IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 87 OF 2013

AFRISCAN GROUP(T) LIMITED ..... PLAINTIFF

VERSUS

SAID MSANGI ..... DEFENDANT

20th April 14th May &, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a prayer made by Mr. Mbamba, learned counsel for the defendant for a summons to issue to a witness from the Business Registrations and Licensing Agency (BRELA) and directions on whether the witness will proceed to testify *viva voce* or file a witness statement before appearing in court for cross examination and re-examination.

This prayer was made during the final pre-trial conference held on 20.04.2015, when both counsel for the parties had just told the court

that they have filed their respective witness statements as required by rule 49 (2) of the High Court (Commercial Division) Procedure Rules, 2012 - GN No. 250 of 2012 (hereinafter "the Rules").

Mr. Mbamba, learned counsel, stated that they had filed the witness statement in respect of the witnesses who were readily available. He went on to say that he could not secure a witness from BRELA because they did not know who could be assigned the file by the office to come and testify. It was his contention that since the Rules are not exhaustive regarding witness statements, there is still room for this court to issue summons in terms of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") to BRELA because it is after the witness is known and summoned that his statement can be obtained or he can appear to testify *viva voce*.

Mr. Rutabingwa, learned counsel for the plaintiff, was not amused by Mr. Mbamba's prayer. He charged stating that sub-rule (2) of rule 49 of the Rules is quite clear that the witness statements must be filed within seven days after mediation fails and that they serve the purpose of examination-in-chief. Therefore, he contended, a witness whose statement has not been filed in accordance with the sub-rule cannot appear before the court because, after filing a statement, the witness appears only for cross examination.

Mr. Rutabingwa went on to state that on 27.02.2015 when they appeared before me, there was no indication that the defendant would require more time to file witness statement and further that everything being clear and ready, the matter was set for final pre-trial conference.

Regarding BRELA, it was his contention that the BRELA offices are known and the counsel had ample time to look for one to come and give evidence from the outset. He vehemently put that the procedure proposed by the learned counsel for the defendant is not known. Neither is it supported by law and it is intended to counter the statements of the plaintiff's witnesses, he charged. He thus prayed that the court should give a direction on this very crucial issue so that the matter proceeds to trial.

I accorded Mr. Mbamba, learned counsel, an opportunity to rejoin. Grabbing the opportunity instantly, he embarked with expository statement that the Rules are not exhaustive in so far as the procedure of proof of cases is concerned. Expounding, he stated that the issue of hearing witnesses involves the right to be heard and as such it is a question of natural justice upon which his prayer was based. He reiterated that BRELA being a Government Office, a witness could not be secured in the absence of a summons from this court. He then insisted that this court should issue a summons and direct as to whether the witness will proceed to give evidence *viva voce* or file a witness statement prior to his being brought to court for cross-examination.

I have heard the contending arguments of both learned counsel with keen interest. Indeed, the question of witness statements, new as it may seems in the realm of Civil Procedure in our jurisdiction, is no longer new in this court. On some occasions, this court has had opportunity to deal with the same, particularly when interpreting the tenor and import of rules 48 and 49 (1) of the Rules. I will therefore not claim to be reinventing the wheel. Neither will I attempt to knock down what has been laid down by my predecessors on this point.

I will preface my reasons with a Statement of my brother at the bench; Nchimbi, J. in ***Barclays Bank (T) Limited Vs Tanzania Pharmaceutical Industries & 3 others***, Commercial Case No. 147 of 2012 (unreported), as regards rule 49 (1) of the Rules. In that case, his Lordship was grappling with a situation where the plaintiff had failed to file a witness statement as required by the rule and stated:

> "... it is clear that witness statement to be filed in court under this Rule 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.

His Lordship went on:

> "...The only way to adduce evidence in chief in this court is by witness statement to be filed by respective parties ... [and] that requirement is mandatory ..."

His Lordship Nyangarika, J., seized with an identical situation in ***Tanzania Azimio Construction Ltd Vs CRDB Bank***, Miscellaneous Commercial Cause No. 138 of 2014 (unreported), wherein the plaintiff was seeking for extension of time to file the witness statement, observed:

> "...witness statements are filed in lieu of examination in chief. The purpose thereof is to expedite the process. Therefore, allowing laxity in the name of wanting for the issues to be framed will not only violate the very rules designed to enhance justice but will also be a bad precedent endangering respect to the rules of procedure ..."

