

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2018

BETWEEN

MANTRAC TANZANIA LIMITED.....PLAINTIFF

VERSUS

GOODWILL CERAMICS TANZANIA LIMITED.....DEFENDANT

Last Order: 18th Nov, 2019

Date of Ruling: 20th Feb, 2020

RULING

FIKIRINI, J.

On 18th November, 2019 when the defendant, Goodwill Ceramics Tanzania Limited was about to commence their defence hearing, a controversy ensued on the status of the witness statement filed. Mr. Roman Masumbuko counsel for the plaintiff raised the concern contending two things: one, that the witness statement contravened the dictates of Rule 50 (1) (c) of the High Court (Commercial Division) Procedure Rules, 2012 as Amended by GN. No. 107 of 2019 (the Rules), which requires the witness statement to be in his own words. The statement contested was in English instead of being in Chinese with English translation.

Two, the witness statement also contravened Rule 50 (1) (f) of the Rules which require the statement to only state facts and not arguments as reflected in paragraphs 11 and 12 of the witness statement.

In view of the contention he urged this Court to expunge the witness statement filed as it did not comply to Rule 50 (1) (c) and (f) of the Rules.

Essentially Mr. Kapinga counsel for the defendant, did not resist the point raised in particular the 1st one, on none- compliance to Rule 50 (1) (c) of the Rules, but was quick to state that the mishap occurred during his handling of the witness statement which were presented to him in both Chinese and English. What he did was to remove the Chinese version and was left with English version. And he considered the anomaly to only have been impacted by not having a certified copy, which he was asking the Court that he be allowed to go and have the Chinese version which was in the witness possession be translated into English and certified, for the interest of justice, since the statements of his other witnesses will also fall short of the same.

Rebutting the submission Mr. Masumbuko highlighted it to the Court that his 2nd limb of objection has not been contested. And as for the 1st limb, apart from acknowledging that the defence has admitted none-compliance to the requirement, but his concern was not on official translation. His argument was the statement was

not in the witness own words and this goes to the root of justice, so the defence counsel cannot rely on substantive justice or overriding principle as no changes can be made to the witness statement already filed. To fortify his position he referred this Court to pages 3-4 of the **Amani Partners Ltd** case, whereby the Court pointed out that when it comes to witness statement especially before this Court which is governed by its own rules of procedure, one cannot invoke overriding principle. This is due to the fact that the process required hearing to be initiated by witness statement and there was no room for change. He further stated that had the Chinese version been the one filed, things might have been different and the prayer might have made sense but not as it is the prayer asking for time to file official translation which was illegal and misguided.

As to what transpired during preparations as shared by Mr. Kapinga, it was Mr. Masumbuko's submission that the Court was not privy to that since it was an arrangement between a lawyer and his client. Examining the submission by Mr. Kapinga from a different angle, it was his position that the witness statement before the Court was what the lawyer has prepared and asked the witness to come and sign. Otherwise the defence counsel had a Chinese version but opted to remove it and filed his English version. He maintained his prayer that the statement be expunged from the record.

I have carefully considered the objection raised by Mr. Masumbuko counsel for the plaintiff, since Mr. Kapinga is in actual fact in agreement that there was no compliance to the requirement of Rule 50 (1) (c) and (f) of the Rules. Whereas Mr. Masumbuko urged the Court to expunge the witness statement from the record Mr. Kapinga was urging the Court that he be allowed to go rectify the anomaly.

The issue for determination is therefore which way should the Court go? Should it expunge the witness statement from the record as argued by Mr. Masumbuko or should it grant the prayer by Mr. Kapinga that he be allowed to go and correct the anomaly.

The proceedings before the Commercial Court are governed by the High Court (Commercial Division) Procedure Rules, 2012 as well as the (Amended) Rules, 2019 (the Rules). Once the matter is confirmed ready for hearing, which ordinarily is after the Final Pre-Trial Conference, parties are ordered to file witness statements each in support of their respective cases and based on the framed issues which need to be proved before the Court. The witness statement filed is basically their examination in chief and they will only be required to come to Court for tendering of documents if any, cross-examination and re-examination if need be.

