

TANZANIA / JUDGMENT

ruth twissa vs israel salath mwakila others 2019 tzhc 83 25 october 2019

COURT
TZHCDECIDED
25 October 2019

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
LAND CASE NO. 65 OF 2015 RUTH TWISSA.....PLAINTIFF VERSUS ISRAEL
SALATH MWAKILA..... 1st DEFENDANT SILVANUS B. MLOLA..... 2nd
DEFENDANT LAWRENT NTANGA..... 3rd DEFENDANT ISACK
KIHWILI..... 4th DEFENDANT SALEHE JUMA SALEHE..... 5th
DEFENDANT AZANIA BANK LIMITED..... 6TM DEFENDANT UBAPA COMPANY
LIMITED & TRIBUNAL BROKERS..... 7th DEFENDANT Date of last Order:
09/10/2019 Date of Ruling: 25/10/2019

RULING

MGONYA, J. The instant suit was initially filed on 13th July 2015 in this Registry having one Plaintiff and eight Defendants respectively. Later in the course of proceedings, the Plaintiff through her Advocate Mr. Hamisi Mfinanga prayed to amend the Plaint where among other things, the 8th Defendant, the Director Ilala Municipality was dropped. The case was not well responded to by most Defendants; serve for the 2nd Defendant one Sylvanus B. Mlola being represented by Advocate Tarzan Mwaiteleke and the 6th Defendant therein, Azania Bank Limited under the representation of Ms. Pendaeli Mziray. From the non-response of other Defendants, initially the matter was ordered by Hon. Mruke J. to proceed Exparte against the 3rd Defendant for failure to file his Written Statement of Defence within statutory time. Later on 24th March, 2017, before the matter proceeded to another stage of First Pre Trial Conference, and due to the severe absence of the 1st, 4th, 5th and 7th Defendants without any explanation neither notification despite of being served, I decided to grant the Plaintiffs prayer for the matter to proceed Exparte against the above mentioned parties. On 11th July 2019, I accordingly conducted the 1st Pre-trial Conference and further referred the case to Mediation for the period of one month from the date of the first session with the Mediator. When the matter was called before the court on 7th August 2019 before this honourable court, it came to my knowledge that the Mediation failed due to the Plaintiffs absence. I quote the Mediator's words as herein below: "COURT: Mediation was to be attempted in the absence of the 1st, 3rd, 4th, 5th and 7th Defendants. Unfortunately, today Mediation could not take place because the Plaintiff is not in Tanzania. She is staying in the United Kingdom. Thus she has failed to appear and she could not

appear for Mediation. ORDER: It is therefore not practicable to conduct scheduled Mediation session because the Plaintiff has failed to attend. Hence the file is remitted to the trial Judge for necessary orders according to law (GN No. 381/2019). (Signed) Mgetta J. 29/7/2019" It is from the said order, the 2nd Defendant's Counsel Mr. Mwaiteleke and the 6th Defendant's Counsel Ms. Mziray prayed to this Honorable court to invoke the provisions of section 29 of the Civil Procedure Code (Amendment of the First Schedule GN. No. 381/2019) particularly due to the failure to attend the Mediation, where they were of the view that, the Plaintiff herein is the cause of the Mediation failure due to her absence as well stated by the Mediator. In that cause, they prayed the court to dismiss the suit under the above provision of law. In response, the Plaintiff's Counsel Mr. Hamisi Mfinanga told the court that, the reason of his client's absence was due to the fact that she is living and working in the United Kingdom. Further, due to her insufficient income she was not able to make it for Mediation. Mr. Mfinanga prayed the court to reject the objection and Defendants' prayer as stated above. From the above divergence submissions, I decided to make a decision, hence this Ruling. Indeed the Civil Procedure Code under GN. No. 381/2019 has brought the massive and revolutionary amendments to the Civil Litigation System in this Country. The aim being to strengthen the Civil legal procedure according to the rapid social economic development that has occurred recently taking into account the factors of time, expenses and other aspects of life. In the amendment brought under GN. No. 381/2019, the purpose and nature of Mediation has been well elaborated under section 26 of the same. Further under section 27 attendance to the Mediation has been well elaborated where parties to the Mediation have been recognized as herein below: "27 (1) The Party or his Advocate or both; where the parties are represented shall be notified of the date of Mediation and shall attend the Mediation session.

- (2) Where the third party may be liable to satisfy all or part of a judgment in the suit or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the suit, the third party or his advocate may also attend the mediation session, unless the court orders otherwise." On the same vein of making Mediation be conducted in a more accurate way and to reach the goal of Mediation, section 28 of the same provides Authority to settle where the same provides: "28 (1) A party to a mediation session shall have authority to settle any matter during the mediation session.
- (2) A party who requires the approval of another person before agreeing to a settlement shall before the mediation session, arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours." The above sections have exhaustively made all the ways possible for a party to make use of Mediation as it was intended by the law. In case the Party to the suit can't make it to the Mediation, there are other alternatives provided by the law that can be used to make the Mediation possible and useful to the parties. The law further provides remedies upon failure of the parties to attend the mediation as well stated under section 29 of the GN. No. 381/2019. The same provides: "29 Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may: 6

