

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO.45/2023

KURINGE REAL ESTATE CO. LIMITED PLAINTIFF

VERSUS

MWAZANI ALLY SWAKALI (As administratrix

of the late Ally Suleman Swakali.....1ST DEFENDANT

HALIMA A. S SWAKALI2ND DEFENDANT

MWAJABU A. S SWAKALI3RD DEFENDANT

SHAIBU A. S SWAKALI.....4TH DEFENDANT

RAMADHANI A. S SWAKALI.....5TH DEFENDANT

RULING

Date of last Order: 12/06/2024

Date of Ruling: 12/06/2024

The Plaintiff sued the Defendants jointly and severally for breach of contract of sale of a plot of land and prayed for Judgment and Decree against them that:

- i. The Defendant refund the consideration price which is the Tanzania Shilling One Hundred and Eighty Thousand (180,000,000/=)
- ii. The payment of the interests of Twenty One percent (21%) per annum from the year 2007 when the principal sum was paid to the date of filling the suit.
- iii. The payment of Court's interests of item (i) and (ii) herein above from the date of filling the suit to the date of full payment.
- iv. The payment of general damages at the discretion of the Court.
- v. The payment of the costs of this suit.
- vi. Any other relief this Honourable Court deems fit to grant.

A Upon conclusion of the pretrial protocols, on 24th April 2024, the Final PTC was held wherein the Plaintiff and the Defendants were duly represented by their Advocates. After framing the issues, parties were ordered to file in Court the Witness Statements and the case was fixed for hearing for two consecutive days on 11th June 2024 and 12th June 2024. On 6th June 2024, the Court served the parties with Notice informing them that the case was put under special clearance session but the dates of hearing remained the same as earlier on fixed that is 11th June 2024 and 12th June 2024. On 11th June 2024, when the suit was called for the Plaintiff to produce his witness

for tendering of exhibits and cross examination, Mr. Egbert Millanzi, learned Advocate informed the Court that the Plaintiff's sole witness was is abroad and that the Plaintiff's lawyers had written a letter to Court on 30th May 2024 which letter was received in Court on 31st May 2024 communicating the excuse and praying for adjournment because the witness was on travel abroad in Guangzhou China. Mr. Beda Kapinga, learned Advocate for the Defendant acknowledged to have been served with a copy of the letter but remarked that there was no ticket attached to the copy served upon him. He said that he was ready for hearing of the case but left it upon the Court to determine the issue of adjournment as prayed by the Plaintiff's counsel. The Court, reluctantly adjourned the case to 12th June 2024 and informed the Plaintiff's counsel to prepare the witness for hearing via video conference on 12th June 2024 at 10:00am East African time. Both parties were directed to bring their witnesses for cross examination. Today morning the 12th June 2024, the case was called for hearing as planned. Mr. Egbert Millanzi and Farida Ibrahim, learned Advocates, represented the Plaintiff while Mr. Beda Kapinga and Yohanes Konda, learned Advocates, appeared for the Defendant.

Mr. Millanzi addressed the Court that after the Order of 11th June 2024, they contacted their witness to prepare him and notify him that the case would be proceeding today. When they informed him of the time, he responded that during that time he would be travelling from Barcelona, Spain, to London, the UK. Mr. Millanzi addressed the Court that the witness had told them that he would be arriving in London at 3:00pm today. Therefore, he could not be available before 4:00pm East African time. Mr. Millanzi, learned counsel stated that the Plaintiff's lawyers have written another letter to notify the Court of that fact today in the morning, a letter which was received in Court today 12th June 2024 and that the same was copied to the defendant's side. Mr. Egbert Millanzi, learned Advocate, made two prayers: (1) That as their witness will be on travel today and it is difficult to get hold of him, the matter be adjourned to another date which is convenient so that the Court can proceed with hearing of the case. (2) In the alternative to the first prayer, as the Witness shall be available online as from 4:00pm East African Time, the hearing be done online as from 4:00pm.

