IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO. 105 OF 2021

NAS HAULIERS LIMITED..... 1ST PLAINTIFF

EVEREST FREIGHT LIMITED..... 2ND PLAINTIFF

TANGA PETROLEUM..... 3RD PLAINTIFF

VERSUS

EQUITY BANK (T) LIMITED..... 1ST DEFENDANT

EQUITY BANK (K) LIMITED.....2ND DEFENDANT

Last Order: 26/9/2022
Date of ruling 28/9/22

RULING

NANGELA, J.:

This ruling is in respect of a preliminary objection raised by the Defendants herein, following a suit filed by the Plaintiffs against the Defendants on 6th October 2021. The objection raised was in opposition to the continued hearing of this case which was scheduled for its hearingon the 26th September 2022.In particular, the objection to the suit was to the effect that:

> The witness statement of Ally Hemed Said who is the sole

> witness of the plaintiffs is incurably defective for want of oath as provided by Rule 49 (1) and 50 (1) (a) of the High Court (Commercial Division) Procedure Rules 2012 as amended by G. N 107 of 2019 and should therefore be struck out and the suit be dismissed with costs in favour of the Defendant.

On the material date when the parties appeared before me for the hearing of the case, Mr. Frank Mwalongo learned advocate appeared for the Plaintiff while Mr. Timon Vitalis and Mr. William Mang'ena, learned Advocatesas well, represented the Defendants. I allowed the learned counsels to orally address the Court in respect of the objections raised. I will thus summarise their submissions before I render my own assessment of them and my verdict.

According to Mr. Timon Vitalis who submitted in support of the preliminary objection, the gist of the Defendants' objection rests on whether it would be appropriate to rely on the witness statement of Mr. Ally Hemed Said while it is not made under oath or affirmation as required by Rule 49 (1) and

Rule 50 (1) (a) of the High Court (Commercial Division) Rules of 2012 as amended by GN No. 107 of 2019.

Mr. Vitalis submitted that, the above cited rules impose a mandatory obligation on the party intending to file a witness statement to ensure that, such a witness statement, which, in judicial proceeding, is taken to be the witness's examination in chief, is made under oath or affirmation. According to him, the mandatory nature of the provisions in question, is based on the fact that, the key word used in the is "**SHALL**".

Relying on section 53 (2) of the Interpretation of Laws Act Cap 1 R.E 2019, Mr. Vitalis submitted that, the use of the word "shall" in a provision presupposes that such a provision is of mandatory nature. Mr Vitalis submitted further that, the requirement for a witness statement to commence by an oath or affirmation is not a mere technical requirement nor it is a matter of form but one that goes to the substance of justice itself.

According to Mr Vitalis, so long as an oath is made to guarantee the veracity of any statement made in the course of judicial proceedings, absence of it can neither be salvaged by

the overriding objective provided under section 3A and 3B of the Civil Procedure Code Cap 33 R.E 2019 nor by Article 107 of the United Republic of Tanzania Constitution. Mr. Vitalis submitted further that, reliance cannot as well be placed on section 64 of the Interpretation of laws Act, Cap 1 R.E 2019 to salvage the omission.

Mr. Vitalis contended that, as a matter of fact and common knowledge, an oath or affirmation is ordinarily made at the beginning of the statements and precedes the facts to be stated in the witness statement so as to guarantee the truth made subsequent to it.

He maintained that, the witness statement of Mr. Ally does was not made under oath and neither does it even state the faith or religion of the maker of the statement or his age. He contended that, as long as an oath or affirmation stands as a guarantee of the facts stated, an oath or affirmation must be express and cannot be implied from the Jurat of attestation which tends to be the last part of an oath/affirmation.

He contended, further, that; the last part of the witness statement does not belong to the makerof the oath but to the

Commissioner for oath before whom the make of the statement appears.

To bolster his submission, Mr. Vitalis relied on the decision of this Court in the case of **Ivee Infusions EPZ Limited vs Mak Medics Limited,** Commercial Case No. 3 of 2019 (unreported), whereby an objection against the use and reliance on a witness statement which lacked an oath was sustained by the Court.

In his further submission, Mr.Vitalis contended that, while it is a practice that a witness appearing in Court to testify will normally take oath before this court prior to the production of documentto be relied upon, nevertheless, that oath is only meant to guarantee the truth of the facts given by the witness in the course of tendering of the intended document as well as facts he will state during his cross examination and re-examination.

In his view, in no way can such an oath apply retrospectively to guarantee the accuracy of the truth in the witness statement.To conclude his submission in chief, Mr. Vitalis pointed out that, since the witness statement of Mr. Ally

lacked the words "oath" or "affirmation",the witnessstamen is incapable of being adopted his examination in chief and, hence, no cross examination as well re-examination can be carried out.

