

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 167 OF 2018**

ECO BANK TANZANIA LIMITED PLAINTIFF

VERSUS

RZ ELECTRICAL TECH LIMITED 1ST DEFENDANT

MILE SOLUTIONS COMPANY LIMITED 2ND DEFENDANT

RAMADHAN AMIR MRISHO 3RD DEFENDANT

BAKARI MOHAMED BAKARI 4TH DEFENDANT

Date of the last Order: 13/08/2020

Date of Ruling: 04/09/2020

RULING.

MAGOIGA, J.

This ruling is in respect of the oral prayer made by the learned advocates for the plaintiff for enlargement of time within which to file witness statement under section 93 of the Civil Procedure Code, [Cap 33 R.E. 2019]. The prayer was serious and strongly objected by the learned advocates for the defendants, who in turn moved the court to dismiss this suit with costs for want of prosecution under Order IX Rule 8 of the Civil Procedure Code, [Cap 33 R.E.2019].

It is imperative albeit in brief to state the facts pertaining to the instant suit. The plaintiff on 10th December, 2018 instituted the above named suit against the above named defendants jointly and severally claiming several reliefs. This suit stem from the loan agreement dated 27th June 2014 in which the plaintiff granted credit facility of Tshs.570,324,418.00 to the first defendant and performance bond guarantee of Tshs. 229,675,582 which were varied accordingly as agreed by the parties. The said facilities were secured by first ranking debenture of the 1st defendant, Assignments and irrevocable domicilian of contract due from Tanesco, irrevocable and unconditional Corporate Guarantee and Indemnity of Mile Solutions Company Limited(2nd defendant), irrevocable and unconditional personal guarantees and indemnity of the directors/shareholders of the 1st defendant (3rd and 4th defendants), Negative Pledge undertaking over the 1st defendant's assets not to dispose without consent of the plaintiff, Lien, Pledge, set off of all accounts of the 1st defendant and specific charge over five vehicles owned by the 2nd defendant. Further facts go that, despite the 1st defendant granted and enjoyed the facility, but has been in default in repayment of the amount of loan due, hence, breach of the terms and conditions of the credit facility. All efforts by the plaintiff to have the defendants observe the terms and conditions have

been in vain, hence, this suit claiming, among others, Tshs.417,542,659.03 being principal amount outstanding and interest as of 1st November, 2018.

The instant suit went on all stages, until on 13th July, 2020 when final pre-trial was conducted inter parties. Among the orders on that day, the court directed parties to file their respective witness statements within 14 days from that date. The suit was set for hearing today, 13th August 2020.

When this suit was called on for hearing on 13th August 2020, the plaintiff was enjoying the legal services of Mr. John Laswai and Ms. Mariam Ismail, learned advocates from Locus Attorneys. And, on the other hand, the 1st, 3rd, and 4th defendants had the legal services of Mr. Andrew Kasaizi, learned advocate and the 2nd defendant was advocated by Mr. Richard Kinawari, learned advocate.

Mr. Laswai when invited to address the court on the way forward of the suit informed the court that, the suit is fixed for hearing but they have prayers to make. The first prayer was for adjournment of the suit and the second prayer was for extension of time within which to file witness statement because the plaintiff was unable to file the witness statement for reasons beyond her control. According to Mr. Laswai, their prayer is pegged on section 93 of the Civil Procedure Code [Cap 33 R.E. 2019]. The reason behind failure to file

witness statement was that, the principal officer of the plaintiff, one, Maziku, who was conversant with the facts of the case resigned the last day of filing the witness statement by giving twenty four hours notice, thus crippling the efforts to file the witness statement that was ready for signature and to be filed. This hindered the plaintiff to file the witness statement in time as the plaintiff had to look for another witness to take over the matter to enable the plaintiff file her witness statement.

On that reason, the learned advocates for the plaintiff humbly urged this court to grant the enlargement of time sought and allow them to file witness statement.

Mr. Kasaizi, learned advocate for the 1st, 3rd and 4th defendant strongly objected both prayers of adjournment and enlargement of time. According to Mr. Kasaizi, after listening to the submissions of the learned advocates for the plaintiff, no reason(s) was so far demonstrated to move this court to exercise the discretion sought. Mr. Kasaizi pointed out that, on 17/09/2019 when first pre-trial conference was conducted, the plaintiff stated that, they will have 4 witnesses, but no where the learned advocates for the plaintiff stated that they have dropped the other three witnesses or even their witness statements are not in court. Further, faulting the submissions by Mr.

Laswai, Mr. Kasaizi argued that, the court was not told who this Mr. Maziku was, and what position he held in the plaintiff's bank. To make things worse, Mr. Kasaizi pointed out that, apart from bare submissions by plaintiff's learned advocates, no letter was tendered in this court to support the allegations of resigning of Mr. Maziku within twenty four hours as alleged. According to Mr. Kasaizi, the learned advocates for the plaintiff came knowing they are coming to seek adjournment and they were required to support their prayer by production of the letter of resignation of Mr. Maziku. Failure to submit or bring the letter, according to Mr. Kasaizi, water down the truth of the reason advanced.

Mr. Kasaizi went on to argue that, the order to file witness statement was given on 13/07/2020 during final pre-trial conference order and as of today is a month since then, but no formal application has been filed in this court, at least with an affidavit stating the reasons and documentary evidence to support the prayer. More so, Mr. Kasaizi pointed out that, this court was not told the date when Mr. Maziku resigned, which makes their reasons porous of no sufficient reasons.

In the totality of the above predicaments in the prayers, Mr. Kasaizi was of the firm view that, the oral application is wanting of any sufficient reason for granting of extension of time.

