

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 100 OF 2022

Between

KUENHE (TANZANIA) LIMITED PLAINTIFF

VERSUS

SVT TANZANIA LIMITED DEFENDANT

RULING

Date of last Order: 23/02/2024

Date of Judgment: 23/02/2024

GONZI, J.;

When the case came for hearing today at 10:00 am 23/02/2024, Mr. John James Learned Advocate for the Plaintiff informed the court that they were ready to proceed with defence hearing as scheduled. On the other hand, Mr. Yusuph Abdallah Learned Advocate for the Defendant informed the Court that the Defence side was not ready to proceed with the hearing as their witness Venance Msebo is not in Tanzania. He stated that the witness is in Nairobi Kenya where he proceeded after his earlier journey to Mombasa. Mr. Yusuph Abdallah also notified the Court that the said witness will be arriving in Dar es Salaam today 23/02/2024 at midnight as he is booked into a Kenya Airways Flight No. KQ 488 from Nairobi to Dar es Salaam. Mr. Yusuph Abdallah duly produced in Court copies of boarding passes issued by Kenya

Airways in respect of Mr. Venance Msebo. The first Boarding pass is for Flight No. KQ 613 from Mombasa to Nairobi dated 22/02/2024 with departure time of 20:45 hrs and boarding time of 20:15 hrs. The second Boarding pass is for flight No. KQ 488 issued by Kenya Airways in respect of the same passenger travelling from Nairobi to Dar es Salaam. It is dated 22/02/2024 with boarding time of 23:00 hrs. Both Boarding passes have QR Barcodes and Reference numbers of electronic tickets printed on them. Mr. Yusuph therefore prayed that the matter be adjourned until Monday 26/02/2024 when the witness will be available to give evidence in court before he travels again on Wednesday 28/02/2024. Mr. Yusuph stated that in my last order the case was adjourned with an order for the Defendant company to pay cost of Tshs. 100,000/= for failure by the same Defence witness to attend the court. He stated that this amount is yet to be paid because he had communicated the order to the Director of the Defendant who happens to be the witness Mr. Venance Msebo, but as he is in Kenya, he has not been able to pay the costs up to the moment. He stated that Mr. Venance Msebo promised that he will pay the costs directly to Mr. John James, Advocate for the Plaintiff as it was done in the past during an application to set aside an order of exparte hearing in this case.

In response, Mr. John James, Learned Advocate for Plaintiff prayed that the witness statement of Venance Msebo be struck out and the court fixes a date for Judgment because the Defendant has failed to defend the case. Mr. John James Advocate for Plaintiff submitted that the Boarding passes submitted in Court actually show that the date of travel was yesterday night that is 22/02/2024 and hence the witness is now in Dar es Salaam but has neglected to attend the Court. He argued that the Boarding pass issued by Kenya Airways shows that the flight from Nairobi to Dar es Salam was yesterday 22/02/2024 at 23:45 hrs.

With regard to non-payment of costs by the defendant for non-attendance of Defence Witness on 19/02/2024 when the case was called for hearing, MR. James insisted that the costs should have been paid by the Defendant before hearing commences today. Mr. James therefore concluded that the Defendant has no intentions to defend the case and hence the witness statement of Mr. Venance Msebo be struck-out and Judgment be entered on the basis of the evidence given by the plaintiff.

In rejoinder, Mr. Yusuph submitted that although the dates in the Boarding passes are of yesterday, but the flight from Nairobi to Dar es Salaam was cancelled and thus the witness will be travelling to Dar es Salaam

from Nairobi today evening and will be available in court as from Monday 26/2/2024. He also argued that it has not been possible to pay the costs of adjournment ordered on 19/2/2024 because the person to pay it is Mr. Venance Msebo who is stranded in Nairobi Kenya.

In this case, the plaintiff closed its case on 16/11/2023 and Defence case was opened. The case was fixed under special clearance session for backlog cases whereby all cases which have stayed over 12 months in this Division are backlog. This case was filed in 2022. Notice of date of hearing was served upon the Defendant and on 06/02/2022 the Plaintiff's Advocate appeared while neither the Defendant nor its Advocate appeared. The case was scheduled for defence hearing on 19/02/2024. Notice of date of hearing was communicated to the Defendant. On 19/02/2024, Mr. Yusuph Abdallah learned Advocate for the Defendant appeared together with Mr. John James, Advocate for the plaintiff. On 19/02/2024 Mr. Yusuph Abdallah learned Advocate informed the court that the only witness for the Defendant had travelled to an undisclosed destination and therefore he requested for an adjournment. This prayer was met with protests from Mr. James learned Advocate for the Plaintiff. The court adjourned the case to 23/02/2024 at 9:00 am for Defence hearing with an Order that the Defendant should pay Tshs. 100,000/= to the Plaintiff as costs of Adjournment. The Order directed

that costs should have been paid before the 23/02/2024 when the case would come for hearing.