With all that in mind, it was Mr. Vitalis's submission that the witness statement of Mr. Ally be expunged from the Court's record, the Plaintiff's case be dismissed and the hearing of counter claim against the Plaintiff be allowed to proceed ex-parte because there will be no witness statement by the Defendant in the counter claim which the Court will be able to rely on.

Responding to Mr. Vitalis's submission, Mr. Mwalongo submitted that, much he understands that the objection raised by the Defendants is premised on an allegation the witness statementwhich was made under Rule 49 (1) and 50 (1) of theHigh Court (Commercial Division) Rules of 2012 as amended by GN No. 107 of 2019, lacks oath or affirmation, the said truth of the matter at hand is that, the said rules have to be read together with the 3rd schedule to the Rules which gave a prescribed format regarding how awitness statement should look like.

Mr. Mwalongo submitted that, the 3rd schedule clearly indicates what should be contained in a witness statement. To be specific he pointed out the form which a witness statement is supposed to take, including that, it first part is left blank for the purpose of filling in details of the witness and goes on from paragraphs 1.1 to 6 thereto, followed by the body of the statement which leaves also a blank space for marking of the documents to be relied upon, before it ends with a statement that says: "I believe the facts stated are true" and, thereafter the Jurat of attestation.

In his submission, Mr. Mwalongo was of the view that, the submission made by the Defendants' learned counsel that oath or affirmation has to be started at the start of the statement was good and logical but what he stated was not part of the schedule. In Mr. Mwalongo's view, Rules 49 (1) and 50 (1)(a) have to be read in line with rule 48 and the 3rdschedule. He posed a question regarding at what point will a witness statement be deemed to have been taken under oath or affirmation. Is it at the Jurat where the witness says: "affirmed or sworn" or is it somewhere else?

Mr Mwalongo submitted that, the statement of Ally Hemed Said, contained affirmation as prescribed by the 3rd schedule of the rules, and, for that matter, the case of **Ivee Infusions EPZ Limited** (supra) was distinguishable to the facts and circumstances of the present case at hand. He contended, that, the objection raised in the referred case was referring to the mandatory requirements of rule 49 (1) and 50 (a) to (i) of the Commercial Court Rules, a fact which also bring to the forefront the question as at what sage is the oath or affirmation in the witness statement said to have been taken.

In his views, an oath will be said to have been taken when it was taken before the commissioner for oath and, that, the relevant part is in the Jurat and the statement is in compliance to 3rd schedule to the Rule.He contended further that, the submission made by the learned counsel for the Defendants befits application to a normal affidavit where the practise thereto is normally to start by the deponent's express mention of his or her religion and proceed to make an oath or affirmation.

He contended, however, that, such a practice is not a requirement in a witness statement and it is not part of what the 3rd schedule to the Rules prescribes. It was Mr. Mwalongo's submission, therefore, that, the preliminary objection was misconceived and should be overruled.

He argued in the alternative, however, that, should the court find that there was a requirement to start the witness statement by a statement stating an oath or affirmation, then this Court should be lenient and allow the Plaintiff to amend the witness statement by inserting those words in the witness statement because the witness had substantially complied withwhat the 3rd schedule to the Rules prescribes.

In a brief rejoinder, it was the submission of Mr. Vitalis that, while he is in agreement with the Plaintiffs' counsel that Rule 49 (1) and 50 (1) (a) of the Rules must be read together with the format of witness statement prescribed in the 3rd schedule to the Rules, his only departure is on what the word "read together with" means.

According to Mr Vitalis, the "reading together" refers to giving effect to the substantive provisions and the form. He

contended that, the meaning does not signify that the court should ignore or overlook the substantive provision and consider the formatonly. In his view, the format cannot prevail over the substantive requirement.

Concerning the issue raised by Mr. Mwalongo in respect of Rule 50 (2) which says the statement shall be *"substantially"* as in schedule 3 to the Rules, it was Mr. Vitalis' rejoinder that the word *"substantially"* does not mean has to be exactly the same as it was in the format prescribed by the 3rd schedule. He maintained, however, that, the Defendants' objection is primarily premised on the content and not in the form made under Rule 48 (2) which now is rule 50 (2) of the Rules.

As regard the submission that the issue of affirmation or swearing is more applicable to the form of an affidavit unlike a witness statement, Mr Vitalis re-joined that, the submission is erroneous because a witness statement has to be more serious than a mere affidavit.

Finally, it was Mr Vitalis's rejoinder submission that, the alternative prayer offered by Mr. Mwalongowas untenable given that, there was nothing to be adopted as a witness statement

and one cannot amend nothing. He maintained that, if the statement is believed to be the witness statement how can one amend it. In view of all that, he urged this Court to uphold the objection and reiterated his earlier prayer.

