

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMECIAL CASE No. 129 OF 2005

COMPUTERS & PROGRAMS  
AFRICA, PTY LIMITED..... PLAINTIFF

VERSUS  
TANZANIA ELECTRIC SUPPLY  
COMPANY LIMITED.....DEFENDANT

R U L I N G

KIMARO, J.

The plaintiff was ordered to deposit security for costs. The deadline for the deposit was on 2/05/2006.

Apparently the plaintiff failed to deposit the security for costs within the time set by the court.

There was no application filed seeking to extend the time to deposit security for costs. The case was called on 12/05/2006 by the court for purposes of rescheduling the date for mention. Previously it had been set for 17/05/2006. On that day the presiding judge would have been engaged in another assignment and would not have been in a position to attend to the case.

It was at this time Mr. Bwana, the learned counsel appearing for the plaintiff in this case made an oral application for extension of time to deposit security for costs.

The counsel was informed that the case was not called for purposes of applications from them. It was solely called for rescheduling of the date that was previously set. The case was then set for mention on 26/05/2006.

On 26/05/2006, Mr. Bwana, counsel for the plaintiff informed the court that the plaintiff had already deposited the amount of security for costs as ordered by the court, and that the transaction was done by telegraphic transfer from South Africa. He prayed that the case proceeds to the next step.

Mr. Johnson, the learned counsel appearing for the defendant prayed for the dismissal of the suit because there was no proof of deposit for security. He added that even if the security for costs was deposited into court, the deposit was made out of time and without leave of the court. He said after the Counsel for the plaintiff had failed to deposit security for costs the only good option which was available was the withdrawal of the suit or else the court has to dismiss the suit.

In his reply Mr. Bwana reminded the court the object of security for costs. He conceded that the security for costs was

deposited out of time but he requested the court to look at the matter objectively. He said failure by the plaintiff to deposit the security in time does not cause any injustice to the defendant, nor does it tantamount to disrespect the court order nor does it in any way delay the management of the case. He submitted further that this case has never been adjourned because of a default by the plaintiff to furnish security for costs.

He made reference to decisions of the Court of Appeal which say that procedural rules should facilitate rather than impair decisions on substantive issues. Disputes should be investigated and decided on their merit. Errors and lapses should not debar litigants from pursuing their cases. The cases were **D.T.Dobie Tanzania Ltd Vs Fantom Modern Transport (1985) Ltd** Civil Application No.141/2001(CAT) (Unreported) and **Tatu Mohamed Vs Maua Mohamed** Civil Reference No.6 of 1996 (CAT) (Unreported). He considered the decisions relevant in support of his submission.

He requested the court to use its inherent powers in order to meet the ends of justice. He cited the case of **Joseph Marko Vs Pascal Rweyemam** 1977 LRT 59 on this aspect.

In the case of **Tatu Mohamed V Maua Mohamed** (supra) the Court of Appeal found that there was a warrant in the case for

making a departure from provisions of Rule 83 (1) of the Court of Appeal Rules because there was an important question of law raised in the appeal. The advocate for the applicant failed to serve a copy of notice of Appeal on the respondent under Rule 77(1) of the Court of Appeal Rules. Sixty days expired before the intended appeal was filed. The respondent moved the court to struck out the notice of appeal under Rule 83(1). According to the applicant, she constantly made contact with her advocate throughout the material period and she had contended that it was wrong to condemn her because of failure of her advocate to serve the respondent with notice of appeal.

In the case of **D.T.Dobie Tanzania Ltd** (supra) the Court of Appeal found that the grounds which were advanced to challenge a defective affidavit had no cumulative effect of rendering it incurably defective and so an amendment was allowed.

I pause here to ask whether the circumstances of this case allow the court to depart from the provisions of XXV rule 2(1) of the Civil Procedure Code, 1966. In other words has the plaintiff laid the ground or justification for departure?

My considered view is that the plaintiff has not done so. I have several reasons for saying so:

- i) The deadline for depositing the security was on 2/05/2006. That was not done,
- ii) The court was not moved before the expiry of that period to have the period extended. When an event is scheduled to take place it must take place or else there must be an intervention before hand for rescheduling of that event. See **Stanbic Bank Tanzania Ltd Vs Reginald John Nolah** Commercial Case No.5 of 2001 (unreported).
- iii) It was only when the court called the parties for purposes of rescheduling the date when the counsel for the plaintiff made an attempt to ask for an extension of time. He was dully informed that the case was not called for that purpose.
- iv) While knowing that there was no extension of time to deposit the security for costs, the plaintiff either on 12/05/2006 (the day the Counsel for plaintiff was in court for rescheduling of the date) or on 15/05/2006 (as shown in the appended telegraphic transfer) paid the money in South Africa for telegraphic transfer to Dar-Es-salaam.
- v) On 17<sup>th</sup> May 2006 the Counsel for the plaintiff wrote a letter to the Registrar informing her of telegraphic transfer of the security for costs. He completely avoided saying when the deposit was made, let alone giving reasons for failure to deposit the security for costs in time. There was also no explanation at all on the appended telegraphic transfer.
- vi) Even on 26/05/2006 the court was not told reasons for late payment. Instead the court was told grounds for departure in the cases cited above.

While I strongly believe that the courts should always decide on the substantive issues, my considered view is that where a party has defaulted to comply with a mandatory requirement, the court should always be furnished with good reasons which will justify a departure from the mandatory requirement. It is not sufficient for the counsel to narrate to the court what was done by the Court of Appeal in other cases. The reasons for failure to comply with a procedural requirement should come first, followed by a narration of the guide given by the Court of Appeal.

In his own words Mr. Bwana did submit that:

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*With respect to the clause on time fixed under Order XXV rule 2(1) of the Civil Procedure Code,... **The plaintiff cannot be left to deposit the security at his/her own time.***”

Compliance with procedural requirement is essential for case management. If defaulting parties are allowed to seek the mercy of the court without showing the court that they merit to get that mercy, the court will fail to have control of the cases and parties will do whatever they like. Such a situation should never be allowed.

I strongly support the principle laid down in Article 107A (2) (e) of the Constitution of the United Republic of Tanzania 1977. Indeed the focus in any case should be on substantive justice. The principle not only promotes human rights but reminds the court to bear in mind the aspect of human rights whenever a case is brought before the court. However, where reasons for default in compliance with a procedural requirement are not given, a party loses the right to have a departure from a mandatory requirement.

In the two cases cited by Mr. Bwana, reasons which justified a departure from the mandatory procedural requirement were given. In this case no reason at all has been given. The court therefore has neither justification nor ground for a departure from the procedural requirement.

The provisions of Order XXV rule 2(1) provides:

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*In the event of such security not being furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.”*

After the plaintiff defaulted to deposit the security within the time required, there was no application to have the suit withdrawn. The only option left to this court is to dismiss the suit with costs. It is accordingly dismissed with costs.

N.P.KIMARO,

JUDGE

02/06/2006

Date: 2.6.2006

Coram: Hon. N.P.Kimaro, Judge.

For the Plaintiff – Mr. Bwana.

For the Defendant.

CC: R.Mtey.

Mr. Nabo Balthazari – Legal Officer of the Defendant – Present.

Court: Ruling delivered.

Order: The suit is dismissed with costs for failure to deposit security within the time given.

N.P.KIMARO,

JUDGE

02/06/2006

1,919 – Words

Jd.

I Certify that this is a true and correct  
copy of the original order/judgment Rulling

Signature Butise  
Registrar Commercial Court Dsm.

Date 2/6/2006