

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
MISC. COMMERCIAL APPL. NO.42 OF 2021  
(Arising from Commercial Case No.138 of 2019)**

**M/S HERKIN BUILDERS LTD.....APPLICANT**

**VERSUS**

**ERICK JOHN MMARY.....RESPONDENT**

Date of Last Order: 22/06/2021  
Date of Ruling: 15/07/2021

**RULING**

**NANGELA, J.:**

On 30<sup>th</sup> March 2021, the Applicant herein filed, under section 95 of the CPC, Cap.33 R.E 2019, a Chamber application supported by an affidavit of Omari Msemu. The Applicant is seeking for the following order in that application, that:

1. This honourable Court be pleased to extend the time within which the Applicant will file witness statements.
2. Costs of this application be provided for.

3. Any other relief the Honourable Court will deem just and fit to grant.

As I stated herein, the above prayers were supported by an affidavit of Mr Msemu. On 19<sup>th</sup> April 2021, Mr Elvason Maro filed a Counter Affidavit opposing the application.

When the parties appeared before this Court on 10<sup>th</sup> May 2021, this Court ordered that the matter be disposed of by way of written submissions. The Applicant was to file its submission on or before 17<sup>th</sup> May 2021 while the Respondent was to file on or before 24<sup>th</sup> May 2021. Rejoinder, if any, was to be filed on or before 1<sup>st</sup> of June 2016. I thereafter set the 16<sup>th</sup> of June 2021 as a day for issuing the final orders.

On 16<sup>th</sup> June 2021, the matter could not proceed and, due to that fact, was rescheduled to 22<sup>nd</sup> June 2021 wherein a date for this ruling was fixed. Central to the ruling is whether the prayers sought should be granted or not.

In his submission in support of the granting of the prayers, Mr Msemu submitted that, the gist of the application is disclosed in paragraphs 6 to 14 of the supporting affidavit. He stated, as reasons regarding why the Applicant failed to file the requisite witness statements in time, that, the same were due to the untimely death of Eng. Sanyael Kishimbo.

He submitted that, apart from Mr Kishimbo being the Managing Director, he was also a technical person (Engineer) in the implementation of the various projects, including the project which is the subject matter of the main suit. It was submitted that, Ms Esther Sanyael Kishimbo, who was a co-director with the late Mr Kishimbo, was just a token Director, as he is with no acquaintance with technical issues or knowledge on the implementation of the project, the subject matter of the main suit.

It was also Mr Msemo's submission that, the death of Eng. Kishimbo made the other expected two witnesses to leave the company, and that, efforts to locate their whereabouts has not been fruitful. Relying on the case of **Lyamuya Construction Company Ltd vs. The Board of Registered Trustees of Young Women' Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT, at Arusha (unreported)**, Mr Msemo contended that, granting extra time is at the discretion of the Court to do so after considering some factors constituting the reasons for the delay and its extent. He urged this Court, thus, to exercise its discretion and grant the prayers.

For his part, Mr Maro opposed the granting of this application. He submitted that, this Court needs to put its feet down and send a strong signal to litigants that, the

Court cannot be treated casually. He contended that, once a case is set for hearing, it cannot be derailed from its course on flimsy reasons.

Mr Maro was of the view that there has been sloppiness and lack of adequate attention on the part of the Applicant all along since, as it was noted in the pleading, there was wrong citation of the parties in both the Chamber application and the reply to the counter affidavit.

Apart from such early observations, Mr Maro argued that, the affidavit of Mr Msemo cannot be relied upon as it contains untruthful deposition and, or misrepresentation. He contended that, facts pertaining to the affairs of the Applicant Company have been irregularly presented by Mr Msemo. In the alternative, he argued that, there has been no good cause or sufficient reasons so far advanced to warrant the extension sought and, that; the application stands to prejudice the Respondent.

