

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 50 OF 2019

BETWEEN

AFRICARRIERS LIMITED.....PLAINTIFF

Versus

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED.....1<sup>st</sup> DEFENDANT

EQUITY BANK TANZANIA LIMITED.....2<sup>nd</sup> DEFENDANT

Last Order: 16<sup>th</sup> July, 2020

Date of Ruling: 25<sup>th</sup> Aug, 2020

**RULING**

**FIKIRINI, J.**

Prior to the hearing of the Plaintiff case the following three preliminary points of objection on point of law were raised by the defendants;

1. By the 1<sup>st</sup> defendant, that the plaintiff's witness statements were filed out of time without seeking an order for extension of time contrary to Rule 49 (2) of the High Court (Commercial Division) Procedure Rules 2012 (the Rules),
2. By the 2<sup>nd</sup> defendant that the witness statements and the additional list of documents have been filed out of time contrary to Rule 49 (1) and (2) of the Rules.

They thus urged the Court to dismiss the plaintiff's case for want of prosecution.

During the hearing the plaintiff was represented by Mr. Ngasa Ganja assisted by Ms. Moransia John and Mr. Haji Sama, while the 1<sup>st</sup> defendant enjoyed the legal services of Mr. Patrick Mtani, and Mr. Kephass Mayenje learned counsel appeared for the 2<sup>nd</sup> defendant. The preliminary points of objection were heard orally.

It was Mr. Mtani's submission that the witness statements of the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiff witness have been filed out of the 14 days' time contrary to the order of this Court issued on 27<sup>th</sup> February, 2020, which categorically ordered parties to file their witness statements within those days from the date of the order. The plaintiff filed their witness statements on 13<sup>th</sup> March, 2020, while counting from the date of order, the deadline was 11<sup>th</sup> March, 2020, which means the filing was done two (2) days later and hence out of time.

Mr. Mtani further submitted that, the plaintiff counsel was present during the final pretrial conference so they were aware of the order of this Court. And in any case if they had difficulties in complying with the Court order, the law gives them room to apply for the extension of time. Since the witness statements have been filed outside the allowed time and without leave of the Court extending the time, thus the consequence for this failure to file witness statements is clear that the suit has to be dismissed for want of prosecution. Supporting his submission, he cited the

case of **Amani Partners Limited & Another v Khiruwani Iqbal Maqbool Chandary**, Commercial Case No. 24 of 2017, p. 5, where the Court concluded that:

*“failure of the plaintiff to file witness statements as directed by the court is equally as failure to produce witness when a case is called for hearing.”*

Mr. Mayenje counsel for the 2<sup>nd</sup> defendant submitted that, plaintiff’s witness statements and the additional list of documents have been filed out of time contrary to Rule 49 (1) and (2) of the Rules, in which the law provides that the statements shall be filed within 14 days after the completion of the final pre-trial conference. So since the final pre-trial conference was completed on 27<sup>th</sup> February, 2020, so the filing of the witness statements and additional list of documents on 13<sup>th</sup> March, 2020, was two days after the expiry of the time period provided by the law. Since the plaintiff did not comply with the Court order and since there was no application made for extension of time to file the witness statements and the additional list of documents out of statutory prescribed time, the 2<sup>nd</sup> defendant prayed for the statements including the additional documents be struck out of the record.

Expanding his submission further, he illustrated that, the word “shall” used in Rule 49 (1) and (2) of the Rules is couched in mandatory terms when construed

undersection 53 (2) of the Laws of Interpretation Act, Cap. 1 R.E.2002. Therefore, failure to comply with Rule 49(1) and (2) of the Rules was equivalent of failure to procure a witness in Court to give evidence to prove or disprove a case. Cementing his position, he cited the case of **Ivee Infusions EPZ Ltd v Mak Medics Ltd, Commercial Case No. 3 of 2019, p. 6.**

Mr. Mayenje pressed the Court to dismiss the suit for want of prosecution as a consequence to the plaintiff's failure to comply to the prescribed time within which she should have filed the witness statements and the additional list of documents.