Mr. Beda Kapinga, learned Advocate for the 5 defendants resisted the plea. He informed the Court he had come with two witnesses as ordered yesterday. These were the 3rd Defendant and 5th defendant and thus the

defense was ready to proceed with hearing of the case. He stated that the Court had ordered the Plaintiff's counsel to make more efforts to ensure that the Witness for the plaintiff testifies today by video conference. He said that the reasons given by the learned counsel for the plaintiff, do not show any efforts made to get hold of the witness to testify. Mr. Kapinga, learned Advocate, stated that the witness could have cancelled the travel to attend the Court session online. Mr. Beda Kapinga submitted further that during the Final PTC on 24th April 2024, the Plaintiff's witness was made aware that he would be needed to testify in Court. He filed witness statement on 7th May 2024. Mr.Kapinga submitted that it was during the date of Final PTC that the hearing date was fixed as 11th and 12th June 2024 and therefore the Plaintiff's witness was aware that he would be required to come and testify on 11th and 12th June 2024, yet the witness scheduled a journey abroad subsequent to the Court order and thereby abrogated the dates which had been fixed for hearing of the case

Mr. Kapinga, learned Advocate also raised issues with the letters seeking adjournment presented to Court by the Plaintiff's lawyers on 31st May and 12th June 2024. He argued that in the letters, the Plaintiff's witness has not stated the reasons for his travels and therefore there is a reasonable ground

for adjournment disclosed. Mr.Kapinga remarked that yesterday on 11/06/2024, the plaintiff's Advocate informed the Court that their witness was in Guangzhou China but today morning the plaintiff's counsel was saying that the same witness was enroute from Barcelona, Spain to London the UK. Mr. Kapinga submitted that the Witness is not telling the truth and that the Boarding pass attached to the letter of 12th June 2024 seeking adjournment, is incomplete as it does not show three names of the Plaintiff's witness, nor does it show the class he is travelling in. Further that there is no ticket attached to compare with the boarding pass. Mr. Kapinga submitted that as the Witness is said to have been in China or Spain, a Visa should have been attached as proof of the travel abroad. He concluded by arguing that there is no ground for adjournment and that it is clear that the plaintiff is not interested to prosecute his case. Mr. Kapinga, learned Advocate for the Defendants prayed that the Witness Statement of the Plaintiff be struck out under Rule 49(2) of the Commercial Court Rules and the matter be dismissed for want of prosecution and with costs.

Mr. Millanzi, leaned Advocate for Plaintiff made rejoinder submissions. He argued that it is true that on 24th April 20204 the Court ordered hearing of the case on 11th and 12th June 2024. It is also true that the Plaintiff complied

with the order of filing witness statement. He argued that also, it is true that the tickets for travel were purchased by the witness after 24th April 2024 when the Court with consultation with Counsel for both sides had fixed the date of hearing of the case on 11th June 2024 and 12 June 2024. Mr. Millanzi submitted that the booking and purchasing of the air tickets subsequent to the Court order that had fixed the dates of hearing, does not, however, mean that the witness for the plaintiff does not have an intention to proceed with hearing of the case but he got an emergency travel. Mr. Millanzi submitted that the practice and the law allows, where a witness is unable to attend in Court, he should notify the Court and the other side to the case. He argues that the plaintiff has done so by writing a letter to Court on 31st May 2024 which was served upon the other side as well. In that letter, he argued, the plaintiff's witness attached the air tickets confirming his travel. He submitted that the tickets show that the witness will be travelling from Dar es salaam to Guangzhou China and the date of his return to Dar Es Salaam is 18th June 2024. Mr. Millanzi submitted that, yesterday, 11th June 2024, after the Court directed that there would be an online hearing of the case on 12th June 2024, he and other lawyers of the plaintiff made efforts to find the witness to prepare him so that he could proceed with the case today

morning but the witness had already purchased an air ticket for travel from Barcelona to London. Mr. Millanzi submitted that the issue of possibility of using video conference came to witness' attention yesterday and hence it was not possible to cancel his booked trip. Thus, Mr. Millanzi submitted that it is not true that they have made no efforts to find their witness to attend the case via remote proceedings. He argued further that it is true that the letter of 31st May 2024 from the Plaintiff's counsel to Court praying for adjournment of the case, showed that the witness was travelling to China and that in the Plaintiff's letter of today 12th June 2024, addressed to Court, the Plaintiff's counsel have shown that the witness will be travelling from Barcelona to London. He argued that there is no contradiction on the journeys, as two tickets are of different dates and issued by two different airlines. He argued that as the ticket attached to the letter of 31st May 2024, showed that the witness was travelling to China, it also showed that he would be away for 14 days and hence the witness has not yet returned to Tanzania he argued that his travel to Barcelona had its origin in China. Mr. Egbert Millanzi submitted that from London, the witness will go to China so as to start his journey to Dar es Salaam from there. The two tickets show the names of the passenger as Mr. Edward Mushi who is the Plaintiff's witness.