Now, turning to the prayer in the case at hand, I deem it to emanate from a somewhat different circumstance, though the desired prayers has the same effect of filing the witness statement out of the prescribed time. I understand that there are rare circumstances that may

sometimes call for this court to waive the requirements of law in order to do substantial justice. Apart from the circumstances obtaining in this case, Mr. Mbamba, learned counsel relies also on the principle of natural justice submitting that the issue of hearing witnesses involves a right to be heard. The question I pose to myself is, whether the circumstances brought to the fore by Mr. Mamba, learned counsel, can warrant waiver of the requirements of rule 49 (1) and (2) of the Rules in the name of natural justice and particularly the right to be heard. And further that the Rules are not exhaustive in this regard and thus a resort should be made to the CPC.

Mr. Mbamba has told this court that, at the time they were required to file the witness statements, they could not get the witness from BRELA because they did not know who could be assigned to testify in the case. It is for this reason he is seeking for summons to BRELA so that a witness can be procured. But the immediate question that lingers my mind, again, is, what is the difference between the circumstances then and the circumstances now that he is seeking for the summons of this court, after the time within which to file the statement has lapsed? Is it known now who has been assigned to testify? The learned counsel did not attempt to answer that question in his submissions; say, at least mention the name of the officer from BRELA who has been assigned to testify so that a summons can issue to him or her. This is a fundamental flaw in the explanation of the learned counsel for the defendant. The learned counsel must be aware that summons in this

circumstance cannot issue to the whole of BRELA. Besides, if the court's intervention was needed in order to issue a summons, it has not come out clearly in the learned counsel's submissions why the learned counsel failed to make this prayer in time.

In my considered opinion, the principles of natural justice cannot come to the aid of the defendant. The right to be heard, just like other rights, must be exercised within the confines of the law so as to avoid further breach of justice. It is the fundamental law in this jurisdiction that the human rights and freedoms, the principles of which are set out in the Constitution of the United Republic of Tanzania, 1977 (henceforth "the Constitution"), shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest. This is the tenor and import of article 30 (1) of the Constitution.

The learned counsel has also averred that the Rules are not exhaustive in regard to hearing procedure of witnesses and, therefore, he had to make a resort to the CPC. This argument cannot stand for two obvious reasons. One, apart from the mention of the CPC and reference to the inherent powers of this court has, the learned counsel has not cited the specific provision of the CPC upon which his prayer for summons to issue was based. Neither did he point out the particular provision on which I could exercise my discretion. It is now settled law, and I need cite no authority for the notorious stance that an application based on

wrong provision of law in incompetent. This is more so to a prayer which is not supported by any provision of the law.

Two, contrary to what is proposed by Mr. Mbamba, learned counsel, the Rules are quite clear and any interpolation that attracts gaps cannot be allowed so as to warrant departure therefrom. It is stated in no uncertain terms at rule 49 (1) of the Rules that for every suit commenced by a plaint, evidence-in-chief shall be adduced by way of witness statement. This statement has to be filed within seven days upon failure of mediation. The rule does not envisage a situation where the litigants are not sure of their witnesses in support of their respective cases. This is so because the law, as a tool of regulating social behaviour, abhors uncertainties. Thus, it is presumed that a party to litigation, upon completion of pleadings and particularly upon completion of mediation, must be fully aware of what is required of him as to the prosecution or defence of his case. In my considered view, the seven days which are allotted to the parties within which a statement should be filed are quite sufficient to have a statement of any witness and from anywhere in this global village, procured.

That apart, my reading of rule 50 of the Rules tells me that this court has power to control evidence as such it can direct on how the same will be adduced. This apparently implies that a prayer, like the one at hand would perhaps have been properly made under that rule. However, I hasten to add here that, the court will not permit a witness statement to

be filed or a witness to proceed *viva voce* in chief after he has gone through the statements tendered by the adverse party; that is after he has known the testimonies in chief of other witnesses. This, in my view, would mean giving the witness the right to be heard but at the same time doing injustice to the other party.

Hence, as rightly contended by Mr. Rutabingwa, counsel for the plaintiff, Mr. Mbamba's move is intended to counter the examination-in-chief of the plaintiff's witnesses. This court, in the interest of justice to both parties, will not allow this to happen, for, doing so will be perpetuating impunity or laxity in the name of the principles of natural justice and that would in itself not only be a violation of the very same principles but also perpetuation of, and ridicule to the Rules.

Since the purpose of filing and serving the witness statement to an adverse party is to afford them an opportunity to assess the same and prepare for cross-examination, it follows that, any party that fails to file the same has no back door through which he can testify more so where such move is deemed to ruin the statements of the witnesses of the adverse party.

It is for the foregoing reasons that I reject Mr. Mbamba's prayers for summons to issue to and or filing of any witness statement other than

the ones already filed as provided by the Rules. As both counsel did not press for costs, I make no order as to costs in this oral application.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of May, 2015.

J. C. M. MWAMBEGELE

JUDGE

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 87 OF 2013

AFRISCAN GROUP (T) LTD ..... PLAINTIFF

VERSUS

SAID MSANGI ..... DEFENDANT

15th & 17th June, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an objection by Mr. Mbamba, learned counsel for the defendant against a prayer made by Mr. Rutabingwa, learned counsel for the plaintiff to have a copy of the document titled "Power of Attorney" being tendered and received in evidence. The prayer was made during the testimony of one Ulf Nilsson PW1 who purportedly issued the power of attorney to one David Mahende to authorize the said Mahende, Director of the plaintiff company to be signatory of the bids of the tenders of Mombo Irrigation Scheme and Lekitatu Irrigation Scheme. It was alleged that the original was in the hands of the Ministry of Agriculture to which it was given during the tendering process some fifteen years back, hence the prayer to tender its copy.

The prayer was strenuously objected by Mr. Mbamba, learned counsel for the defendant stating that the document was inadmissible in terms of section 67 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (hereinafter "the Evidence Act"). Mr. Mbamba argued with some force that the section dictates, *inter alia*, that secondary evidence may be admitted when the original is lost or cannot be found.

The evidence which is a the centre of controversy in this instance is a photocopy which is certainly secondary evidence. Admissibility of secondary evidence is governed by section 67 of the Evidence Act. For easy reference, I reproduce the section as under:

> "(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases–
>
> (a) when the original is shown or appears to be in the possession or power of–
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> (i) the person against whom the document is sought to be proved;
>
> (ii) a person out of reach of, or not subject to, the process of the court; or
>
> (iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be

admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 83;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1) any secondary evidence of the contents of the document is admissible.

(3) In the case mentioned in paragraph (b) of subsection (1) the written admission is admissible.

(4) In the cases mentioned in paragraphs (e) and (f) of subsection (l), a certified copy of the document, but no other kind of secondary evidence, is admissible.

(5) In the case mentioned in paragraph (g) of subsection (1) evidence may be given as to the general result of the accounts or documents by any person who has examined them and who is skilled in the examination of such accounts or documents."

I have quoted *in extenso* the section in order to see whether the present situation fits in anywhere in the provision. In the instant case, the evidence sought to be tendered is, as already alluded to above, secondary evidence. The reason unveiled by the plaintiff why they have opted that course is that the original was tendered to and is in the hands of the Ministry of Agriculture. Nothing has been stated if the original is not available. It is not even stated that persons from the Ministry will not be available. The document is a photocopy which is not even certified. It is the law, as was held in ***Amiroonnissa Vs Abedoonnissa***, 23 WR 208, that:

"Before a party is entitled to give other secondary evidence of the contents of the original, the non-production of the original must be satisfactorily accounted for".

[Referred to at p. 1437 **Sarkar, Law of Evidence**, 17th Edition, Reprint 2011].

In the case at hand, the non-production of the original of the document intended to be tendered has, in my view, not sufficiently been accounted for. That apart, the document is not even certified. I wish to emphasize here that even if the document was certified, it still would be inadmissible for lack of proper foundation of it admissibility in evidence. It has been held that where no foundation is laid in giving secondary evidence certified copies as inadmissible - see ***Roman Catholic Mission Vs S, A*** 1966 SC 1457 referred to at the same page of **Sarkar, Law of Evidence** (supra).

In sum, no sufficient explanation falling within the ambit of section 67 of the Evidence Act has been given to warrant this court admit the uncertified photocopy of the document intended to be tendered. It is for these reasons I find the objection by Mr. Mbamba, learned counsel to be rich in merit and accordingly sustain the same.

Order accordingly.

DATED at DAR ES SALAAM this 17th day of June, 2015.

J. C. M. MWAMBEGELE
JUDGE