I have given due consideration to the rival submissions. In the first place, there is no doubt that a witness statement has a prescribed form under the 3rd schedule to the Rules. Secondly, there is no doubt that in the case of **Ivee Infusions EPZ Limited** (supra) there was an outright concession on the part of the Plaintiff's learned counsel that the witness statement he had filed contravened Rules 49(1) and 50(a) to (i) of the High Court (Commercial Division) Procedure Rules (as amended in 2019). In that premise, it was right for the Court to strike out the witness statement and dismiss the suit.

In this present case, however, the Plaintiff's counsel has contested the objection and the same is premised on Rules 49(1) and 50(1)(a) of the Rules and, in that regard, Mr Mwalongo has distinguished it. In my view, therefore, I would also distinguish the case based on their differences and the facts of each case.

With that in mind, the more pertinent issue for me to address is whether the objection at hand is merited. But, before I consider the merits or otherwise of the preliminary objection, I do find it pertinent, in the first place, to tackle some few auxiliary questions which I am supposed to respond to. These are as here under:

(i) When an oath is said to have been made and in what form and for what purpose?

(ii) Is the impugned witness statement it indeed defective and if so, can it be amended?

To being with, let me state that, a witness statement is a witness's testimony in chief reduced into writing and which is akin to an oral examination in chief given under oath.This fact was emphasized by this Court in the case of **International Commercial Bank (T) Ltd vs. Yusuf Mulla and Another**, Misc. Commercial Case No.108 of 2018 (unreported).

In that case, this Court drew inspiration from the decision of the Eastern Caribbean Supreme Court of Antigua and Barbuda in the case of **John Duggan, (as executor of the**

estate of Jean Duggan, deceased and as executor of the estate of Joseph P. Kelly, jr., Deceased) vs. HMB Holdings Limitedand 2 Others; Claim no. ANUHCV 2002/0055; where the Court, at para 30 and 31, was of the view that:

> "[A] witness statement is really a witness proof. It foreshadows the oral testimony of a witness.... and, in furthering the overriding objectives... not least of which, for the saving of time, the court may order that the witness statement stands as evidence in chief. This, however, does not alter the essential character of witness statement as being a proof reflecting the oral testimony of that witness."

In the context of our law and practice of this Court what follows when a witness statement is filed is its formal adoption in Court by the Witness and subsequent tendering of the documents listed on the witness statement and thereafter cross-examination follows.

From the above understanding, whereas under the normal practice elsewhere oral examination-in –chief is a mandatory requirement as per section 147(1) of the Act, Cap.6 R.E 2019, the practice in this Court is that such a scenario is satisfied by way of filing a Witness Statement in accordance with Rules 49(1) and 50 (1)(a) to (i) and (2) read together with the 3rd Schedule of the High Court (Commercial Division) Procedure Rules 2012 (as amended by rule 26 of the High Court (Commercial Division) Procedure (amendment) Rules 2019.

According to Rule 50(2) of this Court's Rules of Procedure, it is provided 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).*

According to Webster's Dictionary, the term substantial compliancerefers 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."(Emphasis added by the Plaintiff).

I have looked at the impugned statement. What I find, in the first place is that, although it does not have or states the witness's religious belief or contain the words "take oath" or "affirm" in its opening statements, the statement has substantially adopted the format prescribed under the 3rd schedule. In particular, it 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.

Under the law in the law and practice in United Kingdom, for instance, 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 requires the following statement to be included in a witness statement:

> "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."

Indeed, looking at the above statement in comparison with what the third schedule to the Rules applicable this Court, one will find that thewitness statement filed in this Court does indeed mirror the kind of a witness statement filed in the UK Commercial Court and, that, both serve the purposes of expediting conduct of commercial matters.

From that comparative view, I am further moved now to address the collateral questions I raised earlier hereabove. The first one was:

> When an oath is said to have been made and in what form and for what purpose?

Perhaps I shall start by its second limb regarding the purpose of an oath. In doing so, I will refer to the South African High Court (Western Cape Division) decision by MACWILLIAM AJ: in the **Wayne Gavin Armstrong vs The State, Case No.A265/16**:

> "The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable….An oath is no more than a calling on God to punish you if you say what is not true; and, if it is to be clothed with any efficacy, it can matter little what words or ceremonies are used in imposing it, provided the witness regards his conscience as bound thereby. The purpose of administering an oath - normally before a witness testifies - is to ensure that he does not speak lightly and frivolously, but weighs his words; to impress on him the solemnity of the occasion, and above all to provide a sanction against untruthfulness…."