To clarify on the above, Mr Maro submitted that, since the affidavit in support of the application was deponed by Mr Msemo, it would be fair to argue that, the facts in paragraphs 9, 11, 12 and 13 of the Affidavit are mere hearsay, just as paragraphs 6, 7 and 8 in the Reply Affidavit. Mr Maro submitted that, these are internal affairs and happenings of the Applicant, of which the deponent must have been informed about.

Mr Maro contended further, that, Mr Msemo must have been informed that, after the death of Eng. Kishimbo as one of the Directors, the applicant company remained with only a "token" Director who is with no knowledge of the details of the pending case. It was Mr Maro's submission that, the contents of the above noted paragraphs, i.e., paragraphs 9, 11, 12 and 13 of the Affidavit and 6, 7 and 8 in the Reply Affidavit, are hearsay.

Referring to the law governing affidavits, Mr Maro contended that, this Court should not and cannot act on the affidavit of Mr Msemo. To his aid, Mr Maro relied on the decisions of this and the Court of Appeal, on the issue of defective affidavit, arguing that, the affidavit filed in support of the application should be struck out.

In particular, reliance was placed on the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd v Loans and Advances Realization Trust (LART), Civil Application No.80 of 2002** (unreported); **Sabena Technics Dar Limited vs. Michael J.Luwunzu, Civil Appeal No.451/18 of 2020 (CAT)** (unreported); **NBC Ltd vs. Superdoll Trauiler Manufacturing Co. Ltd, Civil Appl.No.13 of 2002, (CAT)** (unreported) and **Benedict Kimwaga vs. Principal Secretary, Ministry of Health, Civil Appl.No.31 of 2002, (CAT)(unreported)**.

On his second point, Mr Maro submitted that, the affidavit relied upon by Mr Msemu contains misrepresentations and untrue statements. He referred this Court to paragraph 8 of the affidavit filed by Mr Msemu which reads as follows:

"8. That, as the Court records would disclose, on 18<sup>th</sup> August 2020 when this matter was called for First Pre-Trial Conference, the Applicant herein informed this honourable Court of its intention to call upon three witnesses. It was intended by the Applicant that the key witness would be Eng. Sanyiel I. Kishimbo, the Applicant's Managing Director and key person in the implementation and supervision of the project, the subject matter of the main suit."

According to Mr Maro, the above paragraph contains untrue statements because, by 18<sup>th</sup> day of August 2020, it would not have been possible for the Applicant Company to have intent to call the late Eng. Kishimbo as the key witness since, the said person, was already a deceased, having died way back in December, 2019.

He also relied on paragraph 12 of the Affidavit of Mr Msemu which makes reference to "**token Directors**" who had no meaningful knowledge on the Applicant's undertakings and who, as per the disclosures made in the

written submission by Mr Msemo, happens to be Mrs Esther Sanyiel Kishimbo.

Relying on the Written Statement of Defence filed in this Court, Mr Maro contended that, Mrs Sanyiel cannot be said to be lacking meaningful knowledge of the affairs of the Applicant while she prepared an elaborate written statement of defence in response to the claims. He urged this Court, on the basis of the Court of Appeal decision in the Case of **Ignazio Messina v Willow Investment SPRL, Civil Appl.No.21 of 2001** (CAT) (unreported), to strike out the affidavit for containing untruthful information.

As regards the prayer for Costs, which is contained in the Chamber Summons, Mr Maro submitted that, while it is true that costs follows the event, the Applicant's prayer is unwarranted. He emphasized that, the application comes from the Applicant after the Applicant had defaulted to file a witness statement in time. He wondered, therefore, why at all the Respondent should be condemned to pay costs.

In a brief rejoinder submission, Mr Msemo reiterated his submission in chief. He argued that, the Applicant's counsel has drawn his own experience of litigation. He contended that, what Mr Maro has raised are disguised points of objection against the affidavit in support of the application and, that, this is a bad practice.

