IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO.151 OF 2017

EAST COAST OIL AND FATS LTD .....PLAINTIFF

VERUS

TANZANIA BUREA OF STANDARDS.....1st DEFENDANT

THE HON. ATTORNEY GENERAL.....2nd DEFENDANT

Date of Last Order: 17/11/2021
Date of Ruling: 29/11/2021

RULING

NANGELA, J:.,

This ruling results from a preliminary objection fronted by the learned counsel for the Plaintiff. By way of background, on 14th September 2017, the Plaintiff herein filed this case against the Defendants and is praying for judgment and decree as follows:

1. A declaration that the second report issued by the 1st Defendant in respect of the imports made by the Plaintiff aboard MT PYXS DELTA is erroneous and null and void to the extent that it categorise the import as other than crude palm olein.

2. A declaration that the Plaintiff is entitled to an assessment of customs import duty on the import at the rate of 10% amounting to TZS 4,488,430,600 and, therefore, it is entitled to a refund of the 15% duty it paid over and above the applicable tax amounting to TZS 6,732,645,901, should have been due from it at the rate of 10%.
3. The 1st Defendant pays the Plaintiff the sum of TZS 377,507,225 being loss the Plaintiff incurred as a result of the 1st Defendant's erroneous second report as per Para.16 of the Plaint.
4. The 1st Defendant Pay the Plaintiff interest on the amount due to the Plaintiff as per prayer No.(2) herein above at the rate of 25% per annum as per mercantile custom from the date the money was paid to the TRA till the date of judgement.
5. The 1st Defendant pay the Plaintiff interest on the decretal amount at the Court's rate from the date of judgment till when the decree is fully satisfied;
6. The 1st Defendant pay to the concern authority any charges incurred in any form like customs warehouse rent over the Plaintiff's

consignment as per Para.17 of the Plaint;

7. The 1st Defendant to pay the Plaintiff costs of and incidental to the suit.
8. Any other relief (s) that the honourable Court may deem fit.

The suit has dragged in Court for some time now. However, on the 17th November 2021, it was scheduled for a continued hearing of the defence case. So far two witnesses for the Defendants have already testified and tendered various documents which were admitted and assigned exhibit numbers.

On the material date, therefore, Mr Alex Mgongolwa, learned advocate appeared for the Plaintiff and was assisted by Ms Zhakia Ally, Mr Roman Selasini Lamwai and Ms Neema Maumba, learned advocates. For the Defendants, the Principal State Attorney, Mr Hangi Chang'a, appeared and was assisted by Ms Grace Lupondo and Luoga William, Senior State Attorneys.

Having called the 3rd witness for the Defence, DW-3 Mr Lawrence Chenge, the same was made to take oath and testified in chief. Led by Mr Hangi, Dw-3 identified and prayed to be received in Court, a witness statement which he had earlier filed in line with the requirements of Rule 49 (1) and (2) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012, as

amended in 2019. This Court received and adopted the Witness Statement as Dw-3's testimony in chief.

In that Witness Statement, Dw-3 referred to two exhibits, namely:

(i) Tanzania Standards TZS 725:2004 ISO/IEC 17025:1999 (E) General Requirements for the Competence of Testing and Calibration Laboratories- Annexure TBS-1.

(ii) TZS 559: 2010 Palm Olein- Specification- Annexure TBS-2.

These two mentioned documents had already been tendered in Court and admitted into evidence as **Exh.D-1** and **Exh.D-2**. Having received Dw-3's witness statement, Mr Hangi requested to show Dw-3 Exhibit D-1 to find out if it is the document he had referred to in his witness statement. At that juncture, Mr Mgongolwa raised an objection to the prayer. He submitted that, it was unprocedural for the witness to be shown a document which he was not intending to tender in Court.

According to Mr Mgongolwa, the procedure of this Court requires that the witness statement be filed in writing and that, it must be under oath. Once filed in Court, on the hearing date the witness is only supposed to identify his or her statement, adopt it in court and the second step is admissibility of documents pleaded and

attached to the witness statement, which will be tendered in court for their admissibility as exhibits.

Mr Mgongolwa contended that, the procedure which Mr Hangi wants to use offends Rule 49(1) of the applicable rules of this Court because the witness statement is an examination in chief. So, after the Witness statement has been adopted and documents tendered, that marks the end of examination in chief, contended Mr Mgongolwa.

He further added that, if there is no document to tender, then, that will mark the end of the examination in chief as there will be no room for examining other documents tendered by other witnesses. He contended that, Dw-3 had the opportunity of examining other witnesses' documents in the witness statement prior to its filing and not at the time he is in the dock testifying to the Court.

Mr Mgongolwa submitted that, the rules were meant to shorten the journey of examination in chief and one cannot fill any potholes by things which he ought to have stated them in his witnesses' statement.