Today 23/02/2024 the case was called at 10:00 am for hearing of the Defence case as earlier fixed. But it happens that the Defendant's witness is not present in court once again and his Advocate has once again reported that the witness has travelled to Nairobi Kenya. The orders to pay cost have not been complied with by the Defendant either. The Defendant's counsel is praying for yet another adjournment of the case to await the return of the Defendant's Witness. The ground for adjournment advanced by Mr. Yusuph is that the witness Mr. Venance Msebo has travelled to Kenya and according to the Boarding pass he is coming back today evening as the flight is cancelled. I have considered the rival arguments by Mr. James for the Plaintiff. I have also looked at the Boarding passes submitted to court by Mr. Yusuph, Learned Advocate for the Defendant. It is true that the Boarding pass submitted shows that Mr. Venance Msebo, the witness the court is told to await for, travelled to Dar es Salaam from Nairobi yesterday 22/02/2024 at 23:45 hrs by Kenya airways flight No. KQ 488 which departed Nairobi at 23:45 hrs. Ordinarily by 10:00 am on 23/02/2024 when the case was called, the witness must have arrived in Dar es Salaam. Mr. Yusuph has argued that the flight was cancelled and therefore the witness will be travelling today

evening. Mr. Yusuph has not submitted any evidence to prove this allegation. No email, text message print-out or any other proof has been presented to prove that flight No. KQ 488 from Nairobi to Dar es Salam was cancelled on 22/02/2024. His words contradict the very Boarding passes he submitted in court. In the quest to do Justice, the court took trouble to ascertain whether indeed flight No. KQ 488 operated by Kenya Airways from Nairobi to Dar es Salaam was cancelled on 22/02/2024? The flight records available online in the Kenya Airways website Flight status page show that flight No. KQ 488 from Nairobi to Dar es Salaam on 22/02/2024 departed Nairobi and "landed late" in DSM. The online flight details on the Kenya airways website indicate that the plane spent 1 hour and 12 minutes to fly from Nairobi to Dar es Salaam. Details of the same flight No. KQ 488 operated by Kenya airways available online at flight aware. com show that actually the flight took off from Terminal 1A of Jomo Kenyatta International Airport in Nairobi Kenya and landed at Terminal 3 of Julius Nyerere International Airport in Dar es Salaam, Tanzania. Therefore, it is true that if the boarding passes submitted by Mr. Yusuph, Advocate for the Defendant, are anything to go by, then the witness Mr. Venance Msebo is indeed home and dry in Dar es Salaam but has conveniently chosen not to attend the court case today. The excuses given by Mr. Yusuph Abdallah that his client is stranded in Kenya due to

cancellation of the flight, are but lies. The learned Advocate is warned to observe ethical standards a lawyer worth the title is expected to live by. Therefore, I find that the Defendant's witness Mr. Venance Msebo has deliberately failed or neglected to appear in court for no apparent reason. It should be noted that this is the 3rd time in row the case is scheduled for hearing and the Defendant is in default to defend the case. On 06/02/2024 the case was set for hearing of defence side but neither the Defendant nor his Advocate attended. On 19th February 2024 the case was again fixed for hearing of the Defence case, under special session but the Defendant's witness did not attend. Today 23/02/2024 when once again the case came for defence hearing under special session the Defendant's witness is absent. The Defendant's counsel never bothered to request for online hearing. I find that the repeated and consistent absence of the Defendant's witness is a sign that the Defendant is not interested to proceed with defending the suit. The Defendant is also in defiance of the court order to pay costs of the last adjournment prior to the subsequent date fixed. Absence from the country is no excuse for not effecting the payment. The Defendant is a company which, in law, is expected to have at least two directors. The other company officials might have effected the payment on time. Also, there are many modes of sending money across the borders from one country to another.

