation of non-citation of the enabling law, Mr. Hyera, Learned Advocate, submitted that the document is a Witness Statement made under the Commercial Court Rules. Hence, even if the name of the Rules is not written, the mention of Rule 48(2) was enough to underscore that particularity. He argued that the omission to name the full name of the Law under which the witness statements were made, does not remove the evidential weight in the evidence of the 1st and 2nd Defendants. He relied on Overriding Objective principle to the effect that the error is trivial and does not cause any injustice.

Dr. Rugazia, Learned Advocate for the Plaintiff, made rejoinder submissions that the Online record print-out of the E-Case Management System

Dashboard, showing the Defendants' filing of witness statements online, as produced in Court by the learned counsel for the Defendants, is correct and that it bears the date and time of filing on it and that it reads that the Witness Statements it relates to were actually filed online on 21st December 2023; which still was outside the prescribed time for filing the Witness Statement on 19th December 2023. He submitted that, the court order did not differentiate the dates of filing Witness Statements for plaintiff and the Defendants as under Rule 25 of the Commercial Court Rules, both parties were supposed to have filed their Witness Statements in court on the same date. Dr. Rugazia argued further that it defies logic that the 1st Defendant went through all the explained hurdles in his attempt to file the witness statement in Court online and manually and yet there is no corroborating evidence from the officials concerned. He submitted that the Plaintiff on the other hand managed to file her witness statement on time online and physically during that same time but without experiencing any such hurdles. Dr. Rugazia submitted that the arguments made by the Defendants' counsel on facing the difficulties with the electronic filing system and control numbers and his meeting the Registrar, Accountant, IT personnel and the Deputy Registrar, if true, would have formed a good basis for the defendants to

apply for extension of time to file the witness statements. He argued that those facts ought to have been brought by way of an affidavit rather than being brought as unsubstantiated statements from the bar.

Further, Dr. Rugazia, learned counsel for the Plaintiff, argued that the Overriding Objective principle cannot be used to knock down the salutary principles of procedural laws because that would bring chaos in the Administration of Justice and Court process; and that there are many Court decisions to that effect. He submitted that the enabling laws are supposed to be included in the Witness Statement. He argued that the witness statements are prescribed documents, and the authors thereof were mindful of the need to show the enabling law that is why the prescribed form has a portion showing the enabling law. Dr. Rugazia submitted that if it is only the copy served upon the Plaintiff which is not signed by the Attesting Officer, then it means that the Plaintiff has been served with wrong documents by the Defendants' counsel other than the real ones filed in court. He submitted that the Witness Statements served upon the plaintiff, at page 5 are not signed by the attesting officer. He reasoned that being served with a different version of documents other than the ones actually filed in Court,

causes injustice to the plaintiff and it is a violation of the rules which require parties to serve each other with the documents they file in Court.

Dr. Rugazia submitted that the Court be pleased to make a Ruling that the witness statements by the 1st and 2nd defendants are improperly before the court and that they should be struck out and the court should allow the plaintiff an avenue to prove his case *exparte*.

In determining the objection raised by Dr. Aloys Rugazia, learned counsel for the Plaintiff I looked at the Court records first.

Two Witness Statements have been filed by the 1st and 2nd Defendants. The Witness Statement of the 1st Defendant is made by one Ally Karim Ladha. It is dated and signed by the respective witness on 18th December 2023. It is attested and signed by the attesting Officer. This Witness Statement was filed physically in court on 27th December 2023. It bears the words "Rule 48(2)" as the Law under which it was made.

The second Witness statement is filed for the 2nd Defendant. It is made by one Venkandesh Kumar Padmanaban. It is dated and signed by the respective witness on 18th December 2023. It was physically filed in court on 27th December 2023. The Witness Statement was attested and signed by the

Attesting Officer. It bears no name of the law or provision of the rules under which it was made.

