

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 10 OF 2017**

BETWEEN

MANTRAC TANZANIA LIMITED.....PLAINTIFF

Versus

JUNIOR CONSTRUCTION COMPANY LIMITED.....1st DEFENDANT

SULEIMAN MASOUD SULEIMAN.....2nd DEFENDANT

NCHAMBI'S TRANSPORTERS LIMITED3rd DEFENDANT

STAMIGOLD COMPANY LIMITED.....4th DEFENDANT

Last Order: 23rd June, 2020

Date of Ruling: 29th June, 2020.

RULING

FIKIRINI, J.

This case was filed way back in January, 2017, and has passed through a number of Judges. The suit filed under Order XXXV: Summary Suit, whereby after leave to appear and defend the suit was granted, the defendants filed their written statement of defence. The 1st, 2nd and 3rd defendants defended by Mr. Frank Mwalongo learned counsel and Mr. Benson Hoseah learned state attorney for the 4th defendant.

Besides a number of adjournments and change of presiding judges, there were two

rulings made. One, on *res sub judice* made on 10th December, 2018 and the other on judgment on admission delivered on 14th August, 2019. This was followed by 1st Pre-Trial Conference which took place on 23rd September, 2019. The matter was thus ready for mediation. In between, the matter was sort of halted. as there was notice of appeal lodged on 5th September, 2019, and also stay of execution vide Civil Application No. 396/16 of 2019 lodged on 18th September, 2019. The application to execute a decree in the present suit was paused after the Court of Appeal ruling granting the application for stay of execution.

After the mediation has failed, the record reverted back to the trial Judge and Final Pre-Trial Conference took place on 15th October, 2019, whereby three (3) issues were framed connoting that the matter was now ready for hearing of the main suit. Again after two adjournments the hearing of the main suit commenced on 17th March, 2020, and the plaintiff's case was closed on 25th March, 2020 with the order for the defendants' case to commence on 28th May, 2020. Prior to the scheduled hearing date and to be specific on 27th May, 2020, Mr. Juventus Katikiro, advocate from Apex Attorneys Advocates wrote this Court on behalf of the 1st, 2nd and 3rd defendants seeking for adjournment, that their witness one Suleiman Masoud Suleiman would not be in a position attend and testify on the scheduled date. The reason given being that the said witness was in custody for

almost two (2) weeks faced with Economic Crime charges namely Economic Crime Case No. 10 of 2020, at District Court of Shinyanga at Shinyanga. That the witness had been released on bail just a previous day and has not yet composed himself and be ready to testify before this Court. The letter suggested for a hearing date in early July or any other date thereafter convenient to the Court.

Mr. Masumbuko on one hand objected to the prayer but on the other came with a suggestion that the hearing of the defence case to proceed since the 4th defendant was present with her witnesses. The prayer supported by Mr. Mwalongo that hearing of the 4th defendant's defence to proceed. In its considered short ruling this Court granted the prayer and hearing of the 4th defendant's case proceeded. Fielding only one (1) witness among the two (2) they had, the 4th defendant's case was closed. The defence of the 1st, 2nd and 3rd defendants was adjourned to 23rd June, 2020, which was almost three (3) weeks or so from the date the matter was last adjourned.

On 22nd June, 2020, the Court received another letter this time from Mr. Mwalongo on behalf of the 1st, 2nd and 3rd defendants, that their sole witness Suleiman Masoud Suleiman could not attend as he was sick and admitted at Dr. Jakaya Kikwete District Hospital, in Kishapu and upon discharge placed on bedrest for four (4) days. A copy of the letter signed by Dr. Shani Josephat Mudamu- the Principal

Medical officer, Kishapu District Council with no reference number dated 22nd June, 2020 was annexed to the letter.

Mr. Masumbuko vehemently contested the prayer for adjournment, assigning the following reasons: that this was a 2017 and the 1st- 3rd defendants were quite aware of that. He as well pointed out that these were calculated actions, because even the last time when the adjournment was being sought, the letter was received a day before. Presently, he was aware that the witness has pleaded guilty and paid fine in Economic Crime Case No. 10 of 2020. It was his further observation that the letter was from Kishapu District Council and not a hospital document. Bearing in mind that the witness is a Member of Parliament for Kishapu Constituent, he had influence on the Kishapu District Council in which he sits as a member. He stated this highlighting that the letter issued contains no diagnosis nor medication prescribed to the alleged patient. In addition, the letter which according to him was just an ordinary letter, was written a day before the hearing date stating when the patient visited hospital complaining of ulcers. This was a calculated move to frustrate the proceedings and this was purposely and will be done time and time again, he contended.

On the strength of his objection, he prayed that since there was no sufficient proof of the witness sickness, one, the Court declare that the witness statement of

Suleiman Masoud Suleiman be struck out under Rule 52 (3) of the Rules, as he failed to enter appearance without sufficient reason, Two, the Court to proceed giving its judgment.

Reacting to the submission and prayers, Mr. Mwalongo urged the Court to disregard the counsel's submission on what transpired last time when this matter was adjourned. It was his position that the reason for seeking adjournment this time was not the reason for adjournment was sought last time. The application for adjournment sought today was due to sickness of the 1st, 2nd and 3rd defendants sole witness.

Regretting praying for the adjournment due to witness failure to travel owing to sickness, Mr. Mwalongo submitted that he asked the witness for proof from the hospital he was hospitalized. Contradicting Mr. Masumbuko's submission regarding diagnosis and prescribed medication, he submitted that as much as Mr. Masumbuko might require that information, but those details may not be disclosed due to professional ethics of doctors.

