**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 76 OF 2020**

**SIMPLY FRESH TANZANIA LIMITED .....1ST PLAINTIFF**

**KETANKUMAR PATEL ..... 2ND PLAINTIFF**

**MAHESHKUMAR PATEL ..... 3RD PLAINTIFF**

**GLASS & GLAZING AFRICA LIMITED ..... 4TH PLAINITFF**

**VERSUS**

**YASMINE HAJI ..... DEFENDANT**

**RULING**

**ISMAIL, J.**

4th, &13th October, 2021

This ruling stems from the Court's ruling delivered in respect of an application for extension of time to file a witness statement. The application - registered as Miscellaneous Commercial Application No. 119 of 2021 - fell through, when the Court held that no sufficient cause had been adduced to warrant exercise of the Court's discretion. The ruling slammed the door on the plaintiffs, for submission of a sole witness statement that was intended to support the plaintiffs' case, and serve as their evidence in chief.

When the matter came up for orders on 12th October, 2021, the plaintiffs were represented by Mr. Omar Msemo, learned counsel, while the defendant enlisted the services of Mr. Jovinson Kagirwa, learned counsel. Mr. Msemo argued that what is at stake in these proceedings is the way forward. He took the view that, in terms of Rule 48 of the High Court of Tanzania (Commercial Division) Procedure Rules, GN. No. 250 of 2012 (as amended by Rule 24 of the Amendment Rules), the Court has a leeway of determining the manner in which the matter can proceed. While acknowledging that this is done at the Final Pre-trial Conference, Mr. Msemo was adamant that the Court stillholds the power of determining how the matter should be proved.He reminded the Court that the Rules are silent on what should be done when a party or both of them fails to file the statement. The counsel took the view that the case can still be proved by other means.

Mr. Kagirwa's rebuttal was equally brief. He took the view that, since no witness statement was filed, the suit is liable to dismissal for want of prosecution. The counsel argued that the settled position is that such failure is tantamount to failure to prosecute. He invited me to inspired by the decisions of this Court and the Court of Appeal in ***Africarriers Ltd v. Shirika la Usafiri Dar es Salaam and Another***, HC-Commercial Case No. 50 of 2019; ***Kenafric Industries Limited V. Lakairo Investments Co.***

***Ltd***, HC-Commercial Case No. 7 of 2019; and ***AAR Insurance (T) Limited v. BeatusKisusi***, CAT-Civil Appeal No. 67 of 2015 (all unreported). Mr. Kagirwa urged the Court to dismiss the suit with costs.

Submitting in rejoinder, Mr. Msemo contended that the cited decisions did not make reference any specific provision as a source of the Court's power to dismiss a suit for failure to file a statement. With respect to ***AAR case*** (supra), Mr. Msemo's argument is that no specific consequence has been cited, besides saying that hearing in this Court is by way of a witness statement. He insisted that the Court retains powers to order the means through which a matter should be proved. He invited the Court to refuse the defendant's invitation to dismiss the matter. He urged the Court to order that the case be proved through other means as anticipated by Rule 24 that amended Rule 48 of the Rules.

From these brief and impressive rival submissions, the singular issue for determination is:what is the consequence of a party's failure to file a witness statement?

As unanimously submitted by learned counsel for the parties, filing of witness statements is governed by the provisions of Rule 48, as amended by Rule 24 of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019. The new look provision states as follows:

*"48. Notwithstanding the provisions of subrule (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 may be proved."*

[Emphasis added]

As counsel are aware, this procedure constitutes as departure from the conventional procedure, enshrined in the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), which caters for a broad procedure on how disputes may be conducted generally. It is a tailor-made procedure with respect to taking of evidence in commercial cases, as acknowledged at p.p. 5-6 of the decision in the ***AAR case*** (supra), wherein it was held:

*"With the coming into force with these Rules, the procedure of taking evidence of a witness both in the plaintiff and defendant cases in the High Court (Commercial Division) has drastically changed. A witness is required to file his witness statement along with the "intended" exhibits. The statements are exchanged. Then a witness appears in Court for cross-examination...."*

The argument by Mr. Msemo is that, preference to a witness statement serves as one of the ways through which a case may be proved. The

enormous powers of the Court enable it to prescribe alternative ways of having a party prove his case. While I agree that the words *"determine the manner in which evidence is to be given at any trial or hearing"* suggest that there may be ways other than proof through witness statements, timing of determination of the way through which such proof has to be done remains a key factor. The law dictates that such determination should be done ***"at the final pre-trial conference"***. Glancing through the proceedings, it is gathered that the final pre-trial conference was held on 9th August, 2021, the date on which the parties were ordered to file their respective witness statements within 14 days from the date of the said order.

By ordering that statements be filed within that time frame, it is clear that the Court determined that the parties' contentions be proved through witness statements and not through any other way. This means, therefore, that subsequent to such choice, the Court was left with no option which would be used to accommodate a defaulting party such as the plaintiffs. It is my conclusion that the condition precedent for the use of the leeway provided in Rule 48 is if such alternative choice is done before the final pre-trial conference. This, then, nullifies Mr. Msemo's contention of existence of an alternative remedy.

With regards to the consequences, Mr. Kagirwa has urged the Court to dismiss the matter for want of prosecution. This contention has been valiantly opposed by Mr. Msemo. He has taken the view that the decisions of the Court relied on by Mr. Kagirwa have not cited any provision of the law which dictates that the consequence of the failure to file a witness statement is to have the suit dismissed, if the offending party is the plaintiff. Before I delve into the heart of the contention on the consequences, let me register my disagreement with Mr. Msemo's contention. The reasoning by a court on a point is as good and forceful as the provision of the law, and the judicial officer that composed the decision is not under any obligation to refer to a particular provision of the law for the decision to be valid and binding. It is enough if it pronounces a position on a matter that is a subject of contention. It is erroneous to consider such decision as having a less effect on the matter merely because the same does not embody citations of any provision of the law.

In both of the decisions of the Court cited by Mr. Kagirwa, the consequence of the failure to file a witness statement has been equated to a failure to produce witnesses when a case is called for hearing. It results in the dismissal of the suit. I cannot agree more with this reasoning and conclusion. I must add that this is an event that is akin to or equated to the

plaintiff's non-appearance under the provisions of Order IX rule 5 of the CPC which provides in part as hereunder:

> "***Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed*** *unless the defendant admits the claim, or part thereof ....*"
> [Emphasis supplied]

Noting that Rule 2 (2) of the Rules allows the application of the CPC where there is a *lacuna* and, aware that the Rules do not expressly provide for the consequence of the plaintiffs' missteps, I feel obliged to invoke the cited provision of the CPC which, along with the cited decisions of this Court, convince me that the inevitable consequence of the plaintiffs' inaction is to have this suit dismissed as I hereby do. The defendant is to have his costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 13th day of October, 2021.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

**M.K. ISMAIL**

**JUDGE**

**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**13/10/2021**