

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 29117 OF 2025

GA INSURANCE TANZANIA LIMITED PLAINTIFF

VERSUS

M-PESA LIMITED DEFENDANT

RULING

16/06/2026 & 30/06/2026

KINYAKA, J.:

Based on the allegation against the defendant for breach of contract and fiduciary duty, the plaintiff instituted the present suit claiming against the defendant for the following reliefs:

- (a) A declaration that the defendant is in breach of the Service Agreement, the Partnership Agreement, the Addendum to the Partnership Agreement and the Plaintiff's written standing instructions of 23 August 2023.

- (b) A declaration that the defendant breached fiduciary duties and statutory obligations.
- (c) An order compelling the defendant to pay the Plaintiff the sum of Tanzanian Shilling Two Hundred Thirty-Five Four Thousand (TZS 235,004,000).
- (d) Payment of general damages for breach of contractual and fiduciary duty to be assessed by this Honourable Court.
- (e) Payment of Interests on the decretal sum:
 - (i) At the prevailing commercial lending rate per annum
 - (ii) At the Court's rate of 7% or such other rate as the Court in its discretion may determine from the date of Judgment until its satisfaction in full; and
 - (iii) Costs of this suit to be provided for, pursuant to Section 36 of the Civil Procedure Code, Cap. 33 R.E. 2023.
- (f) Any other reliefs this Honourable Court deems fit and just to grant.

The defendant resisted the suit by lodging her written statement of defence. Upon completion of the pleadings, the parties attempt to mediate through the Court's annexed mediation failed. On 6th May 2026, parties appeared before me for Final Pre-Trial Settlement and Scheduling Conference. Upon

framing of the issues, parties were ordered to lodge their respective witnesses' statements in accordance with Rule 49(2) of the High Court (Commercial Division) Procedure Rules, G.N. No. 250 of 2012, hereinafter the "Rules" as amended by Rule 25 of the High Court (Commercial Division) Procedure (Amendment) Rules, G.N. No. 107 of 2019, hereinafter the "Amendment Rules".

Parties duly lodged their witness statements. While the plaintiff's statements of Diana Augustine Mukandara and Devotha Frank Nyalusi were both filed on 21st May 2026, defendant's witnesses' statement of Andrew Mark Mrosso, Dingo Peter and Kilian Kamota were filed on 19th May 2026, 19th May 2026, and 20th May 2026, respectively.

On 13th June 2026 when the suit was called on for hearing, Mr. Allanus Mutashobya and Ms. Faiza Salah, learned advocates appeared for the plaintiff and defendant, respectively.

Before commencement of hearing, Ms. Salah informed this Court that the defendant lodged a notice of preliminary objection on 12th June 2026 that the witness statements to substantiate the plaintiff's claims were lodged out

of time. As it is the practice of the courts, the preliminary objection was argued prior to the commencement of hearing the parties' witnesses.

Ms. Salah learned advocate for the defendant submitted that the preliminary objection challenges the plaintiff's witness statements for being filed late, contrary to Rule 49(2) of the Commercial Court Rules as amended. She argued that the Final Pre-Trial Conference was held on 6th May 2026, and statements of witnesses should have been filed within fourteen days from 7th May 2026, making 20th May 2026 the deadline. The defendant noted that the plaintiff's witnesses' statements were filed on 21st May 2026, one day after 20th May 2026 without an order for extension of time. In her submissions, she relied on the decision of the Court of Appeal in **Abid Ally Sykes alias Abid Ally Kleist Sykes t/a Afrinet Solutions vs. M-Pesa Limited**, Civil Appeal No. 171 of 2024 from page 14, 16 up to 17.

She argued that it is an establishing position through the electronic filing laws that filing of documents before courts electronically is completed when a document is submitted virtually through the Court filing system and a date when such a document was filed can be accessed by everyone including the parties and the Court. She prayed for the statements of Devotha Frank

Nyalusi and Diana Augustine Mukandala filed on 21st May 2026 be struck out. She further prayed for dismissal of the suit for want of prosecution relying on the case of **Afrinet Limited & 2 Others vs. Petra Larsson & Another**, Civil Appeal No. 594 of 2022 at page 8 and 9 and in the case of **Petrofuel Tanzania Limited vs Power Roads & 2 Others**, Civil Appeal No. 447 of 2022.