Opposing the preliminary points of objection, Mr. Ganja for the plaintiff admitted that, it was true that on 27<sup>th</sup> February, 2020, the final pre-trial conference was conducted and in accordance with Rule 49 (2) of the Rules as amended by GN No. 107 of 2019, the witness statements were supposed to be filed within 14 days. However, he submitted that according to section 19 (1) of the Law of Limitation Act, Cap 89, R.E 2002 (the Law of Limitation Act), which provides as to when computation should start, the 14 days would end on 12<sup>th</sup> March, 2020 and not 11<sup>th</sup> March, 2020, implying the filing was outside the prescribed time by one day and not two days. However, with that one day delay he argued it resulted from an innocent mistake as the computation of 14 days was done with the understanding that the month of February had 28 days as it is normally is. Based on that

assumption, the counting of the 14 days came up to the 13<sup>th</sup> March, 2020, when the witness statements and additional list of documents were filed honestly believing was in accordance with the Court order. It was only later it came to the counsel's knowledge that the month of February for this year had 29 days, which was an exceptional circumstance. And this occurred when the witness statements and additional list of documents were already in Court and hence impractical to seek for extension of time.

It was Mr. Ganja's additional submission that, the delay of one day can be cured by overriding objectives principle which is provided under Rule 4 of the Rules. The principle encouraged the Courts including this one to focus on substantive justice where the defects has not prejudiced or caused any injustice to the defendants. To strengthen his position, he cited the case of **Chacha Jeremiah Murimi & 3 Others v R, Criminal Appeal No. 551 of 2015**, p. 15-17. Two exceptions on admissibility of document filed out of time were elucidated: *one*, was if it will not prejudice the other party, and *two*, if it will not occasion injustice. This was a current Court of Appeal decision delivered in 2019, which this Court is bound to follow. He further contended that it was not correct to take that every apparent contravention of the rule of Limitation lead to the exclusion of the document in question. The defendants have not demonstrated before this Court that they will be

prejudiced or injustice will be occasioned by the admission of those documents, he argued.

Submitting on fair trial rules, Mr. Ganja submitted that, it required the Court to determine the parties' controversy by listening to both sides since the story of the parties was evidenced by the witness statements which were already in Court.

Disputing the case of **Amani** (supra), cited by Mr. Mtani counsel for the 1<sup>st</sup> defendant, Mr. Ganja submitted that this case was distinguishable to the present case based on the following reasons. *First*, the case described the issues before the coming into effect of overriding objectives, and *second*, it described a different situation in which the party did not even file witness statements and therefore there were no witness statements in Court records.

Responding to the **Ivee** case (supra), cited by Mr. Mayenje for the 2<sup>nd</sup> defendant, it was his submission that, the case was also distinguishable because in the previous case, the complainant had contravened Rule 49 (1) and Rule 50 (1) (a) - (i) of the Rules, while in the present case the defendants were complaining of contravention of Rule 49 (1) and (2) of the Rules. And the objection was on the form of documents which was not an issue in the case at hand. This made Mr. Ganja conclude that, the preliminary points of objection raised by the defendants had no merits.

Mr. Mtani in rejoinder submitted that, so long the plaintiff has conceded that witness statements were filed out of time, and that when the Court order was issued on 27<sup>th</sup> February, 2020, they were present in Court, then the issue of innocent computation of time on whether the month of February had 28 or 29 days was thus irrelevant. And that this argument would have made sense if the submission was for an extension of time application. Furthermore, the plaintiff's counsel did not tell the Court why they filed witness statements without leave of the Court while knowing it was outside the time allowed. According to Mr. Mtani that was disobedience of Court orders.

Responding on the issue of overriding objectives principle as provided under Rule 4 of the Rules, it was Mtani's submission that, this rule cannot apply to litigants or parties who disobey Court orders. If overriding principle will be allowed take care of this, it will be allowing parties to disobey Court orders. Making reference to the **Chacha Jeremiah** case (supra) cited by the plaintiff's counsel, he argued the case was distinguishable and cannot assist the plaintiff for the following reasons: *one*, in the cited case it was all about the admissibility of cautioned statements which was resultant of the police investigation work, while in the present case the issue was about a hearing whereby a party failed to produce witness, and not admissibility of the witness statements. *Two*, in the cited case it was not about documents produced

in disobedience of the Court order while in the case at hand the plaintiff has disobeyed the Court order.

