

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

COMMERCIAL CASE NO. 175 OF 2018.

NAS TYRE SERVICES LIMITED PLAINTIFF.

VERSUS

ANTHONY SELEMAN KOMBE t/a

MOSHI INVESTMENT DEFENDANT.

Date of Last Order:17/02/2020

Date of Judgement: 28/02/2020.

EXPARTE JUDGEMENT.

MAGOIGA, J.

On 06th day of September, 2019 this Court entered judgment on admission in favour of the plaintiff to the tune of Tshs.32,288,690/= . The Court further upon an oral application made by learned counsel for plaintiff, ordered that the remaining claims by the plaintiff shall be proved by witness statement under Rule 31(1) (c) of Rules of this Court as amended by G.N. no.107 of 2019. The consequential orders were given upon the defendant failure to appear on the date fixed for pre-trial conference despite being dully served on 30/08/2019 in Mbeya by process server.

Therefore, from the above background the other claims subject of prove by witness statement were as follows:-

- (i) the difference of the money claimed of Tshs. 78,263,690/= minus Tshs.32,288,690/=, which is Tshs.45,975,000/=.
- (ii) Interest of the principal sum of Tshs.78,263,690/= at the bank's rate of 21% from the date of the transaction to the date of judgement.
- (iii) Interest of the decretal sum at Court's rate of 12%from the date of judgment to the date of final settlement.
- (iv) General damages
- (v) Costs of this suit
- (vi) Any other relief (s) as the honourable Court may deem fit and just to grant.

To get the gist of this judgement, it is imperative to know albeit in brief the facts of this suit as gathered from the pleadings. That sometimes in 2016, the plaintiff entered into oral agreement with the defendant for supply on credit basis various size of tyres. The payments, it was agreed, were to become due after the defendant received invoice against each tyre supplied. However, in the course of doing the business, the defendant received tyres but when the invoices were raised and delivered for payment, the defendant refused,

neglected and denied to make good payments of tyres had and received. The facts go that several reminders and follow ups by the plaintiff were received with empty promises and eventually, the plaintiff decided to institute this suit, hence this judgement.

It was against the above background, when this suit was called for pre-trial conference, on 06th September, 2019, Mr. Gilbert Mushi, learned advocate for plaintiff moved this Court under 31 (1) (c) of the this Court's Rules as amended by G.N. no 107 to prove the remaining claims by way of witness statement. The said prayer was not objected by the defendant for on several occasions, the defendant has not entered appearance to this Court despite dully served with last summons on 30th August 2019.

The provisions of Rules 31(1) (C) as amended provide as follows:

Rule 31 – (1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the Court may:-

- (a) NA
- (b) NA
- (c) Upon proof by witness statement or otherwise enter ex parte judgement;

It was against this background, the plaintiff was ordered on 06th day of September 2019 to file within 14 days witness statement in proof of the other claims. In compliance of the Court's order, the plaintiff filed the said witness statement on 19th September, 2019.

The task of this Court now is to scan through the witness statement and see if other claims have been proved to the standard required in civil cases. Before the Court goes into the witness statement, it is imperative to understand the import of Rule 31 of the Rules as amended. Going by the provisions of Rule 31 clearly set out discretion but serious consequences to a party who default appearance to the proceedings on the first day of pre-trial conference. These are; **One**, for plaintiff the Court may dismiss the suit or proceedings. **Two**, for defendant, the Court may strike out defence or counterclaim. **Three**, the Court may upon proof by witness statement or otherwise enter ex parte judgement. **Four**, any party affected by the above three orders, have a remedy to make an application within 14 days from the date of the order to have the order set aside by the Court on such terms as it considers just. **Five**, where the Court has adjourned the first pre-trial conference, and in the subsequent pre-trial conference the party who fails to

appear/attend the pre-trial conference, the Court shall have no other option but to dismiss the suit.

Back to the instant suit, the Court upon being satisfied that summons were dully served opted to exercise option number three by ordering the proof by witness statement. The phrase "witness statement" is defined under Rule 3 of this Court's Rules to mean a statement given pursuant to Rule 48 of the Rules in lieu of examination in chief. Rule 48 as amended thus provide the following:

Rule 48- Notwithstanding the provisions of rule (1) of rule 49, the Court shall, at the final pre-trial conference, determine the manner in which evidence is to be given at any trial or hearing by giving appropriate directions as to-

- (a) The issues on which evidence is required; and**
- (b) The way in which any matter is to be proved.**

Guided by the above rule, issue to be proved is whether the amount of Tshs.45,975,000/= which is alleged to have not been paid for the tyres supplied and received by the defendant is genuine. The way in which this issue is to be proved was through witness statement. It should be noted further that the claim is for specific damages and as such should be strictly proved as well,

being a trite law in our jurisdiction. See the case of ZUBERI AGOSTINO v. ANICET MUGABE[1992] TLR 137(CAT).

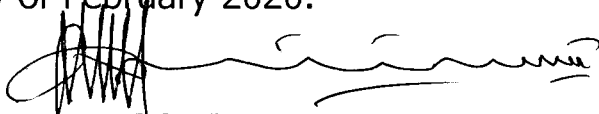
After going through the witness statement and the attached documents, in particular, the relevant invoices, which were annexed to the witness statement as NTS-3, there is a total of Tshs. 76,503,000/= which is the total balance unpaid. So, out of this if one minus Tshs.32,288,690/= you get the balance which has been proved is Tshs.44,214,310/=. I have equally considered the defence of the defendant but who said to have paid Tshs.21,000,000/= but it was 2017 before the institution of this suit, hence same was taken into account before this case.

On that account, this court is satisfied that the plaintiff has been able to prove the balance of Tshs. 44,214,310/= on top of the ones entered on judgement on admission. The plaintiff is equally given interest to the decretal sum at Court's rate of 12% from the date of judgement to the date of final settlement. The plaintiff will have costs of the suit. Other prayers in item (ii) and (iv) are not granted for want of evidence.

It is so ordered.

Dated at Dar es Salaam this 28th day of February 2020.




S. M. MAGOIGA
JUDGE.
28/02/202