

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

COMMERCIAL CASE NO 99 OF 2015

BETWEEN

STANBIC BANK (T) LTD -----PLAINTIFF

VERSUS

NAM ENTERPRISES LTD -----1<sup>ST</sup> DEFENDANT

ALEX STEPHEN LUKUMAY -----2<sup>ND</sup> DEFENDANT

ELIAS STEPHEN LUKUMAY-----3<sup>RD</sup> DEFENDANT

NAMMNYAKI STEPHEN LUKUMAY-----4<sup>TH</sup> DEFENDANT

STEPHEN KORDUNI LUKUMAY-----5<sup>TH</sup> DEFENDANT

**RULING.**

**SONGORO, J**

This Commercial Case No 99 of 2015 was instituted way back August 2015 by Stanbic Bank Tanzania Limited who is the Plainiff. The Defendants are NAM Enterprises Ltd , Alex Stephen Lukumay, Elias Stephen Lukumay, Nammnyaki Stephen Lukumay and Stephen Kordin Lukumay. The suit has undergone several stages of hearing and on the 15<sup>th</sup> May, 2017 the plaintiff case was closed by Mr. Dilip Kesaria, Learned Advocate of the Plaintiff.

Immediately after the plaintiff closed its case on the 15/5/2017, Mr. Muganyizi Learned Advocate requested for adjournment so that he may prepare himself for the defence and the suit was adjourned to 20<sup>th</sup> June 2017 at 9.30 am.

When the suit was called again for the hearing of the defence case on the 20/6/2017, Mr. Muganyizi Learned Advocate for the defendant indicated to the court that is unable to proceed for two reasons. First witness Mr. Julius Mugaragu has been admitted in the hospital. He also indicated that on 10<sup>th</sup> May, 2017 he amended the Written Statement of Defence and he does not know the faith of his amended document. He indicated to the court that Mr. Julius Muragruga may be available after two weeks. So he prayed for another adjournment.

The prayer of two weeks adjournment was opposed by Mr Kesaria, Learned Advocate of the Plaintiff on ground that the same very day he received a call from Mr. Muganyizi that he was in Iringa and intends to write a letter to seek adjournment of the case because he would not be able to attend the hearing which was fixed on the 20<sup>th</sup> June 2017 but was surprised to see Mr. Muganyizi in Court reporting that his witness has been hospitalised. So Mr Dilip Kesaria totally opposed further adjournment.

Then on the 20/6/2017 the court tasked Mr. Muganyizi Learned Advocate of the defendants to bring a proof that if Mr Julius Murugaruga has been admitted in court and in the afternoon, the court was supplied with Medical Chit from Msasani Penisual Hospital dated 20<sup>th</sup> June 2017 which stated that Julius Mugarabo has been admitted in the said hospital for the observation due to malaria bout. The medical chit was signed by Dr Diana Besha.

On the basis of a medical report , the court on 20<sup>th</sup> June, 2017 decided to adjourn the hearing of the defence case to 23<sup>rd</sup> June 2017 at 9.30am in the presence of Mr. Dilip Kesaria Learned Advocate of the Plaintiff and Mr. Muganyizi, Learned Advocate of the Defendants. Also, on the same day the court stated that it will provide its guidance on the issues raised by both Mr. Kesaria and Mr. Muganyizi as to the amendment which were made by the Defendants in their Written Statement of Defence before the commencement of the Defence case.

Thus when the suit was then called on 23/6/2017 at 9.30am so that the court may provides its guidance on the amendment done by the defendants, and proceed with the hearing of the defence case. But the court was informed by the Bench Clerk Mr. Kanyonchele, that all four defendants were absent. Also both defence Counsels who were marshalling defence for the defendants are absent. More the court find that none of the defendant were present in the court premises. In view of that report the court waited up to 9.55 am to see if any of the defendant may appear or any of the defence counsel may appear or any of the witnesses may appear but the situation did not improve. None

of the defendants appeared, Also None of the two defendants counsels appeared and none of the defendants witnesses appeared in court.

More the court find none of the defendants or Counsels or witnesses bothered to communicate with this court or the Deputy Registrar and explain reasons as for their non-appearance or reason for not communicating with the Court.

In view of absenteeism of four defendants, their two counsels and their witnesses, the Court invited Mr. Kesaria Learned Advocate of the plaintiff to address it on the way forward .

