

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 14 OF 2007

IHEMBE INDUSTRIES LTD. PLAINTIFF

VERSUS

ROYAL INSURANCE (T) LTD. 1ST DEFENDANT

CRDB BANK LTD. 2ND DEFENDANT

R U L I N G

F. Twaib, J:

For various reasons, which I feel a strong need to cite herein, this ruling has been pending for more than two years. Such a delay needs to be explained.

Delivery of the ruling was at first being continuously adjourned because of my engagement in many out-of-court activities, such as meetings of various Judiciary Committees and Boards, but later on for the rather unfortunate reason that the court lost touch with the whereabouts of the file and later on, after the file was traced, when the finished ruling was irreparably damaged just before it was ready for delivery. Efforts to retrieve the ruling, like many other documents in the flash disk, proved futile. I have thus been compelled to re-write the ruling. I can only mention that it is a very undesirable situation.

Just before the hearing of this suit was to begin on 25th October 2012, the plaintiff's advocates filed a notice to produce and a supplementary list of documents to be relied upon. When the case was called on for hearing, counsel for the 1st and 2nd defendants raised an oral objection, claiming that the supplementary list of documents was incompetent. The court ordered that the objection be argued by way of written submissions. On 9th July 2013, being settled in my mind that the objection had merit, I sustained it and ordered that the same, together with the Notice to Produce, be expunged from the record. I reserved my reasons for the said order. That was when the unfortunate events that occasioned this inordinate delay began.

At last, I can now give my reasons, which follow below.

I will begin with a discussion on an issue raised by counsel for the plaintiff to the effect that the preliminary objection raised by the 1st and 2nd defendants and their written submissions in support thereof did not challenge the Notice to Produce, and that the same should be acted upon "without further question". In their rejoinder, the defendants' counsel contended that they did, and that the notice contains documents which were not previously disclosed and thus cannot be relied upon. Once the supplementary list is rejected, they cannot be produced under section 68 of the Evidence Act, Cap 6 (R.E. 2002).

I agree. Though it is true that the oral notice of preliminary objection did not specifically mention the notice to produce, counsel's submissions clearly combined both documents, and the circumstances in respect of both are so similar that, being matters of law, the two cannot be separately treated.

The Notice to Produce contained the following citation: "Made under section 68 of the Evidence Act, Cap 6, R.E. 2002)". No provision of the law has been

cited for the Supplementary List. It has been argued by the Plaintiff that the "only relevant provision" is Order XIII rule 1 of the Civil Procedure Code, Cap 33, R.E. 2002. In the view of the plaintiff's counsel, Order VIIIA rule 4 (which counsel for the 1st and 2nd defendants have relied upon), are "out of context" and thus irrelevant. Counsel for the plaintiffs have not given any reason for this view.

Explaining the sole relevancy of Order XIII rule 1, plaintiff's counsel argued that the term "first hearing" in the rule means "when the hearing commences", which is not, as counsel for the 1st and 2nd defendants opined, "the first date set for hearing by the court", whether the hearing actually commences on that day or not. Counsel further submitted that the purpose of the CPC is to regulate civil proceedings in courts of law, and assist the court in answering the issues rather than defeating the ends of justice.

It was further argued on behalf of the plaintiff that only three out of all documents filed on 2st October 2012 were new, as some of them were already disclosed as annexures to the plaint. The three are: letter dated 26th May 2003, Claim Form, and letter dated 1st September 2004. If I understood counsel for the plaintiff well, they seem to argue that those documents that were already on record should be allowed to stand. I have no quarrel with this assertion. Indeed, all documents already disclosed are part of the record of the court and may be relied upon in evidence, so long as the same are produced in accordance with the rule and procedure relating to the admission of evidence. However, as already ordered, I do not think that it was proper for the plaintiff to file the two documents on the very day of the hearing.

In reaching this conclusion, I considered, and agreed with, the contentions advanced by counsel for the 1st 2nd defendants on the following crucial points:

1. The first Trial and Scheduling Conference for this case was conducted on 7th November, 2007 before Mwarija, J. (as he then was). Under Order VIII rule 4 CPC, once a scheduling order has been made, no departure or amendment therefrom is allowed except with leave of the court, upon being satisfied that such departure or amendment is necessary in the interests of justice. The Notice and the List of Supplementary Documents were filed without leave of the court being sought, let alone obtained.
2. It seems to me, upon a purposeful reading of Order VIII rule 1 (1) CPC, which is the basis of the plaintiff's claim that it is proper for a party to produce documents on the day the hearing is to commence or any other day to which the commencement is to take effect, cannot be read in isolation. When the lawmaker enacted Order VIII rule 4 of the Civil Procedure Code, the lawmaker must have been aware of the provisions of Order VIII rule 1 (1). Order VIII rule 4 of the CPC thus changes in a significant way, the application of Order VIII rule 1 (1). In their reply submissions, the plaintiff's counsel did not address the merits or otherwise of this crucial point, preferring instead to dismiss it as being out of context and irrelevant. With respect, that was a wrong approach.

I share the view of the defendants' counsel that Order VIII rule 1 (1) can only be invoked once a court order is secured under Order VIII rule 4. Only upon an application, be it oral or written, for a departure from the scheduling order can the court be in a position to determine, pursuant to the requirements of Order VIII rule 1 (2), that it be satisfied that there exists good cause for the filing of documents beyond the scheduling conference.

It is common ground that the plaintiff's papers filed on 25th October 2012 did not obtain such order. Their filing was therefore invalid.

3. Allowing parties to file documents at the last minute, as the plaintiff's counsel intimates, would have two undesirable consequences:
 - a. It would render meaningless an important rule of civil procedure that requires disclosure of documentary evidence in good time, so that all the other parties may have an opportunity of producing documents to counter those produced. Otherwise, they would have no right or opportunity to do so or, if there is, the hearing would have to be adjourned to allow the other parties to file documents.
 - b. Since the other parties would be entitled to an adjournment in order to file their counter-documents, adjournments may be endless. This would in turn defeat the whole purpose of the amendments introduced in the CPC in 1994, including Order VIIIA rule 1 (2), which was to speed up civil litigation in our courts.

The above were the reasons for my order that the Notice to Produce and the Supplementary List of Documents be expunged from the record of the court.

Costs to be in the course.

DATED AT DAR ES SALAAM this 29th day of January, 2016.

F.A. Twaib
Judge

DELIVERED AT DAR ES SALAAM this day of February, 2016.

DEPUTY REGISTRAR