IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CASE NO. 83 OF 2018

NMB BANK PLC .....PLAINTIFF

VS

QUALITY MOTORS LTD ..... 1st DEFENDANT
KANIZ MANJI .....2nd DEFENDANT
YUSUF MANJI.....3rd DEFENDANT
QUALITY GROUP ENGINEERING LTD.....4th DEFENDANT
QUALITY LOGISTIC CO. LTD.....5th DEFENDANT
QUALITY GROUP PLANT &EQUIPMENT LTD ..6th DEFENDANT
QUALITY GROUP LTD.....7th DEFENDANT

Last Order, 28/07/2020.
Ruling, 18/09/2020.

RULING

NANGELA, J.:

Is it appropriate to strike out a witness statement and dismiss a case on the basis of an objection filed belatedly at a time when such witness statement has been adopted as the testimony in chief of the witness, exhibits tendered, witness cross-examined and the Plaintiff's case marked closed, paving way for the defence case?

This ruling is essentially set to respond to that question and other pertinent issues regarding witness statements filed pursuant to the requirements of Rules 49 and 50 of the *High Court (Commercial Division) Procedure Rules 2012* (as amended by GN.No.106 of 2019).

The ruling arises from a claim filed by the Plaintiff against the Defendants, jointly and severally, seeking for the following:

(i) A declaratory order that, the Defendants are in breach of loan facilities.

(ii) Payment of the sum of **TZS 25,090, 117,083.64/=** and a total of **US$ 17,697,729.54, being the outstanding** principal under the loan facilities as of 6th September 2017.

(iii) Payment of interest on prayer (ii) above at the prevailing commercial bank rate from 6th September 2017 to the date of judgement;

(iv) Payment of interest on the decretal sum at Court rate of 7% per annum, from the date of judgement to the date of satisfaction of the decree.

(v) General damages as may be assessed by this Honourable Court;

(vi) Costs of the suit and interest thereon at Court rate of 7% from the date of judgement to the date of payment.

(vii) Any other relief that this honourable court may deem just and fit to grant.

The facts of the case are brief. On diverse dates, 19th May 2015, 9th March 2016 and 16th May 2017, the Plaintiff made available to the 1st Defendant (**the Borrower**) Term Loans and Overdraft (composite and letter of Credit) (**the Facilities**) totalling **USD 15, 200, 000.00** and **TZS 34,000,000,000.00/-**. Each term facility was payable within a period of 60

months from the first day of drawdowns. The overdraft facilities were payable within 12 months subject to renewal.

In terms of security, all facilities were secured by personal guarantees of the 2nd and 3rd Defendants, as well as corporate guarantees of the 4th, 5th, 6th and the 7th Defendants. An additional security was provided in a form of legal mortgage over a landed property under a Certificate of Title **No.50141, LO.No.177217 Plot No.189/1 Nyerere Road,** registered in the name of the 7th Defendant.

From 19th May 2015 onwards, the 1st Defendant (**Borrower**) accessed and enjoyed the loan facilities. The unfortunate part, however, is that, the Borrower is alleged to have breached the terms and conditions of the Facilities. Despite several demand notices, the Defendants are alleged to have failed to honour their obligations under the facilities' arrangements, hence, forcing the Plaintiff to knock at the doors of this Court to enforce its rights.

On 18th March 2020, the case was scheduled for its hearing. The parties attended the hearing while being represented by their learned counsels. Mr. William Mang'ena and Mr. Evarist Kameja, learned counsels, appeared for the Plaintiff while Mr. Yassini Maka appeared for the Defendants. The hearing of the Plaintiff's case went on smoothly, and the Plaintiff's case came to its closure to pave way for the defence case to open. This Court fixed the dated of the hearing of the defence case to be the 23rd March 2020.

On the material date, however, the case could not proceed following a prayer by Mr. Maka to have the matter adjourned because his only witness was unavailable having resigned from his employment. He stated that the witness has been traced and was willing to testify but he was not available

till 31st March 2020. His prayer to have the case adjourned was not objected to by the Plaintiff's counsel.

