

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT MWANZA**

**COMMERCIAL CASE NO. 05 OF 2016**

**KIBOMBE REMOY MARCO t/a }  
KITALA GENERAL SUPPLY } .....PLAINTIFF**

**VERSUS**

**MATOBERA INVESTMENT LTD. ....DEFENDANT**

**RULING**

**06<sup>th</sup> June, 2018**

**A.R. MRUMA, J.**

On 30.08.2017 this court sitting under Songoro, J. as a mediator unsuccessfully conducted mediation and accordingly marked it to have failed. The court ordered parties to file witness statement within seven (7) days as per Rules. The plaintiff did not file any witness statement and it appears that she withdrew her instruction from AMITIE Attorneys on 11.09.2017. (A handing over letter dated 11/09/2017 was addressed to the Registrar of this court). When the matter was called for final pre-trial on 12.09.2017 the plaintiff was absent and no advocate entered appearance for him.

On 18.10.2017 the matter was called again for final pre-trial conference. This time around Mr. Musa kiobya and Mtawele advocates appeared on behalf of the plaintiff. Mr. Kiobya informed that court that they had just been engaged and made a prayer for amendment of the plaint under Rule 24(1) of the Rules.

The prayer was opposed by Mr. Rubango, counsel for the Defendant, as result of which court directed counsel for the plaintiff to file a formal application which he duly filed at Dar es Salaam Registry on 25/10/2017 and it was registered as Misc. Commercial Application No. 331 of 2017. (I have already struck out that application pursuant to Rule 63(b) of the High Court (Commercial Division) Procedure Rules 2012).

Following the striking out of the Miscellaneous Application No.331 of 2017, the plaintiff is now seeking extension of time within which he can file witness statements. The prayer has been pegged under Rule 2(2) of the High Court ( Commercial Division) Procedure Rules and sections 93 and 95 of the Civil Procedure codes.

The main reason to support the application is that by the time the present counsel was engaged by the plaintiff time to file witness statement had already expired.

Section 93 of the code provides:

*" where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this code, the court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may have expired".*

I have no doubt that section 93 of the Civil Procedure Code does not apply in a situation like this. The said section deal with the enlargement of time

fixed or granted by the court. The period for filing of witness statement was not fixed or granted by the court. It is prescribed by the law, ie. Rule 49(2) of the High Court (Commercial Division) Procedure Rules, 2012. A party who finds himself unable to do any act prescribed by law within prescribed time must apply among other laws, section 14 (1) of the Law of Limitation Act.[cap 89 RE 2002] which provides as follows:

“Notwithstanding the provision of this Act, the court may for any reasonable or sufficient cause extend period of limitation for the institution of an appeal or an application----- before or after the expiry of the period of limitation.”

This law has not been cited.

The Plaintiff is also relying on Section 95 of the Civil Procedure code, which provide for inherent powers of the court to make orders for the ends of justice or to prevent abuse of court processes.

I have considered section 95, of the CPC and I find that it is not appropriate in the circumstance of this case. In the first place section 95 is a supplemental provisions of the law and it comes into play where there is no specific provision to cover for the situation. Here as I have demonstrated above there are specific laws which would remedy the situation.

Secondary, section 95 is for both ends of justice and prevention of abuse of court processes. For court to exercise its discretion judicially, there must be

sufficient reasons or causes for it to prevent events to follow their natural causes. For an application for extension of time to succeed, the applicant must give account for every day of delay. In the case at hand, the delay for period from 18.10.2017 when Counsel Musa Kiobya appeared for the first time to today, has not been accounted for.

In the circumstances, I would refuse to grant any extension for the plaintiff to file witness statement after a delay of over (8) months (from 30/08/2017).

As to the consequences of failure to file witness statement it is now trite law of practice in this court that failure to file witness statement is tantamount to failure to procure witness in court (***See Commercial Case No. 147 of 2012 between Barclays Bank (T) Ltd. Vs. Tanzania Pharmaceuticals Industries Ltd. and 3 others and also Misc. Commercial Case No. 138 of 2014 between Tanzania Azimio Construction Co. Ltd. Vs. CRDB Limited***).

As to the net result, having considered the special circumstances of this case instead of dismissing the suit, I would strike it out for want of prosecution as the plaintiff had failed to file witness statement in time.



  
A.R. Mruma

JUDGE

06/06/2018