

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KOROSSO, J.A., KITUSI, J.A., And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 350 OF 2020**

**AFRICARRIERS LIMITED ..... APPELLANT**

**VERSUS**

**SHIRIKA LA USAFIRI DAR ES SALAAM LTD ..... 1<sup>ST</sup> RESPONDENT**

**EQUITY BANK TANZANIA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam)**

**(Fikirini, J.)**

**dated the 25<sup>th</sup> day of August 2020**

**in**

**Revision No. 50 of 2019**

.....

**JUDGMENT OF THE COURT**

30<sup>th</sup> May, & 30<sup>th</sup> November, 2023

**KOROSSO, J.A.:**

The appeal arises from the judgment of the High Court of Tanzania (Commercial Division) in Commercial Case No. 50 of 2019 where the appellant (plaintiff then) instituted a suit against the respondents jointly and severally for payment of USD 2,889,651.77 being money due and payable to the appellant for supply of commercial buses to the 1<sup>st</sup> respondent. Other claims included general damages, interests, costs and

any other relief granted by the court. The respondents disputed the claims in a jointly written statement of defence (WSD).

At this juncture and for reasons soon to come to light in the judgment, we find no need to reproduce the facts giving rise to the appeal. To be noted is the fact that the hearing of the suit commenced with the High Court inviting the parties to address the preliminary points of objection raised by the respondents on the competency of the suit. The High Court sustained the points of objection giving rise to the instant appeal.

The appeal is premised on three grounds that fault the High Court as follows: **One**, for dismissing the suit instead of ordering remedial measures such as filing new witness statements in lieu of those improperly filed in line with established decisions and the essence of the overriding objective principle on termination of cases enshrined in the High Court (Commercial Division) Procedure Rules, 2012 (as amended) (Commercial Court Rules). **Two**, for dismissing the suit and not ordering remedial measures such as extending the time to file new witness statements as per established decisions and the essence of the overriding objective principle found in the Commercial Court Rules. **Three**, in holding that the

remedy for dismissing the suit was based on what is construed as mandatory Rules of Procedure whilst scheduling for filing witness statements is the discretion of the court and not otherwise.

On the day the appeal came for hearing on 30/5/2023, Mr. Peter Kibatala, learned advocate represented the appellant whereas, the 1<sup>st</sup> respondent was represented by Ms. Subira Mwandambo, learned Senior State Attorney assisted by Mr. Charles Mtae, learned State Attorney. Mr. Karoli Tarimo, learned advocate appeared for the 2<sup>nd</sup> respondent.

When given an opportunity to amplify the grounds of appeal, Mr. Kibatala commenced by adopting the appellant's written submissions to form part of his oral submission. He sought and was granted leave of the Court to argue the first and second grounds of appeal conjointly and the third ground separately. He urged the Court when determining the appeal to take into account the spirit behind the establishment of the Commercial Division of the High Court, which is to afford parties before it to have an expedient, efficient, and relatively technical-free court for investment and commercial disputes. Hence, the evolvement of the Commercial Court Rules to embrace the spirit of administering substantive justice there, he contended.

It was Mr. Kibatala's contention that the filing of a witness statement is akin to a witness testifying orally, and thus all rules pertaining thereto apply, including the corresponding remedial measures and that dismissal of the suit is not envisaged in the circumstances of failure to file witness statements on time. According to him, remedial measures that could have been envisioned where a witness is late or absent to testify and may have caused the postponement of the hearing include payment of costs, measures he argued, which augur well with the spirit of rule 4 of the Commercial Court Rules as amended, which dictates supremacy of substantive justice.

Mr. Kibatala further asserted that in the absence of evidence to show that the respondents were prejudiced by the failure of the appellant to file the witness statements on time, the delay being for only two days, when the fact that the relevant witnesses were present in court and available for cross-examination is considered, it was not proper for the trial court to dismiss the suit for the said anomaly, which he argued is curable in the spirit of addressing substantive justice. The learned counsel for the appellant further challenged the High Court for not taking into account other surrounding factors including COVID-19 prevalence which it had considered when extending the expired speed track and thus

argued that the dismissal order should not have been the option taken. To stress his argument, he referred us to the case of **Triumphant Trade and Consultancy Services Ltd. V. Aggreko International Projects Limited**, Commercial Case No. 26 of 2017 (unreported), which reiterated the need to address substantive justice in the determination of commercial disputes.