- (a) Dismiss the suit, if a non-complying party is a plaintiff, or strike out the defence, if the non-complying party as a defendant;
- (b) Order a party to pay costs; or
- (c) Make any other order he deems just. Back to the matter at hand, from the wording of the Mediator, my brother Mgetta J., and the order emanating there to, the reason of failure to the Mediation on this matter of which is already a backlog in which the court on one part, and the Parties on the other side, are all struggling to see the same reach to its finality, is the failure of the Plaintiff to attend the Mediation for the reason that she is residing and working for gain in the United Kingdom. Under the circumstances, I wonder as to why the Plaintiff's Counsel who by now must have been conversant with the recent amendment to the law did not want to put into practice and make use of sections 27 and 28 of GN. No. 381/2019 as quoted above, as to who may attend and have authority to settle in mediation in whatever the circumstances one being the party's absence for whatever reason. Under the circumstances of this matter and particularly for the stated reason of the Plaintiff's failure to attend mediation sessions, there was quite a wide range of choices to remedy the situation and continue with the mediation as intended by law. In this event, the Counsel for the Plaintiff was expected and in particular after consultation with his client be vested with powers to proceed with the mediation taking into account the rights of the client as directed. What the counsel was supposed to do is just to inform the Mediator that he has been vested with those powers where the Mediator for record purposes could have noted in the coram. The law under section 27(1) clearly states that in mediation, the Party or his Advocate or both; where the parties are represented shall be notified of the date of Mediation and shall attend the Mediation session. Further, the authority to settle has been derived under section 28 (1) and (2) clearly that a party to a mediation session shall have authority to settle any matter during the mediation session; further a party who requires the approval of another person before agreeing to a settlement shall, before the mediation session, arrange to have ready means of communication to that other person throughout the session whether it takes place during or after regular business hours. From the above legal position of which has relieved and improved the mediation procedures for both parties and the court, should not be taken for granted. Under the circumstances, not only the Counsel for Plaintiff was in position to stand on behalf of the Plaintiff during mediation, but also upon arrangement, another person duly appointed by the Plaintiff could have attended the mediation. On my part, I take the recent amendments very seriously as I do not want to undermine the work that has been done by the Legislature in bringing these amendments of which its main purpose is to focus on the intended results of mediation in litigations to attain the benefits of mediation as intended by the law. Before I make my decision on the situation, I want to urge the legal practitioners to take these amendments seriously. The amendments are meant to be used not just for fun, but instead we should take the advantage of the same by improving litigations without having flimsy excuses on these serious matters which takes time, energy and brains to try settling the disputes in a modernized way; taking into account the benefits of Mediation as I have tried to itemize a few of these as herein below: First, is having a

Greater Control of the matter by the parties versus the court. Mediation increases the control of the parties over the determination of the matter. Each party is directly involved in negotiating their own agreement and no settlement can be imposed upon them. In comparison, dissatisfaction is often experienced in court where parties have little choice but to accept the judgment made, which they may not be happy with. Second, is Confidentiality to the Parties. Unlike the potential publicity of court proceedings, everything said at the mediation is entirely confidential to the parties (unless specifically agreed otherwise). Third, it is voluntary. Any party may withdraw at any time of the Mediation, but at least the Mediation could have commenced and tried by the parties. In this event, the mediation will be marked failed, not by nonattendance, but for some other reason(s). Fourth, is Convenience. The mediation is arranged at a venue convenient to the parties, who each have their own room as well as a separate room for joint meetings. The Mediator listens to everyone's view, talks to the parties privately and together, guiding them towards a settlement. Fifth, is Reduced Cost. This mostly benefits the parties to the litigation. Generally the cost is greatly reduced in mediation in comparison to full trial in case the mediation fails. So it is good to give it a try, as traditional litigation is very expensive and the total cost is highly unpredictable. Sixth, is Faster outcome. Because mediation can be used early in a dispute, an agreement can usually be reached quicker than if pursuing controversial issues through full trial. Seventh, is Support. Mediators are trained in working in difficult situations. The Mediator acts as a neutral facilitator and supports each party through the process, unlike in trials. Eighth, and last is Preservation of Relationships. Whether in business or family disputes, preservation of relationships can be a key benefit of Mediation. Mediation helps participants focus on effectively communicating with each other as opposed to attacking each other. Above are few benefits that can be observed in Mediation of which I am sure the same were in the mind of the Stakeholders and the Legislature who finally decided to amend the provisions of Mediation and Arbitration Procedure under the Civil Procedure Code of which should never be underestimated or underrated in any way. All said and done, I take the recent Amendment to the Civil Procedure Code Cap. 33 very seriously and under the circumstances, I have decided to invoke the provisions of section 29 (a) of the Civil Procedure Code (Amendment of the First Schedule GN. No. 381/2019) and proceed to DISMISS THE INSTANT SUIT, that is LAND CASE NO. 65/2015 ii accordingly on account of the Plaintiffs failure to attend the Mediation. The court awards costs to the 2nd and the 6th Defendants. It is so ordered. Right of Appeal explained. L. E. MGONYA JUDGE 25/10/2019 Court: Ruling delivered in chamber in the presence of Mr. Grayson Laizer, Advocate for the Plaintiff; Mr. Ngusa Erasto, Advocate for the 6th Defendant and Ms. Emma RMA this 25th day of October, 2019. L. E. MGONYA JUDGE 25/10/2019 12

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