

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT ARUSHA**

**COMMERCIAL CASE NO. 3 OF 2019**

**IVEE INFUSIONS EPZ LIMITED .....PLAINTIFF**

**VERSUS**

**MAK MEDICS LIMITED.....DEFENDANT**

**Date of Last Order: 01/07/2020**

**Date of Ruling: 08/07/2020**

**R U L I N G.**

**MAGOIGA, J.**

This ruling is in respect of the preliminary objection on point of law raised by Mr. Boniface Joseph, learned advocate for the defendant to the effect that, the plaintiff's witness statement filed in this court contravened the mandatory provisions of Rules 49(1) and 50(a)-(i) of the High Court (Commercial Division) Procedure Rules 2012, G.N. 250 as amended by High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. 107 of 2019. On that predicament, Mr. Joseph prayed that, the preliminary objection be upheld and this suit be dismissed with costs for want of prosecution.

In order to have better understanding of the present ruling, I find it apt to narrate briefly the background facts leading to this ruling.

On 8<sup>th</sup> March 2019 the plaintiff filed in this court the instant suit against the defendant for judgement and decree for payment of outstanding amount of (US\$.29,999.30) being unpaid invoices by the defendant, interests, costs and any other reliefs this honourable court may deem fit and just to grant. The facts go that, despite demand notice, the defendant neglected, refused and failed to pay the amount outstanding, hence this suit. Facts go further that, after pleadings were completed, the suit passed through First Scheduling Conference Order, consequently, upon which, mediation was conducted but failed. Usually, this file was placed back for further orders whereby on 5<sup>th</sup> August 2019 for Final Pre-Trial Conference was conducted. On that appointed day, among others, parties were ordered and directed to file their respective witness statements within 14 days and come to court for cross examination and tendering of documents. According to the record of this suit, both parties complied with the order and direction of the Court by filing their respective witness statements are required under Rule 49(1) and 50 of the Rules. While the suit was pending for hearing, Mr. Jospeh, learned advocate for the defendant, on 11<sup>th</sup> February 2020, formally raised

and filed a preliminary objection on the competency of the witness statement filed by plaintiff's intended witness, one, SUNILCHANDRA V. SHAH on 16<sup>th</sup> August, 2019, to the effect that same does not conform to the legal mandatory requirement of Rules 49(1) and 50(1)(a)-(i) of the High Court (Commercial Division) Procedure Rules ,2012 as amended by G.N. 107 OF 201, hence, this ruling.

The plaintiff at all material time has been enjoying the legal services of Mr. George Mwiga, learned advocate. And, the defendant, has, as well been enjoying the legal services of Mr. Boniface Joseph, learned advocate.

When this suit was called for hearing of the preliminary objection, Mr. Mwiga, learned advocate for the plaintiff, without much ado, told the court that, though the preliminary objection raised was based on form and not the content but he conceded that, same is valid. In the circumstances, the learned advocate for the plaintiff prayed that, since in the notice of objection no prayer was made, then, he prayed that the said witness statement be struck out with no order as to costs.

On the other adversary part, Mr. Joseph submitted that, he commended the step taken by the plaintiff's learned counsel for conceding to

preliminary objection, but quickly pointed out that, the arguments that the objection was based on the form and not the content and the prayer to be struck out the witness statement without an order to costs are misplaced. Mr. Joseph went on to argue that his objection was to challenge the legality and competence of the witness statement which was filed on 16<sup>th</sup> August 2019, for contravening the mandatory requirement of Rules 49 (1) and 50 (1)(a)-(i) of the High Court (Commercial Division) Rules 2012, as amended GN 107 of 2019. According to Mr. Joseph, since the objection has been conceded, then, upon the court striking out the witness statement, the obvious consequence is that no witness for the plaintiff and urged this court to dismiss the suit with costs. Mr. Joseph strongly submitted that, in the absence of witness statement, which is, evidence in chief, then, consequently, the whole suit has to collapse because it is as good as no evidence in chief for which this court can determine the matter. To bolt up his stance, the learned advocate for the defendant cited the case of **Puma Energy Tanzania Limited Vs. Spec Check Enterprises Limited Case No. 19 of 2014(HC) DSM(Unreported)** whereby the position was echoed.

