

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO. 29 OF 2012

PETROFUEL (T) LIMITED.....PLAINTIFF

VERSUS

POWER ROAD (T) LIMITED1st DEFENDANT

LYCOPODIUM TANZANIA LTD.....2nd DEFENDANT

PANGEA MINERALS LTD.....3rd DEFENDANT

RULING

Date of the Last order: 27/4/2022
Delivery of the Ruling: 13/05/2022

NANGELA, J.:

The Plaintiff in this case sued the Defendants and prayed for Judgment and Decree against them jointly and severally as follows:

1. Payment of unpaid invoices of TZS 199,931,520 and interest amounting to TZS 515,072,528, totalling TZS 715,004,048;
2. General Damages amounting to TZS 300,000,000;
3. Interest on the decretal amount at court' rate.

4. Costs of this suit;
5. Interest in cost at Court's rate, and
6. Any other relief(s) as this Honourable Court may deem just and fit to grant.

Earlier in the year 2014, this Court, (Mchimbi J., as he then was) granted an *ex-parte* judgement against all defendants. Later, the *ex-parte* judgment was successfully set aside and the *inter-partes* hearing process was restored by this Court. The parties proceeded well up to the Final Pre-trial Conference stage where they drew-up and agreed on nine (9) issues which I need not reproduce here.

The Final Pre-Trial Conference (FPTC) took place on the 29th March 2022 and the parties were ordered to file their witness statements ready for the hearing of the suit which was to commence and proceed on the 23rd, 24th and 25th May 2022. In particular, the orders of this Court, issued on the 29th March 2022 in relation to the filing of witness statement in Court, were as follows, that:

"Parties are to file witness statements in Court as per the Rules of Procedure applicable to the Court."

Before the Court convened for the commencement of the hearing, it received, on the 19th of April 2022, a Notice of Preliminary Objection and letter requesting for an earlier appearance of all parties before me in chambers where in the 2nd and 3rd Defendants could be heard in respect of the

Notice of Preliminary Objection filed in Court. The Objection was to the effect that, there was a material non-compliance with the Orders of this Court, regarding the filing of the witness statements.

In particular, the objection was couched as hereunder:-

1. That, the witness statement of one Satish Kumar be struck out having been filed out of time; and,
2. Consequently, Commercial Case No.29 of 2012 be dismissed with costs for want of prosecution.

On 27th April 2022, the parties were made to appear before me through their learned advocates to address the objection noted herein above. The Plaintiff enjoyed the services of Mr Stanslaus Ishengoma Learned Advocate, while Ms Janeth Njombe and Caroline Kivuyo represented the 2nd and 3rd Defendants, respectively. The 1st Defendant was absent unrepresented in Court.

Submitting in support of the preliminary objection, Ms Njombe and Ms Kivuyo were of the view that, since the FPTC took place on the 29th March 2022 and the parties were required to file their respective witness statements, the same ought to have been filed within 14 days from the date when the order was issued, and, for that matter, given that the Plaintiff filed its witness statement on 12th of April, 2022, the witness statement was filed out of time. They urged me to have it struck out from the record and, since there will be no

witness statement to support the suit, the suit should be dismissed forthwith for want of prosecution.

In her submission, Ms Njombe urged this Court to consider paragraphs 1 to 6 of the 2nd Defendant's skeleton arguments earlier filed in this Court. She submitted, noting and relying on Rule 49(2) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019, that, the law has stipulated as to when a witness statement is to be filed in Court. In her considered view, the appropriate cut-off date, if counted from the 29th March 2022, should have been the 11th of April 2022.

Ms Njombe submitted that, failure to file the witness statement which under Rule 49(1) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019 is considered as the witness' testimony in chief, amounts to a failure to provide evidence in chief and the suit remains without legs upon which to stand. She surmised, therefore, that, it had to be dismissed for want of prosecution.

As for Ms Kivuyo, she commenced her submission by urging this Court to adopt her skeleton arguments earlier filed in this Court and supported the submissions of Ms Njombe, urging this Court to dismiss the suit.

In his reply submission, Mr Ishengoma was unyielding to the submissions made by the learned counsels for the 2nd and 3rd Defendants. Although he admitted that Rule 49(2) of

the of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019 provides that witness statements should be filed within 14 days, Mr Ishengoma was of the view that, the witness statement was properly filed within time since the counting starts not on the day when the order was issued but the next day. He contended that, the two actions, i.e., the carrying out of a final pre-trial conference and the filing of the witness statement could not have taken place on the same date.

Besides, Mr Ishengoma was of the view that, in the event the witness statement is found to be filed out of time, the remedy is not to dismiss the suit but to struck out the witness statement and orders its re-filing. He was of the view that, the various cases cited and relied upon by the Defendants in their skeleton arguments are not binging on this Court and, that, the Court of Appeal decision (i.e., the case of **National Bank of Commerce Ltd vs. Partners Construction Ltd**, Civil Appeal No.34 of 2003 (unreported)) is distinguishable.

In a brief rejoinder, Ms Kivuyo rejoined that, although the learned counsel for the Plaintiff is adamant that the dates started to count from the 30th of March 2022 and not the 29th of March 2022, the fact remains that, it is not for the counsel to choose when the days started to count. She submitted that, the Interpretation of Laws, Cap.1 R.E 2019 has already provided for guidance and the wording in Rule 49 (2) of the

of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019, will determine the matter.

Citing the respective Rule 49(2) of the GN. No.250 of 2012 (as amended), she further rejoined that, the same clearly provides that the filing shall be within "14 days of the date of the completion of the Final Pre-Trial Conference," and, referring to section 60(1) of the Interpretation of Laws Act, Cap.1, R.E 2019, she contended that where a period of time is specified, then, that date shall be included in computing the time. In view of that, she concluded that, under Rule 49 (2) of the of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019, such time is inclusive of the day when the final PTC was concluded.

To further buttress her point, she referred this Court to the case of **NBC Ltd** (supra) contending that, that case is as well very relevant to the suit at hand since the wording "**of service**" considered in that case, and the words "**of completion**" used in the Rule 49(2) of the GN 250 of 2012 carry a similar syllogism.

Ms Kivuyo invited this Court to further make a finding based on its own decision in the case of **Akiba Commercial Bank PLC vs. UAP Tanzania Company Ltd**; Commercial Case No.24 of 2018 (unreported). In that case, this Court made a finding that, the day counts from the date when the

final pre-trial conference is ended. As such, both Ms Kivuyo and Ms Njombe urged this Court to struck out the witness statement and dismiss the suit for want of prosecution.

I have given a careful consideration to the rival submissions made by the learned counsels for the parties herein. The issue which is pressing on me is whether the witness statement was filed out of time and, if so, whether it should be struck out and, again, if so, what will be the effect of such action to the present suit?

Essentially, this Court has emphasized, time and again, that, orders of the Court must be respected, obeyed and complied with religiously. See the cases of **Deba Sima Ngereja vs. Wangingo Micro Credit (PC)** [2021] TZHC 7516 (neutral citation) and **Maweni Limestone Ltd vs. HC Trading Malta Ltd** (Misc. Commercial Application 27 of 2020) [2020] TZHCComD 1865 (16 June 2020) (unreported).

In this present suit, the contentious issue that led to this ruling stems from the Orders of this Court dated 29th March 2022. On that day, this Court directed the parties herein as follows:

"Parties are to file witness statements in Court as per the Rules of Procedure applicable to the Court."

Essentially, the above phrase meant that, the parties were to comply with the requirements to file witness statements within the time lines prescribed by Rule 49 (2) of the of the High Court (Commercial Division) Rules of

Procedure, GN. No. 250 of 2012 as amended by GN.No.107 of 2019. That respective rule grants 14 days within which a witness statement must be filed. I will quote the entire Rule 49 (1) and (2) here below. It reads:

"49(1) In any proceedings commenced by Plaintiff, evidence in chief shall be given by a statement on oath or affirmation."

(2) The statement shall be filed within fourteen days of the completion of the final pre-trial conference and served as directed by the Court:

Provided that, the obligation of a party to serve a witness statement shall be independent of the other parties' obligation to file and serve his respective statement." (Emphasis added).

As it may be noted in the above quoted rule 49, the rule is couched in a mandatory terms to signify that, it demands a strict compliance. That fact was emphasized by this Court in the case of **Africarriers Ltd vs. Shirika la Usafiri Dar-es-Salaam Ltd and Another**, Commercial Case No.50 of 2019 (unreported). In that case, Fikirini, J., (as she then was) was fully convinced, as I am, that, the word "**shall**" as it appears in Rule 49(2) of the of the of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019, signifies that, that provision is of mandatory application.

The irksome question in this suit and, which has been associated with this rule and all that which it provides, is: **when does the 14 days stated therein commences?** Is it on the date of when the final pre-trial conference ends or the subsequent day? The 2nd and 3rd Defendants' counsels contend that, the reckoning of time starts from the day when the final PTC ends and not the day next or subsequent to it. The Plaintiff's counsel argued the other way, holding that, it is the subsequent day following the completion of the FPTC. That is their contending position so far.

In the **AKIBA COMMERCIAL BANK's** case (*supra*), this Court, (Magoiga, J), had the opportunity of dealing with a similar issue, and, therefore, I am not in any way inventing the wheel. In that case, a preliminary objection was raised intending to block a witness statement which was filed out of time. The Defendant's counsel moved the Court to have the witness statement struck out and the suit dismissed, that being subsequent end result.

In particular, the argument fronted to the Court was that, looking at the wording of Rule 49(2), the phraseology "of completion" indicates that, the counting starts on the day when the final pre-trial conference ends. In resolving the matter, this Court stated as follows, at page 6 of the typed ruling of the Court:

"The above Rule is literally loud and clear....To my understanding, and in my considered opinion, the

phrase '**of completion of the final pre-trial conference**' used in the Rule, is not synonymous to '**from**'. The use of the phrase '**of the completion**' used in the Rule, means the day which the act was done has to be the starting point to count and, as such is part of the day which the subsequent act has to be done."

As well, in the course of its deliberations, this Court found solace in the decision of the Court of Appeal in the **NBC Ltd's case** (supra). The Court of Appeal had discussed an issue which was somewhat similar to the one confronting Magoiga, J, in the **AKIBA COMMERCIAL BANK's Case** (Supra). The issue before the Court of Appeal related to determination of the exact date when the 21 days of effecting service to a party is to be reckoned. In that Court of Appeal's case, the phrase "**within twenty one days of the date of service**" was used and the Court of Appeal resolved that, the 21 days start to run from the date of service, meaning that, the date of service was included in computing the 21 days.

From that analogy, this Court, in **AKIBA COMMERCIAL BANK's case** (supra) made it clear and cautioned litigants stating that:

"Litigants in the High Court
(Commercial Division) are from

the date of this ruling advised to take note of this and make sure they comply with the spirit of the Rule to avoid finding themselves out of time because 14 days are to be reckoned from the day which the Final Pre-Trial Conference is concluded."

There is yet another decision of this Court which deliberated on how Rule 49 of the Commercial Court Rules, applies. This is the case of **Kenafri Industries Limited vs. Lakairo Investments Co. Limited**, Commercial Case No.7 of 2018, (unreported). In that case, her Ladyship, Phillip, J, made it clear that: **"Parties are supposed to file their witness statement(s) in accordance with the law."** She surmised further as follows:

"... Rule 49(2) of the Commercial Court Rules, does not provided (sic) that the witness statements are supposed to be filed within fourteen days before a specific day, but provides that the same have to be filed within fourteen days of completion of the FPTC. In my considered legal opinion the applicable provision is section 60(1) (a) of Cap.1 since Rule 49(2) of the Commercial Court Rules provides that witness

statements have to be filed within 14 days of completion of the final PTC, and NOT from the date of completion of the FPTC. Therefore, the 14 days within which witness statements have to be filed, the date of completion of the FPTC is included."

Besides, a similar approach was taken and applied in the case of **Africarriers Ltd** (supra). As I stated earlier, in that case, Fikirini, J (as she then was) made an equally similar findings having noted as well that Rule 49(2) of the of the of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019, is of mandatory application.

What then is the consequence of the above findings? In his submissions, Mr Ishengoma has tried to convince me that the above decisions are not binding on this Court and that; the one from the Court of Appeal is distinguishable. Well, he is entitled to make an argument which he considers appropriate as per his own view. However, things need to be looked more objectively.