Reiterating his submission, Mr. Mtani contended that the cited case of **Amani** was a good law and relevant to the litigants in this case, since also in **Amani** case it is true the witness statements were filed outside the prescribed time and the counsel conceded to the fact. Rebutting that the **Amani** decision was made before overriding principle came into play, he submitted that the assertion was not correct because at page 4 of the said decision, the overriding principle was considered.

Mr. Mayenje rejoined by submitting on section 19 of the Law of Limitation Act, contended that the submission by the plaintiff's counsel had no relevancy to the case at hand because the said provision accommodates parties when they want to appeal or file for an extension of time and it has nothing to do with the case at hand. On the innocent computation, it was Mr. Mayenje's submission that, innocent assumption was, yes an excuse but cannot be used as a defence to the party who did not comply with the Court order.

As for the overriding objective, the counsel specifically referred the Court to pages 15-17 in the **Chacha Jeremiah** case (supra), where the Court of Appeal referred to section 299 (1) & (2) of the Criminal Procedure Act, Cap. 20 R.E. 2020 (the CPA) on the issue of recalling of witnesses. The referred provision has nothing relevant



to the preliminary points of objection raised before this Court. Likewise, at page 16 and 17, the issue was on cautioned statement filed contrary to section 50 of the CPA, and the Court of Appeal, when dealing with that considered the public interest and the investigation complications which was quite different from the case before this Court. Adding to his submission on overriding objective, Mr. Mayenje pointed out that the said principle cannot help a party to circumvent the mandatory rules of the Court. Clarifying on the position in **Ivee** case (supra), Mr. Mayenje submitted that, it raised more than one principle: *first*, on compliance to the mandatory rule, and *second*, consequences of non-compliance to the rules. *Third*, was on the fate of the suit in the absence of witness statements.

Finalizing his submission, Mr. Mayenje submitted that, the plaintiff admitted that witness statements were filed out of time. Such failure was equivalent to non-production of the witness that was akin to failure to prosecute her case which called for the dismissal of the suit, he submitted. The Commercial Court rules are, mandatory rules of the Court and therefore should be complied with by the parties and cannot be circumvented by overriding objectives, underscored Mr. Mayenje.

I have carefully examined the rivalry submissions and the most important issue to be taken into consideration is **whether the orders of the Court issued on 27<sup>th</sup>**

**February, 2020 were complied with by the parties and if not, what are the consequences?**

On the 27<sup>th</sup> February, 2020, the Court conducted the final pre-trial conference whereby witness statements and any additional list of documents were ordered be filed within 14 days. On that day the plaintiff's counsel was present, so was aware of the Court order. Instead of filing the witness statements and additional list of documents within 14 days to wit by 11<sup>th</sup> March, 2020, the plaintiff filed hers on 13<sup>th</sup> March, 2020, two days out of time. This was done without an application for extension of time sought and granted. The plaintiff's action was contrary to Rule 49 (2) of the Rules, which required as a must that the rule be complied with. The word "shall" used in Rule 49 (1) and (2), according to section 53 (2) of the Interpretation of Laws Act, meant the action to be taken was mandatory. For ease of reference the provision provides that:

*"Where in written law the word **"shall"** is used in conferring a function, such word **shall** be interpreted to mean that, **the function so conferred must be performed**" (Emphasized mine)*

I am alive to the law that not every use of the word "**shall**" means that it is "**mandatory**" It really depends on the circumstance, as it was held in the case of

**Salumu Ndikongeje v Republic, Criminal Appeal No. 238 of 2004.** However, in the present circumstance, I am convinced the use of the word “**shall**” in Rule 49 (2) of the Rules, meant it is mandatory requirement, that witness statements and additional list of documents be filed within 14 days, so the requirement cannot be easily ignored. I am saying so for the following reasons: **one**, the requirement is part of the Commercial Court Rules that cases are proved by filing of witness statements. The rationale behind having these rules was to speed up commercial cases so as to allow business people go back to their businesses rather than wasting time prosecuting their cases. For that basic reason that is why the exercise of filing the statements is taken seriously. Usually after the final pre-trial conference has been conducted, which in this case was conducted on 27<sup>th</sup> February, 2020, the witness statements and additional list of documents if any has to be filed within 14 days. **Two**, rules are in place not for embroidery but for use. In the case of **SGS Societe Generale de Surveillance SA & Another v VIP Engineering & Marketing Ltd & Another, Civil Appeal No. 124 of 2017, DSM (unreported)** the Court of Appeal when was invited to invoke the overriding principle had this to say:

*‘.....not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the*

*mandatory provisions of the procedural law which go to the foundation of the case.'*

This being a mandatory requirement and which goes to the root of the case, it must be observed.