Guided by the above judicial pronouncement, it was the learned advocate for the defendant's submission that, since the learned advocate for the plaintiff has conceded to preliminary objection that there is no proper witness statement, then, the effect is that they have failed to prosecute their case and by virtue of decision cited above the suit is to be dismissed for want of prosecution. Further cementing his point, Mr. Joseph cited another case of **NIC Bank Tanzania Limited v. Hirji Abdallah Kapikulila, Misc. Commercial Application No. 253 of 2017**(HC) DSM (Unreported) in which this court faced with similar situation dismissed the suit for failure to file witness statement.

Based on the above submissions and cited cases, Mr. Joseph, learned advocate for the defendant humbly prayed that this court be pleased to uphold the preliminary objection and went on to dismissed the suit with costs.

Indeed and without much ado, the filed witness statement for the plaintiff in this suit is incurably defective, as readily conceded by the learned advocate for the plaintiff. Both learned advocates for parties are at one that, the consequence is to strike out the witness statement but with different views, that without costs or with costs respectively.

This court, without much ado, after listening to the legal minds for the parties, hereby without much reservations, do hereby strike out the witness statement by Mr. SUNILCHANDRA V. SHAH for the plaintiff for obviously contravening the mandatory provisions of Rules 49(1) and 50(1) (a)- (i) of G.N. 250 of 2012, as amended by G.N. 107 of 2019.

The next question is, what is the fate of this suit, in the absence of the witness statement? It is no gain saying in this court that, under Rule 49(1) of the Rules, in any proceedings commenced by a plaintiff, as in the present suit, the evidence in chief shall be given by a witness statement on oath or affirmation. It is the considered opinion of this court, therefore, that, in terms of the Rule 49(1) read together with section 53 (2) of the Interpretation of Laws Act, [Cap 1 R. E. 2002] the word '**shall**' used in Rule 49(1) of the Rules, connotes a mandatory duty on the parties to file witness statements, and hence, failure to comply with Rule 49(1) for failure to file witness statement is tantamount to failure to procure a witness in court to give evidence to prove or to disprove the case.

In the case **Godwin Ndewes and Karoli Ishengoma Vs. Tanzania Audit Corporation [1995] TLR 200** the Court held that, Rules of the Court must prima facie be obeyed failure to obey there are consequences.

The consequences of a party to the proceedings who has failed to prosecute his/her case are obvious and I need not cite any law or case law but are to dismiss the suit or counter claim.

As noted above, the law that governs production of evidence in chief in this court is by way of witness statement to be filed by the respective parties in compliance of the Rules. In the case of **Barclays Bank (T) Limited V. Tanzania Pharmaceutical Industries and 3 others, Commercial Case No. 147 of 2012 (HC) DSM(Unreported)** it was emphatically held, among others, that requirement of the filing a proper witness statement is mandatory.

Upon this court stricken out the witness statement above, it is obvious no evidence at all to consider the merits of the suit for the plaintiff, and as such no way, this suit can succeed in the absence of the witness statement. Equally I am guided by the holding in the case of **Afrisca Group (T) Limited (supra)** in which it was held, among others, that:

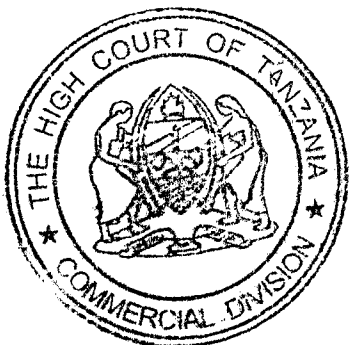
**"... it follows that, any party that fails to file the same has no back door through which he can testify more so where such**

**move is deemed to ruin the statement of the witnesses of the adverse party.”**

In the instant suit, therefore, as no dispute, the filed witness statement was as found hereinabove to be incurably defective, and upon same stricken out, and guided by the judicial pronouncements of my learned Judges (as they were then) cited by Mr. Joseph and which decisions I find no reasons to differ from as to the consequences of want of witness statement in a suit in Commercial Court, I am constrained to find and hold that the instant suit for the plaintiff for reasons demonstrated above is left with no legal legs to stand. And consequently I hereby proceed to dismiss suit for failure take necessary action to enhance prosecution to proceed with costs.

It's so ordered.

Dated at Arusha this 08<sup>th</sup> day of July, 2020.



  
**S.M. MAGOIGA**

**JUDGE**

**08/07/2020**