

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 131 OF 2019

ASSEMBLE INSURANCE TANZANIA LIMITEDPLAINTIFF
VERSUS

DELOITTE & TOUCHE.....DEFENDANT

RULING

Date of last Order: 10th February, 2023

Date of Ruling: 24th March, 2023

E.E. KAKOLAKI, J.

Whether this suit should be dismissed or not for plaintiff's failure to comply with the Court's order for filing witness statements as ordered by the Court, prior to the hearing date is the crux of the matter which this Court seeks to address in this ruling.

Before this Court the plaintiff herein sued the above-mentioned defendant claiming among other things for the payment of sum of Tsh. 2,291,327,684.01, being compensation for the loss suffered due to breach of contract and professional negligence. Upon completion of pleadings on 15/07/2020, the first PTC was conducted and the scheduling orders entered before the plaintiff on 08/09/2021 prayed for amendment of the plaint for

the purposes of determination of the real question in controversy amongst parties, the prayer which was cordially granted and effected by filing amended plaint pleading including years in which the alleged professional negligence occurred and attaching all the necessary annexures. The suit was therefore set for final PTC on 21/04/2022, issues framed and hearing set to come on 10/06/2022, with an order for the plaintiff to bring all her witnesses. It however transpired that hearing could not take place on the said 10/06/2022, as it was adjourned to 13/06/2022. Again on 13/06/2022, the matter was adjourned at the instance of the plaintiff as on that date Mr. Albert Lema, advocate for the plaintiff sought leave of the Court which was cordially granted for the parties to proceed with production of evidence in Court by way of witness statements, as the plaintiff was ordered to file the said witness statements seven (7) days and serve them to the respondent five (5) days prior to the hearing date which was set to come on 24/08/2022. Nevertheless on the date fixed for hearing, Mr. Lema, advocate for the plaintiff informed this Court that, the plaintiff was unprepared to proceed with hearing as on 17/08/2022, the plaintiff had filed with this Court Misc. Civil Application No. 354 of 2022, which was yet to be served to the defendant, seeking to depart from the scheduling orders and praying for

amendment of the plaint, after noticing in the course of preparation of witnesses that, some important documents were attached to the plaint without full accounts or contents. He therefore prayed for adjournment of hearing of the suit pending determination of the said filed application.

Unhappy with the plaintiff's prayer through her advocates Mr. Juvenalis Ngowi and Alex Mianga, ferociously objected it. It was Mr. Ngowi's submission that, this Court's last order was for the plaintiff to file her witness statements seven (7) days before the hearing date but failed to do so. He was of the view that, since the plaintiff has failed to adhere to the Court's orders within time that amounts to failure to prosecute the suit. He referred the Court to the provisions of **Order XVIII Rule 3 and 4 of the CPC** as amended by **GN no. 760 of 2021** which provides under Rule 3(1) that, witness statements should be filed within seven (7) days before the time fixed for hearing and served to the defendants within 5 days. And further that, Rule 4 provides for the consequences for party's failure to comply with the provisions of Order XVIII Rule 3 (3) of the CPC, which is the court to strike out the filed statements.

It was Mr. Ngowi's further submission that, as the statements were not filed at all within seven (7) days and served to the defendant within five (5) days

prior to hearing date, the plaintiff's act is tantamount to failure to prosecute the case as court's orders to that effect were never vacated. He added that, since the plaintiff was to bring his witnesses by filing witness statements seven (7) days before the hearing date but failed to do so, which timely filing of statements to him is equal to appearance before the court to prosecute the case on the specified date, then such non-filing of statements amounted to non-appearance to prosecute the case, which its consequence is dismissal of the suit for want of prosecution under Order IX Rule 3 of the CPC. He further argued that, the reasons advanced by the plaintiff for her failure to file the witness statements are not sufficient as the omission to annex documents attached to the plaint could be rectified by filing them in the list of additional documents to be relied upon, the right which the plaintiff reserved during the 1st Pre-trial conference. He contended further that, in any event the witness statements could have been filed and the application for introduction of new evidence be made but that right was also not exercised without any justification, instead of filing the alleged application on 17/08/2022, which was the last date for filing witness statements which act presupposes the lack of diligence in prosecuting this matter. He stressed that the plaintiff acted negligently and implored the court to dismiss the suit

for want of prosecution and that, in the event the adjournment is granted then the same be with costs.

In rejoinder submission, Mr. Lema attacked Mr. Ngowi's submission terming it as an attempt to put the carts before the horse since the sequence of events requires that, Misc. Civil Application No. 354 of 2022 be disposed first as it was not possible for the plaintiff to file the witness statement without amending the defects sought to be covered in the above application. He stressed that, it is the practice of this Court to dispose of first the pending application before delving into determination of the substantive matter and for that matter if this application is found not to have merit, then the present submission and prayer would be considered next. He maintained that, it was incorrect to file witness statements together with the application for amendment of plaint and prayed for adjournment of the ruling in this matter as if the application is not successfully, then the defendant's prayer will be entertained.

