

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 24 OF 2018

AKIBA COMMERCIAL BANK PLC PLAINTIFF

VERSUS

UAP TANZANIA COMPANY LIMITED DEFENDANT

Date of last Order: 04/08/2020

Date of Ruling: 04/09/2020.

RULING.

MAGOIGA, J.

This ruling is in respect of formal preliminary objection filed by Mr. Karoli Valerain Tarimo learned advocate for the defendant to the effect that, the witness statement for the plaintiff's witness in this suit was filed out of time, as such he moved this court to struck out the witness statement of, one, DAVID KOROSSO and consequently dismiss the suit with costs for want of prosecution.

The facts leading to this ruling are not complicated. Since the institution of the instant suit in this court, the proceedings went on well between parties up to the stages of Final Pre-Trial conference which was conducted on 11/06/2020. On that date, this court gave the following orders; it ordered and directed parties to file their respective witnesses statements within 14

days from that day in accordance with the Rules; parties, if they wish, to file additional list of documents, same be filed before filing of witness statements to enable them to be referred in the witnesses statements as exhibits; and lastly the matter was fixed for hearing of the main suit on 04/08/2020.

Parties complied with the court's directions as ordered above. However, the defendant's witness statement was filed on 24th June, 2020 and the plaintiff's witness statement was filed on 25/06/2020. When parties served each other of their respective witnesses statements as required by the Rules, the defendant's learned advocate raised and filed formal notice of preliminary objection on point of law dated 3rd August 2020 to the effect that, the witness statement filed by the plaintiff was filed out of time by a day and urged the court to struck out the witness statement and consequently dismiss the suit with costs, hence, this ruling.

The plaintiff has at all material time been enjoying the legal services of Mr. James Bwana, learned advocate. The defendant, on the other hand, is advocated by Mr. Karoli Valerian Tarimo, learned advocate.

Mr. Tarimo arguing the preliminary objection was brief to the point that, during Final Pre-Trial Conference, parties were ordered to file witness

statements within 14 days as per the High Court (Commercial Division) Procedure Rules, 2012 as amended by G.N. 107 of 2019 (to be referred herein as the 'Rules'). According to Mr. Tarimo, by virtue of Rule 49(2) of the Rules the said statement was to be filed within 14 days starting the date of completion of the Final Pre-Trial Conference. The learned advocate for the defendant argued that counting from 11/06/2020, the 14 days envisaged ended on 24/06/2020, obviously making the witness statement filed on 25/06/2020 be out of time by a day.

Further, Mr. Tarimo argued that, the provisions of section 60 (1) (a) of the Interpretation of Laws Act [Cap 1 R.E. 2019] categorically provides that once the date of completion is known, then, that day has to be included in computing the time for doing the act. In the circumstances, Mr. Tarimo urged this court to find and hold that, the witness statement of the plaintiff's sole witness was filed out of time and urged this court to find and hold so. The consequence, according to Mr. Tarimo, was to proceed to dismiss this suit with costs for want of prosecution. In support of his stance, the learned advocate cited the case of AMANI PARTNERS LIMITED AND ANOTHER v. KHURAM IQBAL MAQBAL CHAUNDRY, COMMERCIAL

CASE NO. 24 OF 2017 (HC) DSM (Unreported) in which the suit was dismissed for failure to file witness statement for want of prosecution.

In response, Mr. Bwana, learned advocate for the plaintiff, was not moved by the submissions and authority cited by Mr. Tarimo in support of the preliminary objection. According to Mr. Bwana, the witness statement in dispute was filed in time on 25/06/2020 counting from 12/06/2020. The computation, if any, has to start to run the next day as clearly stipulated under section 60 (1) (b) of [Cap 1 R.E.2019], insisted Mr. Bwana. The learned advocate for the plaintiff urged this court to find that the arguments by Mr. Tarimo are misleading and incorrect because section 60 (1) (a) uses the words '**at**', '**on**' and '**with**' which were not used in Rule 49(2). The wording of Rule 49(2) uses the phrase '**of the completion**'. Mr. Bwana, therefore, argued that, counting has to start after completion of the final order and not during.

Further, Mr. Bwana sought the refuge to section 19(1) of the Law of Limitation Act, [Cap 89 R.E 2019] which expressly state the date the event occurred has to be excluded. In support of his position, the learned advocate for the plaintiff cited the case of KEC INTERNATIONAL LIMITED v. AZANIA BANK LIMITED, COMMERCIAL CASE NO 152 OF 2015 (HC) DSM

(Unreported) in which the day of the happening of the last event has to be excluded.

On that note and reasons, Mr. Bwana urged this court to dismiss this preliminary objection with costs and the suit to proceed with hearing inter parties.

In rejoinder, Mr. Tarimo mostly reiterated his earlier submissions and pointed out that since Rule 49(2) did not use words '**from**' or '**after**' it means section 60(1)(b) of Cap 1 R.E.2019 is inapplicable and as such the day in which the last order was done has to be included. According to Mr. Tarimo, section 19(1) of [Cap 89 R.E.2019] does not apply here because it is not about interpretation. In the end, the learned advocate reiterated his earlier prayers.