In view of that, I granted it and re-scheduled the hearing date to 16th April 2020. Unfortunately, on the hearing date, the presiding judge was indisposed and the matter was rescheduled to 27th May 2020 at 9.00 am. On the material date, Mr. Mang'ena and Mr. Kameja appeared for the Plaintiff but Mr. Maka was absent, his briefs being held by Ms. Lema, but with no instruction to proceed. Mr. Maka was before another judge in Mtwara for a hearing. In view of that, Mr. Mang'ena applied for extension of the life span of this case to November 2020, hoping that by the time the matter will be finalised. The hearing of the case was thereby adjourned till 28th July 2020.

On 28th July 2020, the date set for the hearing of defence case, even before the defence case opened, the Court was faced with a preliminary objection filed by the learned counsel for the Defendants. On that material date, the Plaintiff enjoyed the services of Mr. Evarist Kameja and Mr. Baraka Msana, both learned counsels, while Mr. Yassin Maka continued to represent the Defendants. Mr Maka informed the Court that, indeed there was, filed in this Court, a preliminary objection challenging the legality of the Plaintiff's witness statement which was filed in this Court. He requested the Court to consider the objection first before proceeding with the hearing of the case.

Having noticed the objection filed in this case by Mr. Maka, this Court called upon the parties to argue the point of law raised by the Defendants by way of written submissions. The schedule of filing of the written submissions was as follows:

1. The defendants' written submission was to be filed on or before 11th August 2020.
2. The Plaintiff to file its written submission on or before 25th August 2020.

3. Rejoinder submissions, if any, be filed on or before 1st September 2020.
4. Ruling on 18th September 2020 at 9.30.

The parties filed their written submissions duly as earlier directed by this Court on 28th July 2020. I will now examine their written submissions before I come to the analysis of each argument raised in support of or against the point of law which the Defendants have jointly raised in this case.

In his objection, Mr Maka has challenged the legality of the Witness Statement of Mr. Stephen Chuwalo which was filed in this Court on 06th November 2019. His main contention is that:

> "the witness statement of Mr. Stephen Chuwalo is incurably defective for want of an "Oath."

He referred to this Court the case of *EPZ Limited v MAK Medics Limited, Commercial Case No.3 of 2019, High Court of Tanzania (Commercial Division), at Arusha, delivered on 08th day of July 2020, (Magoiga, J)".*

On the basis of the above decision and the objection so filed, Mr. Maka is imploring this Court to strike out Mr. Chuwalo's witness statement, expunge from its record all exhibits tendered and the record of cross-examination carried out and recorded by the Court in respect of Mr. Chuwalo when he appeared in this Court on 18th March 2020 and dismiss the case filed by the Plaintiff against the defendants.

One thing notable from Mr. Maka's submission, from its outset, is his acknowledgement of the fact that, the issue he has raised in this Court, attracts this Court's attention at the a time when the witness (Mr. Chuwalo (PW1)) had already passed the stage or process of tendering exhibits and has been cross-examined. Indeed, so far even as the Plaintiff's case has been closed and the witness discharged from his oath, which was put on him

when he appeared before the Court. I will come to this point during my analysis of the submissions made by the parties.

Mr. Maka has submitted that, as a matter of fact, the defaulting witness statement is without any dispute made with no oath or affirmation. Quoting from the Witness statement, it commences by stating as follows:

> "I Stephen Chuwalo, and adult Christian, male of Ohio Street/Ali Hassan Mwinyi, P. O. Box 9213, Dar-es-Salaam, Tanzania, state as follows. ..."

Mr. Maka argues that, at the foot of the witness statement, there is no part which shows that the witness took an oath before a Commissioner for oaths, and neither is there shown a place where the oath was taken is mentioned nor a date to that effect. He argues that there is no information regarding whether the Commissioner for oaths knew the witness personally or he was introduced by another person, or even a date when the testimony was witnessed. Mr. Maka argues that, there is, however, a part which has been attested by Advocate Augustine Kusalika as portrayed below:

> *"BEFORE ME:*
> *Name: Augustine Kusalika*
> *Signature: (He signed)*
> *Postal Address:P.O.Box 764, Dar-Es-Salaam.*
> *Qualification: Advocate.*

Mr. Maka contended that the above attestation by Advocate Kusalika was insufficient to show that the document was made and/or intended to be made under oath or affirmation. He argues that, that part as shown above, can appear on any document, be it a contract for sale/purchase, a will, a mortgage, lease, employment contracts or pass port applications. He submitted to the Court that, the case before the Court is about a defective witness statement which was not made under oath; however, the day when

the witness appeared in Court for cross examination, he took an oral oath and adopted the witness statement.