To conclude, he placed reliance on the Court of Appeal decision in the case of **Total Tanzania Ltd vs. Samwel Mgonja,** Civil Appeal No.70 of 2018, at page 24, and contended that, there is no room for the filling of potholes after a witness has tendered his/her statement

in Court. He submitted that, Mr Hangi is trying to use a tactic which is creature unknown to the law and must be stopped and allow Dw-3 to proceed to being cross-examined.

This Court posed a question to Mr Mgongolwa to the effect that, since it is shown in the witness statement that the witness has referred to documents which have already been admitted as exhibits D-1 and D-2 by this Court, when can a witness refer to/rely on or use a document which has already been admitted as exhibit if he, himself has made mention of them in his statement?

Responding to that question posed by the Court, Mr Mgongolwa submitted that the only opportunity the witness has to explain or give extra-particulars of a document which was tendered by another witness is through the same witness statement of his, by putting all necessary ingredients of what he wants to say. He sought support from the fact that, the law has put in place limit of time to file a witness statement.

Mr Mgongolowa submitted further that, the requirement to put all things within the witness statement is to ensure that there is no chance of defeating the rule against surprises. He contended, therefore, that, what a prudent lawyer would have done was to analyse, ahead of time, everything and include them in the witness statement.

He submitted, thus, that, Dw-3 has no room to bring in any other explanation of fact since the assumption is that, all the witness is to say is in the witness statement. In view of that, he concluded by stating that, if a witness has not provided the document in his witness statement, he cannot rely on the exhibits already tendered in Court by other witnesses.

As for Mr Hangi, it was a submission that, the objection is misplaced. He submitted that, the practice of this Court after adopting a witness statement as examination or testimony in chief of a witness, the next stage is for the witness to tender all annexure or documents referred to in the witness statement. He submitted that, the said document need not be new to avoid taking the other party by surprise.

He contended, however, that, in the scenario at hand, soon after the witness statement got admitted by the Court as Dw-3's testimony in chief, the witness was required to tender documents which he referred to in his witness statement so as to have them admitted as exhibits and these are the same documents attached in the pleadings (the WSD). The same were referred to in the witness' statement, he so submitted, as the witness did indicate and refer to those documents in his statement.

Mr Hangi submitted as his second point on the status of documents already tendered and were admitted by the Court as forming part of the admitted exhibits. He contended that, since such documents were already admitted by the Court, it would be improper to have then re-tendered as new exhibits since they are already part of the Court's record.

He argued that, if those documents are documents referred to in a witness statement, then, the only appropriate time for the witness to explain about their applicability is during the examination in chief and not during cross-examination or re-examination, the reason being that, at these two later stages, one is bound or limited by what has been earlier stated. He argued that, if the Plaintiff chooses not to ask any question, then the Defendant will have no other option or room to use those documents.

As regards that the documents were not attached, Mr Hangi referred this Court to the earlier ruling of its own dated 26th September 2021, which resolved that issue. He also referred this Court to Rule 4 of its rules of procedure on the need to achieve substantive justice in this particular case, noting that, the essence of Rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended) is to facilitate trial with due

regard being had to the need to achieve substantive justice.

Mr Hangi submitted further that, the Plaintiff's counsel has not been able as well to explain how is the Plaintiff going to be prejudiced if Dw-3 is allowed to explain about the applicability of those technical documents he referred to in his witness statement, which had already been received in Court as Exhibits. He submitted that, the Plaintiff's counsel will be afforded opportunity as well to cross-examine the witness.

Mr Hangi submitted that, this Court should not be allowed to act in a double standard. He urged this Court to refer to its proceedings where it will readily find that, during the examination in chief of Pw-2, the Court did allow Pw-2 to use exhibits already tendered by Pw-1.

In conclusion, he as well invited the Court to also use the principle of overriding objective and allow the witness to make use of the document referred to in his witness statement.

To add to what Mr Hangi submitted, Ms Lupondo rose and took the floor. In her submission, she told this Court that, the only issue which needs to be resolved is one regarding: **when will a witness be allowed to use/rely or refer to a document which is already tendered in Court and admitted as an exhibit?**

Mis Lupondo submitted that the High Court (Commercial Division) Procedure Rules, GN.250 of 2012, (as amended, 2019) do not provide for such a circumstance. In that regard, she argued that, one has to revert to what Rule 2(2) of the same Rules which allows one to resort to the Civil Procedure Code, Cap.33 R.E 2019. Ms Lupondo further referred to section 144 of the Evidence Act, Cap.6 R.E 2019, concerning the order in which witnesses are to be regulated.

In her submission, she held a firm view that, the practice and procedure of referring a witness to a document already received in Court, may happen when the witness is called for examination in chief as well, so long as those documents are already forming part of the record of the Court.

She conceded, as regards the rationale of Rule 49 (1) High Court (Commercial Division) Procedure Rules, GN.250 of 2012, (as amended, 2019), which rationale was clarified by Mr Mgongolwa, is that of accelerating trials in this Court but, she added, however, that, the rationale is also with due regard to the attainment of substantive justice, and, on her part, allowing the witness to make use of the document referred to in his witness statement, and which is already in Court as exhibit, will assist the Court to attain substantive justice.