This marked the end of hearing of this objection. The task of this court now is to determine the merits or otherwise of this objection. Before going into the merits or demerits of the objection, it is imperative to point out and observe that the timeline for filing of witness statement is provided for under the Rules. Rule 49(2) as amended, that is within 14 days '**of the completion of the final pre-trial conference.**' The said provides as follows:

Rule 49(2)- The witness statement shall be filed within fourteen days of the completion of the final pre-trial conference and served as directed by the court. (emphasis mine).

The above Rule literally is loud and clear that, filing of the witness statement has to be done within 14 days '**of the completion of the final pre-trial conference.**' (Emphasis mine). To my understanding and in my considered opinion, the phrase '**of completion**' of the final pre-trial conference used in the Rule is not synonymous to '**from**'. The use of the phrase '**of the completion**' used in the Rule means the day which the act was done has to be the starting point to count and as such is part of the day within which the subsequent act has to be done.

While this ruling was pending, this court received a letter dated 18th August 2020, from the learned advocate for the defendant attached with Court of Appeal decision and drew attention of this court to the case of NATIONAL BANK OF COMMERCE LIMITED v. PARTNERS CONSTRUCTION LIMITED, CIVIL APPEAL NO. 34 OF 2003 in which it was held that where the phrase used is '**within twenty one days of the date of service then twenty-one days start to run from the date of service.**' (Emphasis mine)

In the above case, the court went on to hold that, **'twenty-one days start to run from the date of service. In other words, the date of service is included in computing the period of twenty-one days.'**

Guided by the Court of Appeal holding above, I have no reasons whatsoever not to follow its findings that, where the phrase used is **'of the completion'** the day in which the final pre-trial conference order was done has to be included in computing the period of 14 days within which the witness statement has to be filed.

Now back to the instant suit and guided by the above interpretation, and having carefully considered the rival arguments on the interpretation of Rule 49(2) of the Rules, I quite agree with Mr. Tarimo that, since the Rule used the phrase **'of the completion'** then, the days have to be reckoned from 11/06/2020 and the last day of filing the witness statement was 24th June, 2020. Further and equally, I agree with the arguments by Mr. Tarimo that, section 19(1) of the Law of Limitation Act, [Cap 89 R.E 2019] is inapplicable in the circumstances we have here because what is at stake here is the interpretation of Rule 49(2) of G.N. 250 of 2012 as amended and the time as to when starting counting days has already been set under the Rule 49(2) to be 14 days of the completion of the final pre-trial

conference order. I take the above stance because by virtue of sections 43 and 46 of the Law of Limitation Act, [Cap 89 R.E.2019] read together shows obvious that section 19(1) cannot apply here.

However, considering the circumstances of this case, it should be noted that, each case must be decided on its own peculiar facts. In this suit, what was ordered and directed to parties on the fateful day is imperative to decide this issue. As already noted, the court when ordering and directing parties used the phrase **'from today'** in directing parties on that day in limiting the filing of the witness statement. Now the only issue for determination is whether the witness statement that was filed by the order of this court using the phrase **'from today'** can be said to be out of time. The answer is definitely, No! This court on 11/06/2020, among others, ordered parties to file their respective witnesses' statements using the following language, I beg to quote verbatim:

"2. Parties are hereby ordered to file their respective witnesses statements within 14 days from today in accordance to the Rules of this court." (Emphasis mine).

Much as the court when ordering and directing parties to file witness statement used the phrase **'from today'**, then, without much ado the

plaintiff was at home and dry to the order of the court to file the witness statement on 25th June, 2020. According to that order, 25th June, 2020 was the last day of filing witness statement. Therefore, by the order of this court which is valid and has never been reversed, I find the witness statement filed by the plaintiff on 25th June, 2020 was within time in so far as the provisions section 60 (1) (b) of the Interpretation of Laws [Cap 1 R.E 2019] are concern. The said section provides as follows:

60. Computation of time

(1) In computing time for the purposes of a written law–

(a) where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period;

(b) where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period;

(c) where anything is to be done within a time before a specified day, the time shall not include that day;

(d) where a period of time is expressed to end at, on, or with a specified day or to continue to or until a specified day, that day shall be included in the period;

(e) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day;

(f) where there is a reference to a number of clear days or "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen;

(g) where there is a reference to a number of days not expressed to be clear days or "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day on which the second event happens;

(h) where an act or proceeding is directed or allowed to be done or taken on a certain day, or on or before a certain day, then, if that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day that is not an excluded day.

(2) For the purposes of this section, "excluded day" means Saturday, Sunday or public holiday throughout or in that part of which is relevant to the event, act, thing or proceeding concerned.

Now, therefore, from the foregoing it should be noted that, and to make myself clear the use of the phrase '**of the completion**' in Rule 49(2) of

the Rules was meant to include the day in which a final pre-trial conference was completed. Litigants in High Court (Commercial Division) are from the date of this ruling advised to take note of this and make sure they comply with the spirit of the Rule to avoid finding themselves out of time because 14 days are to be reckoned from the day in which the Final Pre-trial conference is concluded.

That said and done and for the reason given above, the preliminary objection is hereby overruled with no order as to costs for it is the court which directed and used the phrase '**from today**' and as such in the light of section 60 (1) (b) of [Cap 1 R.E. 2019] automatically excludes the day of the order.

Order accordingly

Date at Dar es Salaam this 04th day of September, 2020.




S. M. MAGOIGA
JUDGE
04/09/2020