For that matter, the issue which Mr. Maka posed for this Court to articulate is whether the act of taking an oral oath and adopt the witness statement cures the defectiveness of the said witness statement. Secondly, whether, given the fact that the Plaintiff's case is already closed, that makes the preliminary objection an afterthought and, hence, makes the defectiveness or illegality of the witness statement unchallengeable. Mr. Maka proceeded to address the above two issues in his submissions as follows:

In his submission, Mr. Maka argued that, there is a clear line of distinction between examination in chief and cross-examination before this Court. Setting the legal position, Mr. Maka argued that, examination in-chief in this Court is made upon filing a proper filing of a proper witness statement. He submitted that, examination-in –chief, is a mandatory requirement as per section 147(1) of the Law of Evidence Act, Cap.6 [R.E. 2019], and, in this Court, it is made by way of filing a Witness Statement in accordance with Rule 50 (1) of the *High Court (Commercial Division) Procedure Rules 2012* (as amended by rule 26 of the *High Court (Commercial Division) Procedure (amendment) Rules 2019.* He contended that, under section 147 of Evidence Act, Cap.6 [R.E 2019] the law provides that:

> *"Witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined..."*

Mr. Maka argued, that, cross-examination is an optional right to be exercised if a party so desires. The cross-examination is only conducted after examination in chief has been properly made and the witness (if he so desires) has tendered evidences, argued Mr. Maka. To cement his submissions, Mr. Maka referred this Court to Rule 56 (3) of the *High Court*

(Commercial Division) Procedure Rules 2012 and the case of **UBL Bank Tanzania Ltd v Property Investment Ltd and 2 Others, Comm. Case No.98 of 2017, (Unreported)** (at page 3-4), also **Sharaf Shipping Agency Limited v Barclays Bank Tanzania Ltd and Habib African Bank Ltd, Comm. Case No.15 of 2014, (unreported)** (at page 5-6).

Regarding the issue whether the witness statement made without affirmation or oath is curable if the witness adopts it under an oath when appearing for cross-examination, Mr. Maka submitted that, this issue may as well attract consideration regarding the applicability of the overriding objective principle. In his view, a statement made under no oath or affirmation cannot presumably be cured when the witness adopts it as his testimony in-chief while under an oral oath during cross-examination. He argued that, the requirement of an oath is a mandatory procedural requirement and even the Oxygen principle cannot be blindly invoked in disregard of the rules of procedure couched in mandatory terms. He called to his aid the Court of Appeal decision in the case of **PUMA Energy Tanzania Ltd v Ruby Roads (T) Ltd, Civil Appeal No.3 of 2018, (CAT) at DSM (unreported)**. Referring to that decision, he contended that even if the Court was considering different issues it made it clear why litigants must comply with mandatory rules of procedure. He submitted, therefore, that, the overriding objective principle does not apply where there is a non-compliance with the mandatory rules of procedure. Indeed that is a legal position which has received authoritative approval of the Court of Appeal in a number of cases.

Mr. Maka concluded that, since the Witness statement was not made under oath as required under Rule 50(1) of the *High Court (Commercial Division) Procedure Rules 2012* (as amended), the oxygen principle cannot as

well be relied upon to presume that the witness statement was proper. He, therefore, implored this Court to proceed as it did in the case of **EPZ Limited v MAK Medics Limited, Commercial Case No.3 of 2019, High Court of Tanzania (Commercial Division),** at Arusha, delivered on 08th day of July 2020, **(Magoiga, J)** and struck out the witness statement, expunge from the Court the record of cross-examination and tendering of exhibits and dismiss the suit with costs.

In response to the Defendants written submissions, the Plaintiff submitted that the Defendants have erred in their interpretation of the ruling of this Court issued in the **EPZ Limited's case (supra)** as well as the provisions of the law. The Plaintiff's learned counsel contended that, in the said ruling, the Court ruled that the Plaintiff's witness statement was incurably defective for contravening the mandatory provisions of Rule 49(1) and 50(1) (a) (i) of GN. No. 250 of 2012 (as amended). It was noted further that, in that case, the Plaintiff had also conceded to the objection raised in Court and, in that premise, it was right for the Court to strike out the witness statement and dismiss the suit.

