IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 19 OF 2014

PUMA ENERGY TANZANIA LTD ..... PLAINTIFF

VERSUS

SPEC-CHECK ENTERPRISES LTD ..... DEFENDANT

14th December, 2015 & 2nd June, 2016

JUDGEMENT

MWAMBEGELE, J.:

The plaintiff Puma Energy Tanzania Limited filed this suit on 28.02.2014 against the defendant Spec-Check Enterprise Limited claiming for the following reliefs:

(a) delivery of 177,327 litres of diesel product and 232,035 litres of HFO product;

(b) In the alternative to (a) above, payment of the sum of Tshs. 280,313,019/97 on account of the diesel product and Tshs. 286,278,237/82 on account of HFO product;

(c) Interest on (b) above at commercial rate from 15.06.2010 which is the date of conversion to the date of judgment;

(d) Interest on the decretal amount at the court's rate from the date of judgment until payment in full;

(e) General damages to be assessed by the court for the conversion;

(f) Costs of the suit; and

(g) Any other relief which this honourable court may deem just to grant in favour of the plaintiff.

This case proceeded *exparte*. It was heard on 27.10.2015. The matter proceeded *exparte* after the defendant failed to file the witnesses' statements and having unsuccessfully applied for extension of time to file them. It was Ms. Linda Bosco, learned counsel, who appeared for the plaintiff at the hearing. Only one witness testified in support of the case – Mr. Erick Msamati. He testified as PW1. This witness was a Human Resources Manager of the plaintiff company. His testimony was preceded by his statement being filed earlier. The same was admitted at the hearing as his examination-in-chief and marked as PWS1 in terms of rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

According to the plaint, the claim emanates from a distributorship agreement for the consignment of stock fuel service at its Kilombero Sugar Factory and alliance One Morogoro Depots. It is stated that among the terms of the agreement were that the defendant could prepare and issue an invoice to the buyers and send a copy to the plaintiff on the basis of which the latter could demand payment from the buyer. Further that the defendant would be liable for the loss proved to be as a result of negligence or theft. Further that following an audit conduct sometimes in March and April, 2011, it was discovered that a total of 177,327 litres of diesel and 231,035 litres of heavy fuel had left the tanks from Kilombero Sugar Factory and Alliance One Depots respectively without issuing their respective invoices and instead cancelled

invoices were issued to mislead the plaintiff that fuel never left the tanks at Kilombero Sugar Factory depot. For Alliance one fuel, it is stated that, the previously issued invoices were issued to account for the fuel that were issued.

As a result, it is stated in the plaint, the plaintiff suffered loss and damage to the tune of 286,278,237 invoice value for the fuel. It is pleaded also alternatively that on account of conversion, the said fuel from the said depots were delivered to unknown persons without invoicing them per the agreement. That it suffered loss and damage for the value of fuel which was Tshs. 566,591,257/79

In its defence, the defendant denies the claim, putting that it never entered the contract with the plaintiff but with BP Tanzania who used to conduct daily stock movement summary, weekly physical stock balance report, monthly physical stock balance, three months audit report and yearly stock report and as such it could not take a week without discovering any loss. That the plaintiff could not have paid the commission without receiving payment from the defendant and therefore there was no such loss.

By way of counterclaim, it claimed for payment of an amount to the tune of Tshs. 279, 790,137/01 for distributorship services rendered between July, 2011 and May, 2013 to BP Tanzania. It claims further that by reason of delay to pay such commission, disturbance and inconvenience, it suffered damages and hence due to such failure to pay the same it suffered economic and financial loss due to failure to use the said money for other projects. It was on the above grounds that it counter-prayed for:

a) Payment of the sum of Tshs. 279,790,137/01 (say Tanzania Shillings Two Hundred Seventy Nine Seven Hundred Ninety One Hundred Thirty Seven One Cent only) being the defendant commission from July 2011 to May 2013;
b) Interest on (a) at commercial rate of 20% from July 2011 to the date of judgment;
c) Interest on the decretal sum from the date of judgment to the date of satisfaction of the decree;
d) General damages to be assessed by the court;
e) Costs of this suit be provided for; and
f) Any other orders or relief this Honorable Court may deem fit and just to grant.

