

TANZANIA / JUDGMENT

T AZIMIO CONSTRUCTION CO LTD VS CRDB BANK LTD MISC

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL CAUSE NO. 138 OF 2014 TANZANIA AZIMIO
CONSTARTUCTION CO. LTD..... PLAINTIFF/APPLICANT
VERSUS CRDB BANK LIMITED..... DEFEDANT/RESPONDENT

RULING

[in r e s p e c t o f a n a p p l i c a t i o n f o r e x t e n s i o n o f t i m e t o f i l e w i t n e s s s t a t e m e n t]
[03.09.2014 & 09.10.2014] Nyangarika J. The applicants, through the services of learned counsel, Mr. Jamuhuri Johnson have brought their application under SECTION 14 OF THE LAW OF LIMITATION ACT, CAP.89 R.E 2002 AND S.95 OF THE CIVIL PROCEDURE CODE CAP.33 R.E 2002, so that it can be heard for orders that

1. This honourable court be pleased to extend time in which to file the witness statement
2. Costs
3. Any other and further orders as this Honourable court deems just and equitable to grant. In the affidavit supporting this application, Mr. Allan Mwoleka, who identifies himself as a Director of the applicant Company states that they failed to construct meaningful statement for want of framed issues and the tentative one that they have constructed cannot suffice. It is stated further that since she resides in shinyanga, preparation of the documents entails expensive exercise of travelling to Dar es i Salaam and therefore it is prudent that the filing of witness statements should await the outcome of the final pre-trial conference. Mr. Daimu Halfani, learned counsel for the respondents, on the other hand, stated in his counter affidavit that filing of witness statement does not depend on framing issues, that the deponent Alan Mwoleka was present when the mediation was marked as failed therefore he could not have travelled back to Shinyanga without signing the witness statement, and further that he should follow the law not rely on prudence. As the rules dictates, the hearing of this application was preceded by their respective skeleton written arguments. At the oral hearing, both counsels had nothing much to add. I will, therefore, go through their skeleton arguments and their summary oral arguments. The applicant's counsel submits that difficulty in preparation of witness statement before framing of issues and the distance

between Dar es Salaam and Shinyanga, where the Directors of the plaintiff company resides are reasonable cause for an extension of time to file the witness statement because, as he put it, strict adherence to set time limit may lead to manufacturing of statements or weak points as the issues are yet to be framed. On the other hand, counsel for the respondent's states that absence of framed issues cannot be a ground for failure to file witness statement as required by law because they are different requirements, which must be complied to according to the dictates of the law. He submits that where as the issues are framed and recorded at the first hearing or at the time of final pre-trial conference, the witness statement must be filed within seven days of completion of mediation in terms of RULE 49(2) OF GN.NO.250 OF

2012. It was his statement that the prayers in the chamber summons should not be granted because the two witness statements filed in 2 court on 11th June, 2014 have not been withdrawn or expunged from the court record, and no affidavit has been given for the delay in filing the witness statement of Frederick Mulima, 2nd witness. He went on to submit that it is possible to construct witness statement basing on what has been alleged in the plaint. His prayers were that the said witnesses statement filed in court be expunged for being filed out of prescribed time, that the application be dismissed for want of merit, that the suit be dismissed with costs for failure to file witnesses statement, and that the counter claim, which is a suit itself proceed to be heard ex-parte. I have keenly gone through their arguments and for avoidance of doubt, I will, first, record the events as from the date mediation was marked failed as depicted in the case record. It is as follows: On the 12/5/2014, mediation was marked to have failed. This was in presence of Mr. Johson Jamhuri, advocate for the plaintiff/applicant and Mr. Allan Mwoleka, Director of the plaintiff, on the one hand, and Mr. Daimu, advocates for the defendant/respondent and Mr. David Mayonjo, officer from CRDB Bank. The matter was thereafter scheduled to come for final pre-trial conference before me on 29/5/2014 but none of the parties appeared. Thereafter, I made the same orders for the final pre trial conference to be held on 4/6/2014 but once again, they were both absent. On 19/6/2014, only Mr. Daimu entered appearance. It appears that, behind that scene, two documents namely Statement of Witness by Allan Dominic Mwoleka and that of Frederick Mulima were filed in this court on the 11th June, 2014. On the very same date of 11th June, 2014, this application for extension of time within which to file the witness statement was filed by the very applicants, attaching copies of the said witness statements marked Annexure "A". 3 I must state at the outset, that this whole conduct by the applicant's counsel is quite flabbergasting and surprisingly strange. Whereas the applicants purport to seek for time within which to file their witness statement, yet they are already filed in court, and registered. Counsel for the applicant did not offer an explanation to that rather backward move. He just kept mute and proceeded to press for the orders sought for during the hearing. Accordingly, I think it is pertinent to regularize the proceedings. Since the mediation was marked to have failed on the 12/5/2014, the time within which such statement should have been filed was 7 days hence the deadline thereto was by 19/5/2014. It follows, therefore, that the two witnesses

