

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**MISC .COMMERCIAL APPLICATION NO. 39 OF 2019  
*(Arising from Commercial Case No.140 of 2018)***

**TWALIB RAMADHANI MSANGI.....APPLICANT  
VRS  
MO ASSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

**B.K. PHILLIP, J**

This ruling is in respect of an application for extension of time for filing a witness statement of one Sebastian Kimaro, officer of the Tanzania Revenue Authority (“TRA”) and leave to file additional witness statement of one Twalib Ramadhani Msangi. The application is made under the provisions of section 95, 93 and 68 ( e) of the Civil Procedure Code, Cap 33, R.E 2002 , Rule 55 and 4 of the High Court (Commercial Division ) Procedure Rules , 2012,GN No. 250 as amended by GN. No 107 of 2019 (herein after to be referred to as the rules). The application is supported by an affidavit sworn by the learned advocate Loveness Denis of Misnak Law Chambers, which represents the applicant in this application. The learned Advocate Catherine Solomon, who appears for the respondent deponed an affidavit in opposition to the application.

A brief background to this case is that the applicant herein is a plaintiff in the above mentioned Commercial case No. 140 of 2018, while the respondent is the defendant in that case. On 27/3/2019 this court ordered

the parties to file their witness statements and the case was scheduled for hearing on 21<sup>st</sup> May 2019. Both parties filed their witness statements as ordered. Before the hearing date, the applicant filed this application praying for the orders mentioned herein above.

At the hearing of this application the learned Advocate Loveness Denis and Catherine Solomon appeared for the applicant and respondent respectively. Submitting for the applicant, the learned advocate Loveness started by adopting the contents of her skeleton arguments filed in court and the affidavit in support of this application. The reasons adduced in support of the first prayer are to the effect that the witness statement of Mr Sebastian Kimaro, an officer from TRA could not be filed in time because the witness statement had to be reviewed by TRA officers. The applicant had no control of the process involving the review of the witness statement as it is an internal process and it took a longer time than expected.

As regards the second prayer , the applicant's advocate submitted that inadvertently the interim Cover Note that was attached to the witness statement of Mr. Twalib Ramadhani Msangi is a previous interim cover note issued on 19<sup>th</sup> August 2015 instead of the current one, that is interim Cover Note No. 7472978 which was issued on 18<sup>th</sup> November 2015. She contended that the omission was not out of negligence but human error. Ms Loveness was of the view that the respondent will not be prejudiced if this application is allowed.

In rebuttal, Ms. Solomon, prayed to adopt the contents of her counter affidavit and proceeded to submit that the provisions of rule 55 and 4 of the High Court (Commercial Division) procedure Rules, 2012 are not relevant in this application as the same are concerned with the service of the witness statement. Furthermore, Ms Solomon contended that the applicant has not accounted for each day of delay in filing the witness statements. To cement her arguments she referred this court to the case of **A-One Product & Brothers Vrs Abdallah Almas & 25 others , Civil Application No 586/18 of 2017** (unreported).

In addition to the above, she argued that the Final Pre-Trial Conference has been done, the respondent's witnesses have already filed their witness statements, that means the testimony in chief has been done, therefore allowing the applicant to bring another witness statement at this stage will prejudice the respondent's case. She referred this court to the case of **21<sup>st</sup> Century Food Spackaging Ltd vrs G.T.S Logistics Limited, Misc Commercial Application No. 176 of 2018**, (unreported), in which I declined to grant an application for filing a supplementary witness statement and held that since a witness statement is part of evidence there is no room for filing a supplementary witness statement.

As regards the second prayer, Ms Solomon submitted that a copy of the Interim cover note dated 18<sup>th</sup> November 2005, is attached to the reply to the respondent's written statement of defence. Furthermore, she submitted that, the interim cover in question is indicated in the list of additional

documents to be relied upon filed in court by the applicant. The fact that now the applicant is applying for the same interim cover to be included in the witness statement of Mr. Msangi demonstrates high degree of negligence on part of the applicant's advocate, since they have been handling this matter from the beginning, thus they were supposed to include all necessary documents, she contended. She prayed that this application to be struck out with costs.

In rejoinder, Ms. Loveness submitted the applicant's advocate is not negligent. The omission to attach the proper interim cover note was not out of negligence but a human error. As regards the witness statement of the TRA officer, she insisted that the witness statement was prepared in time but it had to be reviewed by TRA officers, that is how the delay in filing it occurred. Lastly Ms. Loveness contended that the provisions of Rule 4 and 55 of the rules are relevant in the application at hand.