The record shows that a reply to the written statement of defence and defence to the counterclaim were filed by the plaintiff. Therein, all allegations and claims are denied putting that if there are claims the same must be off-set from the amount claimed by her. It was also stated that the plaintiff changed the name from BP to PUMA Energy Tanzania Limited and therefore it is not true that it never entered contract with the defendant.

The record reveals further that the defendant never tendered any witness or evidence and as such the counterclaim was, on 27.10.2015, dismissed for want of prosecution. I only wish to emphasize here that in terms of the procedural rules of this court pertaining to prosecution of cases, a witness statement before oral hearing or proof of the case is of utmost essence. Further, time within which the same must be filed in court is of utmost

importance. These are some of the mechanisms that assist this court to dispense commercial justice effectively, expeditiously and fairly. Accordingly, failure to file a witness statement is tantamount to failure to prosecute or defend one's case – see: ***Barclays Bank Tanzania Limited Vs Tanzania Pharmaceutical Industries Ltd & 3 Others***, Commercial Case No. 147 of 2012, ***PUMA Energy Tanzania Ltd Vs Spec-Check Enterprises Ltd***, Consolidated Miscellaneous Commercial Causes Nos. 233 & 252 of 2014 and ***Afriscan Group(T) Limited Vs Said Msangi***, Commercial Case No. 87 of 2013 all unreported decisions of this court the last two being my rulings in which I relied upon the first decision of my brother Nchimbi, J. to buttress the position that failure to file a witness statement if tantamount to failure to prosecute or defend a case as the case may be. This is legally and logically so because it is through the witness statements that material evidence by way of examination-in-chief is introduced in the Commercial Court – see: rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. Where none is procured, it cannot be said that the case has been proved. This is the reason why the counterclaim had to be dismissed for the want of prosecution.

However, as for the defence, the plaintiff was ordered to proceed *exparte* for the defendant had denied itself audience by failure to bring witness in the prescribed time.

Therefore this case, as already stated at the beginning of this judgment, was heard *exparte*. It is also disclosed by the record that mediation was attempted but settlement was deemed impossible a fact which led to termination of such efforts on the 27.08.2014.

The plaintiff through its learned counsel had proposed and filed issues for the determination of the suit. There being no other proposed issues I will adopt the same. These are:

1. Whether BP Tanzania Limited changed its name to PUMA Energy Tanzania Limited;
2. Whether the defendant failed to issue invoices for the 177,327 litres of Diesel product and 231,035 litres of HFO product which had left the tanks worth Tshs. 280,313,019.82 on account of Diesel product which had left the tanks and Tshs. 286.278.237.82 on account of HFO product;
3. Whether there were losses of 177,327 litres of Diesel; and
4. To what reliefs are the parties entitled.

It is noteworthy that the fourth issue was on the list of the proposed issues for the counterclaim. Given its generality, it is safe to include it here since the counterclaim is no longer alive. I will accordingly deal with them in the order of their sequence.

The first issue is whether the BP Tanzania Limited changed its name to PUMA Energy Tanzania Limited. I deem this issue to be the key to this matter. This is so because the defendant, through its written statement of defence can be said to dispute the *locus standi* of the plaintiff to sue under the said Distributorship Agreement. This fact is clearly discernible throughout its pleadings, particularly paragraph 2 of its defence where it states partly that:

> "...the Agreement was between the defendant and BP Tanzania Limited as seen in annexture PUMA - 1 and not otherwise"

In response thereto, the plaintiff at paragraph 5 of its reply thereto stated that:

> "... BP Tanzania Limited changed its name to PUMA energy Tanzania Limited vide a Certificate of Change of Name dated December 7,2011".

