

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 7 OF 2019

KENAFRIC INDUSTRIES LIMITED PLAINTIFF

VERSUS

LAKAIRO INVESTMENTS CO. LIMITEDDEFENDANT

RULING

B.K. PHILLIP, J

When this case was called for hearing the learned advocate Ernestilla Bahati, who represents the plaintiff invited this court to strike out the witness statements filed by the defendant, dismiss the defendant's counter claim and issue an order for the plaintiff's case to proceed ex-parte on the ground that the defendant's witness statements were filed out of time without any court for order extension for time to file the same out of time. She submitted that the Final Pre Trial Conference (Henceforth "the "FPTC") was conducted on 18th February 2020, in the presence of the defendant's advocate. The defendant's witness statements were filed on 28/8/2020, more than fourteen (14) days from the date of completion of the FPTC, contrary to rule 49 (2) of the High Court (Commercial Division) Procedure Rules 2012 as amended by GN No. 107/2019 (Henceforth "the Commercial Court Rules "), which stipulates clearly that witness statements have to be filed within 14 days upon completion of the FPTC. To cement her arguments, she referred this court to the ruling of this court in the case of

Africarriers Limited Vs Shirika la Usafiri Dar es Salaam and Equity Bank Tanzania Limited, Commercial Case No. 50 of 2019, (unreported), in which my sister Hon. Fikirini, J while dismissing the plaintiff's case for failure to file the witness statements within the time prescribed by the law said the following:-

"In this instant case, since the plaintiff counsel was present when the court orders were issued and without any reasonable cause failed to file witness statements and additional list of documents within prescribed time, and opted not to use his right to apply for extension of time, thus his filing of the witness statement out of time was "un-procedural" and/or "disobedience" of lawful order. The act is tantamount to failure by the plaintiff to produce witnesses when a case is called for hearing, which amounts to non-compliance of the Court order, the consequence of which calls for dismissal of the suit. In the light of the above, the preliminary points of objection raised are hereby sustained, and the suit is dismissed with costs. It is so ordered."

In response, the learned advocate Leonard Sylvanus Joseph who appears for the defendants conceded that the defendant's witness statements were filed out of time. However, he contended that he was unable to apply for extension of time to file the defendant's witness statements as the court's calendar had no room to make such an application. Moreover, Mr. Leonard submitted that on 1st September 2020 when this case was called for orders, this court accepted the defendant's witness statements and the matter was scheduled for hearing. He was of the view that the defendant

acted with proper diligence and prudence as he filed his witness statements before the hearing date, though out of time. He contended that the arguments pertaining to the need for filing an application for extension of time to file the witness statements is overtaken by events. He invited this court to be lenient enough to proceed with the hearing of the case on merits instead of striking out the defendant's counter claim.

As regards the case law cited by Ms. Ernestilla, Mr. Leonard submitted that the same is distinguishable from the facts of this case since it is concern with the plaintiff's failure to file witness statements within the time prescribed by the law not the defendant's failure to file the witness statement in time as it is in the case in hand.

Mr. Leonard Further argued that the plaintiff's witness statements were filed out of the time prescribed by the law too, since they were filed on 3rd March 2020. He contended that the fourteen (14) days prescribed by the law started to run from 18th February 2020, so, by 3rd March 2020 the fourteen (14) days had already expired and no extension of time to file the plaintiff's witness statement was sought by the plaintiff's advocate.

Relying on the case of **Africarriers Limited**, (supra) he invited this court to dismiss the plaintiff's case.

In addition to the above, Mr. Leonard submitted that, the defendant was not served with the plaintiff's witness statements. So, he argued that, if this case proceeds for hearing, the plaintiff's witness statements should be accorded lesser weight. He insisted that service of the witness statement is a requirement of the law.

