

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 08 OF 2022)

UNIVERSAL CARGO

TRANS-SHIPPING HOLDINGS PLC PLAINTIFF

VERSUS

TANZANIA BREWERIES PLC DEFENDANT

Date of Last Order: 03/08/2022

Date of Ruling: 17/08/2022

RULING

MAGOIGA, J.

This ruling is on the objection for adoption of some paragraphs in DW1's witness statement, one, Dickson Rushekya. The impugned paragraphs are 17, 18, 19, 20, 21, 22 and 23 and it was prayed that they be struck out from the court record or not considered at all.

Mr. Nyika for the plaintiff in support of the objection argued that the impugned paragraphs introduced in the witness statement matters not in the pleadings and do not answer issues recorded for the determination of this suit. The learned advocate for the plaintiff pointed out that, these matters are; ownership of the leased premise, the existence of superior landlord, misrepresentation during lease, the defendant has been evicted



from the leased premises, breach and frustration of statutory tenancy as ordered by the court.

According to Mr. Nyika, section 7 of the Tanzania Evidence Act, [Cap 6 R.E.2019] and Rule 50 of the High Court (Commercial Division) Procedure Rules, 2012 both stipulates that evidence be received on issues between parties. Not only that, but the new introduced matters go against the principle that parties are bound by their pleadings, insisted Mr. Nyika. Further, Mr. Nyika pointed out that, to allow such paragraphs to prevail will prejudice the plaintiff's case because are raising a different and distinct cause of action and no way the plaintiff will have an opportunity to respond to them.

On that note, Mr. Nyika strongly urged this court to expunge the impugned paragraphs and proceed to admit the witness statement of DW1 and continue within hearing of the defence case.

On the other hand, Mr. Mponda for the defendant in reply argued that the impugned witness statement with the disputed paragraphs was served to the plaintiff's counsel on 26/05/2022 but to date no formal notice of



objection was filed to that effect. So at this point in time this court should disregard the objection raised.

According to Mr. Mponda, the alleged issues were raised in paragraphs 13 and 14 of the written statement of defence disputing the alleged offer by Southern Enterprises Limited, hence, relevant and an issue between parties. Mr. Mponda went on to point out that, paragraphs 17, 18 and 21 of the written statement of defence raised the issue of tenancy as fishy, fabricated and speculation.


Mr. Mponda went on arguing that as for the pleadings, the defendant served the plaintiff with list of documents filed which includes swift message showing payment of rent for past six months, email communication on Yono Auction Mart having taken possession of the leased premises from 18th May, 2022, lease agreement between plaintiff and Kings Group Limited which all together, according to Mr. Mponda, goes to the root of the case.

Mr. Mponda argued that the plaintiff, thus, cannot shut out the defendant from prosecuting her case on issues raised in the impugned paragraphs considering that even PW1 during cross examination admitted the presence of Yono Auction Mart in the leased premises.



On prejudice, Mr. Mponda argued that no prejudice will be occasioned to the plaintiff because the law allows the court to add issues and proceed to determine the suit on issues emerged through parties' testimonies. According to Mr. Mponda, upon being served with the list of documents, Mr. Nyika ought to have filed a counter list of documents to explain what is going on.

Mr. Mponda attacked Mr. Nyika's attempt to cite section 7 of Tanzania Evidence Act alone, and deliberately omitted to cite sections 8-13 which are very clear that fact not in issue much as are relevant can be entertained as well and concluded that the fact as contained in the witness statement are covered under those provisions because are relevant. Mr. Mponda pointed out that, in those paragraphs, the plaintiff lied to that he had an offer for tenant but which is disputed. The learned advocate for the defendant insisted that, the evidence in those paragraphs is relevant and at issue. Mr. Mponda cited the case of ASTEPRO INVESTMENT CO. LIMITED vs. JAWINGA CO. LIMITED, CIVIL APPEAL NO. 08 OF 2015, CAT DSM (UNREPORTED) and insisted that, it is very clear of what to be done and that the evidence testified in those paragraphs are directly connected to the issues in this case.



On that note, Mr. Mponda urged this court not to sustain the objection and proceed to adopt the witness statement of DW1 wholly as presented.

Mr. Welwel along with Mr. Mponda added that, no prejudice will be occasioned because the plaintiff will have an opportunity to cross examine the witness on the paragraphs in dispute. Mr. Welwel insisted that, through that, the truthfulness or otherwise of the evidence in contest will be known.