statement filed in court on 11/6/2014 without leave of this court to do so are nothing but unwarranted and irreversibly irregular. I therefore order that the same be expunged from the court records. Having so declared, I will proceed as if there was nothing filed in this court in the nature of witness statements as the counsel for the applicant wished. Looking into the affidavit, I find the grounds submitted as reasonable to be seriously wanting in merit as rightly submitted by the counsel for the respondent. I quite agree with the latter that the framing of issues is quite different from the witness statement. I hasten to add here that evidence and or testimony is always aimed at establishing the claim or a cause of action. Therefore, unless the plaintiff state that he or she is not sure of what she wants from the defendants that cannot, in any event be the case, he cannot rely on issues so as to state what he or she knows would establish the claim. It must be well settled in the mind of the learned counsels that witness statement 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 4 violate the very RULES designed to enhance justice but will also be a bad precedent endangering respect to the rules of procedure. That apart, the distance between Shinyanga and Dar es Salaam cannot warrant disrespect to the rules of procedure. Had it been for the distance, this application would have been made immediately after the mediation was marked to have failed. The period between 12/5/2014 and 11/6/2014 is exactly thirty days. Nothing has been offered to explain such an inordinate delay. I am oblivion to ARTICLE 107 A OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA as amended from time to time which requires this court to dispense justice without regard to technicalities, but to this, it is my opinion that the requirement to file witness statements is not a mere technicality but rather a means towards accessing justice. Accordingly, any rule be it of substance or of procedure, that requires compliance to attain such result must be jealously guarded by this court to avoid mistrust and laxity among litigants. It is for the above reasons I dismiss the application for extension of time within which to file the witness statement with costs. That being the stance of this court, the question is what befalls on the main suit filed by the plaintiff. Counsel for the respondent has beckoned me to dismiss it arguing that failure to file witness statement means that no witness can be called in court on behalf of the plaintiff during trial and further that the plaintiff cannot establish his defence against the counter claim. I have sought guidance of law, namely RULES 49(1) AND (2) 49 (I) In any proceedings commenced by plaintiff, evidence-in-chief shall be given by a statement on oath or affirmation.

- (2) The statement shall be filed within seven (7) days of the completion of mediation and served as directed by the court; 5 Apparently, since the proceedings were commenced by a plaintiff, therefore, evidence in chief, which is the evidence of the plaintiff and the defendant are to be given by way of a statement, statement which must be filed within seven days of completion of meditation. Therefore, obviously, where there is no such statement, it means there is no evidence in chief, basis of which further evidence by cross examination could be adduced. It is for this reason, I find failure to adduce evidence in chief to be tantamount to

failure to appear and prosecute the case. I understand, that the consequence of this position is very painful to the party failing to file such statement, particularly, if it is the plaintiff as in this case, but where she chose to commit laches or sleep on his right, such consequences are inevitable. For the above reasons, I proceed to dismiss the suit for want of plaintiff's witness statements to prosecute the case. That leaves me with the counter claim. The counsel for the respondent has ushered me to let it proceed ex parte. In the circumstance I do not see why the same should not be so ordered. I proceed therefore to pronounce as follows:

1. The application for extension of time within which to file witness statement is dismissed with costs.
2. The suit commercial case no.120 of 2013, is hereby dismissed with costs for want of witness statements to prosecute the case.
3. Counter claim in commercial case no.120/2013 shall only proceed ex parte upon a formal application as provided for by the rules. 6 It is so ordered. K.M .N yangarika, JUDGE At Dar es Salaam , 9 th day of October, 2014. 7

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