The learned counsel for the Plaintiff distinguished the **EPZ Limited's case (supra)** from the current one. First, it was argued that, it is not clear whether the particular witness statement in that case contained an oath or not and the decision does show to what extent the statement was defective. He argued that, in the instant case, the witness statement contains not only an oath but is also compliant to the requirements of Rules 49 (1) and 50(1) of GN.250 of 2012 (as amended). In his view, the learned counsel for the Plaintiff argued that, the Witness Statement in the instant case at hand contains a statement of truth which was made before an advocate in compliance with Rule 49 (1), 50 (1) and 50 (2) of GN.250 of

2012 (as amended) and the 3rd Schedule of the Rules, as well as the Notary Public and Commissioner for Oaths Act.

Expounding on the above submission, the learned counsel for the Plaintiff cited Rule 50(2) of GN.250 of 2012. This provides as here below, that:

> "50(2) - The witness statement shall be **substantially** in the form prescribed in the Third Schedule to these Rules." **(Emphasis added by the Plaintiff).**

Referring to this Court what Webster's Dictionary provides regarding the term substantial compliance, it was the Plaintiff's submission that substantial compliance refers to:

> "Compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose even though its formal requirements are not complied."

The learned counsels for the Plaintiff argued that, the witness statement was compliant with the provisions of the law with regard to being made under oath. It states his religious belief, contains a statement of truth signed by the witness in the exact wordings provided for under the 3rd Schedule and was made before a notary Public and Commissioner for Oath, stating the date and place where the statement was made. The learned counsels for the Plaintiff contended, therefore, that, the impugned witness statement was made in the spirit envisioned under the law, which is to ensure that a witness is fully aware of the solemnity of the situation and fully intending to be bound by his words.

It was the Plaintiff's learned counsel assertion that the use of the words "solemnly swear" is not peremptory. They submitted that even if such wording is contained in a witness statement, their purpose and objective are satisfied by the "statement of truth" made by the Witness in the witness statement before an advocate. A leaf was borrowed from the

UK's Civil Procedure (Practice Direction) which provides for the form of statement of truth which is to be included in a witness statement. In particular, the Practice Direction No.32 Part 20.2 provides as follows:

> "I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

The learned counsels for the Plaintiff have argued that, the Witness statement filed in this Court mirrors the kind of a witness statement filed in the UK Commercial Court and both serve the purposes of expediting conduct of commercial matters. To further support their submissions, this Court was referred to the case of **S v Mann (1973) (3) SA** (cited in the case of **Wayne Gavin Armstrong v The State, Case No.A265/16**, High Court of South Africa, Western Cape Division, Cape Town, at page 16, regarding the purpose of making an oath.

It was a further contention of the learned counsels for the Plaintiff that, the kind or form of oath advanced by their colleague, Mr. Maka, is highly misconceived as it befits affidavits as opposed to witness statements. To support their assertion, this Court was referred to its own decision in the case of **Mohans Oysterbay Drinks Ltd v British American Tobacco Kenya Ltd, Comm. Case No.90 of 2014 (unreported)**.

In that case, this Court distinguished the requirements imposed on affidavits and those on witness statements. In particular, the Court stated that:

> "The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit. It must be signed by the deponents; it must be completed and signed by the person before whom the affidavit was sworn whose name and qualifications must be printed beneath his signature; and, contain the full address of the person before who the affidavit is sworn.

> An affidavit must be sworn before a person independent of the parties or their representatives. Only the Commissioner for Oaths may administer oaths and take affidavits. A witness statement on the other hand, must include a statement of truth by the intended maker that the facts stated in the witness statement are true so as to avoid verifying a witness statement containing a false statement without an honest belief in its truth."

Responding to the issue regarding whether the defects in the statement were cured when the witness took oath orally before the Court when he adopted his earlier statement and tendered documents, the learned counsels for the Plaintiff were quite affirmative to that.

The learned counsels for the Plaintiff further distinguished the **EPZ Limited' case (supra)** (relied upon by Mr. Maka, the learned counsel for the Defendants), by stating that, in that case, the preliminary objection was raised before the Plaintiff had an opportunity of curing the defects by taking an oath before the Court. In the instant case, the preliminary objection has been raised belatedly after the witness has been put under oath and has prayed, while under oath, to adopt his witness statement as his testimony in chief. It was argued, therefore, that, if there were any defects, such were cured.