In reply, Mr. Mutashobya for the plaintiff acknowledged the preliminary objection but contended that their statements were filed on 20th May 2026 but admitted on 21st May 2026, attributing any discrepancy to technical issues with the court's electronic filing system covered under Rule 24(2) of the Electronic Filing Rules. They argued that the delay was not due to negligence, did not prejudice the defendant, and cited case law urging courts to prioritize substantive justice over technicalities. He relied on **Yacob Magoiga Gichere vs. Penina Yusuph** civil appeal no 55 of 2017 at page 12 paragraph 4 and page 13 paragraph 2 of the decision. Further reference was made to Rule 4 of the Amendment Rules that emphasize the Court to give effect to the overriding objective provided for under section 4(1) and (2) of the Civil Procedure Code Cap. 33 R.E. 2023 citing also Article

107A(2)(e) of the Constitution which require courts to dispense justice without being tied by undue technicalities.

Arguing that the plaintiff was not negligent to file the witnesses' statements on 21st May 2026, she relied on the decision of the Court of Appeal in **Lyamuya Construction Co. Ltd v Board of Registered Trustees of YWCA Tanzania**, Civil Application No. 2 of 2010 [2011] TZCA 4 which provided the grounds and circumstances where a party may be prejudiced due to late filings. He added that the prayer for striking out the statements of the plaintiff's witnesses and dismiss the case, is premature as the case has not been heard on merit. He relied on the decision in the case of **AMC (T) Limited (Nissan) vs. Drice (T) Limited**, Commercial Case No. 9319 of 2024 where at page 7 where the Court confirmed that failure to comply with timelines to file witness statement is not automatically fatal, buttressing that the defendant's prayer to dismiss the witnesses' statements was premature.

He further distinguished the decision in **Abid Ally Sykes alias Abid Ally Kleist Sykes t/a Afrinet Solutions** (*supra*), in that the plaintiff's situation is different upon encountering technical issues with the Court's online

system. He added that in the said case, the Court of Appeal reinstated the suit and restored the witness statement because striking out the defence on a mistaken procedural issue was wrong. He subscribed to the position of the Court of Appeal in **Petrofuel Tanzania Limited vs Power Roads & 2 Others**, Civil Appeal No. 447 of 2022 and argued that some of the witness statement of the defendant were also filed out of time.

In the end, he prayed for the preliminary objection to be dismissed, and the matter heard on its merits.

In rejoinder, Ms. Salah denied any technical issues with the court's filing system, stating their records showed proper functioning and timely filings. On the plaintiff's reliance of Rule 24(2) of the Rules, she submitted that the plaintiff had not submitted to Court evidence showing that there was electronic error on the court's filing portal that made filing of court's documents through the court's filing system difficult on 20th May 2026. She added that Rule 24(5) of the Electronic filing Rules gives an opportunity to a party to salvage a document that was not filed due to technical issues. Ms. Salah pointed that the plaintiff failed to obtain an order from the Registrar extending time to file the statements out of time. She argued that

the plaintiff had not obtained any court order for extension of time and that the preliminary objection raised a pure point of law not curable by overriding objectives.

She distinguished the decision **AMC (T) Limited (Nissan)** (*supra*) as in that case there was an oral application seeking extension of time to serve witness statement upon the defendant. She explained that the Court refused the defendant's prayer for dismissal of the suit due to prematurity since there was pendency of an application for extension of time to serve the witness statement upon the defendant. She refuted the plaintiff's submissions that in **Abid Ally Sykes alias Abid Ally Kleist Sykes t/a Afrinet Solutions** (*supra*), the Court of Appeal reinstated the suit based on the Court's interpretation of Rule 49(2) of the HCCPR but did not make any finding that when the statement is struck out, the court cannot dismiss the suit, nor was it said that the prayer for dismissal of suit is premature.

The defendant maintained the position stated in **Petrofuel** (*supra*) and **Afrinet** (*supra*) among other cases, that the effect of striking out the witness statement is to leave the case without witnesses, equated the same to failure to prosecute the case when the case comes for hearing which

justifies the dismissal of the suit for want of prosecution. She reiterated her prayer for the preliminary objection to be upheld.

Having heard the parties, I am now enjoined to decide whether the defendant's preliminary of objection on point of law that the plaintiff's witnesses' statements have been filed out of time is merited.

