IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J. A., SEHEL, J.A, And LEVIRA, J. A.)

CIVIL APPEAL NO. 70 OF 2018

TOTAL TANZANIA LTD..APPELLANT

VERSUS

SAMWEL MGONJA..RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Songoro, J.)

Dated the 24th day of November, 2015
in
Commercial Case No. 157 of 2013

....

JUDGMENT OF THE COURT

17th March & 25th June, 2021

SEHEL, J.A.:

This is an appeal from the judgment and decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam in Commercial Case No. 157 of 2013. In that decision, the High Court (Songoro, J. (as he then was)) awarded the respondent TZS. 75,000,000.00 as general damages on account of breach of contract, interest of 5% per annum on the decretal sum from the date the suit was filed to the date of judgment, interest of 10% per annum from the date of judgment to the date the decretal sum is

paid in full and costs of the case. Aggrieved by that decision, the appellant filed the present appeal.

A background to the controversy between the parties is as follows: on 26th March, 2011 the appellant and the respondent executed a Marketing Licence Agreement (MLA) in which the respondent was licensed to run the Total University service station (henceforth "the service station"). The agreement between the two did not go on well. Thus, the appellant issued a notice of termination which prompted the respondent to file a suit against the appellant, Commercial Case No. 37 of 2011. On 18th July, 2011 the parties settled their differences amicably and concluded a deed of settlement. A new MLA was entered whereby the appellant licensed the respondent to operate the service station, allegedly, for three years.

However, on 7th October, 2011 the appellant issued the respondent with a suspension letter (Annexure SMA 2 to the plaint). That letter informed the respondent that in exercise of its powers provided under clause 1 (v) of the new MLA, the appellant intended to terminate the MLA on the ground that the respondent had a cash flow deficit which resulted into the inability to purchase fuel products to continue sales at the service station. Upon receipt of the letter, some communication ensued between

the parties which did not bear any fruit. Hence, on 5th November, 2013 the respondent instituted a suit, a subject of the present appeal, against the appellant seeking a declaratory order that the notice of suspension was illegal thus null and void, payment of TZS. 1,496,323,500.00 being compensation for damages (TZS. 896,323,500.00 being specific damages and TZS. 600,000,000.00 general damages), 25 % interest on decretal sum from the date of filing the suit to the date of judgment, interest at court's rate on the decretal sum from the date of judgment till payment in full and costs of the suit.

The respondent, in his plaint, alleged that the appellant wrongfully terminated the new MLA since at the time when the threat of inability to purchase fuel over the weekend came, the respondent had deposited to the appellant's account TZS. 22,000,000.00 and TZS. 30,000,000.00 on 23rd September, 2011 and 27th September, 2011, respectively. Yet, the account did not reflect the deposits. The respondent further alleged that the appellant made the respondent's manager, one Nitesh Chudesama to write a letter to request credit facility from it in order to fill the service station during the weekend while knowing that it had his deposits. According to the respondent, the letter was the source of the dispute.

On the other hand, the appellant denied the allegation of unlawfully terminating the new MLA and put the respondent to strict proof thereof. It averred that the respondent conceded to have sent the manager to request credit facility which entitled the appellant to terminate the new MLA on ground of non-observation of the terms and conditions of it. Apart from that, the appellant, in its pleadings and through a witness statement of one Marsha Msuya, acknowledged the signing and existence of the new MLA and went further to attach a copy of it in its written statement of defence (TTL 2).

Suffices to point out here that during trial, the following four issues were framed for the trial court's determination: -

1. *Whether there was new MLA entered between the parties to operate the service station.*
2. *Whether the defendant (the appellant in this appeal) breached any of the terms and condition of the new MLA.*
3. *Whether the defendant suffered any damage as the result of that breach.*
4. *What reliefs the parties are entitled."*

On 27th April, 2015 the hearing of the parties' evidence commenced. Pursuant to Rule 56 of the High Court (Commercial Division) Procedure Rules, 2012 published in the Government Notice number 250 of 2012

(henceforth the Commercial Court Rules), the respondent (PW1) appeared for cross examination and tendered seven exhibits. The exhibits tendered were; a deed of settlement (P1), a letter replying to the suspension letter (P2), a letter dated 18th November, 2011 terminating the new MLA with immediate effect (P3), a letter dated 29th November, 2011 requesting for the remission of money (P4), a letter dated 5th December, 2011 requesting for an explanation of TZS 50,000,000.00 deposited by the respondent (P5), a letter dated 30th November, 2011 confirming the participation of the respondent in accounts reconciliation meeting convened by the appellant (P6) and a demand letter dated 19th April, 2011 (P7).