In the fine, therefore, the learned advocate prayed that, this court be pleased to dismiss this suit in its entirety with costs for want of prosecution.

On the part of the 2nd defendant, Mr. Kinawari told the court that, he strongly object the prayers and support all what has been submitted by the learned advocate for 1st , 3rd,and 4th defendants and prayed to add that, during First Pre-Trial Conference order, the learned advocates for the plaintiff told the court that, they will have 4 witness and in their plaint, at pages 8 and 9, one Hope Liana who signed the plaint twice verified to be able to depose to the facts of the case. According to Mr. Kinawari, this witness who signed the plaint and introduced herself as the principal officer of the plaintiff never bothered to file her witness statement and the court was not told her whereabouts since 13/07/2020. The learned advocate for the 2nd defendant strongly pointed out that, no justifiable reasons has been given for failure to bring her witness statement as ordered.

In the totality of the above reasons, Mr. Kinawari pressed that this court be pleased to find out that, no sufficient reasons have been advanced and

proceed to dismiss this suit with costs under Order IX Rule 8 of the Civil Procedure Code.

In rejoinder, Mr. Laswai submitted that the provisions of Order IX Rule 8 of the CPC do not apply in the circumstances we have because the plaintiff by his advocates is present in court. On why Hope Liana could not make a witness statement, Mr. Laswai pointed out that, the principal officer, who signed the plaint is the head of legal and corporate secretary, but this case is on credit facility, therefore, the person who was conversant with the facts was Maziku but who is no longer working with the bank.

With regard to the number of witnesses, Mr. Laswai replied that, the plaintiff has decided to drop them and wanted to use only one witness. Mr. Laswai further implored this court to allow the oral application and guided by the interest of justice, allow an extension of time as by so doing will not prejudice the defendants in anyway but give room for parties to prosecute their case on merits. On the letter of resignation, it was the reply of Mr. Laswai that, it was an oversight not coming with the letter in court today and that as an officer of the court he cannot lie that there is a letter while it is not there.

On the totality of the reasons advanced in support of the oral application, Mr. Laswai prayed that, their prayer be allowed for the interest of justice.

This marked the end of hearing of the oral application for extension of time to file witness statement.

Having summarized the rival oral arguments for the trained legal minds of the parties, and having dispassionately considered the prayer for enlargement of time and the provisions which this prayer was made, I find it imperative to produce the said provisions for easy of reference and its applicability. Section 93 provides:-

Section 93- Where any period is fixed or granted by the court for 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. (emphasis mine).

From the literal reading of the above provision, is obvious and is my considered opinion that, the parliament intended to maintain inherent powers of the court for the enlargement of time in two ways for the interest of justice namely; **one**, the court itself suo motto can extend time, and **two**, by

any party to the proceedings moving the court to enlarge time that was originally fixed despite elapse of the time earlier fixed. It should be noted that, however, the exercise of this discretion by the court suo motto can only be exercised in trivial and mistake that do not affect the rights of the parties or in technical defects or in pandemic situations like Covid 19 where the parties have no control in doing what is/was ordered or fixed by the court of the law.

However, the exercise of such discretion in any other cases must be accompanied with the reason(s) for that matter or the conduct of the party applying must as well be considered.

In the instant oral application, I have no doubt that, the provision which the learned advocate for the plaintiff moved the court to exercise its discretion to extend time is proper one. However, what is in serious dispute is whether there are reasons advanced to warrant the court to exercise the discretion.

The only reasons advanced are the immediate resigning of the Mr. Maziku and the cry for the interest of justice to be done to the parties. The learned advocates for the defendants, on the other hand, had seriously faulted the plaintiff's advocates in his oral prayers that, the said letter of resignation was not produced to court to justify the allegations of the advocate, the plaintiff's

advocate during First Pre-trial conference had told the court that, he had four witnesses and why others did not file their respective witness statements and that, the time has elapsed since the direction and order of the court was given. In rejoinder, Mr Laswai argued that, they have dropped the rest of the witnesses and will use only one witness and that as an officer of the court he cannot lie to court.

Have dispassionately considered the merits of the oral application and the reasons advanced, I agree with the learned advocates for the defendants, that the only plausible reason advanced was that of resignation but same was left hanging for want of supportive evidence to warrant the grant of the extension for filling of the witness statement without much ado. The letter for resignation was imperative and without it leaves a lot to be desired.

However, in my own discretion, I have as well gone further in the circumstances of this suit to consider the interest of justice alongside the conduct of the plaintiff' advocates in this suit. The record of the proceedings shows that, the advocates for the plaintiff have been attending this suit at all material time when called on. This conduct has in one way or another convinced this court to find that, interest of justice calls me not to dismiss

this suit in its entirety but instead I am inclined to grant an extension of time to file witness statement on the following conditions, namely:

- i. the plaintiff counsel are given 7 days from the date of this ruling to file witness statement and have it served to other parties to the suit immediately to allow this suit to proceed with hearing inter parties.
- ii. the plaintiff's advocates are hereby ordered in person to pay the advocates for the defendants each Tshs. 150,000/= being punitive costs of adjournment of the suit on 13/08/2020. The said amount should be paid before the date set for hearing and same should not be taxed.
- iii. the advocates for the plaintiff are as well hereby ordered and directed to pay in this court amount of Tshs.150,000/= to this court for causing unnecessary adjournment on 13/08/2020.

It is so ordered and directed

Dated at Dar es Salaam this 04th September, 2020.



S.M.MAGOIGA

JUDGE

04/09/2020