Considering the fact that this was clearly a point of controversy between the parties, and the fact that the plaintiff through its counsel framed this as an issue to be determined by this court for resolving the matter between them, I am certain that the plaintiff must have been aware all along of the need to establish first its status or rather *locus standi* to sue on the said Agreement. This is a crucial requirement because under the principal of Privity to Contract, it is only parties who are privy to the contract that are obliged to perform the same (see section 40 of the Law of Contract Act, Cap. 345 of the Revised Edition, 2002). Hence, any person who is not expressly party thereto cannot legally be forced to perform such a contract and neither can he/she demand performance from the other party – see: ***D. Moshi t/a Mashoto Auto Garage versus the National insurance Corporation***, Civil Case No. 210 of 2000; an unreported decision of this court.

I must state, at this juncture, the obvious legal principal in the adversarial system of litigation that it is always the duty of the plaintiff to establish its

claims on the required standards of proof regardless of participation or otherwise of the adverse party. In other words, in the light of the elementary rule of evidence that he who alleges must prove, a plaintiff has the duty to prove the veracity of the claim on the preponderance of probabilities even in situations where he is heard *exparte* the defendant.

Coming to the issue at hand, I have gone through the testimony-in-chief of Mr. Erick Msamati PW1 which was marked PWS1 and scrutinized a total of six exhibits namely, 11 stock Cards (collectively as Exh. P1), 22 cancelled invoices (collectively as Exh. P2), the Distributorship Agreement (Exh. P3), six Stock Cards for Alliance One (Exh. P4), four copies of Tax Invoices for Alliance One (Exh. P5), and a Demand Notice (Exh. P6). These were tendered in court by one and sole witness; Mr. Erick Msamati PW1. Therein, I have found nothing pointing to the fact of change of names by the plaintiff from BP Tanzania to PUMA Energy Tanzania Limited as alleged. To be particular, on all of the documentary exhibits enumerated above, none contains the name of Puma Energy Tanzania Limited but BP, and likewise, there is no such Certificate of Change of Name which was pleaded and attached to the reply to the written statement of defence. I note the scanty reference to the fact of change of name when the said witness was being led by Ms. Linda Bosco, the learned counsel for the plaintiff, to tender the exhibits referred to in his statement (at pages 20 and 21 of the typed transcript of the proceedings) where PW1 is recorded at page 20 as saying:

> "This is the Distributorship Agreement between the then BP Tanzania which is current Puma Energy Tanzania and Speck Check",

And at page 21 he is recorded as saying:

> "Between BP Tanzania which is current Puma Energy Tanzania and Spec Check Enterprises Limited."

As they are, none of such statements has material particulars regarding the change of name, and neither was any backed-up by concrete proof. That lapse notwithstanding, those statements cannot be said to be part of PW1's testimony to warrant reliance on the same in proving this fact. This is so because, in terms of the Rules of this Court, testimony in chief is made by way of witness statement which is filed in court before the hearing. Thus, a witness is only procured in court for the purpose of cross-examination and re-examination, if any. Practice has it that before such cross-examination, a party will be given a chance to introduce in evidence the exhibits referred in the said statement. In that line, any statement made in that respect will be taken as part of the testimony only to the extent that explains the particular exhibit and not material alteration by way of addition or subtraction to the written witness statement. This is more so where the case, despite there being a witness statement by the witness for the plaintiff, proceeds *exparte* and thus without cross-examination as it was in this case.

Ms. Linda Bosco learned counsel for the plaintiff argues in her final submissions that since the copy of the certificate was attached to the Reply to the Written Statement of Defence which forms part of the proceedings the fact therefore is "apparent on the face of record". On another stride she

states that the fact is also known to the defendant since it had gone to the extent of filing a counter claim against the plaintiff in the name of PUMA Energy Tanzania Limited.

With all due respect to the learned counsel, I do not find any taste in her line of argument. This so for the reason, first, that proof of any fact in a civil case by the same being "apparent on the face of record" as she puts it is unknown in either evidence or civil procedure code.

