

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 110 OF 2021

Stanbic Bank Tanzania Limited.....PLAINTIFF.

VERSUS

Lawrence Kego Mhind Masha.....DEFENDANT.

RULING.

Date of Last Order: 10/8/2022.

Date of Ruling : 31/8/2022.

MARUMA J.

This is a ruling on a preliminary objection in regard to the witness statement filed in court on 6th July 2022 by the Plaintiff. Upon filling the witness statement, on 1st August 2022 the Defendant raised a point of law that;

1. The Plaintiff's witness statement in respect of this suit is incurably defective for being prepared under a non-existing legal provision. Wherefore, the Defendant prays for this Court to strike out the Plaintiff's witness statement.

On 10/08/2022 the schedule set for hearing of the preliminary objection, parties had services of Mr. Pascal Kamala, Advocate for the plaintiff and Mr. Victor Mwakimi, Advocate assisted by Denis Kahana and Ms. Lige James, Advocate for the Defendant. The counsel for both parties did file skeleton of written arguments prior the hearing as it was ordered on 1st August 2022, so they had only little to add on the part of the Defendant.

It is the Defendant's objection that the Plaintiff's witness statement is incurably defective for being prepared under a non-existing legal provision. It is the counsel submission in his skeleton of written argument submitted that the law governing filing of witness statement is couched mandatorily to the extent that in no way a party filing the same, can escape from consequences of wrong citation and consequently improper filing, quote the provision of Rule 49 (1) & (2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended in 2019 provides that;

Rule 49(1)"... In any proceedings commenced by plaintiff, evidence in chief shall be given by a statement on oath of

affirmation..."

Rule 49(2) "... the statement shall be filed within fourteen days of completion of the final pre-trial conference and served as directed by the Court..."

He argued that making a requirement to file witness statement prior hearing is a condition precedent in which its effect in case of its absence, the Plaintiff cannot prove his case. He added that in the current situation the Plaintiff is moving this Court to rely on a witness statement filed under a non-existing legal provision of Rule 48 which has been amended by the High Court (Commercial Division) Procedure (Amendment) Rules, 2019 however, the substitute of which neither reflects witness statement nor provides the basis for this Court to be moved in hearing this suit.

He submitted that wrong citation, especially citing a non existing legal provision connotes that, this Court is not properly moved at all to act or accord any weight against the Plaintiffs witness statement. He added that in the instant scenario no amount of oxygen

may oxygenate the errors through the overriding objectives based on the case of **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017, (Unreported) at page 14-15 the Court of Appeal of Tanzania seating in Arusha in a likely facing situation held that;

"...Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.... "

He pointed out that the effect of citing wrong enabling provisions of the law had recently discussed by this Court in the case of **Juma Mohamed Futo vs Shabani Selemani**, in Land Revision No. 13 of 2020, in the High Court (Land Division) at Dar es Salaam (Unreported) in which the court held that;

"...Wrong citation of the enabling provision goes to the root of application. It is not a technical matter as opined by the Applicant. Simply stated, wrong citation of the enabling provision cannot be

cured by the principle of overriding objectives...”

He submitted further that the Defendant subscribes the two positions are similar on what transpired to the prevailing situation. The witness statement is incurably defective and the remedy is to strike out since this Court is seized with jurisdiction to proceed with hearing in absence of witness statement supported their argument they referred this Court to the case of **Simply Fresh Tanzania Limited & 3 Others versus Yasmine Haji**, Commercial case No. 76 of 2020 (Unreported) in which Honourable Ismail, J held that,

“...failure to produce witness statement has been equated to a failure to produce witness when the case is called for hearing. It results in the dismissal of the suit. I must add that this is an event that is akin to or equated to the Plaintiffs non- appearance under the provisions of Order IX rule 5 of the CPC...”

Consequently, they prayed that the witness statement be struck out and this suit in its antireality be dismissed with cost.

Responding to the preliminary objection, the Plaintiff argued that

there is no requirement for citing the provision of in the witness hence non-citing the provisions of law in the witness has no any legal effect. He submitted that a witness statement is like a plaint or a written statement of defence whereby citing a legal provision is not required. He added that citing enabling provision is required on the chamber application or other application whereas an applicant is seeking certain reliefs from the court. He further submitted that where there is a legal requirement to cite the provisions of law and the party has cited a wrong provision or has not cited the provision of law at all, the filed document is not rendered defective. He argued that the enactment of the overriding objectives in the Civil Procedure Code Cap 33 RE of 2019 commonly known as Oxygen Principle has the effect of doing away with trivial issues like the objection raised. He quoted the provisions as follows:

3A (1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B (1). For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following-

(a) Just determination of the proceedings:

(b) efficient use of the available judicial and administrative resources including the use of suitable technology: and

(c) timely disposal of the proceedings at a cost affordable by the respective parties.