The sole witness for the appellant, Marsha Msuya (DW1) appeared for cross examination on 13th May, 2015 and she tendered one document titled 'explanation of the current situation at the University' (Exhibit D1).

After hearing the parties' evidence and final submissions of the learned counsel, the learned trial Judge answered the first issue in the affirmative. He based his decision on DW1's witness statement and Annexure TTL 2 to reach a conclusion that, on the preponderance of probabilities, there was sufficient evidence that the appellant and the respondent executed the new MLA.

Regarding the second issue, after revisiting Annexure SMA 2, the learned trial Judge held that it was not contested by the appellant and DW1 that the new MLA was suspended. The learned trial Judge went further to observe that the reason given by the appellant in suspending the new MLA that there was non-performance and repetitive non-observance of the terms and condition of it, lacked credible evidence since a request for credit facilities for supply of fuel was not a proof of inability to run the service station. Subsequently, the learned trial Judge held that the appellant's notice of stopping the respondent to operate the service station was a breach of contract and that the respondent was entitled to compensation for the loss and damages suffered. The third issue was thus, also answered in favour of the respondent.

At the end, the learned trial Judge awarded the respondent the reliefs as stated herein. A claim of a declaratory order was declined on account that the licence to operate the service station was for a period of one year which had expired. Moreover, the claim for specific damages amounting to TZS. 896,323,500.00 was declined for want of proof. In that regard, the respondent's suit was partly allowed.

Aggrieved by that decision, the appellant filed a memorandum of appeal comprising the following eight grounds of appeal: -

1. *That, the learned trial judge erred In law and fact by relying and acting on an annexure that was not tendered as an exhibit and as a result of relying on an annexure held that there was a new MLA between the appellant and the respondent.*
2. *That, the learned trial judge erred in law and fact by holding that by terminating the new MLA the appellant breached the agreement while in fact there is sufficient evidence on record to the effect that the respondent failed to run the service station due to financial problems.*
3. *That, the learned trial judge erred in law and fact by holding that a mere letter seeking for credit facilities of supply of fuel may not be a basis of proof of inability on the part of the respondent to run the service station effectively or to perform his contractual obligation.*
4. *That, the learned trial judge having held that the respondent had failed to prove special damages, erred in law and fact by granting general damages to the tune of TZS. 75,000,000.00 without evidence that the respondent suffered any loss.*
5. *That, the learned trial judge erred in law and fact by awarding interest on general damages of 5% from the date the suit was filed to the date of judgment.*
6. *That, the proceedings are null and void as the case was determined beyond twelve months contrary to rule 32 (2) of the High Court (Commercial Division) Procedure Rules, G.N. No. 250 of 2012.*

7. *That, the judgment and decree in this matter are a nullity for contravening Rule 67 (1) and (2) of the High Court (Commercial Division) Procedure Rules, G.N. No. 250 of 2012 which require judgment to be delivered within 60 days after conclusion of hearing of the case and in case of a failure reasons to be given.*
8. *That, the appellant was denied an opportunity to produce relevant evidence to prove its case as the order to file witness statements was made before issues were framed. The Court may be pleased to declare and direct that the proper procedure is to frame issues before parties are ordered to file witness statements.*

At the hearing of the appeal, Dr. Onesmo Michael and Mr. Benedict Bahati Bagiliye, both learned counsel appeared to represent the appellant and the respondent, respectively. Both parties filed their respective written submissions pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended.

After taking the floor, Dr. Michael adopted the written submissions and informed the Court that he abandoned grounds number six and eight of appeal and that he would argue grounds number two and three together whereas the rest of the grounds of

appeal would be argued separately but as an alternative to ground number one.