With regard to the trial court's observation of what it considered laxity on the part of the then appellant's counsel in failing to comply with its orders, the learned counsel challenged the remark, submitting that upon making such a finding regarding the appellant's counsel, the High Court should have admonished the learned counsel and not punished the appellant, citing the case of **Triumphant Trade and Consultancy Ltd** (supra) and the finding of Court in **Ancopar (O. M) S. A v. Harbert Marwa and Family Investment and 3 Others**, Civil Application No. 94 of 2013 (unreported). In conclusion, the learned counsel argued that had the High Court given proper construction of the Commercial Court Rules, it could have ordered remedial measures as stated earlier especially since the impugned written statements were already part of the record of the said court and in the absence of proof of any prejudice to the parties in the court process.

Expounding on the third ground of appeal, the learned counsel for the appellant challenged the trial court's dismissal of the suit which according to him was essentially a refusal to exercise its discretion as expected that was prompted by the wrong construction of the law and a refusal to take into account the overriding objective in the obtaining circumstances. He urged the Court to find the cases relied upon by the trial court to reach its conclusion to be distinguishable since **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006, **Republic v. Freeman Aikael Mbowe**, Criminal Appeal No. 420 of 2018 and **Martine D. Kumaliya and Others v. Iron and Steel Limited**, Civil Appeal No. 70 of 2018 (all unreported) addressed the import of the word "shall" in legal provisions and the application of civil principles in criminal cases, issues which were not of concern in the present case with different circumstances. He thus prayed for the appeal to be allowed, the ruling and orders of the High Court to be quashed and set aside, and for orders for restoration of the suit so that its hearing proceeds on merit.

In response, Ms. Mwandambo who took the lead in submitting for the 1<sup>st</sup> respondent, commenced by adopting the written submissions filed by the 1<sup>st</sup> respondent and expressing support for the decision of the High Court. With regard to the first and second grounds of appeal, the learned

Senior State Attorney whilst conceding the obvious fact that the overriding objective principles are enshrined in the Commercial Court Rules, she however maintained that the circumstances of the case at hand did not warrant the application of remedial measures as advocated by the appellant's counsel.

The learned Senior State Attorney asserted that the High Court could not order any remedial measures for the following reasons: one, because it was not moved accordingly. On this, she contended that there is nowhere in the record of appeal showing that the appellant prayed for either an extension of time or to amend the witness statements which he now seeks the Court to consider granting. She cited the case of **Hotel Travertine Limited and 2 Others v. NBC Limited** [2006] T.L.R. 19 and **Melchiades John Mwenda v. Giselle Mbagha (Administratrix of the estate of John Japhet Mbagha) and 2 Others**, Civil Appeal No. 57 of 2018 (unreported), which echoed the principle that matters not pleaded in a court below cannot be raised on appeal to reinforce the argument.

Furthermore, while conceding to the correctness of the appellant counsel's statement that the establishment of the High Court Commercial Division was aimed at affording parties an expedient and efficient forum

for the determination of investment and commercial disputes and that the Commercial Court Rules were enacted to give effect to the purpose of establishment of the Commercial Division and modalities of conducting its business, including the timing for filing documents to ensure they are timely presented to foster speedy determination of disputes, Ms. Mwandambo argued that such remedial measures cannot be granted randomly. She argued that for the High Court to have ordered the remedial measures claimed by the appellant, proper applications should have been made to move the court thus and she cited the case of **D. F. Valambia v. Transport Equipment Ltd** [1992] T.L.R. 246 to bolster her stand.

The second reason for arguing against remedial measures was that the principle of overriding objective principle was not introduced to do away with well-established principles and practices of the commercial court. Thus, the High Court could not have turned a blind eye to contravention of rule 49 (1) and (2) of the Commercial Court Rules and referred us to the case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (unreported) where it was held that the overriding objective principle cannot be applied blindly against the mandatory provisions of



the procedural law which goes to the very foundation of the case, she asserted.

According to Ms. Mwandambo, the third reason is that in commercial and investment cases conducted at the High Court Commercial Division, the witness statements are the foundation of a case and cited a High Court decision in **Triumphant Trade and Consultancy v. Aggreko International Projects Ltd** (supra), where it was held that a witness statement is sworn evidence of a witness and it is equivalent of the oral evidence which the witness would adduce if called. The learned Senior State Attorney asserted that, plainly, in cases of a commercial nature, facts are to be proved on the strength or weakness of the witness statements and thus leaves no doubt that witness statements are fundamental in proving and disproving claims in commercial cases. She thus urged the Court to subscribe to the position pronounced in the case of **Mondorosi Village Council case** (supra), that the principle of overriding objective cannot apply to infractions related to fundamental matters of the case, such as those concerning the timing of filing witness statements as in the present case.