On his part Mr. Kesaria informed the court that the suit was fixed today for defence case on the 23/6/2017 at 3.30am. But up to 9.55am all defendants, their two counsels and witnesses are all absent.

The plaintiff counsel relying under Order XVII Rule 2 of the Civil Procedure Code Cap 33 [R.E 2002] he prayed that the court struck out the defendant`s written statement of defence. To support his point the counsel drew the attention of the court to a decision in Commercial Case No 39 of 2014 between Puma Energy Versus Diamond Trust Bank, where plaintiff failed to prosecute his own case and the plaintiff suit was struck out.

He also referred to the court to Rule 56(2) of the High Court Commercial Division Procedural Rules which insist and emphasizes that if the witness fails to attend for cross examination on his witness statement the remedy open to the court is to struck out witness statement. So he requested the court o struck out witnesses statements

Further, the plaintiff`s counsel refer to **Rule 43(1) of the High Commercial Division Procedural Rules**, and provisions of Order IX Rule 6 of the Civil Procedure Code Cap 33 [R.E 2002] which guides the court that where defendants does not appear when the suit is called for hearing the court may make an order to proceed ex-parte. The Plaintiff

Counsel then explained that since the plaintiff has already called his witness and closed his case and defendants have failed to bring their witnesses then the court may proceed to compile its judgement because of the absence of the defendants themselves, their two counsels and witnesses (today) on the 23/6/2017 a day the suit was fixed for hearing amount to failure to prosecute their own case. The Plaintiff`s Counsel prayed to the Court for dismissal of the Defendant`s Written Statement of Defence and Counter claim with costs.

The court has considered the plaintiff prayer and find there are five defendants in this case but none of the defendants appeared before the court or communicated with this court on the reason as to why there are absent today on the 23/6/2017 when the suit was fixed for hearing. Secondly defendants were being represented by two Learned Advocates Mr. Godwin Muganyizi and Stephen Mosha but none of them appeared today to pursue the defendant`s case or communicated with this court as to why there were absent. More the court find the defendants filed a witness statement of Julius Mugaragu and he was absent, and did not even communicate to this court as to why he failed to enter appearance for cross examination on the 23/6/2017.

Bearing in mind that the suit was fixed today on the 23<sup>rd</sup> June 2017 at 9.30 am before Mr Kesaria for the plaintiff and Mr. Muganyizi, Learned Advocate for the defendant and as appear that the court waited for reasonable period to see if any of the four defendants, or any of two advocates or defendant`s witness will appear before the court or any of them will communicate with the court on reasons for their none appearance the court the defendants absenteeism , their counsels absenteeism and witness absenteeism amounted to failure to bring their witness for cross examination and failure to prosecute their own defence. .

On the witness statement of Mr, Julius Murugarua, the court find there was a report that has a malaria, so pursuant to Rule 56(1) and (2) of the High Court Commercial Division Rule GN 250 of 2012 the court find there is exceptional circumstances that, he was



previously sick. So the court decides to retain a statement pursuant to Sub Rule 2 of Rule 56 of the High Court Commercial Division Procedure Rules, [2002] to enable both parties and the court to use it in all subsequent court actions.

On court guidance to the parties on the amendment of written statement of defence made by the defendant on submissions and subsequent steps to be taken is that new claims or counter claims should not be entertained because Rule . 24 (1) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 restrict amendment of pleadings into two areas

- (a) correcting any defect or error in any proceedings, or
- (b) determining the real question in controversy or to achieve justice between the parties

Also a point that a new claim or new cause of action or change substance matter are not allowed in amendment of pleadings was firmly stated and emphasized in several decisions including a decision in the case between N.J. Amin Ltd. v. V. B. Patel & Company Ltd. HCD 1967-1968 No 256. In the above cited court decision his lordship Hamlyn J (as then was ) emphasis and decided that

***"The amendment would not set up a new cause of action, or introduce a new case, or change the subject matter of the suit"***

For that reason the court relying under Order XVII Rule 2 of the Civil Procedure Code Cap 33 marks that the defendant has no further defence and marks their defence is closed and allows both parties to make their written submissions simultaneously within 14 days from today. The Judgment is fixed to be delivered on 8<sup>th</sup> September, 2017 at 2.30 pm

Delivered and Dated at Dar es Salaam on this 23<sup>rd</sup> day of June, 2017



H.T. SONGORO  
(JUDGE)

The Ruling was delivered in the presence of Mr. Kesaria, Learned Advocate for the plaintiff and in the absence of the defendants and their counsel.