Starting with the first ground of appeal concerning annexures that were not tendered and admitted as exhibits, Dr. Michael faulted the finding of the learned trial Judge when he held that the parties had entered into new MLA and that the appellant was in breach. He submitted that there was no material evidence to support that finding. He contended that the learned trial judge erred in law in placing reliance on Annexures TTL 2 and SMA 2 as they were not tendered and admitted in evidence.

He submitted that the respondent was required, by law, to prove his case on a balance of probabilities but he failed to do so. He argued that annexure TTL 2 was annexed to the written statement of defence and to the witness statement of the appellant. It was not attached and tendered as evidence by the respondent who was the plaintiff in the suit. It was the submission of Dr. Michael that the trial Judge was not supposed to act on it as it was not tendered during the trial as evidence by the respondent. To fortify his argument that annexures are not evidence, he referred us to the decision of the Court in **Godbless Jonathan Lema v. Mussa Hamisi Mkanga and 2**

Others, Civil Appeal No. 47 of 2012 (unreported). In that case, the Court cited **Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009 (unreported) where it was held that annexures attached to the plaint or written statement of defence are not evidence. Dr. Michael went further to add that even annexures to the witness statement are not evidence. For this ground alone, Dr.Michael urged us to allow the appeal and set aside the judgment of the High Court, Commercial Division.

For the alternative grounds of appeal starting with the second and third grounds that deal with the issue as to whether there was sufficient evidence that the respondent had failed to run the service station, Dr. Michael submitted that the sole witness for the appellant, one Marsha Msuya testified under Paragraph 14 of her witness statement that the respondent breached the terms and conditions of the new MLA and she was not cross-examined on those facts. Thus, her evidence stood unchallenged. Dr. Michael further submitted that Exhibit D1 which appears at page 120 of the record of appeal showed that the respondent had cash flow deficits in running the service station. In that regard, Dr. Michael contended that there was enough evidence adduced by the appellant that the respondent was unabie to

run the service station hence he breached clause v of the new MLA. He explained that clause v of the new MLA required the respondent to ensure that there is a continuity of sales to customers without running out of stock but the respondent failed to adhere to it. He thus prayed the Court to allow the appeal.

Regarding the fourth ground of appeal that concerns with the award of the general damages, Dr. Michael submitted that since general damages were awarded on account of the duration of the new MLA, they are not general but specific damages. In that respect, he contended that the respondent was not entitled to the award and even if he was entitled then the award was on a higher side.

On the fifth ground of appeal regarding interest on general damages, the learned advocate for the appellant submitted that it is trite law that interest on general damages is due after delivery of judgment because the amount due was unknown at the time of filing the suit. To support that contention, he referred us to the decision of this Court in the case of **Antony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported).

On non-compliance with Rule 67 (1) of the Commercial Court Rules, Dr. Michael submitted that the rule is couched in mandatory

terms that judgment ought to be delivered within sixty days from the conclusion of hearing and in case the judgment could not be delivered in time, reasons ought to be given. He pointed out that the hearing of the case was concluded on 18th June, 2015 when the case was called for mention with a view of fixing a date of judgment after both parties had finalized to file their closing submissions. He pointed out that although the judgment was delivered on 24th November, 2015 after the lapse of more than five months after closure of hearing of the case, the learned trial Judge did not assign reasons for such delay in his judgment. With that submission, he urged us to allow the appeal with costs.

On the part of the respondent, Mr. Bagiliye also adopted the written submissions. He replied to the first ground of appeal that according to the pleadings, the existence of the new MLA was not a contentious issue that required trial court's determination. He submitted that issues for determination by the court are those which one party alleges their existence and the other party disputes them. However, in this appeal, he contended, the appellant did not deny the signing and existence of the new MLA. He urged us to look at paragraph 4 of the respondent's plaint, appearing at page 8 of the

record of appeal, where the respondent alleged that after the parties had settled Commercial Case No. 37 of 2011, they signed a new MLA which allowed the respondent to run the service station for three years. And he requested us to compare that paragraph with paragraph 3 of the appellant's written statement of defence, appearing at page 42 of the record of appeal, wherein the appellant noted the signing and went further to attach a copy of the new MLA to its written statement of defence as annexure TTL 2. Mr. Bagiliye added that the appellant also relied on the terms and conditions of the new MLA to justify the termination. He therefore argued that the presence of the new MLA was not a contentious issue that required determination by the trial court. He submitted that given the circumstance, the appellant ought to be stopped from challenging it and urged the Court to hold that the complaint is an afterthought.

