

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 121 OF 2020

ZEDEM INVESTMENT LIMITED1ST PLAINTIFF
FIRDOS APARTMENT LIMITED.....2ND PLAINTIFF
MOHAMED IKBAL HAJI.....3RD PLAINTIFF

VERSUS

EQUITY BANK (TANZANIA) LIMITED.....1ST DEFENDANT
BILO STARS DEBT COLLECTIONS CO. LTD.....2ND DEFENDANT
OLIVER MARK.....3RD DEFENDANT
MR. DISCOUNT HYPER AND SUPERMARKET LTD.....4TH DEFENDANT

RULING

Date of last Order: 29th March, 2023

Date of Ruling: 05th April, 2023

E.E. KAKOLAKI, J.

This suit was set to proceed with hearing for cross examination of plaintiffs' witnesses and tendering of exhibits on the 29th March, 2023, following this Court's order of 02/06/2022, for the hearing of the case to proceed by way of witness statements. Prior to the above hearing date the matter was scheduled for hearing on 16/08/2022, before the 3rd plaintiff on behalf of all plaintiffs requested for recusal of the trial judge from the conduct of this

matter, the application which was dismissed for want of merit on 25/11/2022, after hearing all parties. It was on that date of 25/11/2022, when hearing of the case was adjourned for four months up to 29/03/2023, on convenience of both parties and in the presence of all advocates.

On the 29th March, 2023 when the same was called for hearing the plaintiffs appeared represented by Mr. Deogratius L. Kirita and Mr. Alfred Kirita whereas the 1st, 2nd and 3rd defendants hired the services of Ms. Caster Lufungulo while the 4th defendant fended by Mr. Michael Kabekenga, all learned counsel. Before hearing could start Mr. Kirita raised and informed the Court that the plaintiffs were not ready to proceed with prosecution of their case as their three witness had travelled outside the country for religious and medical reasons, the information which was communicated to this Court vide the letter dated 24th March, 2023, that was copied to the defendants. He informed further that, the said witnesses who left the country on 25th March, 2023, were to return back on 26th June, 2023, hence an adjournment was sought for the hearing to be set to further date after 26th June, 2023 and if possible be the last adjournment.

The plaintiffs' prayer could not be let to rest on Court's table for consideration as it was vehemently resisted by all defendants. It was Ms. Lufungulo who

attacked the prayer first submitting that, this being an old case of 2020 hence backlog in the registry, there is no justifiable reasons for its adjournment as the 3rd plaintiff together with other plaintiffs had prior notice that the case was scheduled for hearing on that date, hence ought to have chosen either to attend court in compliance of its orders or disregard it by travelling on religious reason and medical check-ups. To her, plaintiffs' attempt to absent themselves through their witnesses in disregard of court's order the practice which is unaccepted and seeking for more than three months adjournment is tantamount to setting court's pace at their own convenience, since court's orders take precedence. She lamented that, if every party in the case chooses to prioritize his religious beliefs chances are very high that many cases in court will not be finalized. As the plaintiffs have a duty of prosecuting their case, which duty they failed to perform, then this Court is bound to dismiss the case for want of prosecution. She invited the Court to be inspired by its decision in the case of **Flomi Hotel Limited Vs. Equity Bank Tanzania Limited**, Civil Case No. 163 of 2017 (HC) where the Court held adjournment should not be granted unless strong reasons worth of being recorded by any reasonable tribunal are given.

Ms. Lufungulo further referred the Court to the case of **Sospeter Tanu Vs. Halima Juma**, PC Civil Appeal No. 40 of 2021 (HC) in which the Court of Appeal decision in **Ibrahim Said Msabaha Vs. Lutter Symphorian Nelson and the Attorney General**, Civil Appeal No. 4 of 1997 (CAT) was referred where the Court observed on the need of Courts to discourage adjournments of cases on flimsy or no grounds at all. As the reasons advanced by the plaintiffs for adjournment are not strong and justifiable, she invited the Court to dismiss the case for want of prosecution.

On the 4th defendant's side Mr. Kabekenga, said that he was objecting plaintiffs' prayer too as the reasons were very clear and obvious that, when the hearing date was set the plaintiffs' counsel was present and informed them. He said, the reason of attending religious meeting advanced by the plaintiffs to justify the adjournment was so flimsy, as the same are conducted annually in which the plaintiffs or their witness would have prioritized this case, as it was planned before instead they chose to disregard it as well as court's order which to him is a disrespect to the Court.