On absence of 3 names of the witness in the boarding pass, Mr. Millanzi responded that it is a matter of policy of the booking company whether to write two or three names but at any rate presence of two names instead of three does not invalidate the air tickets. On the allegation that the plaintiff does not wish to prosecute the case, Mr. millanzi strongly refuted it by arguing that that is not true and that is why the Plaintiff has complied with Court orders by filing witness statements as required and by writing letters seeking adjournments in Court. Mr. Millanzi argued that the Plaintiff has also confirmed that even though the Plaintiff's witness is on travel today, he is ready to continue as from 4:00pm (EAT) today and that means that he is interested to prosecute his case. Mr. Millanzi concluded by submitting that there is no good cause for striking out the witness statement nor dismissal of the case, as the Court is there to do justice for both sides, and that taking into consideration the peculiar circumstances of the witness, he was praying that the Court grants a short adjournment by either fixing another date of hearing or delaying the commencement of the hearing of the case from 10:00hrs to from 16:00hrs as prayed for in the letter.

I have given a thought the matter at hand. On 24th April 2024 during the Final PTC, the Court fixed the hearing of this case to be on 11th June and

12th June 2024. Both parties were ordered to bring their witnesses and the Court had reserved 1 day exclusively for each side to bring its witnesses for the oral hearing. The Plaintiff's Counsel on 31st May 2024 wrote a letter notifying the Court that the Plaintiff's sole witness Mr. Edward Mushi had travelled to China and would be returning to Tanzania on 18th June 2024. No reason for the travel was disclosed. The travel or absence was being advanced as the reason for seeking adjournment of hearing of the case. On 11th June 2024, the case was called for hearing and Mr. Egbert Millanzi, learned Advocate prayed for adjournment in terms of the letter of 31st May 2024. That prayer was protested by Mr. Beda Kapinga learned Advocate for the Defendants. The Court adjourned the matter to the next day that is to 10:00am today the 12th day of June, 2024 which is also a date exclusively reserved by the Court for cross examination of the defence witnesses. The aim was to enable the Plaintiff's sole witness to attend the Court via remote proceedings. The Court directed the Defendant's side to bring its witnesses also on 12th June 2024 so that progress could be made in hearing of this case as planned when designing the special session. On 12th June 2024, the Plaintiff's Counsel wrote and submitted in Court, another letter giving an excuse that the Plaintiff's sole witness Mr. Edward Mushi, would not be able

to attend the online hearing as planned and directed by the Court because he would be travelling from Barcelona Spain to London, the UK. Mr. Millanzi therefore prayed for an adjournment to another date after 18th June 2024 when the witness will be back or to at least after 4:00pm East African time, when the witness would have arrived and settled in London, for online hearing. This prayer was resisted by Mr. Beda Kapinga, learned Advocate for defendants as summarized above.

After considering the rival arguments, I find that the Plaintiff is not interested to prosecute his case. The hearing of this case on 11th and 12th June, 2024 was fixed under special backlog clearance sessions where two entire days of the Court business were dedicated exclusively and reserved for the finalization of this case. The two days have been lost in entirety because of absence of the Plaintiff's sole witness despite being aware of the date of appearance for cross examination and admissibility of documentary evidence. I take note that although the case was slotted into the special clearance session, and a Notice thereof was duly served by the Court to both sides on 6th June, 2024, the dates of hearing this case were not altered from the ones agreed upon by the parties and fixed by the Court on 24th April, 2024. The Plaintiff was not taken by surprise. He had from 24th May, 2024

to 11th June, 2024 to plan his affairs and still be able to participate in the proceedings in Court.