The plaintiff in assigning reason for the failure to comply with the requirement, stated that they innocently missed computation of time thinking this particular February had only 28 days; This explanation has in actual fact no basis, and had that been the case, immediately after realizing the anomaly, the plaintiff would have either withdrawn the witness statements and the additional list of documents filed or approached the Court by way of an application for extension of time and not wait until the preliminary points of objection have been raised, for her to come up with the reason stated. With due respect I do agree with Mr. Mtani that, the argument of innocent computation would have been proper to be submitted during the submission for an application of extension of time to file witness statements out of time and not during the hearing of the preliminary objection, because the essence of application of extension of time is to assess the seriousness and significance of the failure to comply with any rule, direction or Court order. From the look of things, the plaintiff counsel merely decided not to comply with Court order.

It is settled legal position that, a party who knows of existence of an order of the Court is obliged to obey it. In the case of **John Mwansasu v Republic, Criminal Review Case No. 8 of 2000**, it was held that:

*“A courts order is lawful unless it is invalidated by another superior order, and therefore it must be obeyed. Contrary view will have the undesired effect of creating an impasse in the conduct of the trials.”* [Emphasis mine]

It is also a trite law that an advocate being an officer of the Court is deemed to act diligently. There is actually no excuse for an officer of the Court who decides not to comply with the Court order without any sufficient reasons. In the **Calico Textile Industries Ltd v Pyraliesmail Premji [1983] T.L.R. 2**, this is echoed when it was held that:

*“Once the advocates are instructed to take the conduct of the case, they are use all diligence and industry.”*

In this case at hand, the plaintiff advocate was present when the last order was issued and opted not to comply.

Whilst, I totally agree with Mr. Ganja, on overriding objective principle, which promulgate on substantive justice but allowing disregard of the rules of procedures or disobedience of the Court orders, cannot in my considered opinion be cured by overriding objective principle. In the case of **Martine Kumaliya & Others v Iron & Steel Limited, Civil Appeal No. 70 of 2018, TZCA 234**, Court of appeal held that:

*“The overriding objective principle will not help a party to circumvent mandatory rules of the court “*

The second issue is **what are the consequences for failure to comply with the Court order?**

Without doubt, I, do agree with the defendants’ counsels that, failure by the plaintiff to file witness statements and additional list of documents as directed by the Court is equal as to failure to produce witnesses when a case is called for hearing as decided in the **Amani’s** case (supra). It is legal position that, if parties are to act in total disregard to the Court orders, then Court business will be rendered uncertain and that kind of situation will not be good for the efficient administration of justice. Therefore, disobedience of an order of Court naturally should draw sanctions. See: **Estate of the Late Peter Kisumo v Salum Peter**

**Kisumo, Miscellaneous Application No. 441 of 2018 and Idahya Maganga Gregory v Judge Advocate General Court, Criminal Appeal No. 4 of 2002**

In the view of the case cited above, the duty to obey Court orders is essential not only because it protects the dignity of the Courts and confidence but also promote obedience of the rules of procedure on the world of law and justice to the parties.

In this instant case, since the plaintiff counsel was present when the Court orders were issued and without any reasonable cause failed to file witness statements and additional list of documents within prescribed time, and opted not to use his right to apply for extension of time, thus his filing of the witness statement out of time was “un-procedural” and/or “disobedience” of lawful order. The act is tantamount to failure by the plaintiff to produce witnesses when a case is called for hearing, which amounts to non-compliance of the Court order, the consequence of which calls for dismissal of the suit.

In the light of the above, the preliminary points of objection raised are hereby sustained, and the suit is dismissed with costs. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

**P. S. FIKIRINI**

**JUDGE**

**25<sup>th</sup> AUGUST, 2020**