The learned counsels for Plaintiff argued further that, the notion held by the Defendants' learned counsel to the effect that the mere filing of a witness statement amounts to evidence in chief is, at best misconceived. They anchored their contention on what Rule 48 (1) and (2) of the GN.No.250 of 2012 (as amended) and item 5.1 of the third Schedule to the Rules provide. Item 5.1 provides that *"a witness statement is the equivalent of* ***the oral evidence*** *which that witness would, if called, give in evidence".*

It was contended that, ordinarily, oral evidence is given in Court when a witness is summoned and appears in court, and is put under oath to testify what is true. It becomes a testimony in chief after the witness is

made to take an oath, it was so argued. The learned counsels for the Plaintiff argued that, in the same vein, the witness statement becomes his testimony in-chief, only after the witness takes oath and prays that his statement be adopted as evidence in Court. It was argued, therefore, that, the mere filing of a witness statement without more, does not give it the evidential status of evidence in chief. The learned counsels for Plaintiff contended further that, rule 56 (3) of the GN No.250 of 2012 only applies in exceptional circumstances. It was argued that, the crucial issue on that rule is "admission into evidence" and not mere filing.

Arguing by way of an analogy, reference was made to the Indian Case of **V. Rama Naidu & Another v Ramadevi, Andhra High Court, Civ. Rev. Petition No.6069 of 2016** concerning affidavit evidence. In that case, the Court stated as hereunder, that:

> "An affidavit is merely an affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the witness to confirm or differ the contents of the affidavit. After his confirmation or denial of the contents of the affidavit, whatever recorded is evidence... Therefore, what is finally taken as evidence by the Court is not the affidavit but what is contained in the affidavit; if confirmed by the deponent when he appears in cross-examination. ... such affidavit, once taken on oath forms part of evidence as chief examination..."

It was argued, in light of the above analogy, that, even if one was to argue that the filed witness statement was defective for want of an oath, as contended by the Defendants; such defects were cured during trial when the witness took oath before adopting the witness statement to form its evidence in chief.

The learned counsel for the Plaintiff raised, as well, a concern regarding the timing of the preliminary objection. Referring this Court to the decision of the Indian Supreme Court in the case **Smt.Dayamathi Bai v Sri.K.M Shaffi, Civil Appeal No. 2434 of 2000,** (at page 3), the learned

counsel for the Plaintiff submitted that, an objection ought be raised before the admission of the evidence in court. The learned counsel relied on the doctrine of waiver and referred this Court to an Australian decision in the case of **Re Lilley (dec) [1953] VLR 98** (cited in the case of **Robert Bax & Accociates v Cavenham Pty Ltd, Supreme Court of Queensland, Australia**. The learned counsel for the Plaintiff argued that, when the counsel for a party tenders evidence at trial, whether oral or documentary, it is the duty of the opposing counsel, if he so desires, to promptly object to its admissions into evidence, stating the reasons for the objection. It was contended that, failure to do so constitute a waiver.

To further extend the Plaintiff's contention, it was argued that, the submission by Mr. Maka was one based on mode of proof rather than on inadmissibility (illegality) of the evidence. Referring to Order XIII Rule 7 (1) of the CPC, Cap.33 [R.E.2019], it was noted that, every document which has been admitted as evidence forms part of the record of the suit. This Court was referred to the case of **Alfred F.V. Lawa v Mohammed Enterprises Ltd; Land case No. 195 of 2013** to further strengthen that settled legal position.

The Plaintiff's contention is that, admitting the Defendants' objection would occasion an injustice to the Plaintiff as the Plaintiff will be denied of an opportunity to cure the defect, citing the case of **Mohans Oysterbay Drinks Ltd v British American Tobacco Kenya Ltd, (supra)** where a preliminary objection was raised regarding failure to adhere to Rule 48(1) (a), Rule 48 (2) and Rule 49(1) of GN.No.250 of 2012 and the Court ordered for the witness statement to be re-filed, with the defects having been cured. It was contended, in view of that case that, in the instant case, the appropriate stage to raise the objection was before the

evidence was tendered and admitted as exhibit in Court. The learned counsels for the Plaintiff argued that, if the objection was to be raised at that stage, the Plaintiff would have been given an opportunity to rectify the witness statement.