Despite being aware that the case was fixed for hearing on 11th and 12th June 2024, the Plaintiff's sole witness, subsequent to the Court order, that had fixed the dates of hearing of his case, deliberately of his own will, went ahead to procure air tickets for travelling to China and made his travel arrangements in such a way that he would be absent in Court from 3rd June, 2024 to 18th June 2024. The reason for his journey was never disclosed. This means that the Plaintiff's witness opted not to attend the Court and preferred to travel abroad for whatever the reason. The Court was lenient and considerate when the witness was not able to attend on 11th June, 2024. I committed the resources of the Court to ensure the witness would be able to attend the Court virtually via video conference facilities of the Court on 12th June, 2024 as from 10:00am. Yet again, the Plaintiff's Witness made it impossible for the proceedings to proceed by absenting himself online from forum as well when the case came for hearing. This is a clear indication that the Plaintiff is not interested to prosecute the case.

It seems that the Plaintiff's witness in this case is a person who wishes to dictate the way the Court should function, that is the Court should tailor its timetable in conformity with the convenience of the Plaintiff's witness. That is not possible. Adjourning the Court scheduled date from 11th June, 2024 to 12th June, 2024 and changing the mode of conducting proceedings from physical to virtual, were both enough attempts done by the Court in an attempt to accommodate the Plaintiff's witness so as to accord the plaintiff his constitutional right to be heard. While the Court, its staff and facilities all were committed towards accommodating the Plaintiff's witness, the Witness of the plaintiff, in turn, remained adamant with his personal schedule, allowing no adjustments in his rendezvous, whose objectives were never disclosed. He wanted the Court to make yet more accommodations to suit his convenience. No Court of law worth the name does that. The Witness for the Plaintiff has his own businesses to attend to, but the Court also has its constitutionally and legally prescribed business to attend to and that is timely dispensation of justice. Individuals who file cases in Court are bound to follow the laws and rules of procedure of the Court. They should not expect the Court to adjust itself to their needs and convenience. The Plaintiff's

witness in this case should have abided with the rules and orders of the Court.

Granting the prayers advanced by the Plaintiff's Counsel so as to accommodate further the convenience and interests of the Plaintiff's witness, would result into the Court dancing to the tunes and melodies of the Plaintiff and thereby abdicate its crucial role of judicial case management. Talking of the critical role of the Court to ensure effective case management, I will make reference to three sources. The first one is Lazer, Susan (2021) **The Principle of Orality: An Analysis of the Principles Governing the Prevalence of Direct Oral Testimony in the English Adversarial Trial System and the Impact of Reforms to Reduce its Status**, Doctoral thesis, University of Huddersfield, who at pages 59 says as follows:

"Judicial case management is at the fore of the revised system of civil litigation following the introduction of the civil procedure rules. Of all aspects of civil litigation, the control of procedure with the underlying objective of costs reduction has been the greatest shift from the system in existence prior It is not just a judicial power to manage cases but a duty that is now at the heart of the

system. No longer is it for the litigants to control the pace of litigation, it is an obligation of the Court to ensure proper management of the system. Judicial case management is woven throughout the procedures within the civil justice system. (emphasis supplied)”

In the case at hand, in accordance with case management system, the Court allocated two entire days of the busy Court schedule to hear the Plaintiff and the Defendants. The Court put the case under special clearance session for its quick disposal. The Court made it possible for the witness for the Plaintiff to attend the case wherever he is in the world by committing its technical staff and equipment to reach him and take his testimony, but all in vain. The Witness for the plaintiff opted to travel out of the country on the very dates when the case was fixed for hearing. When the dates of hearing were being fixed in Court, on 24th April 2024, after the Final PTC, the Plaintiff was represented by his Advocates. When offered the costly assistance of online hearing, still he could not adjust his schedule accordingly. If the Court accepts the request to reschedule the hearing of the case from 10:00am to 4:00pm, which is way beyond the Court working hours, what assurance is there that the witness will not find another excuse at that time? What should

the Court, its staff, Advocates for the other side and the 2 defendants' witnesses in attendance, be doing in the meantime when waiting for the witness for the plaintiff to finish his journeys? Entertaining such a witness would tantamount to subjecting the entire case progress to the whims, wishes and control of the Witness to control the pace of litigation. I refuse to tolerate such laxity. The mission of the Court is timely justice for all. I would like to make reference to yet another quote emphasizing on the need for effective judicial case management. In her scholarly work explaining the implementation of the overriding objective principles in the UK, Lazer, Susan (supra) states at page 66 that:

"In order to deal with cases expeditiously and fairly while saving expense, the Court has very extensive powers of case management The Court's approach to the avoidance of litigation continuing for an indefinite period was demonstrated in Adnan v Securicor Custodial Services Ltd [2005] PI QR 79. In that case, a request to delay the consideration of damages until the end of the claimant's period of hospitalisation was refused and marked the effect of the overriding objective on what had previously

been a point for frequent protraction of the adversarial trial system.”

Susan Lazer was writing about the need for effective case management in view of the introduction of overriding objective rules in the England. In my view, the same situation obtains in Tanzania. Countless legal provisions insist on the need for justice to be dispensed timely. Sections 3A and 3B introduced in our Code of Civil Procedure and other relevant procedural laws, the overriding objective principles similar to the ones obtaining in the England. If the Court will let itself be manipulated by convenience of parties to the suit, litigation will continue indefinitely and that will defeat the overriding objective principles. I reproduce Section 3A and 3B of the CPC:

"3A.-(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B.-(1). For the purpose of furthering the overriding objective specified in section 3A, the Court shall

handle all matters presented before it with a view to attaining the following-

(a) just determination of the proceedings;

(b) efficient use of the available judicial and administrative resources including the use of suitable technology; and

(c) timely disposal of the proceedings at a cost affordable by the respective parties.

(2) A party to civil proceedings or an Advocate for such a party shall have a duty to assist the Court to further overriding the objective of this Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."

The Court on its part complied with the need to do justice by attempting to have a just determination of the proceedings by affording right to be heard to both parties; making efficient use of the available judicial and administrative resources including the use of suitable technology; and timely disposal of the proceedings at a cost affordable by the respective parties by scheduling a special clearance session wherein all witnesses for the parties would be heard in two days exclusively reserved for this case only. On the

other hand, the Plaintiff as a party to this suit had a duty under the overriding Objective principle according to Section 3B (2). A party to civil proceedings or an Advocate for such a party shall have a duty to assist the Court to further overriding the objective of this Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. The Plaintiff refused or neglected to participate in the processes of the Court and to comply with the directions and orders of the Court. Whereas the Court on 24th April, 2024 ordered the Plaintiff to bring its witnesses for cross examination on 11th and 12th June 2024, the Plaintiff's sole witness, subsequent to Court order, purchased an air ticket and travelled outside the country making sure to return after the hearing dates fixed by the Court. Whereas on 11th June 2024, the Court ordered the Plaintiff to bring his witness in Court at 10:00am (electronically as admitted by Plaintiff's learned counsel), the Plaintiff's sole witness was allegedly on travel abroad. The Plaintiff on the other hand prayed for hearing after 18th June, 2024 of as from 4:00pm on 12th June, 2024 way past the Court's ordinary working hours. Should the Court have confirmed to the dictates of the witness for the plaintiff? My answer is in the negative. An individual as a party or a witness should not control the pace of litigation.

Perhaps the crux of the matter as regards the need for the Courts to have effective case management in line with overriding objective, is seen in the Speech delivered by Master of the Rolls, Lord Dyson in 2013 to the Judicial College (available at [https://www.judiciary.uk > uploads > 2014/10/](https://www.judiciary.uk/uploads/2014/10/)) where at paragraphs 21,22 and 23 he stated that:

"Secondly, and more importantly it is intended to underline and reinforce the importance of conducting and managing litigation so as to ensure that no more than proportionate costs are incurred as between the parties and that no one piece of litigation is permitted to utilise more of the Court's resources than is proportionate, taking account of the needs of other litigants. It thus requires the Court to focus much more clearly and consistently than it has in the past on these essential aspects of case management in the light of the overriding objective. This point has of course rightly been emphasized by Lord Justice Jackson (who else?) in the recent Court of Appeal in Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd [2012] EWCA 22410 where he said this, 'Non-compliance with the Civil Procedure Rules and orders of the Court on the scale that has occurred in this case cannot possibly be

tolerated. Any further grant of indulgence to the defendants in this case would be a denial of justice to the claimants and a denial of justice to other litigants whose cases await resolution by the Court. As I have said, one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all Court-users."

