

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**LAND CASE NO.23 OF 2019**

**SALOME ELIKANA MWAMBI** *in her capacity as a legal personal*

*representative of the late* **JAKA MGWABI MWAMBI.....PLAINTIFF**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT**

**EPIC HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**LILIAN SOPHIA KIMARO.....3<sup>RD</sup> DEFENDANT**

**CHUMA SALEHE t/a SANGA INVESTMENT LTD.....4<sup>TH</sup> DEFENDANT**

**RULING**

*15/02/2023 & 30/03/2023*

**POMO; J**

Before his demise, JAKA MGWABI NGWAMBI instituted this suit against the defendants claiming jointly and severally for the following orders:

- 1. That, the mortgage of the plaintiff's property that is building and appurtenances at Plot No.9 low density Mati Morogoro (the property) is null and void as it was fraudulent procured*

- 2. That, by failing to service the loan properly the 2<sup>nd</sup> and 3<sup>d</sup> Defendant have breached the guarantee agreement and agreement to offer the property as security to the loan facilities advanced to the said 2<sup>nd</sup> and 3<sup>d</sup> Defendants by the 1<sup>st</sup> Defendant hence, the said agreement be deemed to have been terminated by breach of fundamental terms*
- 3. That, the purported sale of the property is null and void as neither was the notice issued nor served to the plaintiff (mortgagor) prior to the alleged auction and sale in accordance to the law*
- 4. That, the said auction and/or sale by the 4<sup>th</sup> Defendant is null and void as it is tainted with frauds and illegalities and lack of licence by the auctioneers to trade as such*
- 5. That, the first Defendant has conspired with the 2<sup>nd</sup> and 3<sup>d</sup> Defendants not to claim recovery of loaned sums from the 2<sup>nd</sup> Defendant proceed to auction the mortgaged property illegally and contrary to the law*

It is a suit which is strenuously resisted by the defendants through their respective written statement of defence.

Having framed the issues for determination on **5/10/2022**, in terms of Rule 2(1) of Order XVIII of the Civil Procedure Code (Amendment of the First Schedule) Rules, this court ordered the evidence in chief be adduced by way of witnesses' statements. The plaintiff was given seven days within which to file the said witnesses' statements the order she failed to comply with.

On 16/03/2023 when the suit came for hearing the plaintiff was present represented by Mr. Gabriel S. Mnyele, learned counsel while the 1<sup>st</sup> and 4<sup>th</sup> Defendants appeared through Mr. Kephass Mayanje, learned advocate too.

Mr. Mnyele, prayed for extension of time within which to file witnesses' statements the seven days to file the same ordered by this court on 5/10/2022 having been lapsed without filing them. He argued that on the said 5/10/2022 the one who appeared for the plaintiff is Ms Anna Dismas Kalolo, learned advocate. That, unfortunately Ms Anna was not aware the principal witness who is the plaintiff was not in Dar es Salaam when this court issued an order for filing witnesses' statements within seven days as she had a ceremony of her last born called Jeremiah in Dodoma and she was

a key person to that event. That, under the circumstance, they failed to get the plaintiff for the recording of the witness' statement

Mr. Mnyele was of a further argument that on 7/11/2022 the matter was placed before Hon. Deputy Registrar of the High Court to whom he couldn't pray for extension of time because such power to extend time is not vested in the Deputy Registrar and that is why the payer is being made on this 16/03/2023 before me, a presiding judge. That, the prayer is made under section 93 of the Civil Procedure Code, [Cap 33 R.E.2019] (the CPC).

On the other hand, Mr Mayenje, strongly resisted the prayer for extension of time sought to file witnesses' statement arguing that on 5/10/2022 when the order for filing witnesses' statements was issued by the court the plaintiff was present in person and no advocate for the plaintiff who appeared including the alleged Anna Dismas Kalolo, learned advocate. That, the allegations that the plaintiff, Salome Elikana, was in Dodoma is a nothing but a false allegation.