On the third ground of appeal, Ms. Mwandambo argued that there is no legal reason advanced by the appellant to fault the decision of the High Court Judge since under rule 49 (2) of the Commercial Court Rules, witness statements are to be filed within 14 days upon completion of the Final Preliminary Trial Conference (FPTC) and thus the time to file them is not discretionary. In consequence, the High Court Judge cannot be faulted for following the law, she argued. It was her further contention that the failure of the counsel for the appellant to comply with the order of the court regarding the time of filing the witness statement, be found to be an act of negligence on his part and should not be reflected as wrongfully penalizing the appellant for the laxity of his counsel.

To augment her position, she referred to the case of **D. F. Valambia v. Transport Equipment Ltd** (supra) where the Court, faced with a similar scenario as to whether or not to depart from the application of the Court of Appeal Rules, among other things stated that the Court Rules which provide for a timetable for the conduct of litigation must be followed. In that case, it was further held that lapses of a minor nature on the part of a counsel may be excused. However, there was a proviso to this stating that where the counsel's conduct amounts to negligence or inaction leading to non-compliance with a mandatory statutory

requirement, the court will not be easily moved to condone such conduct. She implored us to also refrain from being seen as condoning the appellant's counsel's blatant negligence.

On the authorities cited by the learned counsel for the appellant to reinforce his arguments, Ms. Mwandambo beseeched us to find the said authorities distinguishable. According to her, the case of **Triumphant Trade and Consultancy Ltd** (supra) has different circumstances to the case on hand since it dealt with filing witness statements outside the prescribed time without leave while in the cited case the Court dealt with a defective attestation clause, a curable infraction. She thus concluded by praying that the appeal be dismissed with costs.

On his part, Mr. Tarimo adopted the written submission filed for the 2<sup>nd</sup> respondent. He preferred to address the first and second grounds of appeal conjointly. Similar to the submission of Ms. Mwandambo, he conceded to what was stated by the counsel for the appellant on the spirit behind the establishment of the High Court Commercial Division and evolvment of Commercial Court Rules, except for the contention that it is supposed to be a technical free court. For Mr. Tarimo, his understanding of the appellant's counsel's position with regard to the dismissal of the

suit by the High Court is that the fact that the dismissal of the suit is the remedy available for failure to file a witness statement as ordered is not disputed. He disputed the argument faulting the High Court for not exercising its discretion upon the appellant's failure to comply with the order on time to file the witness statements instead of ordering other available remedial measures, such as filing new witness statements or ordering an extension of time for filing new witness statements in lieu of the dismissal order, arguing it was misconceived.

The learned counsel for the 2<sup>nd</sup> respondent argued that the relief which the appellant's counsel states should have been opted is not pegged on what the law provided but on what he considered an exercise of the discretion of the court. Therefore, in the absence of anything fronted by the appellant to show any exceptional circumstances to warrant the High Court to exercise its discretion to grant relief now claimed instead of invoking the appropriate reliefs provided by law, Mr. Tarimo argued that the appellant has nothing to complain about. He contended that as discerned from the record of the proceedings, in the course of determining the preliminary points of objection, the trial court did consider all available options. This, he argued, can be discerned from the fact at that stage, the possibility of entertaining arguments for an extension of time to file the

witness statement (see page 110 of the record of appeal) was considered and thus decided that under the circumstances, it was inappropriate to venture into that avenue and provided reasons.

With regard to the contention faulting the High Court for not applying the overriding objective principle on the matter, the learned counsel for the 2<sup>nd</sup> respondent contended that this argument was misconceived since the appellant did breach the law and it is well settled that the overriding objective principle does not apply sightlessly on mandatory provisions of the law which go to the foundation of the case and cited the case of **Njake Enterprises Limited v. Blue Rock Limited and Rock and Venture Company Limited**, Civil Appeal No. 69 of 2017 and **Puma Energy Tanzania Limited v. Ruby Roadway (T) Limited**, Civil Appeal No. 3 of 2018 (both unreported), and **Mondorosi Village Council and Others** (supra) to bolster his stance. He thus prayed that we find the first and second grounds of appeal unmerited.