Mr. Bagiliye further argued that according to Rule 49 (1) of the Commercial Court Rules, since the new MLA was attached to the appellant's witness statement, one Marsha Msuya it automatically becomes part of the evidence as reasoned by the learned trial Judge. For those reasons, he argued that the first ground of appeal lacks merit. He therefore urged us to dismiss it.

Regarding the issue as to whether there was justification to terminate the new MLA, the learned counsel for the respondent argued that there is no proof that the respondent failed to run the service station because at the time the appellant fronted the allegation of cash problems, the respondent had made two deposits in the appellant's account as evidenced by Exhibit P5 but the appellant failed to supply him the fuel. He therefore contended that the learned trial Judge rightly held that the appellant breached the contract. Thus, the ground is baseless.

As to the complaint on the general damages, Mr. Bagiliye submitted that the ground of appeal lacks merit because after the learned trial Judge had found that the appellant breached the contract then the award of general damages was appropriate to the respondent who suffered loss of business due to such breach of contract. He, however, conceded that the interest rate ought to have started to run from the delivery of judgment.

Responding to the complaint that there was non-compliance with rule 67 of the Commercial Court Rules, Mr. Bagiliye conceded that the learned trial Judge failed to deliver judgment within the prescribed time and he did not give any reason for such delay. He however

contended that the rule is intended to serve the speed delivery of justice and its contravention did not occasion any injustice to the appellant. He added that the procedural irregularity did not go to the root of the matter to vitiate the judgment.

At the end, Mr. Bagiliye urged us to dismiss the appeal with costs.

In his rejoinder, Dr. Michael reiterated that the respondent bore the obligation to prove his case and that the Commercial Court Rules did not repeal the Evidence Act. Regarding the two deposits, Dr. Michael contended that Exhibit P5 was a mere letter written by the respondent's counsel with no conclusive evidence and that the appellant did not bring any evidence to prove that he made the deposits. As to non-compliance with rule 67 of the Commercial Court Rules, Dr. Michael conceded that the appellant was not prejudiced.

Having heard the submissions from both parties we propose to start with the first ground of appeal, that is, whether it was proper for the learned trial Judge to rely on annexure TTL 2, attached to the witness statement and annexure SMA 1 attached to the respondent's plaint. It should be remembered that the submission by Dr. Michael is in twofold. First, the document in dispute and which the respondent heavily relied upon in its case, that is, the new MLA, was neither

attached to the plaint or listed in the list of documents to be relied upon. Nor was it tendered in evidence. Two, a document attached to the witness statement does not automatically form part of the trial court's proceedings.

Our starting point in determining the first part of this ground is the Commercial Court Rules as amended by G.N. No. 107 of 2019 which govern the procedure of filing and conducting disputes in the High Court, Commercial Division. Given that the appeal before us was determined prior to the coming into force of G.N. No. 107 of 2019, we shall determine the appeal as per the prevailing procedure at that time, that is, in accordance with the Commercial Court Rules.

Rule 10 (1) of the Commercial Court Rules which provides for a mode of commencing a suit before the High Court, Commercial Division reads: -

> *"Proceedings in the court shall, except in the case of proceedings which by these Rules or under any written law are required to be instituted by any specified mode of commencement, be instituted by plaint or by originating summons."*

In the light of the above and as we have shown herein, in instituting a suit against the appellant, the respondent filed a plaint before the trial court. As to what should have been contained in the plaint is not provided

in the Commercial Court Rules. Nonetheless, wherever there is a lacuna in the Commercial Court Rules, rule 2 of the same Rules permits the applicability of the Civil Procedure Code, Cap. 33 R.E 2002 as amended (the CPC). In that respect, the contents of the plaint, written statement of defence, counterclaim and set off are as stipulated in the CPC. It follows then that where a plaintiff relies on a document (whether in his possession or power or not) as evidence in support of his claim, he must enter such document in a list to be added or annexed to the plaint (See Order VII Rule 14 (2) of the CPC). Further, Order VII Rule 18 (1) of the CPC requires a plaintiff to seek leave of the trial court to produce a document which was not produced in court when the plaint was presented, or which was not entered in the list of additional documents to be relied upon by the plaintiff before the commencement of the hearing of the suit.