Mr Msemo argued further, that, had the Respondent's counsel wanted to raise objections, he should have done so, taking into account that on 22<sup>nd</sup> April 2021, he withdrew a notice of objection from the Court which was based on the issue of wrong enabling provision of the law. To support his views, reliance was placed on the decision of this Court in the case of **Miza Bakari Haji and 9 Others vs. The Registered Trustees of the Civic United Front, (CUF) and 15 Others, Misc.Civil Application No.479 of 2017, (HC) DSM (unreported).**

In that case, this Court had the following to say, at page 8:

"In my view, the fact that the Applicant's advocate had not at any material time raised any eyebrows against the alleged defects, he must be taken to have waived his right to object them and he could (sic) not do so in his submission without any leave of the Court".

In view of the above, Mr Msemo was of the view, therefore, that, Mr Maro was bringing points of objection through the back door. Mr Msemo was also of the view that, Mr Maro's submission has gone far beyond the judicial test on applications for extension of time and lamented of being unfairly accused of treating the Court



casually. He argued that, what the Applicant did is only to pursue its right to seek the leave of the Court to file the Witness statements out of time.

Finally, it was Mr Msemu's submission that, should this Court find that there are defects in the affidavit; it should also make a finding that such defects do not go to the root of the application. Relying on the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph, Civil Appeal No.55 of 2017** (CAT) (Mwanza) (unreported), Mr Msemu argued that, this Court should deal with the matter at hand justly.

I have impassively considered the rival submissions from the learned counsels for the parties. At the heart of this application is the prayer regarding extension of time to file a witness statement belatedly. The question to respond to is whether this Court should grant such prayer.

Before I address such an issue, I find it apposite to consider some of the issues raised by Mr Maro and responded to by Mr Msemu, regarding the affidavit filed in support of the application. The bone of contention in the submissions is that, the affidavit is defective as it contains extraneous matters which are untruthful, and hearsay to say the least.

I have looked at paragraphs 8, 9, 10, 11, 12 and 13 of the affidavit of Mr Msemu which Mr Maro has raised concerns with regarding their legal propriety. I have also

looked at the verification clause and I do take note that, the contents of these paragraphs are verified as being true to the best of knowledge of the deponent, i.e., Mr Msemo.

While I do take note of Mr Msemo's submission, that, what Mr Maro has raised in his submission is akin to a preliminary objection, and while I take judicial notice of what this Court stated in the case of **Miza Bakari Haji and 9 Others (supra)**, I am of the view that, the information contained in some of these paragraphs is somewhat wanting and cannot just be acted upon blindly.

For instance, under paragraph 8, it is deponed that, one of the three witnesses intended to be called, as per the information recorded by this Court on 18<sup>th</sup> August 2020, was the Late Mr Kishimbo. However, according to Mr Maro, by that time Mr Kishimbo was a deceased having died in December 2019. There has been no dispute that Mr Kishimbo died during that time. That means, therefore, that, paragraph 8 contains untruthful information as one cannot intend to call as a witness, a deceased person.

In the case of **Ignazio Messina (supra)**, which Mr Maro has relied upon, the Court of Appeal of Tanzania did hold that, an affidavit tainted with untruthful information is no affidavit since false evidence cannot be acted upon to resolve any issue. However, is it the entire affidavit of

Mr Msemo tainted with untruthful information or just the relevant paragraph? If it is only paragraph 8 should the entire affidavit be struck out?

In my view, the submission regarding untruthfulness is directed to paragraph 8 of the affidavit and not the entire affidavit. As such, the course to take is to declare that paragraph as being defective and strike it out. I will take that approach and declare the paragraph as being defective, hence, striking it out.

Next is paragraph 9 and 10 of Mr Msemo's affidavit. To paraphrase these paragraphs, they state that, the death of Mr Kishimbo threw the Applicant into a disarray and calling for a rethink in the strategy of how to go about with the defence plan. In my view, these are matters within the knowledge of the deponent as an advocate handling the matter regarding the Applicant in Court. He is the one to formulate the strategy regarding how to advance the defence case. As such, I see no reason why they should be faulted.