As regard to medical check-up reason he argued, the date scheduled for such activity is from 05th May 2023, the date which would not be affected if the plaintiff had decided to attend the court session on 29th May 2023. To

him as plaintiffs in this case ought to have prioritized prosecution of their case instead of subjecting it to delay. In summing up he insisted the reasons advanced by the plaintiffs are clear manifestation of their lost interest in prosecuting this, case hence prayed for its dismissal for want of prosecution with costs.

In rejoinder submission Mr. Kirita held a contrary view to that of defendants' counsel submitting that, the plaintiffs had not lost interest in prosecuting their case and that is why they decided to notify this Court by letter and to have their advocate present in Court, unlike the position obtained in the cases relied on by the 1st, 2nd and 3rd defendants' counsel where the parties were absent and failed to prosecute their cases. He said, the delay in disposal of this matter cannot be attributed the plaintiffs as they have been attending court session without miss since 2020, save for this time in which the witnesses are attending their religious activities (UMRA) associated to Holy month of Ramadhan. He added that, religious beliefs is very personal in which no one can speak for another, hence in this case the plaintiffs had no choice than to choose and conform to their religious beliefs. According to him, their absence in the country for three months should not be interpreted as setting pace to the court on how to conduct this matter as Ms. Lufungulo

would want this Court to believe. As the reasons advanced by the plaintiffs for attending religious activities conducted annually and medical check-ups are sound and justifiable, then it is in the interest of justice that, this case be adjourned after giving the plaintiffs benefit of doubt, Mr. Kitita stressed. He prayed the Court to offer the last adjournment to the plaintiffs.

I have dispassionately considered the fighting submissions by the parties' counsel in this matter regarding the prayer for adjournment of hearing by the plaintiffs. The issue in which this Court is called to answer is whether the prayer by the plaintiff for adjournment of hearing is tenable considering the reasons advanced. It is trite law that no adjournment of hearing of the case shall be made, unless strong reasons worth of being recorded by any reasonable tribunal are fronted by the party seeking it. See the decision of this Court in the case of **Flomi Hotel Limited** (supra). Similarly it was the decision of this Court in the case of **Sospeter Tanu** (supra) that, adjournment must be the last resort and should be granted where only good reasons are assigned by the party. The requirement of a party to assign good reasons is based on the approach taken by Courts in our jurisdiction to discourage adjournment of cases on flimsy or no grounds at all, in a bid of cherishing the long existing rule of practice that, litigations must come to an

end as prolonged litigations is a wastage of time, money, moral energy etc, as it was reasoned in the case of **Sospeter Tanu** (supra) when cited the case of **Amratlal Damodar Vs. Att. Jariwalla** (1980) TLR 31.

It is the law also that, adjournment of hearing by the courts is discretionary and courts are urged to exercise it judiciously as correctly observed by the apex court of this land in the case of **Ibrahim Said Msabaha** (supra) where the Court had this to say:

"...we think the approach of this Court which seeks to discourage adjournment of cases on flimsy or no grounds at all should be followed by all courts in this court, not only because delay amounts to a denial of justice, but also because it is common knowledge that there is a widespread outcry by the people of this country against unnecessary and rampant adjournments of cases by the courts. We do emphasize the point that the discretion of a court to adjourn a case which is scheduled for hearing must always be exercised judiciously, that it, for good cause which must be recorded."

In this case Mr. Kirita argues that, the reasons of three plaintiffs' witness being in attendance of religious pilgrimage of UMRA and 3rd plaintiff's schedule of attending medical check-ups, hence being outside the country for more three months are sufficient and justifiable reasons warranting grant of plaintiffs' prayer for adjournment of hearing of the case, while the

defendants' counsel are of contrary view that, the same are flimsy reasons to warrant this court exercise its discretionary powers as the said witnesses ought to have prioritize this case. It is not in dispute as rightly submitted by both counsel that, this is an old case of 2020 hence a backlog in the registry of this Court. In essence they both agree that the same ought to be disposed of without delay. It is uncontroverted fact also that, on 25th November, 2022 when the matter was set to come for hearing on 29th March, 2023, more than four months passed, both parties were present in Court and saved the date. It is from those facts both Ms. Lufungulo and Ms. Kabekenga argue that, the plaintiffs being in full knowledge of such scheduled date ought to have prioritized this case, instead they disregarded and disobeyed court's order by allowing their witnesses including 3rd plaintiff choose to attend UMRA pilgrimage and the 3rd plaintiff plan for medical check-up during hearing date, which argument is contested by Mr. Kirita that, on 25th November 2022 when the case was scheduled for hearing on the 29th March, 2023, plaintiffs were not aware that it could coincide with dates for religious activities (UMRA pilgrimage) hence failure to note that witnesses would not be available on the scheduled date. With due respect I disagree with Mr. Kirita proposition that, the plaintiffs in particular the 3rd defendants and his

wives as potential witnesses, who alleged to have been in attendance of UMRA pilgrimage were not aware of the dated or period of the UMRA pilgrimage and that it would be falling on 29th March, 2023. The reason I am so viewing is easy to find. **One**, UMRA being a non-obligatory but important pilgrimage to Muslims to the Holy city of Masjid Al-Haram in Macca, is not time dependent like Hijjah as it can be conducted or held at any time of the year. The Court is informed in the letter of 24th March, 2023 filed by Mr. Kirita in this Court, that the three witnesses have been attending that pilgrimage activity annually for the last twenty years, hence negation of the assertion by Mr. Kirita that, they were not aware that it could be held in March, 2023. As alluded to above the said UMRA pilgrimage is conducted at any period of the year, thus witnesses including 3rd plaintiff had a wide range option to either perform the pilgrimage before or soon after the hearing date scheduled by the Court. Much as the plaintiffs were full aware of existence of such important religious activity to them ought to have planned it before and propose to the Court not to adjourn the case for such long time of four months from 25th November 2023, only to absent themselves on the reason of attending UMRA pilgrimage in which they would have postponed or attend after the Court session. It is from those reasons I find the reason advanced

by the plaintiffs to be flimsy one and insufficient to warrant this Court exercise its discretion to adjourn the hearing to further dates.

As to the second reason of the 3rd defendant's scheduled medical check-ups, while I am appreciative of the importance of health check-up for the party or witness though no referral or any medical chit was attached to the letter filed in Court, I subscribe to Mr. Kabekenga's proposition that, since the same was scheduled to be conducted on 05/05/2023 as per the 3rd defendant's letter dated 20/03/2023 annexed to the letter filed in Court, the witness could have attended Court session on 29th March, 2023, and still managed to attend the medical check-up as scheduled. I so view as that reason would not have affected the hearing, had the witness procured his attendance in Court on 29th March, 2023. This reason is also lacking in merit hence insufficient to support plaintiffs' prayer for adjournment of hearing of this case.

As it was held by this Court in the case of **Sospeter Tanu** (supra) when cited the case of **Amratlal Damodar** (supra) that, prolonged litigations waste time, money, moral energy and I would add subjects this Court to unnecessary blames of delaying cases, thus duty bound to discourage or

prevent uncalled for adjournments so as to make sure that, unserious parties in the case do not take advantage of it.

In this case as observed above the plaintiffs witnesses had no reasons to disregard or disobey courts order of procuring witnesses in Court whose statements were already filed for cross examination and tendering of exhibits so as to further hearing of this case, hence a clear manifestation plaintiffs' unwillingness to prosecute this case as appearance of advocate only without witnesses cannot make progress to the case. The submission by Mr. Kirita that, this Court should consider the nature of the case and the fact that, it is involving huge amount of money, I find the same lacking in merit on the reason that, if that is so the plaintiffs would have paid priority to their case so as to let it disposed of time without delay, instead of calling for further delay of another three (3) months up to late June 2023, the act which is intolerable not only by this Court but also by any person sensitive to justice as justice delayed is equally to justice denied.

As stated herein above, on 29th March, 2023, plaintiffs were to procure their three witnesses in Court for cross examination and tendering of exhibits but failed to do. Order XVII Rule 3 of the Civil Procedure Code, [Cap. 33 R.E 2019] empowers this Court to proceed deciding of the suit where either party

whom time has been granted fails to procure evidence for furtherance of hearing. The provision of Order XVII 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.

In this case since the plaintiffs failed to procure witnesses in Court for furtherance of hearing of the case which amounts to failure to prosecute, though with different facts to those obtained in **Flomi Hotel Limited** (supra) and **Sospeter Tanu** (supra), I adopt the principles and the course taken therein and decline from granting the adjournment sought by the plaintiffs. In consequence, I dismiss this suit for want of prosecution.

The plaintiffs are to bear costs of this suit.

It is so ordered.

DATED at Dar es salaam this 05th April, 2023.



E. E. KAKOLAKI

JUDGE

05/04/2023.

The Ruling has been delivered at Dar es Salaam today 05th day of April, 2023 in the presence of Mr. Lewis Lyimo, advocate for the plaintiffs, Ms. Caster Lufungulo, advocate for the 1st, 2nd and 3rd defendants, Ms. Lulu Mbinga, advocate for the 4th defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
05/04/2023.

