IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 85 OF 2020

KENYA KAZI SECURITY (T) LTD.....APPLICANT

Versus

CAR AND GENERAL TRADING LTD.....RESPONDENT

Last Order: 30th July, 2020

Date of Ruling: 24th Aug, 2020

RULING

FIKIRINI, J.

This application brought under certificate of urgency was filed at the instance of the Arbogast Mseke Advocates on behalf of the applicant by way of chamber summons pursuant to Order VIII Rule 23 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) and Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules), seeking for the order of this Court to depart from the scheduling order and simultaneously grant the applicant leave to add number of intended witnesses. The application was supported by the affidavit of Mr. Anthony Mseke learned advocate having conduct of the matter.

In his affidavit Mr. Antony Mseke deposed that it was sickness which made him unable to attend the 1st pre-trial conference conducted on 05th May, 2020, in which Advocate Hassan Mwemba, told the Court that the defence would call 4 (four)

witnesses. He further deposes the history of his sickness that it begun in late January 2020 and was admitted at Aga Khan, and in late February 2020 he went for further treatment and came back in late March 2020, and self-excused from duty until May 2020 to recuperate. And that upon resuming duty that is when he found out what had happened, and on 27th May, 2020, he moved the Court praying for the departure from the scheduling order, but was advised to file formal application and hence this application.

Mr. Anindumi Jonas Semu learned advocate appearing for the defendant filed a counter-affidavit to object the application. In his counter-affidavit deposes that the application was unnecessary delay of the matter as was already scheduled for hearing and all witness statements have been filed. He also deposes the averments in paragraphs 2, 3 and 7 of the applicant's affidavit, that were without any proof, that he was sick; that he was to stay home to recuperate leaving the office to his advocates; and that the number of 4 (four) witnesses stated by Mr. Mwemba were not enough. The Counsel deposes further that the application was an abuse of Court process as the application had already been declined previously, and if at all the application was to be granted it will give an unfair advantage to the applicant who has already seen the other party's witness statements.

The application was orally argued on 02nd July, 2020. Mr. Mseke prefaced his submission by praying to adopt his affidavit to form part of the submission in support of the application. His submission basically reiterated what has been deponed in his affidavit in support of the application that he fell ill towards end of February 2020, admitted at Aga Khan and later had to travel to India for further treatment. He came back late March, his flight being the last one before the lockdown and was home recuperating for 2 (two) months. In his absence Mr. Hassan Mwemba appeared in Court on behalf of the defendant and informed it that the defendant intended to call 4 (four) witnesses, which the counsel said was not correct, giving the reason that Mr. Mwemba had no full knowledge about the case including the nature of plaintiff's claim against the defendant.

And that on resuming office and upon learning what has transpired he moved this Court praying for leave to add a number of witnesses. It was his submission that the grant will not prejudice or create any harm to the plaintiff and thence prayed for its grant without costs.

Mr. Semu as well started with a prayer that the counter-affidavit he swore be adopted and made part of his submission. The Counsel submitting in opposition to the application, which was made, under Order VIII Rule 23 of the Amended CPC, GN. No. 381 of 2019, he argued that the spirit of the amendment was to prohibit

departure from the scheduling order unless it was for the interest of justice. Challenging the reasons advanced by Mr. Mseke, that the advocate who appeared lacked correct information to know the actual number of witnesses intended, he contended that: first, the assertion was hearsay statement from the counsel as there was no affidavit from Mr. Mwemba to say that he lacked information or competence to represent defendant on the material day. Allowing the application based on this reason would be inviting the Court to bless incompetence, recklessness and negligence.

Second, the statement by the applicant's counsel that he was outside the country or admitted anywhere, were not supported by any proof. Third, the affidavit deponed did not give even a hint of the necessity of adding 4 (four) other witnesses such as being possessing special skill or knowledge taking into consideration the case before the Court, was on breach of contract and claim of negligence. The affidavit also did not state any special interest the witnesses will come to represent. In addition, the applicant was in possession of the pleadings and therefore had ample time to prepare for the 1st pre-trial conference. Fortifying his submission, he referred this Court to the case of **CRDB Bank Ltd v NBC Holding Corporation [2000] T. L R. 422** in which reference was made to the case of **Nicholas Perkin v Car & General (T) Ltd, p. 27-28,** where it was stated that negligence of the

advocate or inactiveness cannot be taken as a defence for failure to take a duty under the law.

Furthering his submission Mr. Semu submitted that the defendant had access to all the plaintiff's witness statements; this will give them an advantage. He thus prayed for the interest of justice and the reason that no sufficient reason has been advanced, to grant the application will be infringing interest of justice, and hence prayed for the application to be dismissed with costs.

