

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 220 OF 2012

BETAM COMMUNICATION TANZANIA LTDPLAINTIFF

VERSUS

CHINA INTERNATIONAL TELECOMMUNICATION

CONSTRUCTION.....1ST DEFENDANT

CITCC TANZANIA LIMITED.....2ND DEFENDANT

Date of last Order: 03.04.2024

Date of ruling: 15.05.2024

RULING

NGUNYALE, J.

This is a ruling regarding failure by the plaintiff to pay the exhibit fees as per the Court Fee Rules, 2015 GN no. 187/2015 (hereinafter to be referred as the Rules).

The background of this matter is that, the plaintiff herein had appealed to the Court of Appeal through Civil Appeal No. 251 of 2020 after being dissatisfied with the judgment of this court which was in favour of the respondents for the good reason that the exhibits PE1 to P10 which were tendered during trial were tendered contrary to the Rules which explicitly

state that court fee of 20,000/= Tshs shall be paid for each exhibit tendered before the High Court. That was not done in this case, exhibits P9 and P10 were the basis of the cause of action in the present case but the necessary fees were not paid. The fact that fees were not paid the trial judge decided not act on them without affording the parties the right to be heard over the same.

The Court of Appeal held that the trial court violated the fundamental principle of the right to be heard for raising *Suo mottu* the issue of non-payment of exhibit fees; the parties were to be heard before entering any decision about the exhibits. The Court of Appeal nullified the proceedings and quashed judgment and decree, it went further to order the file to be remitted to another Judge of the High Court for hearing the parties on the issue of failure to pay the exhibit fee and recompose judgement.

When the matter came for hearing on the failure to pay exhibit fees, parties accepted the directive of the court that hearing to take the form of written submissions. The plaintiff was represented by Cyril Rugambwa John Pesha and Richard Benjamin Mchwampaka, both learned advocates while the respondents were represented by William Mang'ena, advocate.

Submitting on the failure to pay exhibit fees, the plaintiff stated that the Rules are rules of procedure which are handmaidens of justice and are facilitative in dispensation of justice. He cited the case of **Nanjibhai Prabhudas & co. ltd vs. Standard Bank Limited** (Civil Appeal No. 13 of 1968) [1968] EACA 5 (10 July 1968) [SAFLII].

The plaintiff advocates stressed that courts should be strict on matters of procedures only if they are of fundamental nature, to them non-payment of exhibit fees is not by any stretch of imagination fundamental as to affect the merits of the case since fees for instituting the case initially had been paid. They cited the case of **Josephat Rugaimukamu vs. Father Canute J. Mzuwanda** [1986] TLR 69, and **Principal Secretary Ministry of Defence vs. Devram P. Valambia** [1992] TLR 387 in which an opportunity was availed to the party who in one way or the other failed to pay court fee before tendering documents as evidence in court. In their submission they insisted that the plaintiff is entitled to be given an opportunity to pay exhibit fees so that the documents admitted be analysed and judgment given on merits.

On the other hand, it is the plaintiff's view that since the Rules have been revoked following the coming into operation of the Court Fees Rules 2018,

GN No. 247 of 2018 which removed the obligation for the payment of exhibit fees in the 1st Schedule under item 18 and this being a procedural law, the court must do away with the said requirement of the payment because procedural law operates retrospectively. To substantiate the position, he cited the case of **Coseke Tanzania Limited vs the Board of Trustees of the Public Service Social Security Fund**, Commercial Case No. 143 of 2019. It is the plaintiff prayer that the court should do away with the requirement of paying exhibits fees and proceed to analyse evidence and deliver judgment on merits.

Replying to the submission by the plaintiff, the defendants jointly through their advocate Mr. Mang'ena submitted that; he is in agreement with the plaintiff that Court Fee Rules are procedural law however, he disagree with the plaintiff that any non-compliance with the procedural laws like in the instant matter should be approached with lenience or should not carry strict consequences. He submitted that procedural laws are of equal importance with the substantive laws, in fact they are the one's which helps parties in realisation of substantive justice. He cited the High Court case of **Barclays Bank Tanzania Limited v. Adam Mhagama**, Labour revision no. 18 of 2020 which explain the importance of procedural law. See also, the Court of