The worries expressed by Lord Dyson in his speech are what transpired in the case at hand. The Plaintiff wants to eat a larger share of the cake of justice than the other Court users. The Plaintiff's witnesses want to make all the other parties to the suit and the Court inclusive as "interested parties" to his travels abroad as if that were an excuse enough. There are 2 Advocates for the 5 Defendants who were in attendance in Court ready for hearing yesterday and today. Obviously for two days they cancelled other businesses from their schedules to attend the hearing of this case exclusively. Equally, there were two Advocates for Plaintiff who might have also kept aside their other works in order to represent the Plaintiff in Court. The Judge, Court Clerks, Personal secretary, Security Officer, IT personel,

Judge's Legal Assistant and other support staff kept aside their other, equally pressing duties, for two days so as to attend to the Plaintiff's case leaving other Court users un-attended. The judiciary committed its scarce resources and equipment for two entire days so as to attend to the Plaintiff's case. Inevitably, there are other members of the public including litigants whose cases are of extreme urgency who were denied the privilege afforded to the Plaintiff in those two days so as to enable the plaintiff vindicate his rights. However, it seems that the Plaintiff with his case, as one piece of litigation, wants to utilise more of the Court's resources than is proportionate, without taking into account of the needs of other litigants. Whereas the Plaintiff's witness is allegedly on his travels abroad, he must remember that on the other hand he has tied up 5 adult Defendants with a Court case on their neck that keeps them in a continued state of uncertainty for the whole duration of the case. Probably some of them also had emergency travels which they had to cancel and heed to the Court Order. Two such Defendants were in attendance in Court ready to give evidence after the Plaintiff's completed his testimony. Adjourning this case will result into the Defendants suffering more than proportionate costs. The overriding objective principle is in most cases resorted to as a rescue mechanism by defaulting litigants but the principle

on the other hand imposes an obligation upon the litigants and their Advocates including the duty to participate in the processes of the Court and to comply with the directions and orders of the Court. The plaintiff has not cooperated nor participated in the process for no justifiable cause.

Mr. Millanzi, learned Advocate urged the Court to do justice for both sides. I would like to subscribe to the words above quoted in the speech of Lord Dillon, MR (supra) that: "one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all Court-users." Whereas the Court tried its best to accommodate the Plaintiff in this case, the Court should also consider the rights and interest of the other Court users including the 5 Defendants herein and other members of the public who also depend on the same Court to resolve the disputes timely. The individual litigants should align themselves to the Court's schedule and not otherwise. The individuals have full control of their dispute so long the same has not been filed in Court. Upon filing the case in Court, the case has to proceed according to the rules of procedure and diary of the Court not of the individual litigants.

I have really considered the rival arguments by the learned counsel for the Plaintiff and the Defendant on the prayers to adjourn the case. To me all the arguments by the learned counsel for the Plaintiff are misplaced. They do not answer the basic question as to why isn't the sole witness for the plaintiff available in Court to testify today while the plaintiff was aware of the Court Order of 24th April 2024 that they had case been fixed for hearing for two consecutive days on 11th and 12th June 2024? The excuses given by the Plaintiff's counsel, despite having some faults in them as pointed by Mr. Beda Kapinga, learned Advocate, have one inherent defect. Why did the Plaintiff's witness have to find himself abroad on the very dates the case had been fixed for hearing by mutual consent of both parties and the Court? The letters submitted explain that the absence of the witness was due to the witness' travel abroad. The issue is why did he have to travel abroad on the same dates the case was fixed for hearing? There was no explanation. One does not just wake up and find himself abroad or on a journey. Mr. Egbert Millanzi stated that the travel was urgent. Mere words from the counsel from the bar are not evidence. The letters themselves do not bear any such excuse. The letters simply depict that the witness is abroad. If one opts to travel abroad in preference to giving evidence in his case, the Court cannot subject itself