I have dispassionately analyzed the submissions made by the learned advocates appearing herein. Starting with the first prayer, the position of law is very clear that the grant of an application for extension of time is under the court's discretion and the applicant has to adduce sufficient reasons for the delay as well as account for each day of delay [See the case of **Benedict Shayo vrs Consolidated Holding Corporation as official Receivers of Tanzania Film Company Limited, Civil Application No. 366/01/2017** (unreported)]. The present application falls in the same category since it is an application for extension of time.

Looking at the reasons for the delay in filing the witness statement of Mr. Sebastian Kimaro as submitted by Ms. Loveness, I am of the view that reasons adduced are sufficient to move this court to grant the 1<sup>st</sup> prayer. It is not in dispute that witness statement at issue is for an officer from TRA, thus the statement had to be reviewed by TRA officers as it involves official information from TRA. In the instant application, the witness statement in question was supposed to be filed on or before 10<sup>th</sup> April 2019. This application was filed on 3<sup>rd</sup> of May 2019. Under the circumstances of this case, it is my opinion that the delay in filing the witness statement is not inordinate delay, since the statement in question had to go through TRA office which is not under the control of the applicant and the testimony involves some official information from TRA concerning the dispute at hand. Definitely, time was needed to properly verify the information contained in the witness statement. In short, I am convinced that there are sufficient reasons adduced for the delay in filing the witness statement in question.

The second issue to look at in respect of the first prayer is the concern raised by Ms. Solomon, that if the prayer is allowed the defendant's case will be prejudiced since the respondent has already finished filing its witness statements and laid down its case, the Final Pre –Trial Conference is done and the case was scheduled for hearing. It is true that this case was scheduled for hearing on 21<sup>st</sup> May 2019. The Final Pre-Trial Conference was conducted on 27<sup>th</sup> March 2019. The plaintiff's witness statements were filed on 10<sup>th</sup> April 2019. Ms. Solomon relied on the case of **21<sup>st</sup> Century Food Packaging Ltd** (supra) to buttress her argument.

Let me say from the outset that the case of **21<sup>st</sup> Century Food Packaging Ltd** ( Supra) that has been referred to me by Ms Solomon in support of her argument , is distinguishable from the circumstances of this case because it contains different set of facts from the case at hand. In that case (**21<sup>st</sup> Century Food Packaging**) the applicant was seeking for leave to file a supplementary witness statement , which is not the case in the first prayer in this application . In the first prayer, the applicant herein, is seeking for extension of time to file a witness statement for a witness who failed to sign the statement on time, it is not a supplementary witness statement. Another thing is that, after the amendment of the rules by the High Court (Commercial Division) Procedure (Amendment) Rules 2019, witness statements are filed after conducting the Final Pre- Trial Conference, (see Rules 49 (2) of the rules) ,so the issue of being prejudiced by a witness statement filed after the Final Pre Trial Conference if at all allowed by the court cannot arise here, as all witness statements now days are filed after conducting the Final Pre trial Conference. Therefore, I decline to agree with the argument raised by Ms Solomon that if the first prayer is allowed, the respondent will be prejudiced. It is the finding of this court that the first prayer has merits.

As regards, the second prayer, let me state outright here that this prayer is untenable. A witness statement is a testimony in chief. (see the provisions of Rule 49 of the rules GN No. 250/2012 as amended by GN No. 107/2019). Since Mr. Twalib Ramadhani Msangi closed his testimony in Chief on the date he made his witness statement. It is my settled opinion

that he cannot make another testimony in chief via the additional witness statement sought to be filled in this application. In fact my decision in the case of **21<sup>st</sup> Century Food Packaging** (supra) falls squarely in the scenario of the second prayer since the applicant seeks for leave to file a supplementary/additional witness statement.

At this juncture I wish to repeat what I said in the case of **21<sup>st</sup> Century Food Packaging** (supra) that a witness statement being part of the evidence, there is no room for filing "additional/supplementary witness statement". A witness statement is a testimony in chief, therefore, once it is filed, the witness's testimony in chief is done. Now, practically, even if the matter would be heard following the procedures in the Civil Procedure Code Cap 33 R.E 2012, once a witness has given his testimony in chief, the door is closed for him to come back again in court to rectify or change what he/she said. I understand a witness can be recalled, under certain circumstances, but not for the purpose of changing what he/she has already testified before the court of law.

In the upshot the first prayer is granted while the second prayer is dismissed. The witness statement of Sebastian Kimaro should be filed within seven days from the date of this order. It is so ordered.

Dated at Dar es Salaam this 20<sup>th</sup> day of September 2019.



  
**B.K. PHILLIP**  
**JUDGE**