

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

COMMERCIAL CASE NO. 27 OF 2014

FBME BANK LIMITED PLAINTIFF

VERSUS

JUDITH MBWILE

JACKSON ERNEST MBWILE } DEFENDANTS

8th & 30th June, 2016

RULING

MWAMBEGELE, J.:

By a ruling of this court dated 29.06.2015, the defendants Judith Mbwile and Jackson Ernest Mbwile were granted unconditional leave to appear and defend this suit and were ordered to file their written statement of defence within twenty-one days from that date. The defendants filed their defence timeously and the matter proceeded to mediation which was recorded as failed on 11.03.2016 after which the court ordered that the matter should be brought to my attention with a view to fixing a date for final pretrial conference.

When the matter came before me on that date for that purpose, it was Mr. Ndazi, learned counsel, who appeared for the plaintiff. Mr. Kakamba, the learned counsel who used to appear for the defendants, did not appear on

that date. Both defendants were, however, present and intimated to the court that they did not know what had befallen their advocate as they tried to reach him by phone but he was not picking up the calls. Mr. Ndazi, learned counsel for the plaintiff intimated to the court that the defendants had not filed their witnesses' statement as prescribed by the law. All the same, Mr. Ndazi prayed to have the matter adjourned to another date.

When this matter was called on for necessary orders on 08.06.2016, both defendants were present as well as their advocate; Mr. Kakamba, learned counsel. The plaintiff had the services of Ms. Kweka who held brief for Mr. Ndazi, learned counsel. Mr. Kakamba told the court why the defendants could not file the witnesses' statements in time. He stated that immediately after mediation was complete and recorded as failed, he could not file the relevant witnesses' statements in time because he fell sick. However realizing what transpired in court on the last day of appearance during which he did not appear but his clients appeared, stated Mr. Kakamba, on 26.05.2016, he filed the relevant witnesses' statements out of time. He filed them 07.08.2016.

Ms. Kweka, learned counsel, who held Mr. Ndazi's brief and ready to proceed with the hearing or any arguments on behalf of Mr. Ndazi as required by rule 44 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules"), had an objection to the course taken by Mr. Kakamba. It was her view that the defendants ought to have filed their witnesses' statements within seven days after completion of mediation. Having failed to do so within the prescribed time, she argued, they should have sought and obtained leave of the court to file them out of time. In the premises, the learned counsel prayed that the witnesses' statements filed by

Mr. Kakamba out of time with no leave of the court, should be expunged and the plaintiff should be allowed to prove the case without the evidence-in-chief of the defendants; that is, the Plaintiff should be allowed to prove the case *exparte*.

In a short rejoinder, Mr. Kakamba, learned counsel urged the court not to dig the grave of justice particularly when it comes to procedural rules. It was his view that the court should not engage in technicalities by paying homage to procedural rules which thwart justice in that process. The learned counsel thus beckoned the court to use its discretion to allow justice to be seen to be done on the part of the defendants. The learned counsel cited the case of ***VIP Engineering Vs Bakhressa*** in which the Court of Appeal, speaking through Samatta, JK (as he then was), warned on the strict clinging to the procedural rules which amounts to denial of justice. The learned counsel did not offer the citation of the case but, I think, he had in mind the case of ***VIP Engineering and Marketing Ltd Vs Said Salim Bakhresa Ltd***, Civil Application No. 47 of 1996 (unreported) wherein it was held:

“...There is danger of consumers of justice losing confidence in the courts if judicial officers are obsessed more with strict compliance with procedural rules than what the merits for the disputes before them are ...”

In the case at hand, it is not disputed that the defendants did not file the witnesses' statements in time and that after realizing that anomaly and having seen what transpired in court on 26.05.2016, they filed the same, as per record, on 08.06.2016 (but the ERV shows that they were paid for on 07.06.2016 as Mr. Kakamba stated). When filing the statements on

07.06.2016 or 08.06.2016; whatever the date, the defendants were already out of time and filed the same without leave of the court. Luckily, Mr. Kakamba, learned counsel for the defendants, does not dispute these bare facts. The statements having been filed out of time and with no leave of the court, in my view, it is as if no witnesses' statements have filed at all. I find no reason why I should not agree with Ms. Kweka, learned counsel, that the same should be expunged. Consequently, the two witnesses' statements filed by the defendants on 08.06.2016 (or 07.06.2016 as Mr. Kakamba alleges) out of time and without prior leave of the court being sought and obtained, are expunged from the record of this case.

