

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 38 OF 2022**

**ECOBANK TANZANIA LIMITED ..... PLAINTIFF**

**VERSUS**

**EAST AFRICAN FOSSILS COMPANY LIMITED..... 1<sup>ST</sup> DEFENDANT**

**VEDASTUS MATHAYO MANYINYI .....2<sup>ND</sup> DEFENDANT**

**STEPHEN MARWA MATHAYO .....3<sup>RD</sup> DEFENDANT**

**MATHAYO SONS ENTERPRISES LIMITED .....4<sup>TH</sup> DEFENDANT**

**RULING**

*Date of Last Order: 30/10/2023*

*Date of Delivery: 30/10/2023*

**MATUMA, J.**

This suit was scheduled today for hearing but both parties have colluded to let it be adjourned. It was M/S Doreen Chiwanga learned advocate for the plaintiff who started to solicit this court to adjourn the case on the reasons to be advanced by the advocate of the defendants as they have agreed by themselves. She then invited the learned advocate of the

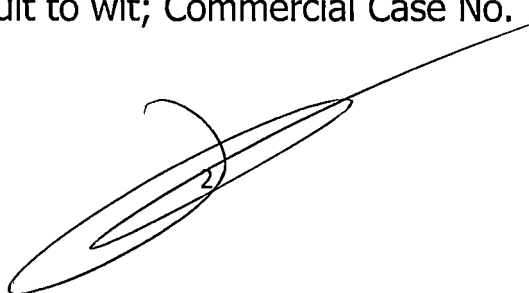


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defendants to expound the grounds upon which they have agreed for adjournment. Mr. Seni Malimi learned advocate for the defendants then argued for adjournment at length pressing that they have another pending suit Commercial Case No. 108 of 2023 whose facts and reliefs are similar to the instant one and therefore it would be in the interest of justice if this matter is adjourned for them to make an appropriate prayer before the presiding Judge of that other case to have the two cases consolidated.

I am very much disappointed by the act of the learned advocates to come to court for a hearing of the suit but with the already calculated move on the matter at the court's back. The 1<sup>st</sup> defendant after the matter had gone through various stages and scheduling orders made, applied for the court to vacate the scheduling orders so that they could amend the Written Statement of Defense to raise a Counter claim.

This court through my learned brethren Justice Agatho on 24/02/2023 made a ruling refusing to vacate the scheduling orders. With that ruling which is still in force, this court maintained the scheduling orders. The 1<sup>st</sup> defendant however in an attempt to pre-empt the said ruling and making it useless filed a separate suit to wit; Commercial Case No. 108 of 2023 and is

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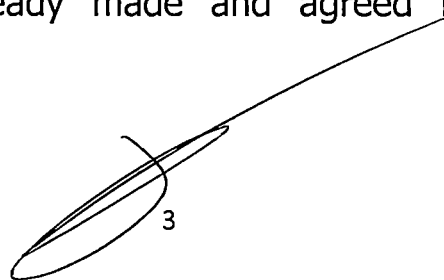
now using the same as an instrument to frustrate the scheduling orders in this suit.

Unfortunately, the plaintiff, who ought to have brought witnesses to prove her case has been reluctant and did not bring any witness today when this suit was scheduled for hearing for the obvious reason that they have colluded with the other side to have the matter adjourned.

If the issues in that other case are different from the issues at hand, I cannot see why the two cases cannot be tried separately despite the fact that such issues might be arising from the same facts.

In any case, if everything in Commercial Case No. 108/2023 is similar to the instant suit why then the other case was instituted if it is not a duplication of the suits! If the pleaded claims and facts are different why can't each case go separately!

Be it as it may, the parties came to court with their already-made decision for adjournment and the learned advocate for the Plaintiff made it clear that they were not ready to proceed with the hearing due to the discussion they have already made and agreed between them. She majestically submitted;



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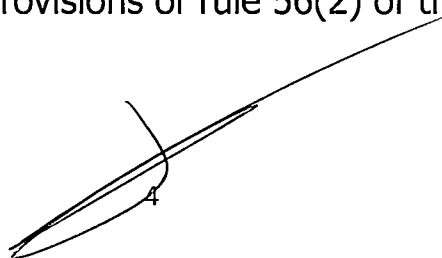
*"The matter is scheduled for hearing the Plaintiff's case but **we are not ready to proceed** with the same owing to a joint discussion between the Plaintiff and the Defendants"*

The case belongs to them and if they are not ready to prosecute the same, we have no powers to force them to proceed. Likewise, the parties have no powers to force the court to adjourn the case against its diary and the scheduling orders.

This case has already taken a long time in court since April 2022 and one of the reasons advanced by Hon. Justice Agatho in refusing to vacate the scheduling orders was that the Plaintiff's evidence in chief has already been given through witness statements.

I am of the same view that the suit having gone through the final pre-trial conference and issues for determination framed, the witness statements having been duly filed and served to the opponent parties, this suit ought to be concluded as scheduled.

I, therefore reject the prayer for adjournment and since the Plaintiff's witnesses are not available for cross-examination, I am obliged to strike out such statements under the provisions of rule 56(2) of the Commercial Court

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Rules as amended. That having done, the Plaintiff's case is hereby dismissed for want of prosecution.

Since the parties colluded for this matter to remain stagnated in the court register, I grant no costs to either party.

It is so ordered.



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**MATUMA**  
**JUDGE**  
**30/10/2023**