Appeal case of **Abubakar Ali Himid v. Nyalusye**, Civil Appeal No. 70 of 2010 which was cited with approval in the cases of **Quality Group Limited v. Tanzania Building Agency**, Civil Application No. 120 of 2013, **Uledi Hasan Abdalah v. Murji Hasnein Mohamed and 2 others**, Civil Appeal No. 2 of 2012, where the court emphasized compliance of procedural laws. It was his further submission that procedural laws should also be respected as they are the bridge to the attainment of the substantive justice. By treating them otherwise like the way the counsel for the plaintiff is trying to convince the court would invite chaos in the administration of justice. It is his submission that compliance with the requirement of payment of court fees is fundamental. See the case of **Romana Malingumu v. Melkio Kiluka**, Misc Land Appeal No. 7 of 2021 where the Court did strike out the application after it found that the same to have been filed without payment of the requisite court's fees. He added that, the plaintiff admits that he did not pay exhibit fees before tendering them in court then the same should be held that they lack validity of being in courts proceedings. The court should refrain from acting on them and the same be expunged from the records. He cited the cases of **Tengeru Flowers Limited v. Dal Forwarding (T) Limited a.k.a Kuehne and 3 others**, Civil Appeal No, 12 of 2011, Civil

Appeal No. 75 of 2015 **Ismail Rashid v. Mariam Msati**, and the case of **A.A.R Insurance (T) Limited v. Beatus Kisusi (CAT)** Civil Appeal No. 67 of 2015. It was his prayer that the plaintiff's prayer of being given an opportunity to pay for the exhibit is not tenable, the plaintiff had a duty to give reasons for non compliance with the mandatory requirement of the law, which he did not give.

Mr. Mang'ena distinguished the cases of **Father Canute** (supra) and **Devram** (supra) from the case at hand stating that the facts in those cases were about failure to pay stamp duty contrary to stamp duty act while the matter at hand is failure to pay exhibit fee contrary to the Rules.

On the 2nd prayer by the plaintiff that, because the Rules were revoked by the Court Fees Rules of 2018 then, as procedural law the plaintiff should benefit from such revocation as procedural laws apply retrospectively. Mr. Mang'ena submitted that the plaintiff has misconceived the applicability of the principle of retrospective effect of the procedural laws as the plaintiff did not comply with the requirement of the law to the effect that exhibits fees were to be paid before being tendered and the court made its decision basing on that position of the law before it was revoked. Had it been that way, the court had yet to decide on this point then the principle of retrospective

applicability of procedural laws would have been beneficial to the Plaintiff. To him allowing the principle of retrospective to apply in this case will bring about chaos because it will open a floodgate of cases which were previously struck out for being defective or incompetent just because there is an amendment or revocation which has changed the earlier position. It is his prayer that the court should expunge the exhibits and proceed to compose the judgment based on the only evidence which is properly before it.

Rejoining the defendants' submissions, the plaintiff almost reiterated the submission in chief and added that the defendants failed to differentiate between incorrect acts which are fundamental and incorrect acts which are non fundamental. The plaintiff failure to pay exhibit fee are incorrect act but not fundamental since the same can be waived. He added that in the conduct of civil proceedings, the documents attached to pleadings do not get admitted as exhibits automatically. The court cannot therefore accept payment of exhibit fees until after they are admitted during hearing. During hearing the exhibits are open to the opposite side to object to the admissibility of each and every attachment for the court to rule on whether the legal error or defect raised in the objection has merit. In this case, both parties agreed to rely on the same documentary evidence tendered by the

plaintiff and so the joint defendants dispensed with their entitlement to object. Rule 4 of the Rules creates the liability to pay exhibits fees, it does not establish at what point in time the exhibits fees should be paid for. To argue that, it should be paid prior to admission is not borne out of any canon of interpretation of the section. The point underscored here was still open to the court to desist from writing its judgement to enforce Rule 7 of the First schedule. Secondly the fees paid on exhibits fees constitutes revenue to the Government, the collector is the court only after it has ruled on admissibility. He added that Court Fees Rules of 2018 simply removed the exhibit fees payable because they were already contained in the filing fees. Since the filing fees was paid, the exhibit fees are taken care in the filing fees. For now, this court cannot receive the exhibit fee since it is not party of the government revenue following passage of GN No 247 of 2018. He prayed the court to dispense with payment of exhibit fees not paid in the past and proceed to adopt the judgement of the predecessor judge up to the stage where she was derailed by exhibit fees issue.

Appreciating the submissions made by both parties, this court has the duty to determine fate of the failure to pay exhibit fee by the plaintiff.

It is undisputed fact that during hearing of the case, exhibits were tendered and admitted in court and by that time, the law required the payment of exhibit fee to be made. In this case exhibits were not paid for. It is also undenied fact that the law which regulate court fees by the time of hearing this case was the Court Fees Rules of 2015 which in 2018 were revoked following the coming into operation of the Court Fees Rules 2018, GN No. 247 of 2018. The same has removed the obligation for the payment of exhibit fees. Also, the parties are in consensus that the rules that regulate payment of court fees are procedural laws.