He went on as well to respond on the allegation that the adjournment sought was calculated move geared to frustrate the proceedings and since the witness is member of the Kishapu District Council, has thus been dictating terms, to be serious allegation but unfounded. Responding to authenticity of the letter, it was

Mr. Mwalongo's submission that Dr. Jakaya Mrisho Kikwete is a public hospital under Kishapu District Council, whereby the authenticity can be verified.

Urging the Court to grant the prayer, Mr. Mwalongo contended that the prayer for adjournment was not out of choice but beyond their control and not plans. As human being we all know what sickness meant and that one cannot plan when it should arise, he maintained.

In view of his submission he prayed Mr. Masumbuko's objection and prayer that the witness statement be struck out be overruled and prayer for an adjournment granted.

In rejoining submission, Mr. Masumbuko stated that he brought up what transpired on the 28th May, 2020 to show that this was calculated move to delay the proceedings. Even the adjournment granted on that day was not deserved as no sufficient reasons were given. Maintaining that the adjournment sought was calculated move, as the witness is said to have missed his medication five (5) days ago and the day he was supposed to travel he fell sick and that was the day he went to hospital. If missing his medication prompted his sickness, then he should have been sick the next day and not few days later. Picking on Mr. Mwalongo's submission, he argued that the submission that diagnosis and medical prescription were private matters, actually supported their position that even in the letter

furnished there was no proof that he attended hospital and was given bedrest. The information cannot be private matter when needed in Court. The letter relied on was secured on 22nd June, 20020, the day he alleged went to hospital and transmitted to the Lawyer and filed in Court.

And reiterating his earlier submission he prayed for the witness statement be struck out and judgment date set.

After listening to counsels on their rivalry submissions, it is apparent that no sufficient reasons have been advanced at all to warrant grant of an adjournment as prayed. The report that the witness fell sick and attended at Dr. Jakaya Mrisho Kikwete hospital where he was ordered four (4) days bedrest was not supported by any medical evidence. Ordinarily, any hospital visit if it is for medical attention, the documentation is not in the form of the letter supplied to this Court. Both Mr. Mwalongo and his client are quite aware of this. There is a medical chit with diagnosis and prescription, without a “**to whom it may concern**” heading or “**Ref: Patient Suleiman Masoud Suleiman**” What was supplied to Court is a letter presumably following the medical attention and not diagnosis or prescription chit. The letter in itself does not at all prove that the witness attended hospital. In my view which is in congruence with that of Mr. Masumbuko, there was no proof of the witness sickness, hospital attendance where he was ordered bedrest. Mr.

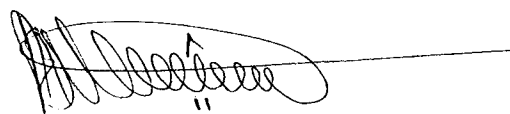
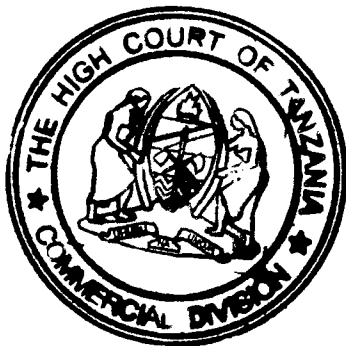
Mwalongo's submission that producing patient diagnosis and prescription was a private matter while can be valid but not in this instance and specifically when the information is required by this Court. And if that was the case there was even no need of securing a letter from Kishapu District Council, as in the letter the patient's condition was highlighted, which made me wonder what kind of privacy was being referred by Mr. Mwalongo. To me Mr. Mwalongo's submission in this regard was simply an excuse for failing to have valid medical chits, the excuse which has failed to persuade this Court by any stretch.

This Court has also considered the manner this adjournment has been sought. Considering the witness is a Member of Parliament, it was expected of him to act responsibly, reasonably and dutifully. For him to skip his medication and wait for five (5) days to go to hospital did not exhibit being a person acting responsibly and reasonably. Instead of furnishing the Court with medical chits, he brought a letter which though authentic but it is more likely than not that the letter has just been secured, he being a Member of Parliament. I do agree that as human beings we have, no control on when we fall sick and how, but we have control on how we process the predicament which has befallen us. Skipping medication for five (5) days and choose to go to hospital when about to travel to attend Court, does not read to me as having no control on sickness when it occurred to him. The manner the

witness handled his situation made me share the concerns Mr. Masumbuko is harbouring. Sickness, while should not be taken lightly and carelessly, but should as well not be used to interfere with running or operations in places like Courts where there are constraints of time and pile up of cases. Every wasted moment already slotted for a specific case means a lot to the Court, particularly at the Commercial Court.

All that said, but considering the stage where the case is and the amount involved, I find it prudent to give the 1st, 2nd and 3rd defendants one last chance to present their case rather than striking out the witness statement as urged to do by Mr. Masumbuko. This is ordered at cost, that the 1st, 2nd and 3rd defendants pay for this adjournment pursuant to Rule 46 (a) of the Rules, as provided by the Court Fees Rules, to the plaintiff and the Court, before the next to be fixed hearing date.

This is the last adjournment which is reluctantly granted. It is so ordered.



P.S. FIKIRINI

JUDGE

29th JUNE, 2020