to his convenience. The Plaintiff has simply ignored the Court order of 24th April, 2024 that had ordered parties to produce their witnesses for cross examination on 11th and 12th June, 2024. Also, the Plaintiff has ignored the Court order issued on 11th June, 2024 that had once again ordered the plaintiff to produce the plaintiff's witness for hearing at 10:00am on 12th June 2024. The Court was generous enough to offer the alternative of reaching the Plaintiff's witness wherever he is in the world by virtual hearing. The learned counsel for the Plaintiff ought to have known the remote proceedings rules and should have prepared their witness for virtual proceedings on 11/06/2024, instead of seeking adjournments to prolong the case. Counsel is advised next time in another case to find more reasons as to why the case should proceed rather than being adjourned. Whenever there is indication that the case may not proceed counsel should show the zeal for the case to proceed. From 10:00am on 11th June, 2024 to 10:00am of 12th June 2024, the Plaintiff and plaintiff's witness had 24 hours to make the online hearing possible. He did not alter his plans. Court orders must be respected. In the case of **CRDB BANK PLC VERSUS HERI MICROFINANCE LIMITED & CASSIANO LUCAS KAEGELE**, Civil Appeal No. 20 of 2020, delivered the

Court of Appeal of Tanzania at Sumbawanga held at page 15 of the Ruling insisting on the need for Court orders to be respected thus:

"It is well settled that orders of the Court are to be respected and implemented. In Karori Chogoro v. Waitihache Menengo, Civil Appeal No. 164 of 2018 (unreported) the Court held: "Court orders should be respected and complied with..." The same sentiment was expressed in Olam Tanzania Limited v. Halawa Kwilabya, Civil Appeal No. 17 of 1999 (Unreported), where we stated: " ... Court orders are made in order to be implemented; they must be obeyed. If orders made by Courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them... Courts of law should always control proceedings."

In the case at hand the Court concludes that this is a witness who is not interested to attend the Court. So, what happens when a witness files a witness statement but does not present himself for cross examination? Under the Commercial Court Rules, the position is settled. The outcome depends on the circumstances of failing to attend by the witness. Where the witness fails to attend but for good cause the Court should give his evidence in the

witness statement, a little evidential weight. Where the non-appearance is without good cause, the witness statement should be struck out. I found that the witness herein was absent without any good cause. I strike out the witness statement of the sole witness for the plaintiff. Hon. Nangela, J., sitting in this Court in the case of **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others** delivered on 15th May 2022 held that:

"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."

I accept the prayers by Mr. Beda Kapinga, and Yohannes Konda, learned Advocates for the Defendants. I do hereby strike out the witness statement of the sole witness for the Plaintiff Mr. Edward Mushi filed on 7th May 2024.

In the **Petrofuel (T) Limited versus Power Road (T) Limited and 2 others (2012)** it was held and insisted at page 14 thereof 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 struck out and I hereby strike it out from the record."

The consequences of striking out the only witness statement for the plaintiff were stated in the Petrofuel case (supra) that where there is no other witness statement of the Plaintiff to rely upon, the consequences of striking out the only witness statement for the plaintiff is dismissal of the suit for want of prosecution. In the Petrofuel case at pages 14 and 15 thereof this Court held that:

"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 Plaintiff, it means that the Plaintiff case has not been prosecuted... the present suit cannot stand anymore but be liable to dismissal."

Due to failure by the sole witness for the Plaintiff to attend the Court for cross examination, the witness statement for the sole plaintiff's witness was struck out. Now, due to the striking out of the only witness statement for the Plaintiff, I do hereby proceed to dismiss the suit with costs for want of prosecution. It is so ordered.

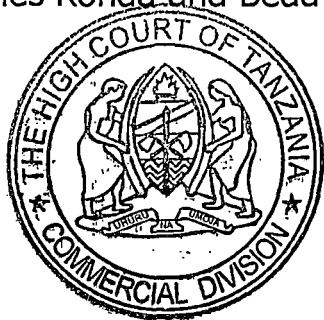



A. H. GONZI

JUDGE

12/06/2024

Ruling is delivered in Court this 12th day of June, 2024 in the presence of Egbert Millanzi and Farida Ibrahim, learned Advocates for the Plaintiff and Yohannes Konda and Beda Kapinga, learned Advocates for the Defendants.




A.H. GONZI

JUDGE

12/06/2024