The party's dispute is whether the plaintiff can be allowed to pay for the exhibits at this stage and whether procedural laws can act retrospectively in the circumstances of this case.

Answering the issues; the plaintiff prayed to be allowed to pay the exhibit fee so that the exhibits can be relied in the final determination of the matter.

The plaintiff's advocate submitted that courts should be strict on matters of procedures only if they are of a fundamental nature, to them non-payment of exhibit fees is not by any stretch of imagination fundamental as to affect the merits of the case since fees for instituting the case initially had been paid. This position was strongly disputed by the defendants who stated that,

procedural laws are of equal importance with the substantive laws; in fact, they are the one's which help the parties in realisation of substantive justice.

I agree with Mr. Mang'ena, advocate for the defendants that procedural laws are of equal importance with substantive laws as it was held in the case of **Barclays** [supra] where this court had this to say;

*"Moreover, **procedural laws like one under discussion are very important, they are vehicle of parties' rights and justice.** They are also significant for maintaining uniformity, certainty, stability and predictability of the laws. These are crucial aspects in the process of adjudication in a legal system of any just society like ours. **Procedural laws therefore have to be respected and observed for the noble role they play in serving substantive justice.** They should not be floated at the whims of the parties. Otherwise, they will be rendered nugatory and mere poetic verses which lack the requisite binding force if disrespect to them is not seriously controlled by Court of this land, matters in Courts will be handled arbitrarily and randomly, hence chaos and injustice will prevail"* [emphasis added]

While subscribing to the importance of procedural laws in adjudication of cases, Mr. Mang'ena submitted that the Plaintiff did not comply with the requirement of the law to the effect that exhibits fee was to be paid before being tendered and the court made its decision based on that position of the law before it was revoked. Had it been that, the court had yet to decide on this point the principle of retrospective applicability of procedural laws would

be of benefit to the plaintiff. With this position and with due respect to Mr. Mang'ena, I find to differ with his position since the law governing payment of exhibit fee never describe at what time should the fee be paid, it is my considered view that the same could have been paid after the exhibit have been admitted in court. Thus, his submission that the plaintiff should have paid for the exhibit before tendering them in court is not correct since tendering an exhibit is a process in which the same may be admitted or rejected.

Regarding the plaintiff prayer that the court fees rules are retrospective in nature so the fees be waived as the law have been revoked, Mr. Mang'ena submitted that the principle of retrospective cannot be applied because the court had already decided on the exhibit before revocation of the Rules.

In the case of **The Director of Public Prosecutions versus Jackson Sifael Mtares**, Criminal appeal no. 2 of 2018, the court of appeal had this to say:

*"Normally, it may not be made to apply retrospectively where the said legislation affects the substantive' rights of the potential victims of that new law. On the other hand, however, **if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary**" [emphasis added]*

It is from that decision and of the firm view that, the rules being procedural rules, may act retrospective. However, in the circumstances of this case, the newly enacted rules which revoked the Court Fees Rules, 2015 came into operation on 1st June 2018. By the time these new rules came into operation; the parties had already closed their case and judgment of the court had already been delivered (it was delivered on 27/03/2017). I don't find any possibility of the applicability of the principle of retrospective effect in the circumstances of this case. The relevant rules in the present circumstance are the old rules i. e the **Court Fees Rules, 2015**.

Thus, I agree with Mr. Mang'ena that allowing the principle of retrospective effect to apply in the circumstances of this case the court will open a floodgate of cases which were previously struck out for being defective or incompetent for non-compliance with the old rules. In considering the prevailing circumstance of the case at hand which was decided before the new rules came into effect, the proper remedy is for the plaintiff to comply with the regime before 1st June 2018.

Therefore, for the interest of justice and on account of the circumstance that the exhibits were admitted without objection, prudent suggests fairness in favour of the plaintiff. The plaintiff is ordered to pay the relevant fees for

exhibits No. PE1 to P10 per the **Court Fees rules, 2015** within seven days from the date of this ruling. Upon payment of the fees, the court will compose fresh judgment and deliver it according to the order of the Court of Appeal of Tanzania dated 18th day of October 2023. Order accordingly.

Dated at Dar es Salaam this 15th day of May 2024.



D. P. Ngunyale

Judge

Ruling delivered this 15th day of May 2024 in presence of the learned Counsels namely Richard Benjamin Mchwampaka for the plaintiff and Mr. Rwekama Rweikiza for the defendants.



D. P. Ngunyale

Judge