In rejoinder, Ms. Ernestilla submit that, she had a proof of service of the plaintiff's witness statements unto the defendant's advocate. She produced in court three witness statements bearing a rubber stamp having the name of plaintiff's advocate law firm (Leonard & Co. Advocates). She reiterated her submission in chief and insisted that the issue of service of the witness statements is independent from the legal requirement for the parties to file their witness statements within 14 days from the date of completion of the FPTC. Also, she submitted that Mr. Leonard's arguments that the issue concerning the need for filing an application for the extension of time to file the witness statement is overtaken by events is misguided since, the law of Limitation Act, allows parties to a suit to file extension of time even after the expiry of the time prescribed by the law. She insisted that the defendant's advocate had ample time to apply for extension of time to file the defendant's witness statements but opted not to do so.

Responding to the argument raised by Mr. Leonard that, the plaintiff's written statements of defence were filed out of time too, Ms. Ernestilla submitted that, according to the provisions of section 60(1)(c) of the Interpretation of Law Act, (Henceforth "Cap 1"), the fourteen (14) days for filing the witness statement started to run from 19th February 2020 since the date on which the order was made has to be excluded. So, she was of the view that the fourteen (14) days for filing the witness statements expired on 4th March, 2020, whereas the plaintiff's witness statements were filed on 3rd March 2020. She maintained that the plaintiff's witness statements were filed within the time prescribed by the law.

In rejoinder, Mr. Leonard maintained that the defendant was not served with the plaintiff's witness statements as there is no signature of any of the officers from the defendant's advocate law firm, on any of the witness statements produced before this court by Ms. Ernestilla to signify that those witness statements were received by the defendant's advocate.

Having analyzed the competing arguments raised by the learned Advocates, I wish to point out that it is a common ground that pursuant to the provisions of Rule 49(2) of the Commercial Court Rules as amended by GN No. 107 of 2019, witness statements are supposed to be filed in court within fourteen days (14) of the completion of FPTC. For ease of reference let me reproduce the same here under;

Rule 49 (2)

"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)

In this case, Mr. Leonard has conceded that he filed the defendant's witness statements on 28th August 2020, so, as correctly argued by Ms Ernestilla, the same were filed out of time since the FPTC for this case was conducted on 18th February 2020. With due respect to Mr. Leonard, the excuses he explained in his submission for filing the said witness

statements filed out of time without obtaining a court order for extension of time to do so are grossly misguided. It has to be noted that the issue for application for extension of time for filing the witness statement cannot be termed to have been overtaken by events simply because a party filed his or her witness statement in oversight of the law and the same is in case file. A mere fact that the witness statements were filed in court cannot be taken to convey a message that this court accepted the said witness statement to be filed out of time. Parties are supposed to file their witness statement(s) in accordance with the law. There is no extension of time by implication. It is either sought and granted or not sought at all, as it is in the instant case. Whatever the case, the law takes its course. Therefore, the consequences for failure to seek and obtain extension of time to file a witness statement, naturally follows since the legal requirement for filing the witness statement within 14 days is a fundamental procedural law as far as hearing of cases in this court is concerned.

From the foregoing, I am constrained to strike out the defendant's witness statements for being filed out of time without any court order for extension of time to file the same.

I have read the decision of my sister Hon. Fikirini, J and the whole of provisions of section 60 of the interpretation of Cap 1. what I have noted is that the provisions of section 60(1)(C) of Cap. 1 cited by Ms. Ernestilla, is not applicable in this matter because the provisions of Rule 49(2) of the Commercial Court Rule, does not provided that the witness statements are

supposed to be filed within fourteen days before a specified day, but provides that the same have to be filed within fourteen days of completion of the FPTC. In my considered legal opinion the applicable provision is section 60(1)(a) of Cap 1 since Rule 49(2) of the Commercial Court Rules provides that witness statements have to be filed within 14 days of completion of the final PTC, NOT from the date of completion of the FPTC. Therefore, in counting the 14 days within which witness statements have to be filed, the date of completion of the FPTC is included.

For ease of reference let me reproduce hereunder the provisions of section 60(1) (a) of Cap 1

Section 60(1) (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."