It was Mr. Mayenje's further submission that the order of 5/10/2022 of this court was not complied with. That, the order required the plaintiff to file witnesses' statements within seven days but she didn't. That such non

compliance is tantamount to failure by the plaintiff to bring witness to prosecute the suit.

That, the reasons adduced by the counsel for the plaintiff speaks against the court record arguing that such fault leads to dismissal of the plaintiff's suit. He cited the case of **Africarriers Limited Vs. Shirika la Usafiri Dar es Salaam Ltd and Another, Commercial case No. 50/2019 High Court (Commercial Division) at Dar es Salaam (Unreported)** at P12-15 , which case, he submitted it had a scenario similar to the suit herein and the consequence was to dismiss it. He argued the court to dismiss with costs the plaintiff's suit.

Regarding **section 93 of the CPC**, Mr. Mayenji submitted that it is within the discretion of the court which need to be exercised judiciously arguing that since the reason advance on the non-compliance are not genuine, then the discretion should not be exercised under the cited section.

Mr Mayenji further submitted that, the application of this nature should have been made within sixty (60) days from the date the order lapsed per **item 21 of part III to the schedule of the law of limitation, [Cap. 89 R. E. 2019]** arguing that the prayer by the plaintiff for extension of time to

file witness' statement out of time be refused and the suit be dismissed with costs.

In his rejoinder, Mr. Mnyele argued that whether or not Anna Dismas Kabole, advocate came in court or not it is not his issue as he instructed her to come in court. So, if she didn't attend then he is not aware and added that Ms Anna Dismas is his employee and nephew

Again, Mr. Mnyele submitted that he didn't say that the plaintiff was not in court on that particular date of 5/10/2022. That, what he said is she was in Dodoma the next week and that what the respondents' counsel said is not much correct

As to the defence counsel prayer for dismissal of the suit, Mr Mnyele argued that he is precluded to make such prayer. Such prayer was supposed to be brought by way of preliminary objection in the manner raised in the case of **Africarriers (supra)**. That, his reply was limited to what was submitted in chief as to whether justifiable cause has been shown or not for the extension of time sought and that the **Africarriers Ltd** case cited (supra) is distinguishable on the following grounds: **One**, there were two preliminary objections in place which is not the case here. **Secondly**, in that

case the plaintiff proceeded to file witness's statement out of time without leave of the court while here they are yet to file them. **Thirdly**, in **Africarrier** case, the plaintiff did not make any application for extension which is not the case here. That, we have made the application for extension of time before the objection could be raised. The court thus has the power to consider our application and possibly in a positive way, and **Lastly**, the **Africarriers Ltd** case is not well decided. The last order is that the suit is dismissed with costs

As to the prayer by the defence counsel that the suit be dismissed, that is not the law, Mr. Mnyeale argued. He is of the contention that the law is, failure to file witness's statement is equivalent to failure to bring witness in court for examination in chief. The dismissal under the circumstance need be dismissal for want of prosecution under S.99 of CPC and not a blank dismissal which entail the plaintiff cannot come back to file a suit

As to limitation of 60 days within which the application could have been made, Mr Mnyeale argued that informal Application has no limitation as to when they should be made per the proviso to **Rule 2 of Order XLIII of the CPC**

Finalizing his rejoinder, Mr. Mnyele argued the court in deciding the application be guided by the wider interest of justice and therefore it be pleased to find out that the plaintiff had a good cause for her failure to file witness' statement and she be granted the extension sought.

Having heard the rival submission for and against the plaintiff's application, the issue before me is whether extension of time sought by the plaintiff's to file witness' statement should be granted or not.

The reasons advanced by the plaintiff for her failure to comply the order of this court dated 5/10/2022 to file the witness's statements within the ordered seven days is that on the date of fixing the order Ms Anna Dismas Kalolo, learned counsel who appeared for the plaintiff was not aware that the plaintiff was not in Dar es Salaam as she was in Dodoma attending the ceremony of her last born one Jeremiah as a key person to the ceremony. That, under the circumstance, they failed to get the plaintiff for the recording of the witness' statement.