In the present appeal, as rightly submitted by the learned counsel for the appellant, the respondent who filed a suit against the appellant alleged that parties entered into a new MLA in favour of the respondent that was to run for three (3) years but he did not attach a copy of it in his plaint. Neither did he enter it in the list of documents to be added or annexed to the plaint. Section 110 of the Evidence Act, Cap. 6 RE 2019 places the burden of proof on the party alleging a fact, here, the burden is upon the

respondent who asserted that there was a new MLA in favour of the respondent to run for three (3) years. We do accept that the appellant did not dispute the fact that the parties signed a new MLA but then there was a disagreement between the parties on the terms and conditions of the new MLA. As such the acknowledgment did not override the legal burden placed upon the respondent to establish and prove the terms and conditions which the parties were in dispute. It should be remembered that the respondent pleaded under paragraph 4 of the plaint that the new MLA was to run for three years. That paragraph reads: -

> *"4. That, on 18th July, 2011 the parties had Commercial Case No. 37 of 2011 settled and that was followed by the Defendant signing a new MLA in favour of the Plaintiff that was to run for 3 years indicating that the working capital for running the Mlimani service station would increase from TZS. 120,000,000.00 that the Defendant had previously sanctioned, to TZS. 220,000,000.00, the calculation that the Defendant personally did during the settlement meeting."*

In response to that paragraph 4, the appellant averred under paragraphs 3 and 4 of the written statement of defence as follows: -

> *"4. That, part of paragraph 4 of the Plaint that refers to the settlement of Commercial Case No. 37 of 2011 and*

signing of new Marketing Licence Agreement (MLA) is noted; the rest of paragraph is strongly disputed. The Defendant avers that the signing of the MLA, put them (the Defendant and the Plaintiff) on a probationary period of six (6) months subject to the Plaintiff's fulfilment of terms and conditions of the MLA. Further response to Paragraph 4 of the Plaint is done by the Defendant annexing a copy of the License Agreement and marked TTL2 and with leave; the same form part of this written statement of defence.

5. *That, as further response to paragraph 4 of the Plaint, the Defendant firmly states that the amount of working capital mentioned was the amount agreed upon by the parties during the settlement meeting to serve as a mere indicative working capital for the then current business requirement and can never be construed as setting a ceiling nor an instruction from the Defendant to the Plaintiff on the amount of working capital required."*

It follows from the above pleadings that the respondent accepted the signing of the new MLA but disputed the construction of the terms and conditions of the agreement. He disputed the period of three years by arguing that it was subject to six months-probation period and also disputed the working capital that it was only indicative and not conclusive. In that regard, we respectfully differ with the submission by Mr. Bagiliye

that no contentious issues arose from the new signed MLA so as to require the trial court to make a determination on them. Since the appellant disputed the duration of the agreement and the working capital, the respondent had a legal burden to prove his allegation of the three years contract and the ceiling of the working capital. He could have perfectly discharged that duty by first laying a base on his case by attaching and tendering as evidence the new MLA for the trial court to be satisfied with its terms and conditions.

Mr. Bagiliye tried to persuade us that since it was attached to the appellant's witness statement then it be taken that it formed part and parcel of the evidence. This was also the reasoning of the learned trial Judge when he said: -

> *"Under Rule 49 (1) of the High Court (commercial Division) Procedure Rules GN 250 of 2012 the legal status of the Witness Statement and its annexure is considered as evidence in chief of DW1. By annexing a copy of the licence, DW1 was admitting that, there was such agreement. More, in paragraph 10 of her Witness Statement DW1 firmly admitted that, on 26/3/2011, the Plaintiff and Defendant executed the Marketing Licence Agreement. Then in Paragraph 12, of her witness statement again DW1 admitted that, on the 18/9/2011*

the Plaintiff and Defendant signed a new Marketing Licensing Agreement and she then stated that, a copy of the Agreement was annexed to her statement as Annexure TT2... Honestly, the court find even if original or certified copy of the Licence was not furnished to the court as Mr. Kyauke stated in his submission, but the point to be considered is that, DW1 in her witness statement on behalf of the defendant has admitted that, there was New Marketing Licence Agreement between the plaintiff and the defendant. So relying on the witness statement of DW1 and Annexure TTL 2 the court is satisfied that, there is sufficient evidence from the defendant, DW1 and PW1 which established that, plaintiff and defendant executed the Marketing Licence Agreement with the Defendant."