In rejoinder, Mr. Mseke, maintained his prayer that the application was simply to have the applicant be allowed to have more witnesses to come and testify against the respondent's case in furtherance of her very fundamental right to be heard. This application was orally made during final pre-trial conference which was by way of JoT-Virtual court, but was advised to file formal application which was done before witness statements were filed. The thinking that the application was an afterthought was out of question. He went on submitting that this case involved as claim of more than Tzs. 1.8 Billion, therefore the prayer by the applicant to have more witnesses was geared towards bringing out light and not prejudicing the respondent.

On proof in support of his illness, Mr. Mseke submitted that he had annexed discharge summary, and therefore not correct to say he did not attach any evidence as submitted by his colleague.

He concluded his submission by urging the Court to grant the application as it was not an afterthought but after the 1st pre-trial conference they realized they needed more witnesses.

I have carefully examined the rivalry submissions. From the outset I would wish to restate that, granting or not granting of this application is at Court discretion. The discretion which ought to be exercised judiciously, by taking into account, all the circumstances of each particular case and guided by the principles of justice equity and common sense.

Although there is no exact definition of what amounts to sufficient cause or reason but that is one of the pre-condition in order for the application to be granted. However, with time the Court of Appeal has come up with decisions giving guideline on what should be considered as sufficient cause or reason. **See: Tanga Cement Company Limited v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001 and Gideon Mosa Onchwart v Kenya Oil Co Ltd & Another [2017],** in short in all these cases what the Court is saying the reasons given should be considered or interpreted broadly rather than narrowly.

This includes all the reasons or causes which are outside the applicant's power or control or influence resulting in not taking the required action at the appropriate time.

The applicant in both his affidavit in support of the application which he prayed the Court to adopt, which it had done and his oral submission expounding on what transpired and omission which will impact the applicant's case, the assertion which was completely refuted by the respondent, this Court weighing the two opposing submission find the following: **one,** the applicant in his affidavit implored illness which occurred to him late February, 2020, the illness which subjected him to be admitted at Aga Khan. No evidence in support of the admission at Aga Khan was attached. The applicant's averment therefore remains to be mere statement which can hardly be relied on by this Court.

Two, due to his condition he had to go for further treatment, without mentioning where. The mentioning of that he travelled to India came about during his oral submission. It is a well-known legal stance that submission is not evidence but opportunity whereby explanation or clarification is made. In addition, such account is in actual fact a statement from the bar the practice which is highly detested by the courts. As stated by the Court of Appeal of Uganda in the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd [2002] 2EA**, to which I subscribe to, is

that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In that case, the Court stated as follows:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

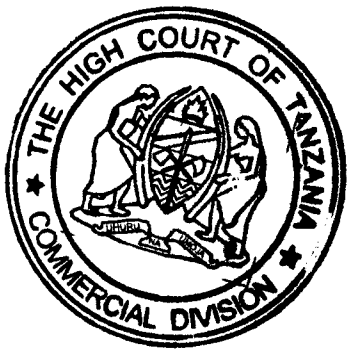
Three, this Court does not at all doubt the applicant's version that he was ill but the manner he was elucidating his illness is what is troubling the minds. Being admitted into any hospital must have generated medical document, the one attached was a discharge summary. I have closely examined the document, which unfortunately does not disclose the name of the hospital let alone being information in a document without a letter head to at least prove authenticity of the discharge summary. From the looks of the document, it is a document which can be created by any person, not even necessarily a specialized one in graphics design. The document was attached but not referred in any of the paragraphs of his affidavit. To say it was a fabricated document and an afterthought would not be an exaggeration but reality before the Court. The counsel as well stated travelling to India for further treatment, the trip to India which is outside the country must definitely have required travel documents including visa, passport and ticket. And since he was presumably traveling for medical reasons a referral letter from Aga Khan hospital though not a necessity but would have added up to his narrative.

None of those were attached to the affidavit in support and no explanation was given as to why those documents were not attached.

Four, in addition out of the 9 paragraphs the applicant has not in any of those paragraphs stated or even during the submission, though would not have assisted, the reasons for wanting to add 4 (four) more witnesses. His statement was the counsel who appeared before the Court one Mr. Mwemba lacked correct information besides that being hearsay but it shows or mean that Mr. Mwemba is incompetent and did not well represent the applicant/defendant on that day. And if that was the case then it means that the applicant through his advocate Mr. Mseke is inviting the Court to bless incompetence, recklessness and negligence, which I do not think that is what courts are here for. Mr. Mwemba's affidavit in what was the situation and how did he come about the number of 4 (four) witnesses intended to be called and that their evidence, would have assisted the Court in arriving at a fair and just decision.

Examining all these together, I completely agree to Mr. Semu's submission that the application is unnecessary delay of the matter which was already scheduled for hearing and all witness statements have been filed.

For the reasons stated above, I find the application devoid of merits and proceed to dismiss it with costs.



P. S. FIKIRINI

JUDGE

24th AUGUST, 2020