

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 59 OF 2017

MAXCOM AFRICA PLC

.....

PLAINTIFF

Versus

UDA RAPID TRANSIT PLC

.....

DEFENDANT

RULING

Date of the Last Order: 14/02/2018

Date of the Ruling 16/02/2018

SEHEL, J.

On 14th day of February, 2018 the matter was fixed for final pre-trial conference. However instead of conducting a pre-trial conference Counsel Mwaikugile representing the plaintiff made an oral prayer for extension of time within which to lodge witness statement and this is the ruling to that effect.

Counsel Mwaikugile submitted that last time his colleague, counsel Kihoho, notified this Court that the plaintiff filed its witness



statement in time as directed by this Court but upon a follow up of the receipt it was revealed that the said receipt was written as "written statement of defence" by the registry officer instead of "witness statement". The counsel contended that such a default needs to be rectified hence the present prayer for extension of time.

Advocate Mtani representing the defendant strongly objected to the prayer by fronting three reasons. First he said there are no sufficient reasons advanced to warrant the extension of time. Secondly he said this is the second request for extension of time after the Court granted the plaintiff the same on 10th October, 2017 but defaulted to comply with the court order. Thirdly, it was submitted that the application is made orally while according to the nature of the application the plaintiff ought to have filed a formal application.

In a rejoinder submission it was impressed by the counsel for plaintiff that the error was occasioned by the court thus in the interest of justice the prayer should be granted. He contended that if the prayer is granted will not prejudice the defendant. The counsel

further acknowledged that this is the second request but with different reasoning.

The issue to which this court is invited to determine is whether plaintiff should be allowed to present its witness statement after failing to do so despite being granted extension of time.

In determining this issue it is important to give a brief background of the matter. On 10th day of October, 2017 the plaintiff was granted extension of time to file the witness statement after it had failed to comply with the provisions of Rule 49 (2) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 ("the Rules"). The plaintiff was granted three days-time within which to file its witness statement. And the matter was fixed to come for final pre-trial conference on 21st day of November, 2017. However, on 21st November, 2017 the counsel for the plaintiff notified this Court that they have not yet served the defendant with their witness statement. It was also noted by the Court that the alleged witness statement is not in the Court file. Having noted so, the counsel for the plaintiff informed this Court that they did file the witness statement in time

and he intimidated that he even have a receipt to prove the same. But thereafter he told this Court that the alleged receipt which he has it is written that they have filed written statement of defence instead of witness statement. Suffice to state here that the said receipt was not tendered nor shown to the Court. The counsel therefore requested for time so that he can sort out the matter with the registry. Therefore, the final pre-trial conference was rescheduled to be held on 14th February, 2017. It is on this date that the present prayer for extension of time was made orally by counsel Mwaikugile with the reason that the plaintiff wants to rectify the error. If I understand the counsel for plaintiff correctly, he wants to correct the error in order to have a properly filed and paid up witness statement.

As correctly submitted by counsel Mtani given the circumstances and facts of the issue at controversy, it was not proper for the counsel to make an oral submission. The court need to be satisfied that indeed there was an error made by the registry officer in issuing receipt. The court cannot act on statements that come from the bar. There must be in place evidence to support the

allegation of the incorrectly recorded issued receipt. It has been repeatedly held by the Court of Appeal of Tanzania that it is of paramount importance that the affidavit of a person whose evidence is material has to be attached to the application to substantiate the assertion (See the cases decided by the Court of Appeal of Tanzania of **David Mwakikunga vs Mzumbe University, Civil Reference No. 12 of 2004**; and **Unyangala Entreprises Ltd and five Others vs Stanbic Bank (T) Ltd, Civil Application No. 56 of 2004**)-all unreported).

The affidavit of the registry officer who is said to have issued the plaintiff with the receipt that it has been wrongly written was necessary and so fundamental in justifying the allegation that the witness statement was filed in time but issued with wrong receipt. The absence of the affidavit of this material witness makes the assertions given by the counsel for the plaintiff to be mere assertions coming from the bar with no cogent evidence to support it. In that respect, the plaintiff is left with no explanation as to why it failed to file the witness statement in time despite being granted extension of time. It

would be over indulgence of this Court to grant the prayer sought simply on the pretext of justice. Those who seek the protection of the law in court of justice must demonstrate diligence since the law aids not only the brave but those who act diligently. I also understand that the plaintiff is pleading to the Court's discretionary power. It should be noted that discretionary powers has to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily (See the cases of **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, (both Unreported)).

As I said since there is no acceptable explanation given by the plaintiff for this court to grant the requested extension of time for filing witness statement then I am constrained to decline the prayer. Therefore, the application for extension of time is hereby dismissed. Taking into consideration that during the first pre-trial conference, parties were directed to file their witness statements within seven

days from the date when the mediation has been marked as failed and since the plaintiff failed to comply with such direction then in terms of Rule 29 (3) of the High Court (Commercial Division) Rules GN 250 of 2012 I proceed to dismiss the plaintiff's suit with costs. It is so ordered.

DATED at Dar es Salaam this 16th day of February, 2018.



A handwritten signature in blue ink, appearing to read "B.M.A Sehel".

B.M.A Sehel

JUDGE

16th day of February, 2018.