And this takes us to the second part of Dr. Michael's submission. Before we proceed any further, we wish to recall what we said in **AAR Insurance v. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported) concerning documents attached in the witness statement. In that appeal, the learned trial Judge considered and acted upon six and ten documents which were attached in the appellant's and the respondent's witness statements, respectively whereas the said documents were not formally tendered and admitted in the trial court. The witnesses identified the

documents attached in the witness statement but did tender them. The Court had this to say: -

> *"With the coming into force of these Rules (Commercial Rules), the procedure of taking evidence of a witness both in the plaintiff and defendant cases in the High Court (Commercial Division) has drastically changed. A witness is required to file his witness statement along with the intended exhibits. The statements are exchanged. Then a witness appears in court for cross examination. In our case the appellant had three witnesses whereas the respondent had one, the respondent alone. The three witnesses in the appellant's case filed six intended exhibits; whereas the respondent filed ten intended exhibits. But these intended exhibits were not formally tendered in court, though they were referred to in the proceedings and judgment as exhibits... the learned Judge considered the aforesaid documents without complying with the rules of admissibility and endorsement. That was not proper. Those documents, in terms of O. XIII, rule 7 (1) as correctly submitted by Mr. Mnyele should not form part of the record."*

At the end, the Court expunged the documents because they were not endorsed by the trial court.

Back to the appeal before us, we have shown that the learned trial Judge interpretated rule 49 (1) of the Commercial Court Rules to mean that the documents attached in the witness statement automatically form part and parcel of the trial courts' proceedings. For better appreciation of what we are going to say, we wish to reproduce hereunder the said rule. It provides: -

> *"In any proceedings commenced by plaint, evidence-in-chief shall be given by a statement on oath or affirmation."*

Suffices also to reproduce rule 56 (1) of the Commercial Court Rules which provides: -

> *"A party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross-examination."*

And rule 57 of the Commercial Court Rules that provides: -

> *"The Court may, on an application by a party, allow a witness to give evidence without being present in the courtroom, through video link at the cost of the applicant."*

From the above, it is clear that a statement on oath or affirmation is treated as evidence in-chief in respect of proceedings commenced by a

plaint. In other words, a witness statement is a written testimony made by a witness before a commissioner for oath for the purpose of giving evidence in-chief before appearing in court for cross-examination. Essentially, it is the testimony in-chief of that witness regarding the case (see rule 49 (1) of the Commercial Court Rules). Its format is prescribed in the Third Schedule to the Commercial Court Rules. Among other things, it ought to be accompanied by the intended exhibits to be tendered during trial. Therefore, a witness statement is only a statement of that witness which is treated as evidence in-chief and such treatment does not extend to the documents attached to it.

A witness, whose statement was filed in the trial court, ought to be caused to appear before the trial court or through a video link for cross examination. Upon appearance, he is either affirmed or sworn-in. Thereafter, he identifies and adopts his witness statement and the normal procedure of admissibility of any document annexed to his witness statement, in terms of sections 63, 64, 64A, 65, 66, 67, 68 and 69 of the Evidence Act, Cap. 6 RE 2019, has to be followed. That is, if the witness wants to tender a particular document, pleaded and attached to his witness statement, he ought to make a prayer for tendering it as exhibit. And the

adverse party should be given a chance to object or concede to its admission.

If it is admitted, the trial court ought to comply with the endorsement of such document pursuant to Order XIII Rule 4 of the CPC and such admitted document pursuant to Rule 7 (1) of Order XIII of the CPC forms part of the record of the trial court proceedings. In case it is rejected, the reason for its rejection ought to be given (see Order XIII Rule 3 of the CPC). Further, the rejected document does not form part of the record of the trial proceedings and it ought to be returned to a person who intended to tender it (see Order XIII Rule 7 (2) of the CPC). It follows from that procedure that exhibits attached to the witness statement do not automatically form part and parcel of the court exhibits unless and until they are admitted in evidence and endorsed accordingly by the trial court.