As one may note from the above quoted case, the purpose of an oath, and as correctly stated by Mr. Vitalis, is to guarantee the veracity of the statement made by a witness in the course of judicial proceedings. It helps to impress one on the solemnity of the occasion.

But he questions which follows is when is it made? Is it when the one taking oath or affirming state in the witness statement that "I take oath" or "I affirm" or is it just sufficient when, as per the statement of truth contained in the prescribed form in the 3rd Schedule to the Rules? As it may be observed from the **Wayne's case** (supra)for an oath:

> to be "clothed with any efficacy, it can matter little what words or ceremonies are used in imposing it, provided the witness regards his conscience as bound thereby."

In that case, a deponent of an affidavit signed it before appearing before Commissioner for oath and the challenging question was whether the affidavit was defective or not. The Court deliberated as stated as follows:

> "Compliance … provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence. Where an affidavit has not been so attested, **it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator** as outlined above. And **whether there has been such 'substantial compliance' is a matter of fact, not of law**. Where a man, fully aware of the solemnity of the occasion and fully intending to be bound by his words, signs before swearing, it would place form above substance were his affidavit to be nullified for such chronological irregularity."

From the above considerations, much as an oath becomes an oath properly called when one appears before the person who has the mandate to administer it such a

commissioner for oath, it can matter little what words or ceremonies are used in imposing it. At the end of the day, however, is the substance not the form that will matter.

Perhaps I should further ice the discussion by looking at what this Court stated in the case of **MohansOysterbay Drinks Ltd vs. British American Tobacco Kenya Ltd,** Comm. Case No.90 of 2014 (unreported), given that, a submission was made that, the reasoning of the learned counsel or the Defendants was more suited to the drafting of an affidavit than a witness statement.

In that case of **MohansOysterbay Drinks Ltd** (supra), 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."

All in all, the bottom line of the above discussion, having so said, is the question is whether the witness statement is defective and if so, whether it can be amended.

In their submissions, both learned counsels for the parties were in agreement that, Rule 49(1) and Rule 50(1)(a) to (i) and (2) of the applicable Rules to this Court, are to be read together with the third schedule to the Rule which contains a prescribed form regarding how a witness statement is to look

like. As I stated herein earlier, the impugned witness statement is couched in line with the 3rd schedule.

In my humble view, the third schedule has condensed what is required of by Rule 50(1) of the High Court (Commercial Division) Rules 2012 (as amended) so as to ease things out and should not be complicated further. Given that the statement couched in line with the prescribed form under the third schedule, and since the same must be made before a commissioner for oath, the absence of the words "I swear" or "affirm" cannot make such a statement which substantially conforms to the form prescribed under the third schedule to be defective.

By the way, a witness may still start his/her statement with such solemn words and proceed to tell lies and hearsays throughout. For that matter, the procedure remains that, even if the statement has been filed in Court, still the witness will have to formally tender it in Court for it to be tested as to its admissibility and conformity.

In my view, if one carefully takes into account 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, it will be clear that, the mere filing of the witness statement does not make it to amounts to evidence in chief until when the witness appears in Court to testify. Item 5.1 provides that "*a witness statement is the equivalent of* ***the oral evidence*** *which that witness would, if called, give in evidence*".

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. In the same manner, a witness statement will be a testimony in chief after the witness is made to appear before the Court to have his statement formally adopted by the Court as his testimony in chief since he may even deny to have written it. And, his statement will of necessity, always besubjected to scrutiny during its admission to be part of the proceedings as witness' examination in chief.

The last part of my discussion is whether a witness statement can be amended before it is formally received by the Court. In my view, and I stated earlier, a witness statement is akin to an examination in chief only that it is reduced into writing. Being a written document, I am of the view that, even

if the Rules are silent, still, the Court, in a proper context of a given circumstance may, upon an application from a party and before the witness statement is formally adopted as part of the record of the proceedings in Court, grant an amendment.

I hold it to be so because, at some instances, even an affidavit, which is also evidence made under oath, may be amended upon request by a party. However, since I have made a finding that the witness statement conforms to the requirement of the law, I see no reasons why I should accede to the alternative prayers made by Mr. Mwalongo.

Having considered the relevant questions which I raised herein, the last and culminating question is whether the objection raised by the Defendants is of any merit. The response to this main issue was dependent upon the two minor issues. Since I have ruled positively on the minor questions which I raised in the course of my discussion, it follows that, the answer to this main issue should be in the negative, i.e., the objection has no merit because the witness statement conforms to the requirements of the law.

In the upshot of all that, this Court settles for following orders:

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

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

It is so ordered.

DATED AT DAR ES SALAAM ON THIS 28TH DAY OF SEPTEMBER, 2022

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DEO JOHN NANGELA
JUDGE