

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

**MISC. COMMERCIAL APPLICATION NO 253 OF 2017
(Arising from Commercial Case No. 116 of 2016)**

NIC BANK TANZANIA LIMITED APPLICANT

Versus

HIRJI ABDALLAH KAPIKULILA RESPONDENT

RULING

Date of the Last Order: 26/02/2018

Date of the Ruling 02/03/2018

SEHEL, J.

The applicant herein who is also a plaintiff in Commercial Case No. 116 of 2016, through the services of Locus Attorneys, filed the present application for the Court to exercise its inherent power and make an order for granting the applicant leave to substitute a witness as such substitution is necessary for the ends of justice in Commercial Case No. 116 of 2016. The applicant also prays for costs and any further orders as deem fit. It is made under Rule 2 (2) of the High Court (Commercial Division) Procedure *dw.*

Rules, GN 250 of 2012 (hereinafter referred to as "the Rules") and Section 95 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 the application.

Before going to the merits of the application it is necessary, at this juncture, to provide a brief background of the matter. The applicant sued the respondent through Commercial Case No. 116 of 2016 seeking for payment of outstanding loan amount of Tshs. 160,562,539.53; payment of general damages; payment of interest at the rate of 20% per annum on the principal amount from 6th September, 2016 until full payment; payment of Court's interest rate on the decretal amount at the rate of 12% from the date of judgment till full payment; costs. The applicant also seeks for alternative remedy, namely: sale of Motor Vehicle with Reg. No. T 988 CRP make Yutong Bus, T 662 DBV make Yutong Bus, and T 278 DFA make Yutong Bus; and costs of the suit. After being served with the paint, the respondent filed his written statement of defence.

Pleadings having been completed, the suit passed through scheduling conference and mediation. Mediation did not produce any fruitful results.

thus the file was reverted back to me for continuation of the trial. Mediation was concluded on 8th day of May, 2017. Thus, pursuant to Rule 49 (2) of the Rules, parties had seven days to file their witness statement from the date mediation was concluded. Both parties dully complied with requirement of the law by filing their witness statements on 15th day of May, 2017. Applicant filed one witness statement of Michael Clement Benedict Kimwaga and respondent also filed one witness statements of Hirji Abdallah Kapikulila. At the final pre-trial conference the matter was set for hearing on 19th June, 2017. On 19th day of June, 2017 counsel for the plaintiff appeared together with his witness, Mr. Kimwaga but prayed for an adjournment with a reason that the witness was sick thus he had no time to prepare his witness and the witness has not come with original documents. The prayer for adjournment was allowed and the suit was set to come for hearing on 25th day of July, 2017. On the date fixed for hearing, counsel for the plaintiff notified the Court that their sole witness has absconded work for the past two weeks and all efforts to trace him have proved futile. He said even his mobile phone is not reachable. With those circumstances, the counsel prayed for the plaintiff to be allowed to

substitute the witness. Having heard, the prayer, I ordered for the plaintiff to file a formal application. Hence the present application.

Counsels for both parties duly complied with Rule 64 of the Rules by filing skeleton arguments three days prior to the oral hearing. Counsel Makarios who appeared to represent the applicant begun his submission by adopting the contents of the affidavit filed in support of the application and skeleton arguments. He then highlighted few things that the application is made under Rule 2 (2) of the Rules because there is no specific rule in the Rules to govern the applicant's application. Section 95 of CPC was cited because it preserves the inherent powers of the Court as may be necessary for the ends of justice. He said Section 95 of CPC requires the applicant to advance justifiable reasons as to why the Court should invoke its inherent powers and reasons for the ends of justice. Regarding justifiable reason, he said the applicant complied with all the rules of filing witness statement by filing a witness statement of Michael Clement Benedict Kimwaga, who is the sole witness for the applicant. He submitted that on 28th day of June, 2017, the witness Kimwaga tendered a two months resignation notice without stating the reasons for resignation and in his resignation letter, he

promised to leave the work after complementing the time span of the notice which was two months. However, on 5th July, 2017 the witness stopped coming to work as such he absconded from his work. The counsel submitted that the applicant tried to trace him but his efforts were failure. He said the applicant issued a public notice that Michael is no longer working with the applicant and to date his whereabouts is unknown. It is for this reason which is beyond the knowledge of the applicant necessitated the applicant to seek leave for substitution of the witness.

Regarding ends of justice, he submitted that Rule 48 (1) (a); (b); and (c) of the Rules requires a witness statement to be made on oath; contain name, address and occupation of the witness; and should be in the witness's own words which means all these will only be met by the witness, one Mr. Kimwaga and not any other person. The counsel further pointed out that Rule 49 (1) of the Rules provides that in any proceedings commenced by a plaint, evidence in chief must be given by a statement on oath or affirmation and that a party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross examination as provided by rule 56 (1) of the Rules. He said the applicant


is intending to rely on the sole witness statement of one Michael Clement Benedict Kimwaga whom due to the explained circumstances the applicant is unable to cause his appearance for cross examination as such there is a danger of such witness statement to be struck out unless the Court is satisfied that there are exceptional reasons for the witness's failure to appear as provided under Rule 56 (2) of the Rules. The counsel argued Rule 56 (3) of the Rules is very limited in that the Court can admit a witness statement with a lesser weight attached to it. Therefore, to the counsel's view this position of the law shows that it is very important for the Court to exercise its inherent power and make the order sought. More so, he said the applicant has a constitutional right to appear and defend a case.