In **Japan International Cooperation Agency v. Khaki Complex Limited** [2006] T.L.R 343 we insisted that the trial court should ensure compliance with Order XIII Rule 7 of the CPC and where there is contravention the Court will always frown on it. We said: -

> *"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in*

evidence cannot be treated as forming part of the record although it is found amongst the papers on record."

In the present appeal, as rightly submitted by Dr. Michael, annexure TTL 2 attached to the written statement of defence and to the witness statement of Marsha Msuya was not supposed to be acted upon by the learned trial Judge because it was not admitted in evidence in the trial court and it was even not attached or listed in the plaintiff's pleading. Similarly, annexure SMA 2 which was not admitted is evidence as exhibit and even not attached to any of the witness statements ought not to have been acted upon. As annexures attached to the plaint or written statement of defence are not evidence (see **Godbless Jonathan Lema v. Mussa Hamisi Mkanga and 2 Others** and **Sabry Hafidhi Khaifan v. Zanzibar Telecom Ltd (Zantel) Zanzibar** (supra)). The same applies to annexures to a witness statement under the Commercial Court Rules.

In line with what we have held in our previous decisions, we are enjoined to follow suit. We are therefore satisfied that the learned trial Judge erred in law by acting and relying on annexures TTL 2 and SMA 2 which were not admitted in evidence as exhibits. We find merit on the first ground of appeal.

Ordinarily, we would have ended up here but for the sake of completeness we shall proceed to determine the remaining grounds argued in the alternative. As to whether the respondent (who was the plaintiff) managed to prove his case on a balance of probabilities, we have stated herein that the case for the respondent mainly rested on the terms and conditions of the new MLA. In order for him to prove his claims for breach of the terms and conditions of the new MLA, he ought to have tendered the new MLA in evidence as exhibit but he did not do so. As such, no evidence was brought forward by the respondent to establish his claim of the breach of the terms and conditions of the new MLA. We thus find merit on the second and third grounds of appeal.

Having found that the respondent did not prove his case to the required standard, the fourth and fifth grounds of appeal dies a natural death.

We now turn to the last ground of appeal where there was a concession that the learned trial Judge flouted the procedure provided under rule 67 of the Commercial Court Rules which provides:

> *"67 (1) The court shall, at the conclusion of hearing deliver judgment within a period of sixty days in case of a judgment or thirty days in case of ruling.*

(2) Where a judge fails to comply with the provisions of sub rule (1), he shall state in the court record the reason for such failure."

Perhaps, it is noteworthy to state the legal principle behind the above procedural rule. It was mainly promulgated to ensure timely disposal of commercial disputes and expediency of the dispensation of justice to the parties and the public at large. Undeniably, there are times where the trial judge would take longer than ninety (90) days to deliver the judgment either due to the complexity of the case or for any other reasons, that is why the rule required the trial judge to give reason in the judgment.

In the matter at hand, counsel are at one that the learned trial judge did not deliver the judgment within the prescribed period of 90 days and he did not give reason for the delay. We are quite clear in our mind that the contravention of rule 67 of the Commercial Court Rules does not lead to invalidating the judgment unless it is shown that there was miscarriage of justice. This is because the rules of procedure are meant to facilitate justice and not to impede it unless a there is a miscarriage of justice. Of course, we are mindful that it is important to comply with them but sometimes their contravention

would not necessarily go to the root of the matter and vitiate the judgment.

In the present appeal, given the concession made by the counsel for the appellant and, on our part, we failed to find any detriment caused by such failure. The omission was not fatal and does not therefore, render the judgment invalid. For that reason, we do not find merit in this ground and we proceed to dismiss it.

In the end, we find merit in the appellant's appeal. Accordingly, we allow it with costs.

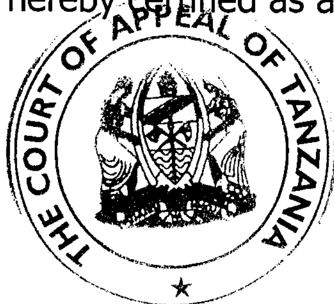
DATED at **DAR ES SALAAM** this 24th day of June, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 25th day of June, 2021 in the presence of Mr. Onesmo Michael for the Appellant and the Respondent appeared in person is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL