

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL CASE NO 177 of 2008**

**COMMUNITY FOOD LIMITED.....PLAINTIFF**

**VS**

**QUALITY FOOD BEVERAGE.....DEFENDANT**

**Ruling**

Date of last Order: 24-07-2012

Date of Ruling: 25-07-2011

**JUMA, J:**

When this suit came up for the continuation of the hearing of the defence witness on 24<sup>TH</sup> July 2012; Mr. Eustace, the learned Advocate representing the Plaintiff was present and expressed his readiness to proceed. Mr. Kamugisha and Mr. Rattansi, the two learned Advocates who have all along been representing the defendant, were both absent. In their absence; appeared Mr. Anjan Bandyopavhya, who introduced himself as a Principal Officer of the defendant company. The Principal Officer of the defendant informed the court that Mr. Kamugisha is not around and that he (the Principal Officer) needed more time to establish the whereabouts of Mr. Kamugisha!

Mr. Eustace expressed his strong opposition to any further adjournment of the defence case. The learned Advocate pointed out that the defendant's case is conducted by Mr. Kamugisha and Mr. Rattansi and wondered why both learned Advocates failed to show up for the hearing of the case. Mr. Eustace also noted that although the defendant was scheduled to begin the examination in chief of its second witness the Principal Officer came to court without bringing the second witness. Mr. Eustace drew my attention back to the 4<sup>th</sup> June 2012 when the defence came up for continuation of hearing and Mr. Rattansi informed the court that he was not ready because defendant's witness was not available.

Relying on the provisions of Order XVII Rule 1 of the **Civil Procedure Code, Cap. 33 (CPC)**, Mr. Eustace asked this court to disallow any further requests for adjournments of the defence case, and this court should on the basis of evidence on record proceed to order final submissions, Judgment and bring this suit to a conclusion. Order XVII Rule 1 of the CPC state:

*3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.*

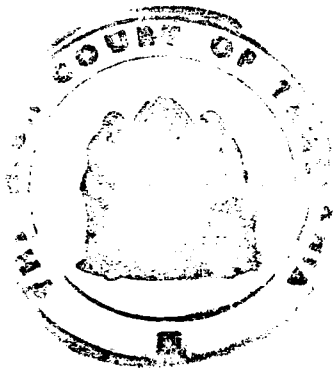
In his reply, Mr. Anjun the Principal Officer of the defendant company repeated his request for further adjournment to allow Mr.

Kamugisha who had been a lead Counsel to appear and lead the defence case.

From the submissions of the parties it is pertinent to pause and reflect back that this case which was filed way back in 2008 has been pending for a long time. Due to this extended pendency, the initial speed track assigned to this case has been extended twice, on 5<sup>th</sup> December 2011 and again on 4<sup>th</sup> June 2012. This case has reached a stage where the Plaintiff Company has already led its witnesses and closed its case. One witness for the defendant- Amri Haji Suleiman (DW1) has already been heard. The issue for my determination is whether the defendant company has failed to cause the attendance of its witness within the meaning ascribed under Order XVII Rule 3 of **CPC**.

Way back on 5<sup>th</sup> December 2011 Mr. Kamugisha had requested, and this court had allowed the defendant to bring one more witness in support of the defendant's case. The defendant company had a legal duty to cause the attendance of defence witnesses to advance this suit to its next stage. Mr. Eustace is with due respect correct to point out that on 4<sup>th</sup> June 2012 when the defence came up for continuation of the hearing of defence witness, it was Mr. Rattansi again who informed the court that he was not ready because defendant's witness was not available. Today the defence case came up for hearing but the defendant company not only failed to cause the attendance of the witness, but both the learned Advocates representing the defendant failed to appear in court. The defendant has clearly defaulted in its obligation to not only secure the

attendance, but to proceed with examination in-chief. In light of the default, I am not persuaded that further adjournment will be to the best interests of justice. I shall therefore not grant any further adjournment to allow any further witness by the defendant company. This suit shall proceed to the stage of hearing submissions of the opposing sides and finally disposed on the merits based on evidence of witnesses who have so far testified. Plaintiff is awarded costs.



  
**I.H. Juma**  
**JUDGE**  
**25-07-2012**