Definitely there would be no hurdles to send money from Kenya to Tanzania for 4 days since my last order of 19/02/2024 to date 23/02/2024.

As the Defendant in this case abstained to attend the court for Cross examination without justifiable reasons, what are the consequences? Rule 56(2) of the commercial court Rules GN. No. 250/2012 as amended in 2019 provides that:

"Where the witness fails to appear for cross examination, the court shall strike out his statement from the record unless the court is satisfied that there are exceptional reasons for the witnesses' failure to appear"

What are the reasons for failure by the Defendant's witness to appear in the present case? Mr. Yussuph Abdallah, learned Advocate for the Defendant duly addressed the court that the witness is outside the country and according to his Boarding passes he is not in Tanzania today. When Mr. John James, learned Advocate for the Plaintiff pointed out that the Boarding passes were for yesterday's travel and not today, Mr. Yusuph, in rejoinder, shifted the goal posts by stating that the flight No. KQ 488 for 22/02/2024 was cancelled and thus the boarding passes of yesterday will be used today. I asked myself why Mr. Yusuph did not mention the issue of flight

cancellation in his submissions in chief and introduced it in his rejoinder? It is an afterthought. Also, I asked myself if indeed the flight was cancelled and that is the excuse being advanced by Mr. Yusuph, then why did he take trouble to submit the irrelevant boarding passes in Court in the first place? The Boarding passes do not show any details of flight cancellation. He submitted them to show that the witness is in Kenya and that he is due to travel to Tanzania today at 23:45 hrs. That is all that he submitted. As I have shown, the Online records for flight KQ 488 for 22/02/2024 show that the flight safely landed in Dar es Salaam in the night of 22/02/2024 to 23/02/2024. This means that the witness actually has woken up in Dar es Salaam today 23/02/2024. Therefore, it is not true that the witness is outside Tanzania as it was reported by Mr. Yusuph, learned Advocate. His witness has simply neglected to appear in court for cross-examination. This is the second time in a row for a case for which the court has dedicated a special clearance session. Adjourning this case further will only prolong the case and delay justice. Pendency of a case in court ordinarily entails halting socio-economic affairs connected with the particular case. Whereas other businesses are stalled to await finalization of the case by the court, prudently the court on the other hand cannot also halt progress of the case to await the will of the parties to the case to decide at their leisure as to whether and

when they wish their case to proceed in Court. Once parties bring their dispute to Court, they are duty bound to adhere to the rules and directives of the Court. The court cannot subject itself to the convenience of the parties. The Defendant in this case, if genuine, had an option to use video link for online hearing. But the Advocate for the Defendant repeatedly came only with a prayer to adjourn the case which was fixed for hearing. In two successive dates, the Defendant only prayed to have the case adjourned. He wished to have the case adjourned to the extent of telling lies to the court that the witness has travelled and is yet to come back to Tanzania! However, the records brought by the Defendant's own Advocate show that the Defendant's witness is actually present in Dar es Salaam. Therefore, no plausible reason is given for his non-appearance in court.

Accordingly, I invoke Rule 56(2) of the Commercial Court Rules and I do hereby strike out the witness statement of the only Defendant's witness one Mr. Venance Msebo. As the Plaintiff's case was closed, I grant the Plaintiff 14 days period to submit final Written Submissions before the Court proceeds with delivery of Judgment. The Order of costs of 19/02/2024, remains intact. It is so ordered.



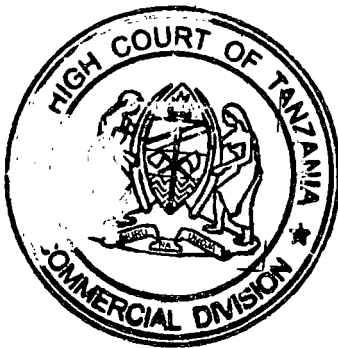
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A. H. GONZI

JUDGE

23/02/2024

Ruling is delivered in court this 23rd day of February 2024 at 2:00 pm in the presence of Mr. Ibrahim Kibanda learned Advocate holding brief for Mr. John James Advocate for the Plaintiff and in the absence of the Defendant whose Advocate Mr. Yusuph Abdallah was present in Court in the morning today hence duly notified of the delivery of this Ruling this afternoon.



A handwritten signature in black ink, appearing to be "A. H. Gonzi", written over a horizontal line.

A. H. GONZI

JUDGE

23/02/2024