The first question is whether or not the two Witness Statements for the 1st and 2nd Defendants were filed in Court within the time frame as ordered by the Court? The two learned counsel have parted ways on this. Dr. Aloys Rugazia, learned counsel for the Plaintiff is of the view that the Witness Statements were filed outside the prescribed time while Mr. Mozart Hyera is of the view that the two Witness Statements were filed on time and in compliance with the Court Order. I looked at the court records, again, to see what was the order of the court in relation to filing of the Witness Statements? I reproduce the Order issued by this Court on 5th December, 2019 in the presence of learned counsel for both parties, verbatim:

"1. Witness Statements be filed by 19th December 2023.

2. Hearing of the case on 19th and 20th February 2024 at 10:00 am."

Mr. Mozart Hyera, learned counsel for the Defendants submitted that the Order of the Court on 5th December 2023, directed that the Plaintiff should have filed her Witness Statements by 19th December, 2023 and that the

Defendants should have filed their Witness Statements by 20th December, 2023. Clearly the Court records do not support what Mr. Mozart Hyera argued. The Court's order required both sides to file their witness statements by 19th December 2023. Like it was argued by Dr. Aloys Rugazia, Witness Statements are filed in court by both sides on the same date, unless the court grants one party, upon application, an extension of time. I asked myself as between the records of the Court as borne out in the file and the records or memories of the parties and or their Counsel which should prevail? In **Security Group (T) Limited versus Steven Gerson Kizinga (As An Administrator of the Estate of the late Mashaka A. Setebe, Consolidated** Civil Appeal No. 386 of 2020 & 50 of 2021, decided by the Court of Appeal of Tanzania at Mbeya, the principle was reiterated at page 10 the Court of Appeal decision that:

Indeed, this being a record of the proceedings of the CMA, it cannot be easily impeached as it is presumed to be authentic as to what transpired before it.

I am settled that the record of the Court prevails over the record or memory of a party to the case or his counsel. The correct position in this case therefore is the one as argued by Dr. Aloys Rugazia, Learned advocate for

the Plaintiff. The Court specifically directed both parties to file their Witness Statements by 19th December 2023. There was no order directing the Defendants to file their Witness Statements separately or for the Defendants to file their Witness Statements on 20th December, 2023-that is one day later after the Plaintiff, as stated by the Defendants' learned counsel.

Mr. Hyera, learned advocate for the Defendants attempted to salvage the situation by giving a long narrative attributing the Defendants' failure to file their Witness Statements on 19th December 2023 to systemic hurdles the Defendants faced with the e-filing system. While the narratives by Mr. Hyera, learned advocate for the Defendants would have been impressive and somehow convincing if they were relevant and properly substantiated in Court, unfortunately the narrative is set on the wrong premise and the whole argument has started on the wrong footing. For the arguments and narrative of Mr. Hyera, Learned Advocate for the defendants, to be relevant, it presupposes that the Court order of 5th December, 2023 had directed the Defendants to file their Witness Statements on another date after 19th December 2023. But as shown above, the court records show otherwise and the court records are sanctimonious. In my view, the narrations by Mr. Hyera, Learned Advocate for the Defendants, would have been relevant if

the Defendants had actually filed online their witness statements by 19th December 2023 as ordered by the Court and had thereafter delayed to submit the hard copies thereof for physical filing. The court might have considered the alleged hurdles encountered in the electronic filing system. But that is not the case. The Court Order required both parties to file their Witness Statements by 19th December 2023. There is no explanation as to why the Defendants did not file the same on 19th December 2023 as ordered. There is no explanation why the Defendants waited until 21st December, to file the Witness Statements electronically. There is no explanation as to why the Defendants, having missed the deadline ordered by the Court, did not apply for extension of time, if they had a justifiable cause, for delay to file their Witness Statements in Court. I find that the Defendants did not take seriously the Court Order directing them to file their Witness Statements by 19th December, 2023.