The arguments raised by Ms. Enestilla that the 14 days within which the witness statements in this case were supposed to have been filed started to run from 19th February 2020, on the reason that the date on which the FPTC was conducted, that is 18th February 2020 should be excluded is not correct.

My stance stated herein above is in line with the decision of the Court of Appeal in the case of **National Bank of Commerce Limited Vs Parners Construction Co. Ltd, Civil Appeal No.34 of 2003**, (unreported) in which the Court of Appeal said the following;

"After excluding the application of section 19(1) of the Law of Limitation Act, we turn our attention to the provision under which the

summons was issued, that is, ORDER VIII Rule 1(2) CPC. We have already reproduced it above. But here we will examine closely the meaning of the phrase "within twenty-one days of the date of service". Our understanding of this provision is that the defendant is required to file his written statement of defence within twenty one days from the date of service. That is, the twenty-one days start to run from the date of service. In other words, the date of service is included in computing the period of twenty-one days. In that respect, in the instant case, time started running from 4th June, 2002 when the appellant was served and ended on 24th June, 2002. Therefore when the written statement of defence was filed on 25th June 2002 it was out of time by one day."

Similarly, in the case of **Africarriers Limited** (supra), in which this court conducted FPTC on 27/7/2020 and ordered parties to file the witness statements within 14 days from the date of that order as provided in Rule 49 (2), and the plaintiff filed its witness statements in 13th March 2020, this court made a finding to the effect that deadline for filing the witness statement was 11th March 2020. It ruled out that witness statement was filed two days out of time and proceeded to dismiss the case with costs. It is obvious that, the fourteen days (14) started running from 27th February 2020, the date on which the FPTC was conducted. So the day on which the FPTC was conducted was not excluded as submitted by Ms. Ernestilla. So, as it is clearly, stipulated in section 60 of Cap 1, there is a difference in the way days are counted. It all depends the word(s) used in the statute and how the particular provision of the law is couched. [see

the case of **Appolo Diagnostic Center Limited Vs Ivory Tower Limited, Commercial case No.6 of 2019**, (unreported) and **KEC International Limited Vs Azania Bank Limited, Commercial Case No 152 of 2015** (unreported)].

In this case, on 18th February, 2020 the court made an order that the witness statements were to be filed within 14 days as per the Commercial Court Rules. Therefore, the 14 days for filing the witness statements expired on 2nd March 2020 not 4th March 2020 as submitted by Ms. Ernestilla. Since the plaintiff's witness statements were filed on 3rd March 2020, the same were filed one day out of time. The consequences of filing the witness statements out of time is to strike out the same. Thus, I hereby struck out the witness statements filed by the plaintiff.

Having made the above findings, at this juncture, it is important to state the position of the law, that is, the failure to file a witness statement within the time prescribed by the law is tantamount to failure to produce a witness when the case is called for hearing, [see the case of **Africarriers Limited**, (supra)]. There are number of cases in which this court clearly explained that the failure to comply with the requirements of Rule 49 of the Commercial Court Rules is fatal. One of those cases is the case of **Barclays Bank Tanzania Limited Vs Tanzania Pharmaceuticals Industries Ltd and two others , Commercial Case No. 147 of 2012**, (unreported) in which Hon Nchimbi ,J as he then was, while discussing the consequences of a failure to comply with the provisions of Rule 49 (1) of the Commercial Court Rules, said the following;

"The pertinent issue to be determined by the court is whether under the circumstances obtaining in this matter the plaintiff's failure to comply with Rule 49 of the Rules should render the suit liable for dismissal.

I will attempt to resolve the issue by drawing the following analogy. Rule 48 of the rules provides for a requirement of witness statement in any proceedings commenced in this court as per mandatory requirement given under Rule 49(1). Under Rule 3(j) witness statement is defined as a statement given pursuant to the Rules in lieu of examination in chief.

