

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 61 OF 2015

BANK OF AFRICA (T) LIMITED PLAINTIFF

VERSUS

INTERSALES TANZANIA LIMITED 1ST DEFENDANT
HAPPY KAITIRA BURILO 2ND DEFENDANT
IRENE EPHRAIM MAGULA 3RD DEFENDANT

RULING

Date of the Last Order: 09/02/2018

Date of the Ruling 14/02/2018

SEHEL, J.

This is a ruling on an application made by the counsel for the plaintiff, Mr. Magusu, learned advocate that the witness statement of one Grace Ikombe, who is the sole witness for the plaintiff be admitted under Rule 56(3) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 ("the Rules"). It was his submission that he tried to contact the witness but the witness declined to honour their call. Last time when the matter was fixed for hearing, counsel Magusu notified this court that

their sole intended witness who has filed her witness statement no longer works with the plaintiff and that they tried to contact her but she was outside Dar es Salaam therefore the counsel prayed for another date for hearing. The hearing was adjourned to come today and today the counsel still could not manage to bring the witness.

The prayer was strongly objected by the counsel presenting defendants Mr. Shadrack, learned counsel with a reason that if the witness statement is admitted, defendants will not have a chance to cross examine the witness, thus the court will not have a chance to weigh the veracity of the statement. He thus prayed for the same to be strike out.

As I said earlier the matter is fixed today for hearing of the Plaintiff's case. Both counsels acknowledged that the sole witness of the Plaintiff did not turn up for cross examination despite being directed by this court on 4th December, 2017 during the final pre-trial conference that all witnesses who have filed their witness statements shall appear for cross examination.

Rule 56 of the Rules provides:-

"(1) A party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross examination

- (2) *Where the witness fails to appear for cross examination, the Court shall strike out his statement from the record, unless the Court is satisfied that there are exceptional reasons for witness's to failure to appear.*
- (3) *Where the Court admits a witness statement of a witness who has failed to appear for cross examination lesser weight shall be attached to such statement"*

Applying the above rule to the matter at hand, the plaintiff herein is relying on a witness statement of one Grace Ikombe as such the plaintiff is required by the Rules to cause this witness to attend for cross examination. We are told by the counsel for the plaintiff that this witness declined to respond to their call hence the plaintiff is praying for the court to invoke the provisions of Rule 56(3) of the Rules by admitting the witness statement and accord it with a lesser weight. For this Court to admit a witness statement who has failed to appear for cross examination the court must be satisfied that there are exceptional circumstances. The question that follows is whether the non-appearance of the witness was due to the exceptional circumstances. It is unfortunate that exceptional circumstances

have not been defined under the rules. In the case of the National Bank of Commerce Limited Vs Ahmed Freight Ltd and 2 Others, Commercial Case No 4 of 2015 (unreported) i found that a death of a witness is one of the exceptional circumstances. In the matter at hand the non appearance of the witness was not due to death but due to unwillingness of a witness to appear and be cross examined. To me this cannot be equated as exceptional circumstances. Consequently in terms of Rule 56(2) of the Rules I do hereby strike out from the record the witness statement of Grace Ikombe. Since this is the sole witness for the plaintiff then in terms of Rule 2(2) of the Rules read together with Order XVIII Rule 3 of the Civil Procedure Act, Cap. 33 I do hereby strike out the suit for failure of the Plaintiff to cause the attendance of her witness. The defendants shall have 1/3 of their costs which shall be taxed as they did incur some costs in defending the suit.

It is so ordered.



B.M.A Sehel

JUDGE

14th day of February, 2018