In rejoinder, Mr. Nyika started with the point for failure to file formal notice of objection by replying that failure to file formal notice do not bar him from orally objecting now because it is today that the witness statement is being presented for its adoption in evidence.

Mr. Nyika went on to insist that, the evidence in the impugned paragraphs are on matters not pleaded and is the basis of their objection. On the argument that he ought to file counter list of documents, he replied that is novel procedure not known in law and went on to argue that cases are not pleaded by list of documents but list of documents are intended to support already pleaded case/facts. According to Mr. Nyika, the list of documents is introducing a new cause of action altogether.



Mr. Nyika pointed out that the fact in issue is on statutory agreement and entitlement of damages, contrary to what are introducing now. On the arguments that no prejudice will be caused because there is a right of cross examination, Mr. Nyika replied that cross examination is, and cannot be, a new way of bringing in new cause of action in a suit.

On the applicability of sections 7-13 it was the reply of Mr. Nyika that what is contained in those provisions and correct interpretation is that those provisions applies to fact not in issue but is relevant, and was quick to pose a question that, how is the issue of misrepresentation, eviction relevant to the fact in issue? According to Mr. Nyika, whether the defendant is a statutory tenant or not is the issue here and equated the evidence in the impugned paragraphs totally new cause of action. On that note, Mr. Nyika insisted that sections 8-13 must be read together with the long established principle that a case must be pleaded and anything outside pleadings cannot be introduced through witness statement.

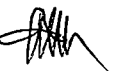
Further Mr. Nyika rejoined that there is a serious prejudice if the defendant is allowed to take the course of action taken which will amount to bring in a new cause of action which cannot be answered by cross examination. Further, Mr. Nyika argued that the case of ASTEPRO INESTMENT CO.

LIMITED cited by the learned advocates for defendant support the position are arguing and not the position are advanced by learned advocates for the defendant.

On that note, the learned advocate for the plaintiff reiterated his earlier prayers.

This marked the end of hearing of the objection taken against contents of paragraphs 17, 18, 19, 20, 21, 22 and 23 introduced through witness statement of DW1.

Having carefully and impartially considered the rivaling arguments for and against the objection, with due respect to Messrs. Mponda and Welwel, I am constrained to find that indeed and truly paragraphs 17, 18, 19, 20, 22 and 23 introduced quite a distinct cause of action not pleaded in the amended plaint nor raised in the amended written statement of defence. I will explain. **One**, the defendant, if wanted to raise such new cause of action should have prayed for amendment of the amended written statement of defence and incorporate them in the pleadings. This was not done as such cannot be sneaked through back door of list of documents and witness statement. **Two**, as rightly argued by Mr. Nyika, and rightly so



in my own view, the principle that parties are bound by pleadings is to avoid surprise and changing goal post in a case after hearing the other parties' case. The above principle was underscored by the Court of Appeal in the case of PAULINA SAMSON NDAWAVYA vs. THERESIA THOMAS MADAHA, CIVIL APPEAL NO.45 OF 2017 MWANZA CAT (UNREPORTED) in which quoting with approval the case of JAMES FUNKO GWAGILO vs. ATTORNEY GENERAL [2004]TLR 161 observed and remarked that:-

"function of pleadings are to put notice to the case which the opponent has to make lest is taken by surprise and parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from what he had originally pleaded."

Three, equally important to note and as rightly argued by Mr. Nyika, the purpose of list of documents is to support the already pleaded facts and not to bring in a new cause of action in a suit. Nowhere in this suit, an issue of misrepresentation was pleaded with particulars by the defendant and the plaintiff equally responded to them.




Four, sections 7 to 13 inclusive cannot be applied to abrogate the above stated principles but are to apply to proceedings where facts not in issue but were obviously pleaded and replied by the opposite party. Failure to plead a fact in issue in the pleadings, cannot be entertained via list of documents and witness statements because that will cause an obvious prejudice which cannot be taken care of during cross examination which has no limit contrary to pleadings which are limited.

On the foregoing, the objection is merited in this case and this court hereby expunged or will not consider the disputed paragraphs.

That said and done, the rest of written testimony of DW1 are hereby adopted in this proceedings as his testimony in chief.

Order accordingly.




S. M. MAGOIGA
JUDGE
17/08/2022