

TANZANIA / JUDGMENT

abrashid company limited vs mwanga district council another 2023 tzhc 15642 27 february 2023

COURT
TZHCDECIDED
27 February 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT
MOSHI CIVIL CASE NO. 12 OF 2021 ABRASHID COMPANY LIM
ITED.....PLAINTIFF VERSUS MWANGA DISTRICT COUN
CIL..... 1st DEFENDANT THE ATTORNEY GENERAL..... 2nd
DEFENDANT

RULING

8th & 27th February, 2023 A.P.KILIMI, J.: This is the ruling in respect to preliminary objection on the point of law raised by the learned counsel for the respondents as follows: -

1. That, the list of additional documents to be relied upon is bad in law for being
 - (a) In contravention the scheduling order and Order VIII Rule 23 of the Civil Procedure Code, Cap.33 R.E 2019.
 - (b) In contravention of the scheduling order and Order XIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E 33 of 2019.
2. That, the notice to produce is bad in law for being in contravention of Civil Procedure Code (Approved Forms) Government Notice Number 388 of 2017, form number C / 12 and Regulation 2. At the hearing of these objections Mr. Lussa learned counsel for the respondent prayed to drop objection number two and remained with one i objection. In supporting the remaining objection, the counsel submitted that, on 14/11/2022 the Plaintiff filed list of additional documents to be relied upon, this document was filed after the first PTC, which was decided on 27/7/2022 and hearing commenced on 9th November, 2022. He further submitted that order VIII rule 23 of the Civil Procedure Code, Cap. 33 R.E. 2019, hereinafter "CPC" , prohibit departure or amendment of scheduling order without the leave of the court, in this court no any application requesting a leave to file list of documents by plaintiff. Therefore, the plaintiff has filed the list without leave contrary to requirement of order VIII rule 23 of CPC, to buttress his point he has referred commercial court no 117 of

2017 in the case of Joint Venture Tangeru Construction Co. Limited and Techno Combine Construction Limited (Joint Venture) v. Tanzania Ports Authority and Ano. By so doing the counsel prayed the same be rejected with costs because it is in contra version of scheduling order and no blessing of this court. The counsel further in part (b) contended that, the list of document filed contravene scheduling order under order XIII rule 2 of CPC, at the marginal note of this order provides that document evidence to be produced at first hearing of the case, the first hearing commenced 9th September, 2022 and at this date plaintiff did not neither disclose to this court whether he has additional evidence nor make application for the same, this list of additional document was filed on 14th December, 2022 after the commencement of hearing of this case, without any formal application showing reasonable course for the same. He then prayed that it is against the law this need to be reject. Responding to the above submission, Ms. Lilian Justus learned counsel for Plaintiff contended that, after they filed the list of additional document in 14/12/2022, she contacted, and casually met the counsel for the defendant and informed that on the next scheduled date for hearing, she will address the court and seek leave of the court, to accept the list of additional document, to her surprise on the said date, she found the notice of preliminary objection which in essence rendered their application for leave nugatory. The counsel further contended that, the reason that she filed the lists of documents prior, were two, first; because they were mindful of the speed track chosen and it was our intention to dispose the suit before expiry of speed track and second; because they wanted to give the defendant ample time to be aware of the document intended to rely upon. So that he may not claim miscarriage of justice in his part, so in fact the filing was for the benefit of the Defendant to be informed him prior. In respect to the case cited by the counsel for defendant, she contended that the said case is distinguishable from this case at hand, while in the case cited of page 3 of the said Ruling, the plaintiff stated before the court that he will not have any application, discoveries or interrogation, this was not the case in this court, and at final PTC of the said case, the plaintiff said, he has already filed a list of additional document. But that is not the situation in this court. She then concluded that it suffices to say that the scheduling in this matter has never been closed. The counsel for plaintiff further prayed this preliminary objection be dismissed and if it will be pleased the plaintiff be allowed to file the application to seek leave to file the said document, which was uploaded on December, 2022 and it was been taken by event by preliminary objection raised by the Defendant. In his rejoinder Mr. Lussa submitted that, although he was contacted but it is clear the leave to file any document is not given by the parties, so party cannot confiscate the power of the court, so it was her duty to seek the leave of the court before filing. The counsel further insisted that the case is applicable because a plaintiff filed a list of documents to be relied upon after the hearing started, the scheduling order was closed after final PTC conducted at 5th October, 2022. And the said departure from scheduling order has to be through a formal application, to buttress this stance he has referred the case of Stanbic Bank (T) Limited v. Nolan (2003) 2 E.A 674 I have considered the rival submission of both learned counsels, before I pact them, I wish to adduce the law in regard to filing of list additional documents. Order VII Rule 18 (1) of the CPC provides as follows: "A document which ought to be

produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without leave of the court, be received in evidence on his behalf at the hearing of the suit " [Emphasis added] The alternative to the above is to use the avenue provided under Order XIII rule 1 of the CPC. Sub-rule (1) and (2) of rule 1 of Order XIII rule 1 of the CPC provide that- "(!) The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced.

- (2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs." [Emphasis is added] In the above law, its literal meaning, implies that a list of additional documents must be filed in court before hearing of the case commences. Moreover, any production of a document which was not annexed to the plaint or entered in the list can only be done if leave of the court is sought. It complements what is stated in Order XIII Rule 1 which underlines the need for having the court's accession before such document is adduced. (See the case of Joint Venture Tangeru Construction Co. Limited and Techno Combine Construction Limited. (Supra) I wish to seek persuasion from the Matter of Petition for Letters of administration by Alice Kambona Gilyoma and Rose Mbogo Gityoma Probate and Administration Cause No. 7 Of 2021 HC. At Musoma. When, my brother Kahyoza J. observed that, the rationale of rule 1 of Order XIII of the CPC, is not hard to find; one, is to ensure there is fair trial that is each party has a right to know the evidence against him before hearing commences so as to prepare his case. A party cannot know the existence of the documentary evidence unless the same is brought to his attention. Thus, after the party filed documents under rule 1 of Order XIII of the CPC, he must serve the adverse party before the hearing commences. And two, another rationale of rule 1 of Order XIII of the CPC is to prevent fraud by late production of forged or dubious documents and not to penalize parties for non-production in time. Bringing home the point, the record of this case reveals that, the said list of additional documents was received on 14th November, 2022. By this date already the hearing was commenced on 9th November, 2022. It is undisputed no leave was sought in this court for the same. The reasons advanced by the learned counsel that she was saving the speed track chosen and to give the defendant ample time to be aware of the document intended to rely upon, in my opinion does not hold water because it the duty of court to rescheduled speed track if is nearly to expire and any pleading or document intended to be used in court by one party must pass in the eyes of the court before reaching the opponent party to the case, this is the gist of the law cited above. The counsel for the plaintiff notwithstanding the above objection, prayed to this court be allowed to file the application to seek leave to file the said list documents. Taking the fact that she has already filed the same, thus my to opinion is passed by event. I am mindful that, it is a matter of fact and law that the reception of the documents intended to be relied upon by either party to the suit under Order XIII Rules 1 & 2 of the CPC is quite different from admitting the said documents

in evidence. (See Order XIII Rule 3 of the CPC) and it is therefore the law a party who intends to apply under Order XIII Rule 2 of the CPC for production in Court of additional list of documents intended to be relied upon must first pray the court showing good cause for doing so. In this matter neither it is shown that the said list of documents were mentioned by plaintiff in his plaint, nor parties were already aware of the said documents by names, that ought to be relied upon at the hearing. In the upshot of all stated above, I am settled that there was a need of this court to grant leave before the said list is filed. I therefore concede with Mr. Lussa that the same was filed against the law because it lacks blessing of this court. I therefore sustain this objection and consequently the 8 said list filed is hereby expunged forthwith. According to the circumstances of this matter no order for costs is granted. It is so ordered. 9

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