It is worth noting that, following plaintiff's prayer for adjournment of the ruling on whether this suit should be dismissed or not for plaintiff's failure to comply with the Court's order for filing witness statements, on 16th September 2022, ruling on such issue was stayed pending determination of

Misc. Civil Application No. 354 of 2022. On 10/02/2023 this court delivered its ruling dismissing the said application for want of merit with costs and proceeded to set the date for determination of the stayed ruling on the above cited issue.

I have dispassionately considered the rivalry arguments by the two legal minds. It is uncontroverted fact that, on 13/06/2022, at the instance of the plaintiff this Court granted leave for this suit to be proceeded with by way of witness statements and the plaintiff ordered to file them within seven (7) days prior to the hearing date scheduled to come on 24/08/2022. It is also a common fact that, up to that date the plaintiff had not filed the said statements as ordered by the Court instead without leave of the Court chose to file Misc. Civil Application No. 354 of 2022, seeking for orders of departure from the scheduling orders of 13/07/2020 and amendment of the plaint to include the missing contents in the documents purportedly annexed to the plaint, the application which was dismissed for want of merit on 10/02/2023. As this Court's orders of 13/06/2022 were not complied with, I equitably agree with the proposition by Mr. Ngowi, counsel for the defendant that, plaintiff's failure to file witness statements as directed by the Court is equally to failure to produce witnesses or perform any other act necessary to further

progress of the suit when the case is called for hearing, which entitles this Court to proceed with determination of the suit forthwith as provided under Order XVII Rule 3 of the CPC, which course I hereby take. The said Order VII Rule 3 of the CPC reads:

*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. (Emphasis supplied)*

The provisions of Order VIII Rule 22(1) and Order XVIII Rule 2(1) and (3) of the CPC as amended by Civil Procedure Code (Amendment of First Schedule) Rules of 2021, GN No.760 of 22/10/2021, introduced production of evidence in court by way of witness statements. The provisions however do not provide for the consequences of party's failure to file said witness statements, apart from providing for consequences of failure to serve the witness statement under Order XVIII Rule 4 of the CPC which is the requirement under rule 3(3) of the same Order. In this case no doubt the orders of 13/06/2022, directing the plaintiff to file witness statements as a mode of production of her evidence in Court were made for the purposes of furthering progress of the suit. However, as alluded to above the plaintiff

disobeyed the said directions and without leave of the Court decided to file Misc. Civil Application No. 354 of 2022, seeking for orders of departure from the scheduling orders of 13/07/2020 and amendment of the plaint, the application which was dismissed for want of merit. Dismissal of the said suit leaves the plaintiff with no justification for his failure to comply with the court's directives of 13/06/2022. The law is very clear under Order VIII Rule 21(a) of the CPC, on consequences befalling the party failing to comply with court's directions. For clarity, Order VIII Rule 21 (a) of the CPC provides thus:

21. Where a party has failed to comply with any of the directions, the court may make the following orders:

*(a) **dismiss the suit, if the non-complying party is a plaintiff;***

That aside, this Court in numerous occasions has been insistent that courts order and rules should be obeyed. For instance, in the case of **Godwin Ndewes and Karoli Ishengoma Vs Tanzania Audit Corporation** (1995) TLR 200, the Court held that:

"... rules of the court must prima facie be obeyed and, in order to justify a court in extending time during which some steps in procedure requires to be taken there must be some materials on which the court can exercise its discretion. If the

law were otherwise any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation. Rules are made to be followed.”
(Emphasis supplied)

Further to that, in the case of **Shabani Amuri Sudi (the administrator of the estate of the late Amuri Sudi Vs. Kazumari Hamisi Mpala**, Misc. Land Application No.30 of 2019, (HC –unreported), this Court had this to say:

*“Court orders must be **respected, obeyed and complied with religiously**. Likewise, court proceedings are controlled by the presiding judge or magistrate, **parties cannot decide to do contrary to the court's order. Tolerating them will amount to voluntary invitation to judicial chaos, disrespect and injustice.**”* (Emphasis supplied)

In this case since the plaintiff failed to file her witness statements as directed by the court on 13/06/2022, which is equivalent to failure to call witnesses for prosecuting his case or failure to perform an act necessary for furthering progress of this suit, it is this Court’s finding that, her act in this case squarely falls under purview of the provision of Rule 21 (a) of Order VIII of the CPC, which when exercised judiciously attracts dismissal of the suit, as to hold otherwise is tantamount to opening Pandora box for the party to disobey

and stifle Court's orders on pretext of amendment of plaint or any other reasons.

All said and done, this suit is dismissed under Order VIII Rule 21(1)(a) of the CPC, for plaintiff's failure to comply with Court's order of 13/06/2022, ordering her to file witness statements. Defendant will have her cost of this suit.

It is so ordered.

DATED at Dar es salaam this 24th March, 2023.



E. E. KAKOLAKI

JUDGE

24/03/2023.

The Ruling has been delivered at Dar es Salaam today 24th day of March, 2023 in the presence of Mr. Albert Lema, advocate for the applicant, Mr. Peter Clavery, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

24/03/2023.