In the case of **CRDB BANK PLC VERSUS HERI MICROFINANCE LIMITED & CASSIANO LUCAS KAEGELE**, Civil Appeal No. 20 of 2020, delivered the Court of Appeal of Tanzania at Sumbawanga held at page 15 of the Ruling insisting on the need for court orders to be respected thus:

It is well settled that orders of the Court are to be respected and implemented. In Karori Chogoro v. Waitihache Menengo, Civil Appeal No. 164 of 2018 (unreported) the Court held: "Court orders should be respected and complied with..." The same sentiment was expressed in Olam Tanzania Limited v. Halawa Kwilabya, Civil Appeal No. 17 of 1999 (Unreported), where we stated: " ... Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them... Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos. The above being the position, it is thus not expected for a party not to comply with an Order of the Court. In the present case, the order of the Court which we reproduced earlier, did not give room for the appellant to remove or add anything in the notice of appeal apart from amending the title of the case. In removing the names of the other former defendants in the amended notice of appeal without leave was essentially non-compliance with the said order. The issue that arises, is whether the

appellant's failure to fully comply with the same is fatal and renders the appeal incompetent as prayed by the counsel for the respondents.

Therefore, it was incumbent upon the Defendants to comply with the Court Order of 5th December, 2023 that directed both parties to the case to file their respective witness Statements by 19th December, 2023. The Defendants might not have grasped the ramifications of their omission. Failure to file a Witness Statement on time is equated to failure by a party to prosecute his case. It attracts the same consequences like a party not appearing in court, without without just cause, when the case is called for hearing of his evidence in chief.

The fate of a Witness Statement filed out of time without a prior extension of time by the court is well known and is prescribed in the Commercial Court Rules. Whereas Dr. Aloys Rugazia, learned Counsel for the Plaintiff invited the Court to invoke the provisions of Order VIII Rule 21(a) of the Civil Procedure Code, it should be noted that the procedures of this Division of the High Court are prescribed in the Commercial Court Rules, 2012 as amended, and that the Civil Procedure Code will be resorted to where the Rules are silent. I can just sum up the consequences which visit the Witness

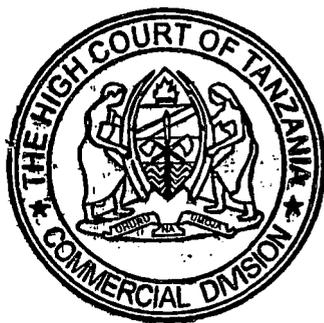
Statements of the 1st and 2nd Defendants, filed unilaterally out of time, by quoting with approval the holding by Hon. Nangela, J., sitting in this Court in the case of **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others** delivered on 15th May 2022 where this Court held that:

“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 case at hand, I find that the two and the only Witness Statements for the 1st and 2nd Defendants Ally Karim Ladha and Venkandesh Kumar Padmanaban, respectively, were unilaterally filed in court out of time in contravention of the Order of the Court and the mandatory Rules of the Commercial Court. Therefore, I am left with no option other than to strike out the witness statements. That being the case, I do hereby strike out the

two Witness Statements of the Defendants from the record. As the two witness statements have been struck out of the record, I find that determination of the other objections to the Defendants' Witness Statements as raised by Dr. Aloys Rugazia, Learned Advocate for the Plaintiff, is of no practical use as the impugned Witness Statements are no longer part of the record of the court.

Having struck out the only witness statements for the Defendants in this case, the next question is what happens to the case at hand? This is automatic and predictable. Failure by the Defendants to file their witness statements tantamount to failure to prosecute their case when it came for hearing of their evidence in chief. Dr. Rugazia Learned Advocate for the Plaintiff has prayed for the Plaintiff to be granted an opportunity to make *exparte* proof of his case. That is the position. I therefore order the case to proceed *exparte* against the Defendants and according to the applicable rules of procedure under the Commercial Court Rules. It is so ordered.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

A. H. GONZI

JUDGE

23/04/2024

Ruling is delivered in Court this 23rd day of April, 2024 in the presence of Ms. Valentina Charles learned counsel for the Plaintiff and Mr. Moses Hyera, learned counsel for the Defendants.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

A. H. GONZI

JUDGE

23/04/2024