As regards to the issue whether the Rules allow this Court to expunge the witness statement, as suggested by the Defendants, the learned counsels for the Plaintiff sought assistance from the decision of this Court in the case of **Mohans Oysterbay Drinks Ltd v British American Tobacco Kenya Ltd, (supra)** and **Mantrac Tanzania Ltd v Goodwill Ceramics Tanzania Ltd, High Court, Comm. Case No.16 of 2018 (unreported)**. It was submitted that, in both cases, this Court conceded that there is no provision in the rules providing for the taking of that course. The learned counsel for the Plaintiff argued, therefore, that, even if the Court was to make a finding that, the witness statement was not conforming to the requirements under the Rules in respect of its form and contents, the rules do not direct that the same be expunged from the record.

To wind up their long submission, the learned counsel for the Plaintiff addressed this Court on the issue of "interest of justice" as aptly accommodated under section 3A and 3B of the Civil Procedure Code, Cap.33 [R.E.2019].To further support their submission on that point, this Court was referred to the cases of **Mantrac Tanzania Ltd v Goodwill Ceramics Tanzania Ltd, (supra);** (citing with approval the cases of: **Samson Ng'wilida v Commissioner General of Tanzania Revenue Authority, Civil Appeal No.86 of 2008 (unreported); R.N Jadi & Brothers v Subhashcandra (2007) 9Scale 202**) and **Mohans Oysterbay Drinks Ltd v British American Tobacco Kenya Ltd, (supra).** The

learned counsel for the Plaintiff urged this Court to follow the course taken by the above cited authorities and uphold substantive justice rather than allowing the Court to be inhibited by technicalities.

I am grateful to the learned counsel for both parties for their industriousness and the research they have put in their submissions filed in this Court. The key question which I am called upon to answer (leaving aside other collateral issues which I will necessarily have to tackle) is: **whether the preliminary objection raised by the Defendants is meritorious.**

In the course of considering the merits or otherwise of the preliminary objection, I find it pertinent, in the first place, to tackle two issues which are closely associated with the main issue. These are as here under:

(i) Whether the witness statement is indeed defective and if so, whether the defects were cured when the witness appeared in Court for cross-examination wherein he took an oral oath and adopted the witness statement as his testimony in-chief.

(ii) Whether the defendants are entitled to raise such a preliminary objection after the Plaintiff's case has come to a closure, and, if that is not affirmatively so, whether such objection is an afterthought and, hence, makes the alleged defectiveness or illegality of the witness statement unchallengeable.

In the course of addressing these issues, I will commence with this last issue.

In the meantime, however, let me set out the necessary legal principles that need to be observed with regard to preliminary objections.

It is trite law that, unless a preliminary legal issue or objection touches on the jurisdiction of the court, such an objection needs to be raised at the earliest possible time.

There are a number of this Court's decisions that have directly pointed or alluded to that position. Such cases include the decisions of this Court in the cases of **Aloys Lyenga v Inspector-General of Police and Another [1997] TLR 10**; **Paul Mushi v Registered Trustees of Consolata Fathers, Land Appeal No. 107 of 2016 (unreported)**; **National Bank of Commerce v Maisha Musa Uledi, Life Business Centre, Civil Application No. 410/07 of 2019 (unreported)**; **Lilian Sifael v Cocacola Kwanza Ltd, Labour Revision No.8 of 2019, (unreported)** and **Evanson Temu and 3Others v Agness Nyagetera, Misc. Land Appl. No.314 of 2016, (unreported)**. All these have emphasised that preliminary points of law or objections should be raised at the earliest possible time, at some instances along with the pleadings.

The second principle which I find vital to consider is the doctrine of waiver. Waiver is a difficult term to define and is not a term of art. In the English case of **Banning v Wright (Inspector of Taxes) (1972) 2 All ER 987** Lord Hailsham defined the term waiver by stating that;

> 'the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.'

In **Johnson v Agnew [1980] AC 367** the Court was of the view, at 398, per Wilberforce LJ., that, *"though the subject of much learning and refinement, in the end it is a doctrine based on simple considerations of common sense and equity."* In the case of **Rajput v Rajput [1986–1989] 1 EA 483**, the appellant's learned counsel had objected to a consideration of a counter-affidavit which he held was a pure hearsay. However, all the way from the

trial court up to the High Court no objection was ever made as to its admissibility. When the learned counsel tried to challenge its being relied upon in the Court of Appeal, Court of Appeal of Tanzania had the following to say:

> "The proper forum for raising the issue of hearsay was at the Magistrate's Court. In view of the course the matter has taken, we do not think at this stage we can allow this issue to be raised. The appellant would, on the basis of something in the nature of an equitable estoppel, be barred from doing so. It is a civil matter, and the appellant **had waived his right to object to the admissibility of hearsay evidence** in this appeal." (Emphasis added).

