

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA**

COMMERCIAL CASE NO. 10 OF 2019

PEACE MAKER EXPRESS CO. LTD. PLAINTIFF

Versus

MKOMBOZI COMMERCIAL BANK LTD. 1st DEFENDANT

LOCUS DEBT MANAGEMENT LTD. 2nd DEFENDANT

Date of last order: 06/12/2021

Date of Ruling: 06/12/2021

RULING

MKEHA, J.

Mr. Bernard Kabonde learned advocate for the plaintiff has moved the Court for an order adjourning hearing of this suit to another date. The suit had been fixed to come up for hearing on this day. Both parties did file their respective witness statements as ordered by the Court. The suit, which dates back to October, 2019 is unhappily finally ripe for hearing.

According to the learned advocate for the plaintiff, the first intended witness has suddenly fallen sick to the extent of being rushed to the hospital for treatment. And, that the second expected witness is son of the first intended witness. That, this other expected witness is the one who has rushed the sick person to the hospital.

The learned advocate submitted that although he is aware that under the (High Court Commercial Division) Procedure Rules there is a room for according lesser weight to a witness statement, when admitted without

there being cross examination of the maker of the statement, the circumstances in this case are different. In view of the learned advocate, he has sufficiently made a case, demonstrating exceptional reasons for the witnesses' failure to appear in Court on a date fixed for hearing.

Dr. George Mwaisondola learned advocate for the defendants submitted in reply by objecting the prayer for adjournment sought by the plaintiff. According to the learned advocate, in the absence of any medical evidence, it cannot be rightly submitted that the intended witnesses have defaulted appearance because of being hospitalized. In his view the submissions of the learned advocate for the plaintiff do not fall squarely within the ambit of Rule 46(2) (b) of the Rules. Dr. Mwaisondola learned advocate invited the Court to struck out the witness statements and thereby dismiss the suit pursuant to Order IX of the Civil Procedure Code.

When Mr. Kabonde learned advocate rose to rejoin, he insisted that the first intended witness has been admitted at the hospital. He neither tendered any medical evidence to prove the said fact of admission at the hospital, nor did he mention the name of the hospital at which the first intended witness has been admitted. Nevertheless, the learned advocate insisted that, his client falling sick suddenly and the other witness being at the hospital to take care the sick one, are exceptional circumstances warranting grant of the adjournment sought. The learned advocate urged the Court not to invoke Order IX of the Civil Procedure Code by dismissing the suit.

The only determinative issue is **whether there is proof of circumstances beyond the control of the plaintiff's witnesses for grant of the adjournment sought.**

While the learned advocate for the plaintiff has insisted that the first intended witness has been admitted and is now receiving treatment at the hospital, he tendered no tangible evidence proving the said fact. He did not even dare to mention the name of the hospital at which the sick person is receiving treatment, also being under care of the second intended witness. The position regarding grant of adjournments in our jurisdiction is strict. The following decision of the Court of Appeal demonstrates the said strictness. In the case of **CHRISTINA ALPHONCE TOMAS** (As Administratrix of the late **DIDASS KASELE**) **VS. SAAMOJA MASINGIJA, CIVIL APPLICATION NO. 1 OF 2014**, the Court of Appeal expressed the following regarding adjournments: The Court has always discouraged adjournments on grounds of sickness not supported by medical proof. The learned advocate is aware or ought to be aware that the Court has to have evidence to support grounds for an adjournment. We totally discourage the idea of seeking adjournments not supported by concrete proof that they are genuine applications.

Equally, in this case the learned advocate for the plaintiff ought to have anticipated that this Court would require evidence proving illness of the witness before granting the adjournment sought. In the present case, the plaintiff had filed two witness statements. For unsubstantiated reasons, neither of the witnesses has appeared. In the circumstances, I hereby strike out the witness statements of Ms. Magdalena Chiwale and that of Mr. Michael Mnanka under Rule 56(2) of the Rules. I proceed to dismiss the suit with costs under Order IX Rule 5 of the Civil Procedure Code.

Dated at MWANZA this 6th day of DECEMBER, 2021.


C.P. MKEHA

JUDGE

06/12/2021

Court: Ruling is delivered in the presence of Mr. Kabonde learned advocate for the plaintiff and Dr. Mwaisondola learned advocate for the defendants.


C.P. MKEHA

JUDGE

06/12/2021