That apart, one would wonder, if at all there was such change of names, for if that was the case, no reason was brought to the fore for failure to produce the said certificate, let alone the copy which was attached to the pleadings. For this, I hastily observe here that the learned counsel, who is not a toddler at law, should be aware, or presumed so to be, that mere attachment of annextures to the pleadings does not make the same evidence to prove what is pleaded and which it purports to support. It is settled law in this jurisdiction that annextures, unless admitted in evidence, are not part of evidence – see: ***Abdallah Abass Najim Vs Amin Ahmad Ali*** [2006] TLR 55, ***Japan International Cooperation Agency (JICA) Vs Khaki Complex Limited***, Civil Appeal No. 107 of 2004 (CAT unreported), ***Mohamed A. Issa Vs John Machela***, Civil Appeal No. 55 of 2013 (CAT unreported), and ***Shemsa Khalifa And Two Others Vs Suleman Hamed Abdalla,*** Civil Appeal No. 82 of 2012 (CAT unreported).

In ***Japan International Cooperation Agency***, for instance, the Court of Appeal, quoted with approval the decision of the High Court of India of ***S. M James and another Vs Dr. Abdul Khair*** , AIR 1961 p. 242 in which the

Indian Court was construing Order XIII rule 7 of the Indian Civil procedure Code, which is *in pari materia* with our Order XIII Rule 7 (1) and (2) of the CPC, in which it was held:

> "From Rule 7 above quoted, it is plain that documents admitted in evidence are the only documents that can legally be on the record; and, other documents cannot be on record of the suit. The language of Rule 7 shows that the document must be either placed on the record or returned to the person producing it.
>
> There is no alternative. Rule 7 (2) is explicit, and therefore, **a document not having been admitted in evidence, cannot be treated as forming part of 'the record of the suit' even though, in fact, it is found amongst the papers of the record.**"
>
> [Emphasis supplied].

It is fairly apparent from the foregoing quote, therefore, that despite the presence of the said Certificate of Change of Names in the records of this case file, the same does not form part of the record thereof. Neither is the said document or fact therein one for which this court is required to take judicial notice of, and thus, it cannot warrant reliance on the same by this court in resolving this issue of change of name by the plaintiff. To require this court to do so on the fact that it is "apparent on the face of record", as

Ms. Linda Bosco tried to impress upon the court, to my thinking, would be nothing but a misconception of the law.

And if I may add here, annextures are always for purposes of putting to notice the other party on evidence to be relied upon so as to accord the adverse party ample opportunity to defend; annextures, unless admitted, are not evidence.

And to argue this point a little bit further, assuming, for the sake of argument, that the document under discussion was part of the record, yet it would not have saved the plaintiff's day on this take. This is because, firstly, as intimated above, the attached document is a copy of the purported Certificate of Change of Name and as therefore it is secondary evidence. No reason for tendering the same or introducing the same was tendered by the learned counsel or her client. The clear presumption is that it was attached to the reply in anticipation of introducing the original at the hearing. Indeed, it defies both logic and practice that the learned counsel would seek this court to rely on the said document for its being attached thereto "as being an apparent fact of change of names" on the face of record, in sheer violation of the rules of procedure, evidence and prudence.

The fact that the said Certificate was issued to the plaintiff leads to an irrefutable inference that the same was in its custody, and therefore failure to produce the same in an *exparte* proof of the case entitles this court to draw an adverse inference against it to the effect that there was no such change of name at all.

The above notwithstanding, in my considered opinion, the mere change of name of an entity does not necessarily imply change of its structures, business processes and personnel. Hence, an assumption is that transactions, systems, structures, and personnel or records remain the same save for the name of an entity. In the present matter, the general circumstances as gleaned from the pleadings, testimony and exhibits does not suggest that the said BP Tanzania still exists as PUMA Energy Tanzania Limited. I shall demonstrate.