Counsel Ruhumbiza appeared together with advocate Binamungu and Msechu adopted the skeleton arguments and counter affidavit. In his oral submission he replied that Rule 52 (4) of the Rules is very clear that the Court can admit the witness statement of a person who failed to appear as a witness. He said the applicant made no efforts to prove that witness has been summoned but refused as per Order XVI Rule 1 of CPC. He argues

substitution of a witness is not possible and that it is only Michael Benedict Kimwaga can be summoned. To him the applicant's application lacks merit.

It was re-joined by counsel Makarios that the appropriate rule is 56 and not 52 as argued by the counsel for the respondent and it was insisted that the applicant made all efforts but proved failure.

From the submissions made by the counsels, the Court is invited to determine one issue, that is, whether it should allow the applicant's application for substitution of the witness.

The law that governs witness statement has been aptly laid down by the counsel for the applicant in his skeleton argument. Rule 49(1) of the Rules provides that for every suit commenced by a plaintiff in commercial court, evidence-in-chief shall be adduced by way of a witness statement which has to be filed within seven days upon failure of mediation. It was echoed by this Court in its numerous decisions that the requirement of filing witness statement is mandatory. For instance, 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) 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."

Therefore, the procedure in giving evidence in Commercial Court, where the suit is commenced by a way of a plaint, is by way of witness

statement. Such witness statement shall be substantially in the form prescribed in the 3rd schedule to the Rules (See rule 48 (2) of the Rules) and most importantly it shall amongst other things be made on oath or affirmation; contain the name, address and occupation of the witness; be in the intended witness's own words; be dated and signed or authenticated by the witness. In other words, a witness statement is a written statement of evidence in chief and its contents are in exclusive witness's own words.

It is unfortunate that the witness for the plaintiff, one Michael Clement Benedict Kimwaga left the offices of the plaintiff before giving his cross examination. This being the scenario then can his statement be used by another person and such other person be cross examined on it as requested by the counsel for the plaintiff? Counsel Ruhumbiza's view was that in terms of Rule 5 (4) of the Rules the only option opened to this Court is to admit the witness statement. Counsel Makarios replied that the relevant Rule is Rule 56 (2) and not 52, of which I totally agree with him. Rule 56 in its totality 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 the witness's 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."

It follows then that a party who wants to rely on a witness statement must cause the attendance of such witness for cross examination. Where the witness who has filed his witness statement fails to appear then the Court shall strike out the witness statement. However, if the Court is satisfied that there are exceptional circumstances for non-appearance then the Court can admit the statement and give it lesser weight. Counsel Makarios impressed upon this Court that all efforts were made by the plaintiff to have the attendance of the witness but proved futile.


The question that follows is whether the non-appearance of the witness was not due to the plaintiff's fault. On the facts of the case, the only effort taken by the plaintiff was to trace the witness through phone.

No other effort had been taken. The public notice issued by the plaintiff cannot be taken as efforts of tracing the witness since the said notice was for the public to be aware that the witness no longer works with the plaintiff. It is merely an advert for alerting plaintiff's customers and public at large that they should not engage with the witness in respect of any transactions involving the plaintiff. It was not for causing his appearance in Court.

I am well aware that the Rules do not define what constitutes "failure to appear" and "exceptional circumstances". Failure to appear may as well be due to unwillingness of a witness to appear and testify; or due to death; illness or infirmity. Of course a person with extreme old age or who suffers mental illness is considered not competent to testify according to Section 127 (1) of the Evidence Act, Cap. 6. Nonetheless, in the event of the death or serious illness of a witness between his examination in chief and his cross examination then the evidence is admissible but its probative value may be very small and may even be disregarded (See Sarkar on Evidence, 15th Edition reprinted in 2002 at page 2170). On the matter at hand we are told that the witness Michael Clement Benedict Kimwaga

whose statement was filed before this Court, the statement which is considered as his examination in chief, left the offices of the plaintiff before being cross examined and he is no-where to be found. It is also on record that before the witness left the offices of the plaintiff, he was well aware that he is required to appear before this Court for cross examination. He even entered appearance before this Court for cross examination but on that date he had no documents with him. Nevertheless, he opted not to appear and make any follow up. In other words his failure to appear is due to unwillingness of the witness which cannot by any stretch of imagination be taken to be exceptional circumstances envisaged under Rule 56 (2) of the Rules. It also cannot be a ground for allowing the applicant to substitute a witness as the law is very clear that the witness statement is the exclusive source of the witness' evidence in chief and that if he fails to appear, his witness statement shall be strike out. For this reason, I see no merit to the applicant's application. I thus proceed to dismiss it with costs. It is so ordered.

DATED at Dar es Salaam this 2nd day of March, 2018.



B.M.A Sehel

JUDGE

2nd day of March, 2018.