This assertion, as pointed out above, is strenuously resisted by the Mr. Mayenje, learned counsel for the 1<sup>st</sup> and 4<sup>th</sup> Defendant on the ground that the same is nothing but false allegations. That, on the material date it is only the plaintiff who appeared and the said Ms Anna Dismas Kalolo, learned



advocate didn't appear in court on the said 5/10/2022 arguing that the averment that the plaintiff was in Dodoma attending ceremony of her last born one Jeremiah is lies to the court.

In resolving this, let the court proceedings in respect of the said 5/10/2022 speak by itself. I reproduce verbatim: -

*"5/10/2022*

*Coram: Hon. A.R. Mruma, J*

*Plaintiff – **present***

*For the 1<sup>st</sup> Defendant – Mr Mayenje for the 1<sup>st</sup> and 4<sup>th</sup> Defendants*

*For the 2<sup>nd</sup> Defendant*

*For the 3<sup>d</sup> Defendant – ( Ex-parte)*

*For the 4<sup>th</sup> Defendant – Mr Mayenje*

*For the 5<sup>th</sup> Defendant – (Ex-parte)*

*CC : Selphine".*

From the above except, it is quite clear that the fact advanced by the counsel for the plaintiff is unsupported by the court proceedings. Prudence demands that Mr. Mnyele could have enquired from his client before advancing such false facts to the court that the plaintiff was absent and

asserting that Ms Anna Dismas Kalolo, learned counsel is the one who appeared on that date which is not the case.

In my view, I am not convinced with the plaintiff's ground advance in her application for extension of time to file witness's statements. As point out, the same is full of lies not worthy to be acted upon by the court of law.

In **Ratman Vs Cumara (1965) ICLR 8** at page 12 quoted with approval by the Court of Appeal in **Gibb Eastern Africa Ltd Vs Syscon Builders Ltd and 2 Others, Civil Application No.5 of 2005 CAT at Dar es Salaam (unreported)** at page 14, the Privy Council stated thus:

*"The rules of court must be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law was otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation".* End of quote

In the event and guided by the above settled law in Gibb's case (supra) I decline to grant the prayer for extension of time to file witnesses'

statements by the plaintiff for lack of sufficient material upon which to extend time.

Having so declined to extend time, my last issue becomes, what is the way forward regarding the fate of the plaintiff's suit?

As correctly submitted by Mr. Mayenje, in my view, and undisputed by Mr. Mnyele, the counsel for the plaintiff, that failure to file the witnesses' statement is tantamount to failure to bring witnesses to prosecute the suit. In Africarriers Limited Vs Shirika la Usafiri Dar es Salaam Limited, Commercial Case No.50 of 2019 High Court (Commercial Division) at Dar es Salaam (Unreported), at p.10 this court facing an objection raised against the witness's statements filed out of time without leave of the court framed the issue for determination as follows:

*"Whether the orders of the Court issued on 27<sup>th</sup> February, 2020 were complied with by the parties and **if not, what are the consequences?**"*

In resolving the second limb of the framed issue, this court stated thus, at page 15:

*"The act is tantamount to failure by the plaintiff to produce witnesses when a case is called for hearing, which amount to non - compliance of the court order, **the consequence of which calls for dismissal of the suit**".* End of quote

In the matter at hand, having declined to extend time for lack of justifiable ground to extend time to the plaintiff to file witnesses' statements, I see no reason as to why I should not follow the path taken by this court in the **Africarriers'** case (supra) against this suit. In the upshot, I hereby dismiss the suit with costs.

It is so ordered.

Right of Appeal explained.

Dated at Dar es Salaam this 30<sup>th</sup> day of March, 2023.



**Musa K. Pomo**

**Judge**

**30/03/2023**