The manner of how should the witness statement be or look like has been illustrated under Rule 50 (1) (a), (b), (c), (d), (e), (f), (g), (h) (i) and (2) of the

Rules (previously Rule 48). The directive on how a witness statement should be pursuant to Rule 50 (1) (c) of the Rules, on which Mr. Masumbuko’s objection is pegged states as follows:

*“So far as reasonably practicable, **be in the intended witness own words**”* [Emphasis mine]

And the other provision referred to is Rule 50 (1) (f) of the Rules which states:

“Neither contains lengthy quotation from documents or engage in legal or other arguments”

Mr. Kapinga never responded to the 2nd limb of objection that the witness statement contained arguments and was lengthy. I have examined the statement and find that it is undeniably lengthy and some paragraphs are indeed argumentative as pointed out by Mr. Masumbuko, which is in contravention of Rule 50 (1) (f) of the Rules.

Equally, I am in agreement that the witness statement is not in compliance to the mandatory requirement of Rule 50 (1) (c) as it was not in Chinese the language the which would possibly manifest what was intended by the witness recording the statement. I, however, browsing through the Rules, have not been able to come across a provision empowering this Court to expunge or reject a witness statement.

for failure to comply with Rule 50 (1) (c) of the Rules, and particularly on the kind objection as raised by Mr. Masumbuko.

The situation is different when it comes to Rules 50 (1) (f) of the Rules, apart from not being contested by Mr. Kapinga as intimated earlier, Rule 53 of the Rules could have been applied. The Rules provides as follows”

“During the hearing of the suit and upon oral application by a party or suo motu, the Court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.”

Filing of a witness statement in proving the contested issues and how the statement should be are both matters of procedure. Though important but should not outweigh and avert the opportunity of parties to be heard and have their controversy decided once and for all. This stance I would dare say is supported by the reasoning and decision in the case of **Re Coles Ravenshear Arbitration [1907] KB 1**, where it was stated:

“Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be

so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case”

I, fully agree to the perspective taken and measuring it against the objection raised, the following are my reasons: **one**, the justification behind having witness file their witness statement, is an innovation brought about to expedite the conduct of commercial cases, so as to allow investors and business people to go about their affair, since in other courts bringing of witnesses has been delaying the process. So the introduction of witness statement shortened the process. Instead of having a long day in Court, witness who has already filed his/her statement will only come to Court for tendering of documents, cross-examination and re-examination if need be.

Two, the statute establishing filing of witness statement did not bar oral testimony completely or at least there was no provision in that regard. And on this, I take my refuge under Rule 48 (b) of the Rules which provide as follows:

“The way in which any matter is to be proved.”

My understanding of the provision is oral testimony or other modes of proving the case can be used. From the provision, however, that ought to be decided during Final Pre-Trial Conference and not at any other stage of the hearing. **Three**, the

purpose of having matter heard inter-parties is to make sure that no party is condemned unheard. And to be heard can be through oral testimony as is the case in other courts, filing of witness statements, whereby witness will only come for cross-examination and re-examination. The aim of all these development was while stressing on expeditious disposal of commercial disputes on one hand, but safeguarding rights of the parties on the other, particularly if the reason for the impediment is technical.

It is against that background, I find Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, of 1977 as amended from time to time should come into play. Specifically Sub-article (e), which has been clearly clarified in the case of **Samson Ng'wilida v Commissioner General of Tanzania Revenue Authority, Civil Appeal No. 86 of 2008 (unreported)**. In that case the Court stressed on dispensation of justice rather than technicalities, when it stated:

“To dispense justice without being tied up with undue technical provisions, which may obstruct dispensation of justice.”

Also borrowing from the case of **R. N Jadi & Brothers v Subhashchandra (2007) 9 Scale 202**, whereby the Court considered the procedural law *vis a vis* substantive law and stated:

“All the rules of procedure are the handmaid of justice. The language employed by the draftsman of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.” [Emphasis mine]

Since there is no provision which would let Mr. Kapinga to go and make the correction and considering this is an adversarial system where the emphasis is that, no party should be denied the opportunity of participating in the process of justice dispensation, deciding otherwise will mean and lead to shutting door to the defendant to mount her defence. This is moreso, considering: *one*, the stage at which the case is and *two*, no prejudice can be claimed on a decision I am about to make, which is instead of relying on the contested witness statement, including those for the witnesses to come, I, for the interest of justice order the witness to be

sworn and proceed to give oral evidence which will be followed by cross-examination and re-examination. The same should apply for the two remaining intended witnesses as well.

In light of the above, instead of ordering expunging of the witness statement as urged by Mr. Masumbuko or allow rectification as requested by Mr. Kapinga, both positions which are not provided for in the High Court (Commercial Division) Procedure Rules, 2012 as Amended by GN. No. 107 of 2019 (the Rules); I order the case to continue with the hearing whereby witness will be sworn and give oral testimony. It is so ordered.



P.S.FIKIRINI

JUDGE

20th FEBRUARY, 2020