Next is a paragraph 11 and 12 of Mr Msemo's affidavit. As regards these paragraphs, I am of the view that, much as Mr Msemo is the advocate in the conduct of the matters before the Court, the contents in those paragraphs are surely based on information since there is no way Mr Msemo who is not an employees of the

Applicant will be able to state those facts without being informed.

That being the case, the source of who informed him ought to have been disclosed. The law is clear; an affidavit must disclose the source of information if it is made on information. The cases of **Salim Vuai Foam vs. Registrar of Cooperative Societies [1995] TLR 75** and **Phantom Modern Transport [1985] vs. D.T. Dobie (Tanzania) Ltd, Civil Ref.No.15/2001 and 3/2002, CAT, (unreported)** are clear on that. As I stated earlier, I will also expunge these two paragraphs from the affidavit.

Paragraph 13 is about efforts which the deponent has spent in seeking two of his intended witnesses. I find no offense with what the deponent states since that is what he has been doing as an advocate of the Applicant.

In my view, having expunged paragraphs 8, 11 and 12 from the affidavit, the question that follows is whether the remaining paragraphs can still stand to support the application. In my view, the affidavit can still remain intact to support the application. That being the case, I will proceed to determine whether it contains sufficient reasons for delay in filing the witness statement timely.

In his submission, Mr Msemo contended that, a person who should have been one of the witnesses, Mr Kishimbo is no more a citizen of this world, having been

summoned to the Almighty God. But the issue is: *when did he pass away?* Mr Maro has stated, and no counter argument on that, that, Mr Kishimbo died in December 2019. If that is the case, can this be a suitable reason for extension of time while Mr Msemo knew well in advance that Mr Kishimbo cannot be a witness for his case? I think not. However, let me move a further step as per the contents in the affidavit.

As per the record of this Court, the First Pre-trial Conference took place sometimes on 18<sup>th</sup> August 2020, followed by a failed mediation and later the Final Pre-trial Conference which took place on 16<sup>th</sup> February 2021. The parties were required thereafter to file their witness statement within 14 days. According to paragraph 13 of the supporting affidavit, two of the intended witnesses have not been located and, hence, the application for extension of time.

Primarily, an application of this kind is granted at the discretion of the Court. Such Court's discretion is to be exercised judiciously upon disclosure of "**good cause**" for failure, on the part of the Applicant to file the witness statement within the prescribed time limit.

In principle, there is no hard and fast rule regarding what amounts to "**good cause**". Rather, the expression "good causes" will largely depend on the *bona fide* nature

of the given explanation by the Applicant regarding his/her failure to act within time.

In the case of **Puma Energy vs. Karim Aziz Banji, Misc. Commercial Application No.161 of 2019 (unreported)**, this Court, citing the Indian case of **B. Madhuri Goud vs B. Damodar Reddy, 2012 (12) SCC 693**, was of the view that:-

"If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

Given the facts and circumstances giving rise to this Application, the reasons disclosed in the Applicant's affidavit, and, in view of the reasoning given herein above, I find, in the interest of justice, to grant the prayers for extension of time within which the Applicant may file Witness Statements which could not be filed as per the earlier directives of this Court under Rule 49(2) of this Court's Rules of Procedure.

As regard the prayer for costs of this application, I am in full agreement with Mr Maro, that, the circumstances leading to this application do not warrant the Applicant to ask for costs of this application.

Consequently, this Court settles for the following orders, that:

1. Save for the prayer for costs, the prayers sought in the Chamber Summons for enlargement of time within which to file the requisite witness statements are hereby granted.
2. The Applicant is given 14 days within which the requisite witness statements should be filed.
3. The prayer for costs is denied on the basis of that the Respondent has nothing to do with the Applicant's delay and, hence, he cannot suffer cost at the expense of the Applicant's own delay to file the required witness statements.

**It is so ordered.**

**DATED at DAR-ES-SALAAM 15<sup>th</sup> JULY, 2021**



  
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**HON. DEO JOHN NANGELA**  
**JUDGE**