

IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

COMMERCIAL CASE NO 30 OF 2014

BETWEEN

ATHANASIA T.MASSINDE t/a ABETI PRIMARY SCHOOL -----PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LTD -----DEFENDANT

RULING

Date of hearing :23/2/2016
Date of the Ruling;24/2/2016

SONGORO, J

On the 19/3/2014, Athanasia Masinde trading as Abeti Primary School filed a suit against the National Bank of Commerce Ltd, Defendant, claiming for payment of shs 122, 606, 380/= as compensation, after her school was unroofed by whirlwind (cyclone) when it was under insurance cover arising from the Defendant loan.

In response to the Plaintiff suit, the Defendant filed a Written Statement of Defence and opposed Plaintiff claims.

Then on the 22/6/2015 the "First Pre- Trial Conference" was conducted and on the 8/9/2015 Mediation Session was conducted and it failed.

Next, on the 8/10/2015, the suit was called before me for necessary orders with the view of fixing subsequent steps and Mr Fred Sanga Learned Advocate for the Plaintiff reported that, the Ms. Athanasia Masinde the Plaintiff have not filed Witness Statement because she was sick.

The Counsel then informed the court that, Rule 49(2) of the High Court (Commercial Division Procedure) Rule GN 250 of 2012 there are bound to file Witness Statement but the have failed to do so. He prayed for more 7 days to file the Witness Statement

In response to the oral application to file Witness Statement, Mr, William Mang`era Learned Advocate from Plaintiff`s bank opposed the application and argued that, the Learned Advocate of the Plaintiff did not adduce any evidence to support his assertion that, his client is sick. In view of the above, he pressed for dismissal of objection.

The court on the same day of 8/9/2015 uphold the objection of the Defendant bank and found that, the Plaintiff` Counsel did not adduce credible evidence if his client was sick. So the court decline to extend time within which Defendant may file a Witness statement.

Then on 28/10/2015 the suit was again called for Final Pre-Trial Conference and the suit was fixed for hearing on the 23/2/2016.

Then on the 23/2/2016 when the suit was called for hearing, again Mr. Fred Sanga made an oral application to file Witness Statement of his witness on the ground that, they delay to file it. This time Mr. William Mang`era reminded the court, and Mr Sanga that, similar application was made on the 8/9/2015 and it was rejected by the court.

He further prayed for rejection of the Application for extension of time to file a witness statement, even went further and prayed for dismissal of the suit on the ground that, there is no witness statement which is an "examination in chief" to support the Plaintiff suit.

The Counsel pointed out to the court that, the consequences of none filing of a witness statement by the Plaintiff who is the only witness calls for dismiss the suit.

To substantiate his argument Mr. William refer the court to its own decision of LTA Construction (T) Limited 3 others Versus Resolute Tanzania Limited decision Civil Application No 177 of 2014 and produced a copy of the said decision.

The counsel then clarified that, in the LTA case the court observed that, Rule 49(2) of the High Court (Commercial Procedure) Rules, GN 250 of 2012, states Witness Statement shall be filed within 7 days

from the dated of completion of Mediation. He the quoted a decision of this court in the LTA Case cited above which emphasis that, in any proceedings commenced by the plaint, evidence in chief shall be given by a statement on oath or affirmation. Failure, to file a statement in 7 day it amount to failure to prosecute the suit.

Mr. William insisted that, since no witness statement was filed, court is bound to dismiss the suit on the ground that, the Plaintiff has failed to prosecute his own case

I have considered the objection raised, and reviewed the court record, and find the Mediation Session was conducted on the 8/9/2015 and it failed on that, day. So from 8/9/2015 a date which mediation failed, the Plaintiff had 7 days to file his witness statement, which expired on or about 16/9/2015. But it turn out the Witness statement was not filed

Then 8/10/2015, the Plaintiff through Mr. Fred Sanga, Learned Advocate applied for more time to file her witness statement on the ground that, the delay to file it was caused by sickness. But the application was rejected because the Plaintiff and even his did not advance any evidence which proved she was sick.

Then on the 23/2/2016 when suit was called for hearing, it turned out that, the Plaintiff `s is the only witness, and did she not file her

witness statement which is her "examination in chief" in support of her claims in the plaint.

Now the issue before the court for determination is whether or not failure by the Plaintiff who is the sole witness in her case, to file Witness statement may lead to dismissal of the suit as the Defendant's Counsel Claim.

I have perused the decision in the case of LTA Construction (T) Limited 3 others Versus Resolute Tanzania Limited decision Civil Application No 177 of 2014 referred to me, and Rule 49 (1) of the High Court (Commercial Procedure) Rules, GN 250 of 2012, and find they insist that, the suit commenced by the Plaintiff, "the examination in chief" shall be given in a form of "*witness statement*" made under oath or affirmation.

In deed the Rule 49(1) of GN 250 of 2012 states and I quote;

"In any proceedings commenced by the Plaintiff, evidence in chief shall be given by a statement on oath or affirmation."

Also, in the Ruling of LTA LTA Construction (T) Limited 3 others Versus Resolute Tanzania Limited Commercial Application No 177 of 2014 at page 14 of typed Judgment, Hon Nchimbi J stated and decided that, none filing of "witness statement" amount to failure to prosecute the case and there no any "evidence in chief" on record.

Honestly I agree with the finding and decision of this court in the above cited decision of LTA Construction (T) Limited 3 others Versus Resolute Tanzania Limited decision Civil Application No 177 of 2014 that, once witness statement is not filed, there is no evidence in chief of the said witness.

Reverting back to the facts of the present suit, I find no witness statement which is evidence in chief of Ms. Athanasia Masinde which was filed 7 days after mediation session.

Since, the Plaintiff is the sole witness from the Plaintiff side, her failure to file a "Witness Statement" means there is no examination in chief to support her claim in the Plaint and amounts to failure to prosecute the suit.

Consequently, for reasons explained above, I hereby dismiss the suit with costs in favour of the Defendant. The right of appeal is fully explained to the parties.

Dated at Dar es Salaam this 24th day of February, 2016



H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 24th day of February 2016




H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Fred Sanga, Learned Advocate for the Plaintiff and Plaintiff herself and presence of Mr. William Mang`era, Learned Advocate for the Defendant