On the third ground of appeal, Mr. Tarimo argued that in addition to what he submitted earlier, noteworthy is the fact that the decision of the court to dismiss the suit was founded on some of the decisions cited above on the application of the overriding objective principle and that

essentially, the appellant's counsel challenge against the High Court's refusal to exercise its discretion in the circumstances of this case, is founded on a wrong legal premise.

Furthermore, the learned counsel for the 2<sup>nd</sup> respondent also implored us to find the cited cases by the appellant's counsel to be distinguishable since the mandatory nature of the word "shall" in a statute is dependent on the circumstances of the case and the High Court decided the way "shall" in rule 49 (2) of the Commercial Court Rules connotes a mandatory requirement and not otherwise. It was thus his prayer that the appeal be dismissed.

Mr. Kibatala's rejoinder was brief reiterating the arguments put forward in his submission in chief.

Having carefully considered the arguments from the counsel for contending parties and perused through the record of appeal, clearly, the three grounds of appeal give rise to the following issue for our determination; whether under the circumstances, the High Court erred in law in dismissing the suit instead of exercising its discretion and consider other remedial measures and application of the overriding objective principle instead of dismissal of the suit.

It is a fact that the High Court dismissed the suit filed by the appellant against the respondents, upon hearing and determining two preliminary points of objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, which essentially culminated into an objection that the appellant's witness statements and the additional list of documents were filed out of time without seeking an order for an extension of time contrary to rule 49 (2) of the Commercial Court Rules.

It is not disputed that on 27/2/2020, when counsel for all the parties were present as seen from the record of appeal, the High Court conducted FPTC, whereby the parties were ordered to file the witness statements and any additional list of documents within fourteen (14) days of the Order, invariably by 11/3/2020. The appellant filed the same on 13/3/2020. On 16/7/2020, when the matter came for hearing, and after the court granted a six-month extension to the life span of the case, it proceeded to hear rival submissions on the preliminary points of objection filed by respondents. It is on record that the appellant was then represented by Mr. Ngassa Ganja, learned advocate assisted by Ms. Moransia John and Mr. Haji Sama, learned advocates. Mr. Ganja essentially conceded to the objection, stating that inter alia: -

*"We confess that, there was an innocent computation of 14 days whereby the plaintiff (the appellant) had a knowledge that the month of February has 28 days... Based on that innocent assumption, the 14 days came to be on 13<sup>th</sup> March, 2020 when he filed the witness statements and additional list of documents as per Court Order."*

While conceding to the fact that the documents were filed past the time specified by the order of the trial court, he argued that the delay could be cured by the overriding objective principle provided under rule 4 of the Commercial Court Rules. Indeed, a similar argument was advanced before us by the current counsel for the appellant for the Court's consideration. What is clear from the record is that in the High Court, the learned counsel for the appellant did not pray for any remedial measures including prayer for an extension of time to file the said documents or advance any special circumstances to warrant the High Court to depart from the remedy provided by the Commercial Court Rules upon a parties' failure to comply with rule 49 (1) and (2), which we are now urged to consider.



At this juncture, it is prudent to reproduce rules 49 (1) and (2) of the Commercial Court Rules for our further scrutiny and ease of reference, it provides that: -

*"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 pretrial Conference and served as directed by the court."*** [emphasis added]

The above provision stipulates in clear words the requirement to file witness statements within 14 days after completion of FPTC. The word shall encapsulate the mandatory nature of the requirement in consonance with the provision of section 53 (2) of the Interpretation of the Laws Act that provides:

*"Where in written law the word 'shall' is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".*

Having heard the rival arguments from the counsel of the contending parties, we are convinced that in the circumstances of this case the use of the word "shall" in rule 49 (2) of the Commercial Court

Rules, underlined the mandatory nature of the provision. Furtherance to the legal position, there is a clear order of the Court for compliance of the law as can be found on page 84 of the record of appeal.

The trial court after recording the framed issues ordered that witness statements be filed to prove the drawn issues and that thereafter, parties were to come to court only for tendering documents, cross-examination and re-examination. Parties were also implored to file any additional list of documents within 14 days of filing witness statements. Clearly, the court was further reminding the parties to comply with the law in filing witness statements after issues for the determination of the suit had been filed. Thus, without doubt, compliance with the law was essential, in our particular case, the appellant failed to do so and contravened rule 49 (2) of the Commercial Court Rules.