Now, let me contextualise the above discussion in light of the instant case at hand. As I said earlier, I will start by considering the second issue which is:

> *'whether defendants are entitled to raise a preliminary objection at a time when the Plaintiff's case has already been closed, and, if that is not in the affirmative, whether such objection was an afterthought and, hence, makes the defectiveness or illegality of the witness statement unchallengeable.'*

As it may be noted from the submissions by the learned counsel for the parties herein, the objection filed in this Court challenges the witness statement filed in this Court as being incurably defective. This objection was raised after the impugned witness statement had been received into evidence as PW1's testimony in-chief and after the learned counsel for the Defendants had cross-examined the witness on the basis of the same witness statement. Above all, the objection was also brought to the front after the Plaintiff's case had been closed, paving the way for the defence case. All these raise concerns regarding the appropriateness of the objection given the time or the point/stage at which it is being raised.

The learned counsels for the Plaintiff have submitted that, in these contested proceedings, the Defendants should not be allowed to raise the objection at this stage or time. They have placed reliance on the doctrine of waiver, and, referred this Court to Australian decision in the case of **Re Lilley (dec) [1953] VLR 98** (cited in the case of **Robert Bax & Associates v Cavenham Pty Ltd, Supreme Court of Queensland, Australia**.

In that case of **Re Lilley** (supra), Smith, J., is quoted to have stated, in an extensive review of authority, that:

> "It has been said that, in a trial before a Judge alone, if inadmissible evidence has been received, whether with or without objection, it is the duty of the Judge to reject it when giving judgment—see Phipson on Evidence (8th ed.), at p. 673. **But in relation to contested proceedings this proposition, if it is construed as extending to all evidence which could have been excluded by an appropriate objection, is, in my view, much too wide.** In such proceedings a failure to object to the reception of evidence at the time when it is tendered **ordinarily amounts, of course, to a waiver of objections**— see *Gilbert v. Endean* (1878), 9 Ch. D. 259; *David Syme & Co. v. Swinburne* (1909), 10 C.L.R. 43, at pp. 56, 60, 75, 76, 86-7; *Miller v. Cameron* (1936), 54 C.L.R. 572—and, where there is an effective waiver of objections, I do not think that the Judge is bound to disregard relevant evidence. Indeed I doubt whether he is ordinarily entitled to do so—compare *Miller v Cameron* (1936), 54 C.L.R. 572, at p. 582."

Taking the cue from the above, it is my considered view that, act of filing of the objection impugning the witness statement after the Plaintiff's case had been closed, and, after the witness statement, and all exhibited named therein, had been made part of the record of this Court, is an act done in too late an hour to catch the train. I am totally in agreement with the submissions made by the learned counsel for the Plaintiff that, the witness statement having been adopted by PW1 as his testimony in-chief, it

became part of the record of the Court as per **Order XIII rule 7 of the CPC, Cap.33 [R.E 2019],** and is no longer objectionable. In the decision of this Court in **Alfred F.V. Lawa v Mohammed Enterprises Ltd**; (supra), the Court held that once a document become part of the record of the Court it cannot be impeached. I find that position to be applicable also to the case at hand.

In particular, since the witness statement was not impeached at the time when the witness (PW1) adopted it as his testimony in-chief (and was cross-examined on the basis of it), to borrow the words of the Court of Appeal in the case of **Rajput v Rajput (supra)**, the learned counsel for the Defendants is now, *"on the basis of something in the nature of an equitable estoppel, barred from doing so, [and, this being] a civil matter, and [he] had waived his right to object to the admissibility of [the Witness statement]."* Under the doctrine of waiver, discussed herein above, it is clear that he waived his rights and that is why he went ahead to cross-examine Pw1 on the basis of the same statement filed in the Court.