In the first place, I do agree with Mr Ishengoma that, the decision of one judge of this same Court does not bind another judge of the same judicial rank. However, I am as well fully aware of what this Court stated in the case of **Issack & Sons Co. Ltd vs. North Mara Gold Mine,**

Commercial Case No. 3 of 2020, (unreported). In that decision, this Court, (citing its other decision in **Bank of Africa Tanzania Ltd vs. Nakumatt Tanzania Ltd & 3 Others**, Commercial Case No.151 of 2019(HCCoDv), (unreported)) stated that, that:

"as a matter of practice, comity and rationality ,it is not advisable to depart from a decision of a brother or sister Judge easily unless there are truly cogent reasons to do so."

From the above understanding, it follows that, Mr Ishengoma's plea that I should consider a departure from the earlier cited decisions of this Court regarding the operationalization of Rule 49 (2) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN. No. 107 of 2019 is untenable, unwise and undesirable. In fact, this Court must, at all times, be vigilant to ensure and safeguard certainty and predictability of the law, a fact which applies even to how it takes into account its own decisions issued by other judges of the same Court.

Secondly, the necessity of complying with rules of the Court cannot be overemphasized. In the **Africarriers Ltd's case**, (supra), this Court made it clear that, rules are in place not for embroidery but for use. Even more emphatic and binding is the decision of the Court of Appeal in the case of

Saidi Issa Ambunda vs. Tanzania Harbours Authority, Civil Application No. 164 of 2005. In that decision, the Court of Appeal, citing the case of **Ratman vs. Cumara Samy** (1965) 1 WLR 10 at Page 12, observed and stated that:

"The rules of court must be obeyed ... If the law were otherwise; a party in breach would have an unqualified right ... which would defeat the purpose of the rules"

It is from the totality of the above discussion I find that, the witness statement filed by Mr. Ishengoma was filed out of time and, hence, in contravention of not only the Court Order dated 29th March 2022 but also the provisions of Rule 49(2) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 as amended by GN.No.107 of 2019. Consequently, there being a contravention of that mandatory rule, nothing can be relied on to rescue the situation but that, the witness statement stands to be struck out and I hereby strike it out from the record.

The next question is what will be the effect of striking it out as I have done here above? The various cases I relied on herein above are very clear. Since there is no other witness statement which can be relied on to substantiate the allegations in the Plaint, it means that the Plaintiff case has not been prosecuted.

In the **Kenafri Industries Ltd's case** (supra), this Court made the following observations, that:

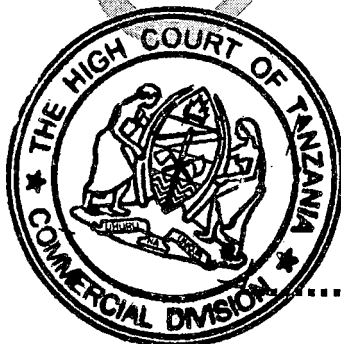
"There are a number of cases in which this Court clearly explained that the failure to comply with the requirements of Rule 49 of the Commercial Court Rules is fatal. One of those is the case of *Barclays Bank Tanzania Limited vs. Tanzania Pharmaceuticals Industries Ltd and 2 Others*, Commercial Case No.147 of 2012, (unreported), in which Nchimbi, J (as he then was) ...said the following: The pertinent issue to be determined by the Court is whether under the circumstance obtaining in this matter the Plaintiff's failure to comply with Rule 49 of the Rules should render the suit suitable for dismissal.... Rule 49 is not a kind of one which can be ignored as long as the suit was commenced by Plaintiff....since I have found that the Plaintiff failed to prosecute its case... it is incurably fatal flaw in the procedure for which I proceed to dismiss it,

with costs, for want of
prosecution."

The above observations respond to the question regarding the effect of the finding this Court made and the subsequent striking out of the sole witness statement. I thus entirely associate with it and state that, the present suit cannot stand any more but be liable to dismissal. As such Mr Ishengoma's submissions that this Court should make an order of re-filing the witness statement is erroneous and does not hold water.

All said and done, this Court settles for the following orders:

1. That, this Commercial Case No. 29 of 2012 is hereby dismissed in its entirety.
2. The dismissal is with costs to the 2nd and 3rd Defendants.



It is so ordered

HON. DEO JOHN NANGELA
JUDGE
13/05/2022