To re-echo, rule 49(1) provides that in any proceedings commenced by plaint, evidence in chief shall be given by a statement on oath or affirmation and the same has to be filed within seven days of the completion of mediation and served as directed by the court.

From the above legal exposition, it is clear that witness statement to be filed in court under the Rules is, in effect, evidence in chief which under the civil procedure code, Cap. 33 R.E. 2002 is given through oral examination in chief or directly by a witness as evidence in chief. The procedure for hearing of suit and examination of witnesses under the CPC is governed by order XVIII. That order relates to right to begin, statement and production of evidence, how evidence shall be taken etc.

The Commercial Court rules have drastically departed from that procedure and the civil procedure code, for that matter, is no longer applicable unless there is a lacuna in the rules as clearly provided

under rule 2.....The question here is whether the requirements in Rules 48(1) and 49(1) and (2) are of a kind which the court may ignore or overlook them. I have stated above that the only way to adduce evidence in chief in the court is by witness statement to be filed by the respective parties. From the analogy of the Rules that requirement is mandatory and Mr. Msafiri rightly emphasized on that. I will, therefore, observe that failure to file witness statement is tantamount to failure to procure a witness in court to give evidence to prove or disprove a case and, therefore, failure to prosecute or defend it. Under the civil Procure Code, a witness cannot be cross examined before undergoing examination in chief. The witness must be procured to give evidence in chief. Under the new Rules this is done by way of filing witness statement which stands for examination in chief..... Rule 49 is not a kind of one which can be ignored as long as the suit was commenced by plaint.....Since I have found that the plaintiff failed to prosecute its case on 14/5/2014 the date on which the case was slated for hearing it is incurably a fatal flaw in the procedure for which I proceed to dismiss it, with costs, for want of prosecution."

I entirely subscribe to the above observations made by Hon. Nchimbi, J as he then was. His observations are still valid up to date despite the amendments of the Commercial Court Rules by GN No 107 of 2019, since the basic principles established in the provisions of the laws in question are intact. The amendment made by GN No. 107 of 2019, only increased the time within which a witness statement should be filed ,that is from

seven to fourteen days and also changed the stage at which it should be filed, that is instead of being filed upon failure of the mediation currently ,it is filed upon completion of the FPTC.

From the foregoing, the issue as to whether or not the plaintiff's witness statements were served unto the defendant's advocate has become redundant, thus I do not see any plausible reason to deal with in this ruling. However, it has to be noted that the requirements for the service of the witness statements unto the opposite party and the consequences for failure to serve the witness statements are provided under Rule 55 of the Commercial Court Rules.

Without prejudice to what I have stated herein above, I have noted that, either there was an oversight of the law by the learned advocates appearing in this case or wrong interpretation and application of the provisions of the law pertaining to the filing of witness statements. Be as it may, the position of the law is very clear that ignorance of the law is not a defence. Likewise, oversight of the law is not a defence or an excuse, in particular when a party is represented by a learned Advocate. In the case of **Calico Textile Industries Ltd Vs Pyraliesmail Premji, Civil Appeal No.16 of 1983, (1983) TLR,28 (CA)**, while dismissing an appeal that was filed out of time court had this to say;

"Having heard both sides, it is quite clear that the appeal was filed hopelessly out of time. The reason for the delay advanced by Mr. Patel for the appellant is that he did not check the requirements of

the law properly. Surely this cannot be sufficient reason for allowing Appellant, who is represented by a learned Advocate, to file his appeal so much out of time”.

By passing, I wish to point out that this court cannot grant an extension of time to file witness statement *suo motto* without being properly moved by the party/parties to a case, since it can only exercise its discretion to grant such an extension of time, upon sufficient reasons being adduced by the parties to convince it to grant the same. In this case, no party sought for extension of time to file the witness statements.

In the upshot, the main case and the counter claim are hereby dismissed. Each party will bear its own costs.

Dated at Dar es Salaam on this 12th day of November, 2020.




B.K. PHILLIP
JUDGE