

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

COMMERCIAL CASE NO. 98 OF 2017

UBL BANK (TANZANIA) LIMITED..... PLAINTIFF

Versus

1. PROPERTY INVESTMENTS LTD 1ST DEFENDANT

2. SABRY ALLY SAAD 2ND DEFENDANT

3. MUSLIM SHIVJI KARIM 3RD DEFENDANT

RULING

MRUMA, J:

This is a ruling on a prayer for adjournment of hearing of the defence case on the ground that the Defendant's sole witness, Mr. Muslim Shivji Karim who is also the 3rd Defendant and Director of the 1st Defendant's Company is sick and is currently attending medical treatment in the UK.

The prayer has met stiff resistance from Mr. Dilip Kesaria, counsel for Plaintiff on the following grounds.

Firstly Mr. Kesaria has contended that this is a backlog case and it has been cause listed in a special clearance session with a judge specifically brought to the station to attend it amongst other similar cases, but on the eve of the hearing of the case, that is on 26/3/2019 the

3rd Defendant who is also the Director of the 1st Defendant and sole witness for the Defendants left the country purportedly to catch up with his Hospital appointment in UK which was scheduled for 1st April 2019 - Six days from the date the matter was scheduled for hearing.

Secondly Mr. Kesaria has contended when the matter was adjourned for defence hearing today the court made an order that in the event the said Defendant cum witness will not be back to the country, arrangement should be made for him to testify through video link while in UK. However, that order had not been complied with and further adjournment is being sought on the ground that the witness is due for surgery on 9th April 2019 which is another five (5) days from today and no reason has been furnished for his inability to give his testimony through video link and no application has been made for leave to substitute his evidence as he is only one of the Directors of the 1st Defendant's Company and therefore other directors and/or officers of the company could be brought in and testify for the company.

Mr. Kesaria fears that there may be endless adjournments of the matter unless this court interferes and make an order under Rule (2) of Rule 56 of the High Court (Commercial Division) Procedure Rule 2012 to the effect that the witness statement of this witness be retained for the use by the court instead of striking it out. The learned counsel referred the court to its own decision in Commercial Case **No. 99 of 2015 between Stanbic Bank (T) Ltd Versus NAM Enterprises and 4 Others** where this court (Songoro J, as he then was) retained a witness statement of a witness who was absent and court had no specific date from the

Defendants as to when the witness would be available for cross-examination and re-examination. The statement was retained and considered by the court in line with Rule 56 (1) and (2) of the High Court (Commercial Division) Procedure Rules 2012.

In his rejoinder Mr. Ashiru Lugwisa argued the court in making its ruling whether to grant the adjournment sought or not to take into consideration the fact that sickness is exclusively under the control of Almighty God therefore the witness had no control of it all. He said that the 3rd Defendant had been diagnosed with breathing and chest problems according to yesterday's (ie 3/4/2019) medical report. He said that it is because of this health condition that this witness cannot stand cross-examination today.

As regards to bringing another witness, the learned counsel said that the option could not work because the second Defendant who is also the Director of the 1st Defendant's company is the son of the 3rd Defendant and has accompanied him in the UK trip. The learned counsel insisted that even though the surgery is scheduled for 9/4/2019, but due to his ill health the witness cannot testify whether by coming to the court or through video link.

Let me start by saying that in terms of Rule 49 (1) of the High court (Commercial Division) Procedure Rules 2012 in all proceedings commenced by plaintiff, evidence in chief is given by a statement on oath or affirmation. Under Rule 56 (1) of the said Rules a party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross

examination. In other words, in all proceedings under the Rules witnesses are called for purposes of cross-examination only. cross examination of witness is a procedure governed by the Evidence Act (Cap 6 RE 2002). Under Section 146 (1) of the Evidence Act the examination of a witness by the party who calls him is called his examination in chief while under Section 146 (2) of the same Act examination of a witness by the adverse party is called his cross-examination. Pursuant to Section 147 (1) of the Evidence Act, Examination in chief of a witness is mandatory but cross examination and re-examination of that witness is optional. The law says:

147 (1) witnesses shall be first examined in chief, then (if the adverse party so desires) cross examine them”.

In the case at hand we have on record the witness statement of Muslim Shivji Karim who is the only defence witness. This statement is his evidence in chief [see Stannic Bank case (Supra)] and it is as if it was given through examination in chief of that witness. Thus, filing witness statement is good as giving evidence in chief by objecting to the adjournment and requesting the court to retain the statement so that it may be considered in line with Rule 56 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012, counsel for the Plaintiff is by implication do forgo the right to cross examine the witness which is optional anyway. Similarly by giving up his right to cross-examine and requesting the court to retain the statement and consider it in its judgment the Plaintiff forgo her right to object to the admission of all exhibits which have been referred to in the witness statement.

Thus, save for the lesser weight which may be attached to the evidence pursuant to Rule 56 (3) of the High Court (Commercial Division) Procedure Rules, I don't see how a party whose witness has failed to appear for cross examination can be prejudiced if that witness statement is admitted for consideration by the court. To the contrary, I would think that cross examination may taint the veracity of the witness's evidence in chief (ie witness statement), shake his credit and/or injure his character, things which may prejudice his case. In other words, failure to appear for cross examination may act as a blessing in disguise for the Defendant in this case.

That said, I refuse to grant the adjournment. I find that the fact that no specific date has been suggested by the Defendant's counsel as to when this witness will be available for cross examination and it is not known when or how many days he will take recover after surgery are special and exceptional reason, within the ambit of sub-rule (2) of Rule 56 of the High Court (Commercial Division) Procedure Rules.



A. R. Mruma

Judge

4/4/2019