In the case of **Sylvester** s/o **Fulgence and Vedastus** *s/o* **Sylvester v The Republic, Criminal Appeal No. 507 of 2016 (unreported)**, which I also find to be quite authoritative and applicable to the instant case, the Court of Appeal of Tanzania had the following to say in relation to failure of a party to object to the tendering of a document into evidence and the same is allowed to form part of the record of the Court. In that case, the Court stated that:

> "If [a] person does not object to the tendering of the document and that document is admitted and its contents read over then he cannot, at a later stage, be heard in objection raised thereafter in respect of its voluntariness. We held so in the case of **Emmanuel Lohay and Another v The Republic, Criminal Appeal No. 278 of 2010** (unreported) where we said: "With respect, it is too late in the day for them to do so because their admissibility or

> otherwise was never raised at the trial. ...It is trite law that if [a] person intends to object to the admissibility of a statement/confession he must do so **before it is admitted and not during cross-examination or during defence - Shihoze Semi and Another v The Republic [1992] TLR 330.** In this case, the appellants "missed the boat' by trying to disown the statements at the defence stage. That was already too late. **Objections, if any, ought to have been taken before they were admitted in evidence.**"

Although the above holding of the Court of Appeal was in relation to a statement made by an accused person in criminal proceedings, the same can as well be situated in the instant case to the effect that, objection relating to the a witness statement filed in court should be raised at the earliest possible time before the plaintiff or defence case comes to a closure. Raising it at a later stage after it has formed part of the evidence received in Court, will be an act done too late to 'catch the boat'. In this case, therefore, the Defendants missed the "boat" and are barred from raising the objection at this time. Theirs was a pure afterthought.

The above legal position may also find a persuasive support from the Indian case cited by the learned counsel for the Plaintiff. In the case of **Smt.Dayamathi Bai v Sri.K.M Shaffi, (supra)**, the Court was of the view that,

> "Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the **mode of proof alleging the same to be irregular or insufficient**. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. **In the latter case, the objection should be taken when the evidence is tendered and once the document has**

> **been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play.** The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular." [**Emphasis added**].

In view of the above, it follows, therefore, that, the second issue regarding whether defendants are entitled to raise a preliminary objection at a time when the Plaintiff's case has already been closed, is responded to in the negative. In my view, it came as an afterthought and, the case of **EPZ Limited v MAK Medics Limited, Commercial Case No.3 of 2019, High Court of Tanzania (Commercial Division), at Arusha, delivered on 08th day of July 2020, (Magoiga, J), and** which seems to be the basis upon which the objection is anchored is wholly distinguishable.

I hold so because, looking at the EPZ Case (supra) the objection raised and determined therein was raised earlier enough before the Plaintiff's case commenced. Second, the Plaintiff readily conceded to it and the case had to collapse because it was as good as no evidence was adduced to support the claims.

The situation in this instant case, however, is different because, the evidence in chief and all exhibits referred to in the witness statement, had been received into evidence and were all forming part of the record of the Court as per Order XIII rule 7 of the CPC, Cap.33 [R.E 2019]. As such, there was no room to impeach them. The objection was, therefore, an afterthought and any defectiveness of the witness statement will remain unchallengeable.

The other issues which was the first in line from the main issue, was: *whether the witness statement is indeed defective and if so, whether the defects were cured when the witness appeared in Court for cross-examination wherein he took an oral oath and adopted it as his testimony in-chief.*

Having made a finding in respect of the second issue, which finding is to the effect that the witness statement and all exhibits having been admitted into the record of this Court unchallenged, cannot be impeached after the Plaintiff's case has come to its closure, I see no reason why I should proceed to determine the first issue.

In my view, the response to the second issue sufficiently provides an answer to the main issue, i.e., that, the objection raised by the Defendants is unmerited and should be dismissed. That being said, this Court makes the following orders, that:

(i) the preliminary objection raised by the Defendants lacks merits and is hereby dismissed.

(ii) The defence case is to proceed as per the date to be arranged by the Court.

(iii) Costs to follow the event.

It is so ordered.

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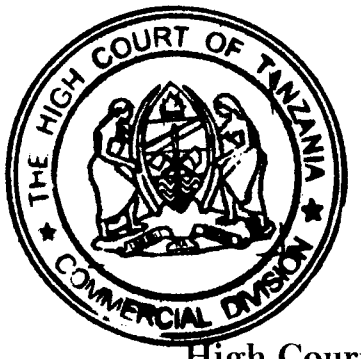
DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)

18 / 09 /2020

Ruling delivered on this 18th day of September 2020, in the presence of Mr. Evarist Kameja, Advocate for the Plaintiff, and Mr. Yassini Maka, Advocate for the Defendant.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
18/ 09 /2020