

applicant also prays for the said witnesses to be compelled to produce various documents which are said to be in their custody/possession. The application is made under Order XVI Rule (1) and (6) of the Civil Procedure Act, Cap.33 (hereinafter referred to as "CPC").

The respondent after being served with the application filed its counter affidavit to oppose it and a notice of the preliminary objections that contained six points in limine. This is a ruling on the preliminary objections raised by respondent.


Before going into the submissions on the preliminary objections, it is opportune to give brief background facts relevant to the matter at hand so as to fully appreciate the counsels' submissions. The applicant's suit was lodged to this Court on 26th day of July, 2016. On 22nd March, 2017 the first pre-trial conference was held where both parties notified this Court that no further applications to be made to that effect, amongst other things, it was scheduled that no further applications, discoveries, and/or interrogatories shall be made. The suit went through mediation and the final pre-trial conference was

held on 5th July, 2017 whereby it was ordered that the trial of the suit shall commence on 11th September, 2017. On the scheduled date, counsel for the plaintiff/applicant was appearing before Honourable Mwandambo, J so the hearing was adjourned to 21st November, 2017. By this time, the applicant/plaintiff had already filed the present application this halted the hearing of the main suit to proceed. The application was filed on 8th day of September, 2017.

Prior to the oral hearing of the preliminary objections, counsel for the respondent filed skeleton arguments as stipulated under Rule 64 of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"). The skeleton arguments were fully adopted by Eustace Rwebangira, advocate for the respondent and he had nothing more to add. On the first objection it was submitted that the applicant by filing the present application has departed from the scheduling order without leave of the Court which is contrary to Order VIIIA Rule 4 of CPC. To support his argument he cited the decision of this Court in **Gerhard Hockmuth Vs Intermarine Limited & Another**, Commercial Case No. 2 of 1999

(Unreported) where Kalegeya, J (as he then was) held that a party should not be allowed to amend the pleading after mediation has been held and failed unless there are very exceptional and compelling circumstances.

Antipas, advocate for the applicant acknowledged that the scheduling order was made but he argued the applicant has a right under Order XVI Rule 1 of CPC to bring the present application at any stage. In the alternative he argued if the Court finds that the application contravened scheduling order then the proper course is not to strike out the application but rather to look into the interest of justice as provided for under Order VIII A Rule 4 of CPC and allow such departure. The counsel further pointed out that the application was filed after the anticipated witness refused to record his witness statement.

It was insisted by counsel Rwebangira that Order VIII A Rule 4 of CPC prohibits departure from the scheduling order without leave of the court and that the reason given could have been proper at the application for departure. 

From the submissions made by the counsels, I gathered that they are at par that the applicant's application is brought after the scheduling order. It is also not disputed that the applicant did not seek departure from the scheduling order. The counsel for respondent argued that since the suit has passed through scheduling order then the applicant ought to have sought departure of the scheduled order under Order VIII A Rule 4 of CPC before filing the present application. Counsel for applicant had a different view. It is his stance that Order XVI Rule 1 of CPC is self-explanatory that the applicant can make the application at any stage without seeking for departure of the scheduling order. From these submissions it is for this Court to determine as to whether the applicant ought to have sought departure of the scheduled order before filing the application.

In tacking this issue, I prefer to start by revisiting Rule 29 (1) of the Rules which deals with the pre-trial conference. It reads:-

"Without prejudice to sub rule (1) of rule 24 at any time before any case is tried, the Court may direct parties to attend a pre-

trial conference relating to the matters arising in the suit or proceedings."

It is my reading of the above Rule that before the case is tried the court may direct parties to attend a pre-trial conference. As I said, parties did attend the first pre-trial conference on 22nd March, 2017.

The purpose of holding pre-trial conference is to consider amongst other things the possibility of settlement of all or any of the issues in the suit or proceedings; to require parties to furnish to the Court with any information that the court considers fit; to give direction as the court may consider necessary or desirable in order to secure just, expeditious and economical disposal of the suit or proceedings (See sub-rule 2 to Rule 29 of the Rules); and for setting of the speed track in accordance with Rule 32 (2) of the Rules.

If any party defaults in complying with any of the directions given then the court is empowered to either dismiss the suit or strike out the defence or counter claim or enter judgement or make such

other order as it considers fit. This is clearly stated under Rule 29 (3) of the Rules.

A party to the suit or proceedings is prohibited to depart or default from the direction given by the Court under the provisions of Rule 29 of the Rules. If any party defaults then stringent measures befalls upon him/her as provided for under Rule 29 (3) of the Rules.

It is for this reason, the counsel for respondent wished for applicant to seek leave of the Court under Order VIII A Rule 4 of CPC that allows departure from the scheduling order. As I said the counsel for applicant argued that the applicant is not required to seek leave because he said Order XVI Rule 1 of CPC allows the applicant to make application at any time even after the scheduled order was fixed. With due respect to the counsel's submission, CPC is not applicable in commercial cases unless there is lacuna in the Rules. The procedure of hearing and attendance of witnesses in the Commercial Court is governed by Rule 49(1) of the Rules that provides for every suit commenced by a plaint in commercial court, evidence-in-chief shall be adduced by way of witness statement

which has to be filed within seven days upon failure of mediation. The requirement of filing witness statement is mandatory as stated by Hon. Nchimbi, J (as he then was) in **Barclays Bank (T) Limited Vs Tanzania Pharmaceutical Industries & 3 others**, Commercial Case No. 147 of 2012 (Unreported) when he said:

"...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 ..."

The purpose of filing witness statement has been explained by Hon. Mwambegele, J (as he then was) in **Afriscan Group (T) Limited Vs Said Msangi**, Commercial Case No. 87 of 2013 when the Court was faced with almost similar situation but declined the prayer by stating:

"....the purpose of filing and serving the witness statement to an adverse party is to afford them an opportunity to assess the same and prepare for cross-examination, it follows that, any party that fails to file the same has no back door through which he can testify more so where such move is deemed to ruin the

statements of the witnesses of the adverse party. It is for the foregoing reasons that I reject Mr. Mbamba's prayers for summons to issue to and or filing of any witness statement other than the ones already filed as provided by the Rules."

I understand that the counsel for the applicant is pleading that he faced difficulties in obtaining the statement of the witness and that is why he has decided to file the present application. This submissions, as correctly submitted by the counsel for respondent, comes from the bar and it is no where to be found in the affidavit. Furthermore, I have instigated herein that the final pre-trial conference was held on 5th July, 2017 after all parties have filed their witness statements. I take that by this time the counsel was aware that one of his witnesses declined to record his statement. It is thus not known why it took the counsel almost two good months for him to file the present application on 8th September, 2017, if at all, his argument is true. As I said once a pre-trial conference is held and the court thereafter made its direction then parties are obliged to comply with the court's direction, failure of which may result in

dismissal of the suit, striking out of the defence or counter claim or even judgement be entered pursuant to Rule 29 (3) of the Rules.

Since the applicant in the matter at hand, contravened Court's direction issued on 22nd March, 2017 then in terms of Rule 29 (3) of the Rules I proceed to strike out the applicant's suit, that is, Commercial Case No. 89 of 2016. Consequently, the present application has also to be strike out and I do hereby strike it out with costs. It is so ordered.

DATED at Dar es Salaam this 9th day of February, 2018.



A handwritten signature in blue ink, appearing to be "B.M.A Sehel".

B.M.A Sehel

JUDGE

09th day of February, 2018.