As intimated earlier on, failure to bring the said certificate of change of names suggests that there was none at all. Secondly, the contract having been entered during the reign of BP, it would have been expected that the personnel who at the said time were working under the said name and now working in the name of Puma Energy Tanzania Limited, particularly those who dealt with the transactions under the agreement would at least be procured in court. I have in mind personnel in the capacity of Accountants, Marketing personnel, or General Manager, who were in direct transaction during the operation of the agreement such as issuance of fuel, preparation of receipts for payments *et cetera*, were very crucial to iron out some of the doubts such as facts as to change of name of the plaintiff. To the contrary, the one and only Witness who introduced himself through the witness statement as Human Resource Manager of the plaintiff never told this court anything in particular to point out the existence of BP as Puma Energy Tanzania Limited, say at least the date of his employment so as to assume that he was well acquainted with the facts he was testifying on. It is for this reason, I think, his witness statement is nothing but a mere repetition of the plaint, or rather a copy and paste work of the same.

For the foregoing reasons, I find the first issue in the negative. Thus, there was no change of names of BP Tanzania to Puma Energy Tanzania Limited. The only immediate issue however is, if that issue is negated, what is the effect thereof to this suit? This is the question to which I now turn.

Following such finding, and on the basis of exhibit P3, it is evident that the plaintiff herein - PUMA Energy Tanzania Limited - was never a party to the said Distributorship Agreement. There being no material evidence of assignment of the same by the said BP Tanzania (assuming there was one or at least acquisition of the latter's assets if there was any), I find no basis for the plaintiff to claim under the same agreement so as to warrant grant of the prayers. If anything, the plaintiff is a stranger to the contract between BP and the defendant.

For the avoidance of doubt, I am alive to the provisions of Order I Rule 10 (1) of the CPC which are to the effect that the court, may, at any stage of the suit, order substitution of persons or addition as plaintiff where it is in doubt that the suit has been instituted in the name of wrong person through a *bonafide* mistake so as to determine the real matter in question. However, in the present suit, I am constrained to act so because, clearly the plaintiff, despite the glaring fact which was in her knowledge at all material time, that it was not a party to the said Agreement (Exh. P3) on the basis of which it is claiming, proceeded to file this suit as such.

What adds salt to the wound is the fact that the issues for determination were proposed by its learned counsel and arguments in that respect made through

the closing submissions through, it appears, the same counsel. Further, it is neither a question of joinder or non-joinder of the parties so as to bring the suit within the ambit of Order I rule 9 and save it from drowning.

I must stress here that the evidentially unsupported arguments from the bar through the closing submissions (which are not evidence) by the learned counsel that the plaintiff changed its name by virtue of operation of the law is seriously fragile and of no effect whatsoever. It is settled law in this jurisdiction that submissions are not evidence – see: ***TUICO at Mbeya Cement Co. Ltd Vs Mbeya Cement Co. Ltd and National Insurance Corporation (T) Ltd*** [2005] TLR 41 (HC), ***Morandi Rutakyamirwa Vs Petro Joseph*** [1990] TLR 49 (CA), ***VETA Vs Ghana Building Conrtractors*** Civil Case No. 198 of 1995 (unreported) and ***BATA Limited Canada Vs Bora Industries Ltd*** Commercial Case No. 76 of 2005 (unreported).

Further, to argue, as the learned counsel did in her closing submissions, that there was change of name because the defendant had gone to the extent of instituting a counterclaim against the plaintiff in the said name is nothing, in my view, but shooting in empty air. This is for the reason that even if the demised counterclaim had to be grounded on the very same Distributorship Agreement in question (Exh. P3), the same could not yield anything, for, it is clear as a sunny day from the foregone discourse that there is no privity of contract between the plaintiff and the defendant the breach of which could entitle either of them to bring an action before this court.

For what has been stated and done above, dealing with the rest of the issues would be of no essence but academic exercise in which I am not prepared to indulge today. Consequently, I proceed to dismiss this suit in its entirety. Since the same proceed ed *exparte*, I make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 2nd day of June, 2016.

J. C. M. MWAMBEGELE
JUDGE