Notably, the defendant partly conceded that she filed the witnesses' statements on 21st May 2026 beyond the period of limitation provided for under Rule 49(2) of the Rules as amended by Rule 25 of the Amendment Rules. However, she prayed for dismissal of the preliminary objection considering her failure to file the statements within time was not out neglect or negligence as she encountered technical challenges with the Court's electronic system. She added that the defendant will not be prejudiced if the witness statements are accommodated. She also relied on the decision in the case of **AMC (T) Limited (Nissan)** (*supra*) to argue that the preliminary objection is premature and sought the Court's lenience to invoke the overriding objective principle under sections 4 and 5 of the Civil Procedure Code Cap. 33 R.E. 2023, hereinafter the "CPC".

Indeed, the law is clear under Rule 49(2) of the Rules as amended by Rule 25 of the Amendment Rules that witness statement must be filed within fourteen days of the completion of the final pre-trial conference. Rule 49(2) of the Rules as amended provides:

"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 party's obligation to file and serve his respective statement." [Emphasis added].

The Court of Appeal has since the promulgation of the Rules in 2012 followed by the amendments effected in 2019, interpreted the provisions of Rule 49(2) of the Rules and cemented the position that the witness statement should be filed within fourteen days of completion of the final pre-trial conference. See the decisions of the Court of Appeal in **Afrinex Limited and 2 Others vs. Petra Larsson and Another** (Civil Appeal No. 594 of 2022) [2025] TZCA 274 (24 March 2025) at pages 7 and 8, **IVEE Infusions EPZ Limited vs. MARK Medics Limited** (Civil Appeal No. 155 of 2021) [2024] TZCA 793 (21 August 2024) at page 9, **Kenafric Industries**

Limited vs. Lakairo Investment Company Limited (Civil Appeal No.149 of 2021) [2024] TZCA 164 (6 March 2024) at page 7, **Petrofuel (T) Limited vs. Power Roads (T) Limited and 2 Others** (Civil Appeal No. 447 of 2022) [2025] TZCA 168 (4 March 2025) at page 12, **National Bank of Commerce Limited vs. Partners Construction Co. Ltd** (Civil Appeal 34 of 2003) [2005] TZCA 32 (15 June 2005) at pages 6 and 7, **Tanzania Azimio Construction Co Ltd vs. CRDB Bank Ltd** (Civil Appeal No. 94 of 2015) [2019] TZCA 639 (11 March 2019) at page 1, 8 and 11.

In the above cited decisions, the Court of Appeal confirmed that the computation of the period for filing witness statement under Rule 49(2) of the Rules is strictly, “*within 14 days of*” the completion of the final pre-trial conference. In **Tanzania Azimio Construction Co Ltd vs. CRDB Bank Ltd** (Civil Appeal No. 94 of 2015) [2019] TZCA 639 (11 March 2019), the Court of Appeal had an opportunity to interpret Rule 49(2) of the Rules prior to the amendment of the Rules. At page 11 of the decision, the Court of Appeal held:

"We wish to observe here that the appellant has burnt a lot of fuel in the affidavit supporting the application before the High Court and in the memorandum of appeal and written submissions

before us to challenge the unreasonableness of rule 49 (2) of the Commercial Court Rules. He wanted to lure us into deciding its unreasonableness. Much as we are aware that the provision has been a subject of hue and cry from the bar, we agree with Mr. Mpoki that this is not a proper forum to solve the problem, if any. We urge the appellant to wait for an opportune moment in an appropriate forum to address his dissatisfaction on the unreasonableness, or otherwise, of the sub-rule. Until the maker of the Commercial Court Rules decides to amend the rule or when case directs otherwise, we urge the bar, in the meantime, to follow the letter of the law.”

Apparently, the Court of Appeal maintained the position that in computing time for filing submissions, the date when the final pre-trial conference was conducted is included in the computation.

Following the amendment of the Rules, similar stance was maintained by this Court. When interpreting Rule 49(2) of the Rules in line with section 60(1) of Interpretation of Laws Act Cap. 1 R.E. 2023, hereinafter the “ILA”, the Court of Appeal held in **Petrofuel (T) Limited vs. Power Roads (T) Limited & 2 Others** (Civil Appeal No. 447 of 2022) [2025] TZCA 168 (4 March 2025) at page 12 through to 13 of the decision that:

"What has polarized the learned counsel is the aspect of counting the days. The question here is: should the date of the pre-trial conference be excluded? Mr. Mosha contends that it should, while his adversaries hold a divergent view. To be able to answer this question we need to establish the cut-off day. Our reading of the rule brings a clear impression, in our view, that the counting starts on the day of completion of final pre-trial conference. This is gathered from the words "of the completion of the final pre-trial conference" which imply, in our case, 29th March 2022. In other words, this is what is known, in terms of section 60 (1) (a) of Cap. 1, a specified day. For clarity, the latter provision states as hereunder:

"60 (1) In computing time for the purposes of a written law-

(a)where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period. "

At page 13, the Court proceeded:

"This is unlike the wording of section 60 (1) (c) that Mr. Mosha clung on. In this provision, computation follows the wording "time before a specified day" which connotes that time that precedes the action does not count in such computation. We think, both counsel for the 2nd and 3^d respondents were right in their contention that, since a specified day in this context is 29th

*March, 2022, the date on which the final pre-trial conference was held (page 1453), counting of the 14 days starts from that day. This finding is in congruence with what the Court held in **Kenafri Industries Limited** (supra) in which a similar issue featured. It was observed:*

"Coming back to the present case, it must be plain that the fourteen days period within which the parties were supposed to file their respective witness statements was computable from a specified day that is, the 18th February, 2020 which was the day of completion of the final pre-trial conference. That being the case, we would agree with Mr. Joseph but for one thing...."

It is from the above authorities and the dictates of Rule 49(2) of the Rules, I hold that the plaintiff's witnesses' statements were filed two days after the lapse of filing the same on 19th May 2026. Similarly, the statement of the defendant's witness, Kilian Kamota filed on 20th May 2026 was lodged beyond one day from 19th May 2026 when the fourteen days of the completion of the final pre-trial conference expired.

In consequence, I find the plaintiff's witnesses' statements filed out of time prescribed by Rule 49(2) of the Rules. I thus sustain the defendant's preliminary objection for being merited.

Further, I have considered the plaintiff's argument to salvage the witnesses' statements but found no merit in them. The plaintiff's prayer for extension after filing of her witnesses' statements out time without an order extending time to file the same, is unmaintainable. Moreover, extending time to the plaintiff in the circumstance will be tantamount to pre-empting the defendant's preliminary objection.

On the alleged technical issues encountered by the plaintiff during filing, the same lacks substantiation. As the defendant successfully lodged statements of her two witnesses into the system on 19th May 2026, it cannot be said that there was a technical issue with the court's system that encumbered the plaintiff from filing her witnesses' statements within time.

Even if the plaintiff had encountered such challenges, he did not substantiate before this Court the encountered challenge. She did not substantiate the steps she took including engaging the Deputy Registrar of this Court for appropriate reliefs as provided under Rule 24(5) of the Judicature and Application of Laws (Electronic Filing) Rules, G.N. No. 148 of 2018.

Regarding the alleged lack of prejudice, the applicability of overriding objective principle and Article 107A(2)(e) of the Constitution, I find the same misplaced.

It is settled position of law that rules of procedure are to be respected otherwise there would be no point of having rules prescribing for procedure of doing an act including filing of pleadings and evidence within specified timelines. Plainly, the overriding objective principle under section 4 and 5 of the CPC does not apply to circumvent mandatory procedural requirement. It was held by the Court of Appeal in **Muse Zongori Kisere vs Richard Kisika Mugendi & Others** (Civil Application No. 244 of 2019 [2022] TZCA 640 (18 October 2022) where at page 4 through to 5, the Court held:

"From the above settled legal position, with respect, we do not accept the applicant's prayer to ignore the delay and proceed to determine the application on merit. Equally, we don't subscribe to the 1st respondent's proposition and invitation to disregard the delay because the issue of time limit is not a legal technicality that entitles the applicant to amnesty under the Overriding Objective principle enshrined under the AJA. On the contrary, it is settled that once the issue of time limitation is established, it has the effect of causing the jurisdiction of the Court to cease....."

Accordingly, I strike out the plaintiff's statements of Diana Augustine Mukandara and Devotha Frank Nyalusi and the defendant's statement of her Kilian Kamota for being filed out of time. Since the only two witnesses' statement of the plaintiff have been struck out, the plaintiff is deemed to have failed to prosecute his case when it was called on for hearing. Subsequently, in terms of Order IX Rule 5 of the Civil Procedure Code, Cap. 33, R.E. 2023, I dismiss the plaintiff's suit for want of prosecution.

Since the defendant has partly defaulted to file one of her three witness statements within time, I order each party to bear its own costs.

It is so ordered.

Right of Appeal to the Court of Appeal fully explained.

DATED at **DAR ES SALAAM** this 30th day of June 2026.



H.A. KINYAKA

JUDGE

30/06/2026