Following this position, the appellant implored us to find that the High Court erred by not considering other remedial measures under the umbrella of invoking the overriding objective principle. The High Court was faulted for not considering an extension of time to file the witness statements instead of dismissing the suit. On whether or not the court should have applied the overriding objective principle, whilst we agree

with the High Court Judge and all the counsel for the parties that the rationale behind the Commercial Court Rules is to speed up cases of a commercial and business nature, however, this does not mean that rules to facilitate expediency should be infringed as urged by the learned counsel for the appellant. Rules are developed to be used and complied with and not for display purposes. This position has been restated in various decisions of the Court. In **SGS Societe Generale de Surveillance SA and Another v. VIP Engineering and Marketing Ltd and Another**, Civil Appeal No. 123 of 2017 (unreported), the Court held that:

*"Overriding objective is not meant to enable parties to circumvent the mandatory rules of the Court or to turn a blind eye to the mandatory provisions of the procedural law which go to the foundation of the case"*

Certainly, the overriding objective principle is not meant to be a magic wand for those who disregard procedural rules as expounded in **Njake Enterprises Limited v. Blue Rock Limited and Another** (supra), **District Executive Director Kilwa District Council v. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 (unreported) and **Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited**

(supra). We therefore agree with the High Court Judge that the overriding objective principle does not apply in the present case. In any event, the overriding objective principle is not invoked to help a party to circumvent mandatory rules of the court as held in **Martine Kumaliya and Others v. Iron and Steel Limited** (supra).

We are thus constrained to hold so, because as correctly stated by the learned Senior State Attorney and the counsel for the 2<sup>nd</sup> respondent, rules are in place to be followed. We find the appellant's explanation for failing to file the witness statements in time, alleging to have innocently confused the dates, not to have substance, as held by the High Court Judge. This is because, if that was the case, it would have been expected that upon realizing the fact that he had confused dates as alleged, the appellant's counsel would have promptly proceeded to rectify the infraction by either withdrawing the improperly filed witness statements or applying for the extension of time to file the same, which unfortunately, was not the cause he preferred.

Indeed, in commercial cases such as the one at hand, witnesses' statements are fundamental to proving or disproving claims in a suit. Taking into account the relevant rules, certainly, the position of the law is

that failure of a party to file witness statements and/or an additional list of documents as prescribed by the law and ordered by the court is tantamount to failure to prosecute the case through said witnesses. The witness statements represent the act of adducing evidence in court by the said witnesses. Regarding the consequences of such failure, it has been previously held that such failure is fatal and incurable. (see **Barclays Bank of Tanzania v. Tanzania Pharmaceuticals**, Commercial Case No. 147 of 2013 (unreported), a position we are persuaded to hold also. Parties are expected to produce witnesses when the case is called upon as held in the case of the **Estate of Peter Kisumo v. Salum Peter Kisumo**, Misc. Application No. 441 of 2018 (unreported).

In the instant case, the appellant failed to comply with the rules, and we find under the circumstances, the High Court judge cannot be faulted for dismissing the suit since in essence the case was not prosecuted. We are of the view that the cases cited by the appellant's counsel are distinguishable in that they were applied under different circumstances. We also refrain from invoking the overriding objective principle for reasons alluded to herein and it is incorrect to state that such failure did not prejudice the rights of the respondents under the circumstances. We cannot ignore the issue of time limitation imposed by

the Commercial Court Rules to facilitate expediency and efficient determination of cases.

All in all, we find the appeal unmeritorious, and henceforth, we dismiss it with costs.

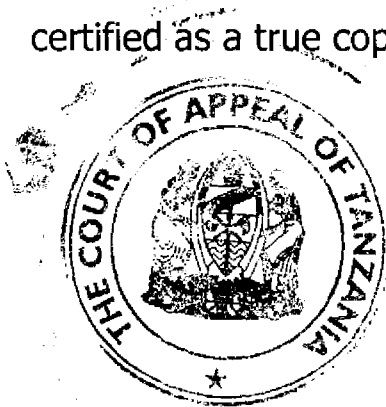
**DATED at DAR ES SALAAM** this 21<sup>st</sup> day of November, 2023.


W. B. KOROSSO  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

This Judgment delivered this 30<sup>th</sup> day of November, 2023 in the presence of Ms. Faith Kikoti, learned counsel for the Appellant and Ms. Nkamba Nshuda, learned State Attorney for the 1<sup>st</sup> Respondent while Mr. Kephass Mayenja, learned counsel for the 2<sup>nd</sup> Respondent, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**