(2) A party to civil proceedings or an advocate for such a party shall have a duty to assist the Court to further overriding the objective of this Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

The counsel submitted that duty also is imposed to advocates as well to uphold the objectives of law by to avoid trivial issues. He cited two cases insisted that citing and wrong citation is no longer an

issue because the court is clothed with jurisdiction to determine all the disputes within the ambits of law. The case of **Alliance One Tobacco & Others Vs Mwajuma Hamisi (As Administrax of the Estate of Philimoni R. Kilenyi And Another,** Misc Civil Application No. 803 of 2018, High Court of Tanzania at Dar es Salaam (unreported) . Also, the case of **Dangote Cement Limited Vs Nsk Oil Gas Limited,** Misc. Commercial Application No.08 of 2020, High Court of Tanzania Commercial Division, at Dar cs Salaam (unreported). The Plaintiff therefore prayed that the preliminary objection be dismissed and the court to allow them to insert the proper provision.

In determining this preliminary objection, I considered the arguments and positions of the law referred to by the parties herein. My focus will be based on the purpose and the context of the law positions in regard to the point of law raised.

Having gone through the filed witness statement, filed by the Plaintiff, it goes without saying that the Plaintiff did cite the wrong

provision of rule 48 (2), which has been amended by rule 49 (1) of the Rules as amended in 2019.

I also agree with the arguments by the counsel for the defendant on the two positions on the effect of wrong citation as ruled out in the cases of **Mondorosi Village Council and 2 others (Supra)** and that of the High Court of **Juma Mohamed Futo (Supra)** that wrong citation of the enabling provision goes to the root of the matter and cannot be cured by the principle of overriding objectives.

However, in my view, the above positions should be applied depending on the circumstances of case by case. On that premise, I have to differ with them based on the issue of this application. As it is stated earlier, the plaintiff's witness has been brought under the wrong citation of rule 48 of the Commercial Court rules of procedures. The pertinent question to be answered is whether this wrong citation goes to the root of the case.

Going through the proper rule 49 (1), which the defendant emphasized to be of mandatory terms is provides that,

"...The statement shall be filed within fourteen days of the completion of the final pretrial conference and served as directed by the Court..."

The focus under the clause is on the time period of 14 days for filing a witness statement. With this approach, I believe the positions in the defendant's two decisions are irrelevant to the matter at hand. This is stated in light of the context of rule 50 (1) of the rules, which governs what should be included in the witness statement. I believe it is superfluous to conjecture the citation of 49 was aimed of the purported required term, as asserted by the defendant's counsel.

Furthermore, based on the matter at hand, I must read the preceding condition that the necessary context is on time as well as discussed in the case of **Hood Transport Company Limited vs East African Development Bank**, Civil Appeal No. 262 of 2019 where the Court of Appeal explaining the context of the provision of rule 49 at page 11 that,

"...49 (1) and (2) of Commercial Court Rules as amended by

*GN.No.107 of 2019 that examination in chief is by way of witness statement which **must be filed fourteen days** after the final pre-trial conference and before hearing commences...”*

After understanding the context of Rule 49, I must guide myself as to the consequences of wrong citation. According to recent decisions of the Court of Appeal an erroneous citation does not render the issue incompetent before the Court.

Based on the preceding case law, I subscribe to the firm belief that the wrong citation does not constitute an irregularity that cannot be remedied, and hence strike out the plaintiff's witness statement. Instead, as the Court of Appeal ruled in the case of **Amani Girls Home vs Isack Charles Kanela**, Civil Application No. 325/08 of 2019 (unreported). At page 7 the Court held that,

“...Although the applicant herein was supposed to cite rule 10 of the rules in his application which he did not, the courts’ jurisdiction to entertain the application has not been ousted by such failure....”

I find the wrong citation of rule 48 (2) of the Commercial Court Rules can be cured by inserting the proper provision of rule 49 (1) of the Rules as this was a slip of the pen because prior to the amendment of GN.107 of 2019, the applicable rule for filling out of witness statement was rule 48 (2) of the Commercial Court Rules. When the Court of Appeal facing a similar situation in the case of **Beatrice Mbilinyi vs Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2022 where the Court of Appeal observed that;

"... The applicant cited Rule 89(1) of the Rules which is for withdrawal of the notice of appeal by the appellant, We find this to be slip of the pen because the prayer by the applicant is striking out the notice of appeal whose relevant provision is rule 89(2) of the Rules. Thus, by authority under 48(1) of the Rules we ordered insertion of rule 89(2) instead of Rule 89(1) of the Rules as enabling provision of the law..."

At this point, it is not like I have ignored the court decisions cited by the Plaintiff based on the overriding objectives, but I am of the view that since there is a lot on my plate to be utilized on the issue

at hand, I must explore the available remedies as discussed above with no need to explore the final option to address the issue raised.

Based on the foregoing observations and guidance above, I proceeded to order the Plaintiff to insert the proper rule 49 (1) of the Commercial Court Rules as amended by GN.107 of 2019. As a result, the preliminary objection raised by the defendant is accordingly overruled. The suit is to proceed with determination on merit. It is so ordered.

Dated at Dar es Salaam this 31st day of August 2022.



Z.A.Maruma.

JUDGE