Having so done, what should be the way forward? Ms. Kweka, the learned counsel holding brief for Mr. Ndazi, learned counsel for the plaintiff, has urged this court to order an *ex parte* proof. I think she is right. I shall demonstrate.

Let me start with the premise that in the Commercial Division of the High Court, evidence-in-chief of a witness is done through presentation of a witness statement. The provisions of rule 49 (1) of the Rules are relevant here. The sub-rule categorically provides:

"In any proceedings commenced by plaintiff, evidence-in-chief shall be given by a statement on oath or affirmation."

Those statements must be filed within seven days after failure of mediation. This is the tenor and import of sub-rule (2) of rule 49 of the Rules. Let it speak it for itself:

"The statement shall be filed within seven (7) days of the completion of mediation and served as

directed by the court; Provided that a party's obligation to serve a witness statement is independent of any other party's obligation to file and serve its respective statement."

The practice of filing witnesses' statements as evidence-in-chief is relatively new in our jurisdiction. It was introduced by the Rules which came into force on 13.07.2012. The practice is widely gaining recognition in this jurisdiction. An akin procedure has been introduced in Election Petitions by the provisions of rule 21A of the National Elections (Election Petitions) Rules, 2010 - GN No. 447 of 2010 as amended by the National Elections (Election Petitions) (Amendment) Rules, 2012 – GN No. 106 of 2012.

Ever since the inception of the Rules, this court has all along been taking failure to file witnesses' statements seriously. The court has all along been holding that the filing of witnesses' statements which are received in evidence in lieu of evidence-in-chief is a mandatory requirement failure of which the defaulter is taken by the court that he has failed to prosecute or defend the case (as the case may be). In ***Barclays Bank (T) Limited Vs Tanzania Pharmaceutical Industries & 3 others***, Commercial Case No. 147 of 2012 (unreported), my brother at the bench; Nchimbi, J. had an occasion to deal with the tenor and import of rule 49 (1) of the Rules. There, like here, the court was grappling with a situation where the plaintiff had failed to file a witness statement as required by the rule. His Lordship observed:

"... it is clear that witness statement to be filed in court under this Rule is, in effect, evidence in chief which under the Civil Procedure Code, Cap.

33 R.E 2002 is given through oral examination in chief or directly by a witness as evidence in chief.

And His Lordship went on:

"...The only way to adduce evidence in chief in this court is by witness statement to be filed by respective parties ... [and] that requirement is mandatory ..."

His Lordship Nyangarika, J., seized with an identical situation in ***Tanzania Azimio Construction Ltd Vs CRDB Bank***, Miscellaneous Commercial Cause No. 138 of 2014 (unreported), wherein the plaintiff was seeking for extension of time to file a witness statement, observed:

"...witness statements are filed in lieu of examination in chief. The purpose thereof is to expedite the process. Therefore, allowing laxity in the name of wanting for the issues to be framed will not only violate the very rules designed to enhance justice but will also be a bad precedent endangering respect to the rules of procedure ..."

Reverting to the case at hand, the defendants have, essentially, not filed any witnesses' statements. What should have been done by Mr. Kakamba, having realized that the statements were not filed timeously as required by the law, was for him to seek and obtain leave of this court to have them filed out of time. That was not done and the learned counsel proceeded to file them in court without seeking and obtaining such leave. The procedure opted by Mr. Kakamba, learned counsel, is unacceptable.

Mr. Kakamba, learned counsel for the defendants produced a medical chit as proof of his illness immediately after failure of mediation. The reasons why the statements were not filed in time are not relevant at this stage. If anything, they would be relevant in an application for extension of time within which to file the statements. I am not ready to accept the reasons for delay at this stage and worse more such reasons are being made from the bar. It is the duty of any officer of the court to which Mr. Kakamba belongs that rules of the court must *prima facie* be observed. On this point, I wish to cite ***Ratnam Vs Kumarasamy and Another*** [1964] 3 All ER 933, wherein it was held:

"The rules of court must *prima facie* be obeyed and, in order to justify a court in extending time during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation."

The learned counsel for the defendants has not properly moved the court to consider the reasons for the delay to file the statements and therefore his defence to ask the court not to be caught up by technicalities in administering justice is misconceived. As already stated above, that could be appropriate material to seek and obtain court discretion in an application for enlargement of time within which to file the statements.

In the light of the authorities cited above with which I find myself highly persuaded and have no sound reason to depart from, I find and hold that the defendants have failed to defend the suit. I therefore grant Ms. Kweka's prayer that this case should proceed with *ex parte* proof as prayed. It will be so proved on a date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE