

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL CASE NO. 192 OF 2019

PETRONAS ENERGY(T) LIMITED..... ..PLAINTIFF

VERSUS

1. ALLIANCE INSURANCE CORPORATION

LIMITED..... ..DEFENDANT

2. PENTAGON INSURANCE BROKERS (T) LTD...DEFENDANT

RULING

8th February & 2nd March 2023

MKWIZU,J:

This is a ruling in respect of an objection posed by Mr. Nanyaro, advocate for the 1st defendant on the admissibility of a set of documents tendered by PW1 to wit Police Form No 90 by traffic Muheza, Vehicle Inspection Report No A.056208 by Traffic Muheza, Sketch map plan of the accident at issue , a letter and a checking sheet issued to the plaintiff by CMC Automobile Limited.

Two objections were tabled by Mr. Nanyarao, *one* is that the documents are lacking the requisite foundations. He said the witness has not said how the documents came into his possession before tendering them in court. He invited the court to seek guidance from the exhibit guidelines.

Secondly, the tendering of these documents contravenes the legal requirement under Order XIII Rule 1(1) of the CPC(Cap 33 RE 2019) which requires the document to be relied upon to be filed before the *first of hearing of the suit*. Citing a decision of this court (Nangela J) in **Bank**

of Africa Tanzania Limited v OM-Agro Resource Tanzania Limited and 7 Others, Commercial case No. 139 of 2019, Mr. Nanyaro said "*the First hearing of the suit*" is any time before the issues are framed under order 14 because, to him, it is at that very point that contentious issues are unearthed from the pleadings.

Thirdly, the documents are not pleaded in the pleadings. He asserted that amended plaintiff, the 1st defendant's WSD, and the plaintiff's reply to the 1st Defendant's amended WSD have no mention of the tendered documents to justify adducing evidence on the point. Supporting his arguments with the case of **National Insurance Cooperation Limited v Sekulu Construction Company**, (1986) TLR, Mr. Nanyaro maintained that parties are bound by their pleadings and therefore are not allowed during the trial to depart from their pleadings by adducing evidence which is extraneous from the pleadings. He argued that to allow the admission of the tendered documents is to take the 1st defendant by surprise as the Defendant will have no time to counter the said documents.

He forcefully claimed that the main issue before the court is the accident that led to the damage of the vehicle belonging to the plaintiff and therefore all necessary documents were to be annexed to the pleadings or produced before the Final PTC in terms of the reserved leave at the First pre-trial conference and not otherwise. He on this point relied on the decision of **Yara Tanzania Limited V Ikuwo General Enterprises limited**, civil Appeal No 309/2019, where an observation was made that courts should not allow or form an opinion on a document that is not attached in the pleadings even if the said document is admitted as evidence in court as doing so would be to jeopardize the right to be heard

of the opposite party. He finally prayed for the rejection of admission of the tendered document.

Mr. Nkoba Advocate for the 2nd defendant had no objection to the prayer for admission.

Responding to the raised preliminary objections, Mr. Ngatunga for the plaintiff said, before seeking leave to tender the documents in question as exhibit, PW1 explained in what respect the document was in the case. To Him, the foundation was laid and that the exhibit Management guideline 2020 is not binding but rather a guideline.

Regarding the second objection, he said, Order XIII Rule 1(1) of the CPC allows the filing of the documents before the hearing of the suit. He contended that they had reserved their right to file a list of additional documents to be relied upon which was allowed. In any case, the cited case of **Bank of Tanzania V OM resources Agro** is only persuasive to this court. It is not binding.

Further to that, Mr. Ngatunga said, the evidence contained in the tendered documents is within what is pleaded. Paragraphs 7 and 8 of the amended plaint state the time of the accident, the vehicle involved, location of the accident, and the state of the vehicle after the accident, and paragraph 11 discloses what happened to the vehicle after the accident that, it was dragged from the scene of the accident Muheza and therefore the documents are in support of what is pleaded in the plaint, so the decision of **Yara Tanzania Limited v Ikuwo General Enterprises** (Supra)cited is not applicable. He insisted on the prayer for admission of the documents tendered for they are legally before the court.

I have duly considered the arguments made by the learned counsels for the parties. The issue is whether the objections are meritorious or not. I will preface my analysis with the law guiding the production of documents in court. I will begin with the rule that governs the presentation of documentary evidence by the plaintiff. Order VII, Rule 14, imposes a duty upon the plaintiff to produce along with his plaint all documents in his possession or power. Order VII Rule 14 (2) of the CPC reads:

"Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

And Rule 18 (1) of Order VII read together with Order XIII Rule 2 bars the production of a document that was not annexed to the plaint unless leave is granted. Rule 18 of Order VII reads thus:

"A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without leave of the court, be received in evidence on his behalf at the hearing of the suit"

However, Order XIII, Rule 1, gives the exception to the above position, it allows the production *at the first hearing of the suit* of documentary evidence which are in the plaintiff's possession or power, on which they intend to rely, and which has not been already filed, in Court and all documents which the Court has ordered provided that is it accompanied

by an accurate list thereof. Order XIII Rule 1 (1) and (2) of the CPC(Cap 23 RE 2019) provides:

1.-(1) The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced.

(2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

2. No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for the non-production thereof; and the court receiving any such evidence shall record the reasons for so doing.”(Emphasis added)

The restriction provided for under Rule 2 above relates to documents that are neither annexed to the plaint nor produced with the list of additional documents before the first hearing date. The provision, in my view, serves two purposes, one is to give a party the timeliest possible notice of the documentary evidence that is to be relied upon by his/her opponent

and the second is to minimize the chances of manufacturing documentary evidence during the hearing to cure some mischief arising during the trial

The parties' counsel in this matter agrees to this legal position, their point of divergence is on whether the contested documents were filed before the *first day of the hearing or not*. While Mr. Nanyaro refers to the first day of the hearing as the date before the framing of the issues, Mr. Ngatunga argues that the *first day of the hearing* is the date when the actual trial commences.

I have revisited the records, the prayer for tendering the opposed documents, was, according to the records, preceded by Mr. Ngatunga's illumination that they are documents brought to court through a list of additional documents filed in court on 19/12/2022 and which are serially No. 9 to 13 of the lists in the witness statement. So, the question to be determined here is whether 19/12/2022 when the list of additional documents was filed, falls before or after the first day of the hearing. This takes me the order of this court dated 29/11/2022 that scheduled the hearing date.

"ORDER: Plaintiffs' counsel to file witness statement of all witnesses he intends to use in his trial seven days before the hearing date and serve the same to the defendants at least five days before the scheduled hearing date. Hearing on 24/1/2023 at 9.00am..."

Looking at the sequence of events, it is my considered view that, the *first day of the hearing* was explicitly fixed by this court on 29/11/2022 when it orders the plaintiff to file witness statements before hearing date. It is

after this order that the plaintiff's counsel filed a list of additional documents to be relied upon under Order XIII Rule 1 (1) of the CPC, in terms of his earlier on reserved rights at the first pretrial conference held on 15/9/2022. Thus, the list of documents to be relied upon filed by the plaintiff on 19/12/2022 before the filing of her witness statement and the date fixed for the commencement of the hearing was lodged aptly before the first day of hearing. I am, on this fortified by the decision of the Court of Appeal in **Ecobank Tanzania Limited v. Future Trading Company Limited**, Civil Appeal No. 82 of 2019, (Unreported) dated 13th August 2021 where an issue whether the filing of the witness statement, which is normally done after the final pre-trial conference, marks the commencement of the trial was posed for the Court's determination. Having evaluated the matter, the Court of Appeal said:

"It is our position that filing of witness statements did not per se entail commencement of hearing since no witness had tendered his statement and no assessment was made by the court suo motu or on the application of any party to see whether the statements contained any inadmissible, scandalous, irrelevant or oppressive matters. For evidence to be treated as evidence, it must be trimmed of the above inadmissible materials, which at the time the successor judge was taking over, had not happened."

It went on to say,

"... we hold that at the time that the predecessor judge took over, the hearing had not commenced because at that time

no witness statement had been admitted for purposes of being relied upon as evidence in terms of the Commercial Division Rules of Procedure”.

Construed literally, the decision above suggests that the first day of the hearing cannot be any time before the admission of the witness statement as evidence in court. I am bound by this decision of the highest court of the land in so far as the point at issue is concern. Guided by the above authority, I am convinced that the list of documents containing the opposed documents was well presented in court before the commencement of the hearing and therefore admissible.

Mr. Nanyaro’s second point is that the tendered documents form no part of the pleadings. I think this point is a total misconception of the facts presented for adjudication. The subject matter of the suit is the car accident involving the plaintiff’s vehicle. I have read the cited decision of **Yara Tanzania Limited v Ikuwo General Enterprises** (supra) relied upon by Mr. Nanyaro. I think it is distinguishable, in that case, the plaintiff had tendered a contract that was neither expressly nor impliedly pleaded. While the claim between the parties was based on a breach of an agreement between the appellant as an agent and the respondent the tendered exhibit PI constituted the un-pleaded *cause of action* between the appellant and the respondent in respect thereof. In discounting the said exhibit the Court of Appeal said:

“The above facts clear as they are, do not, in our view, plead whether expressly or by implication the existence of the agreement in exhibit PI. There is no any other factual allegation in the plaint mentioning or implying the

existence of the said document either. Therefore, in as much as the document in exhibit PI was not pleaded, we agree with the counsel for the respondent that, it could not be relied upon to determine the appellant's claim". (emphasis added)

The facts in our case are different. As rightly submitted by Mr. Ngatunga Paragraphs 7, 8, and 11 of the amended complaints are specific to the point. The paragraphs contain detailed information about the accident, the date of occurrence, the involved vehicle, the location of the accident, the state of the vehicle after the accident, and further information regarding how the vehicle was dragged from the vehicle from the scene of the accident (Muheza) to Da es Salaam. Thus, the tendered documents are in support of the facts pleaded in the amended complaint. This point as well has no merit.

Lastly, Mr. Nanyaro objected to the admission of the documents for lacking the requisite foundation by PW1. This preliminary objection is as well unfounded. PW1's evidence contains an explanation of how the exhibits are connected to the case.

Consequently, the preliminary objections are overruled.

Dated at Dar es salaam this 2nd Day of March 2023



E. Y Mkwizu
Judge
2/3/2023

