

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
DA ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC CIVIL CASE NO. 99 OF 2020**

**EQUITY FOR TANZANIA LIMITED ..... PLAINTIFF**

**VERSUS**

**FEME MINING EQUIPMENT AND AGRICULTURE LIMITED .. DEFENDANT**

**RULING**

*3<sup>rd</sup> & 21<sup>st</sup> April 2023*

**MKWIZU, J**

This court is, in this ruling to determine whether the plaintiff's witness statement was filed beyond the scheduled time or not and give directions on the way forward. But before embarking on the raised issue, it is perhaps sensible to narrate brief factual background of the matter.

The plaintiff and the defendant had on 25<sup>th</sup> May 2016 entered into a supply agreement where the defendant was to supply, deliver and repair the plaintiff's equipment. The defendant was to deliver with the requested specifications to the agreed point and agreed dates. She was to bear the costs and provide all manpower, tools, machinery, supplies, and necessary appliances with all the installations at the agreed delivery points and meet other conditions stipulated in the agreement.

In executing the contract, the defendant was instructed to supply, deliver and repair certain equipment to the plaintiff's various customers on diverse dates between August 2017 and September 2018 the instruction which he neglected thereby causing loss and damages to the

plaintiff hence this suit where the plaintiffs claim for payment of 265,706,934.9/= as specific damages and interests.

The trial of the suit was to be conducted through witness statements under Order XVIII Rule 2 of the Civil Procedure Code (Amendments to the 1<sup>st</sup> Schedule) Rules 2021 and, on 29/11/2022 the plaintiff's counsel was ordered to file witness statements of all intended witnesses seven days before trial and serve the same to the defendant. The actual trial was planned to start on 1/3/2023 at 10.00 am. On the hearing date, the court *suo-moto* raised an issue on whether the witness statements were filed within the time and parties were given time to research and address the court on that issue.

Addressing the court on 3/4/2023, Mr. **Munice advocate** readily conceded that the witness statement was filed in court late by one day and hence time-barred. He, however, associated the delay with the misinterpretation of the court order by the advocate who was present in court, when the order was given. He said, the CPC does not provide for the remedy and therefore he invited the court to use its discretionary powers and allow the matter to proceed on merit. He pegged his reasoning on the decision of **Wellness Co Limited V MGEN Tanzania Insurance Co Limited**, Civil Case o 201 of 2021

Arguing in the alternative, the plaintiff's counsel said, should the court disagree with his proposition, it should strike out the Witness statement and extend the time for the plaintiff to refile the same with costs. He again banked on **Eco Bank Tanzania Limited V RZ Electrical Tech Limited and 3 Others**, Commercial case No 167 of 2018, where an extension of

time was granted to the plaintiff to file her witness statement under section 95 of the CPC.

Mr. Mfinanga Advocate for the defendant was of the similar view that failure to file witness statements within time as per the court order has no remedy under the CPC. He said, in **Fair Deal Auto PVT Limited V City Boys Electronics Co Limited**, Civil Case No 187 of 2019, the High Court construed the Civil Procedure Code, (amendment of the 1st schedule), Rules of 2021 made under GN No 761 of 2021 that they do not provide for the consequences of failure to file witness statement. He was however quick to add that it is settled that failure to file a witness statement is equivalent to failure to prosecute one's case under Rule 21A of Order VIII of the CPC as amended by GN No 381 of 2019 but the court has the discretion to dismiss the suit. He finally advised the court to exercise its discretion in the situation of this case to dismiss the suit.

In his short rejoinder, Mr. Munice's advocate said, the cited case by the defendant's counsel is distinguishable. In that case, he said, the plaintiff failed to file witness statements within seven days as ordered and when the matter came for hearing after a lapse of 21 days, there was nothing filed in court while in this case, they had filed the witness statement though late by a day. He insisted on his earlier prayer seeking an indulgence of the court not to dismiss the suit because the defendant is not offended anyhow.

I have heard the parties on this point. There is no doubt that the plaintiff's witness statement was filed outside the time fixed by the court. Both parties agree to that fact. The court is only invited to investigate the consequences of such a failure.

Generally, the filing of a witness statement is a legal obligation under Order XVIII of the CPC, as amended by GN No. 760 of 2021 and the plaintiff's statement is served by Rule 3(1) of the same order which reads:

*"3. -(1) After completion of mediation the plaintiff **shall**, in not less than seven days before the time fixed by the court for the hearing, file a statement by each witness whom he intends to call at the trial, setting out the substance of his evidence."*

The provisions above are couched in mandatory terms. The word "shall" used proposes compulsory commands. Under these provisions, this court on 29/11/2022 had ordered the plaintiff to file statements of all intended witnesses within seven (7) days before the hearing date which was to be held on 1/3/2023. Contrary to the court order, the plaintiff delayed for a day and filed her witness statements on 23/2/2023.

In his effort to convince the court to exercise its discretion in his favour, the plaintiff's counsel said, the late filing of the witness statement was due to a misinterpretation of the court's order by the plaintiff's counsel who was present on the date the order was given. His statement, however, lacked the necessary details to assist the court to gauge the reason behind the mischief. The plaintiff's counsel was in my view, expected to give a concrete reason mitigating the delay and why should the court resort to exercising its discretion under section 95 of the CPC in the plaintiff's favour after he disobeys the court's order. In **Africarriers Limited V Shirika la Usafiri Dar Es Salaam Limited and Another**, Commercial Case No 50 of 2019, the plaintiffs' counsel like in the present matter had failed to file the witness statement in time. He was delayed

for two days. Defending the delay, the plaintiff's counsel asserted that they innocently missed the computation of time thinking February had only 28 days; discounting that argument, Hon Fikirini J, (as she then was ) observed:

*"...an advocate being an officer of the Court is deemed to act diligently. There is no excuse for an officer of the Court who decides not to comply with the Court order without any sufficient reasons.*

*In the Calico Textile Industries Ltd v Pyraliesmail Premji [1983] T.L.R. 2, this is echoed when it was held that:*

*" Once the advocates are instructed to take the conduct of the case, they are using all diligence and industry. "*

*In this case at hand, the plaintiff advocate was present when the last order was issued and opted not to comply."*

I am persuaded by the above decision. The courts have always stressed the need for obedience to court orders. There is a plethora of authorities to that effect one being 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, (unreported), this Court held:

*"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 a voluntary invitation*

*to judicial chaos, disrespect, and injustice.”( Bold is mine)*

Similarly, in **Africarriers Limited V Shirika la Usafiri Dar Es Salaam Limited and Another** (Supra), the court held:

*“...the duty to obey Court orders is essential not only because it protects the dignity of the Courts and confidence but also promotes obedience of the rules of procedure on the world of law and justice to the parties.”*

Given the circumstances explained above teamed with the plaintiff's failure to justify the delay, I find no reason to pardon the disobedience committed and allow the suit to proceed on merit as prayed for by the plaintiff's counsel. In the premises, the witness statement filed outside the time specified in the court order is hereby struck out of the court's records leaving the court record without evidence by the plaintiff resulting in dismissing the suit for want of prosecution. Costs to follow the events.

**Dated at Dar es Salaam, this 21<sup>st</sup> April 2023**



**E. Y Mkwizu**  
**Judge**  
**21/4/2023**