As regard the case of **TOTAL** (supra), Ms Lupondo submitted that, the case is distinguishable from the circumstances of the case at hand. She contended that, the Court of Appeal of Tanzania's discussion in that case was only limited to the explanation regarding the rationale of Rule 49(1) of the High Court (Commercial Division) Procedure Rules, GN.250 of 2012, (as amended, 2019) and, the tendering of documents. She argued that, that judgment does not bind this Court as regard the new issue that has arisen in this matter, which is whether this new witness can be referred to documents already tendered and admitted as exhibits in Court.

That being said, Ms Lupondo contended that, the objection raised by Mr Mgongolwa lacks merits because a witness cannot just bring a document in Court and merely dump it there with no assistance to the Court in its journey of attaining substantive justice. She urged this Court to overrule the objection and allow the witness to be referred to the exhibits already admitted in Court.

Mr Mgongolwa made a rejoinder submission. He rejoined that, the Defendants' counsels have admitted three things, namely, that: (i) under this Court's rules of procedure, there is a process of filing witness statements and, that, the witness statement can have documents intended to be tendered, which must be in the witness statement; (ii) there is a stage of adopting the witness

statement and what follows thereafter is admissibility of documents, if any as exhibits of the Court. He contended that, the learned State Attorneys have not said that there is a stage of explaining about other documents produced by other witnesses.

Mr Mgongolwa argued that, in the current statement, there is a mere mention of the document without explanations. He submitted that, a mere mention is not good enough and if one intends to give explanations about the document, such explanations should go into the witness statement as one will be bound by the witness statement for cross-examination.

He rejoined further that, under the Rules governing the procedure in this Court, a witness is at liberty to attend or not to attend for cross-examination, although doing so would have some repercussions. He submitted that, the learned State Attorneys are avoiding telling the Court as to why they did not attach or put in place explanations regarding what the witness want to tell the Court. He contended that even if what the witness is to tell the Court is technical, there is always a language for that and the witness is not an expert witness according to the witness statement.

Mr Mgongolwa rejoined further in regard to the applicability of Rule 4 of the High Court (Commercial Division) Procedure Rules, GN.250 of 2012, (as amended,

2019). He was of the view that, the oxygen principle which is enshrined in that rule applies only when there is a defect to cure but we are not told which defect the Defendants' attorneys are intending to cure.

Referring to the case of **TOTAL (supra),** Mr Mgongolwa rejoined that, the case is not distinguishable as the Defendants' attorneys have not laid out how different it is with the case at hand. He submitted that, the Plaintiff is prejudiced by the fact that, allowing Dw-3 to make use of the document (Exh.D1 and D2) will violate the rule against surprise.

I have carefully followed up the argument for and against the objection raised by Mr. Mgongolwa. As it may be noted, both parties seem to agree on how the Procedural Rules governing the conduct of matters in this Court applies. That procedure was well capture in the **TOTAL's case** (supra). The two counsels' point of departure, however, is not very well demarcated in their submissions and, for that matter, a careful treading on their terrain of discussion is needed, if one is to disentangle their self-created "Gordian Knot."

Even so, before I go to the crux of the matter, I find it apposite to start by looking at the objection itself and how it was brought to my attention. In my view, the objection was a hurried one. I hold that view because, the same came at the time when the third witness for the

defence case, Dw-3 just finished having his witness statement received as Dw-3's testimony in chief. In that statement Dw-3 referred to two documents which, though not attached to the statement, were already tendered and admitted in Court as Exhibits D-1 and D-2.

When Mr Hangi wanted to show the witness whether the documents he had mentioned are the ones already received as exhibits in Court, the objection which is the subject is of this ruling, immediately surfaced. To my considered view, asking a witness to identify a document which s/he is to be shown (if indeed it is the one he has referred to in his witness statement or not), does not amount to giving details about it. I do not even see how that would prejudice the Plaintiff, in the first place.

I hold it to be so because, in the first place, the learned State Attorney had intended to ask the witness, Dw-3, to identify whether the documents he had referred to in his witness statement was the one already in Court or not. My understanding is that the witness (Dw-3) was not tendering but rather identifying whether the documents he had referred to in his witness statement are the same as the ones already admitted in Court.

Secondly, I do not see any violation of the rules of this Court in that act. I hold so because, in Court, an article such as document, record or other tangible object

can readily be produced and even marked ("ID") for identification purposes only.

The general principle, however, is that, documents produced in court for identification, even if marked, are not exhibits and have no weight at all as evidence. See the case of **Mbaraka Abdallah Al- Said and Rubeya Abdallah Al-Said vs. NIC (T) Ltd and PPSRC**; Commercial Case No. 72 of 2003.

However, if it is to be duly tendered as exhibit, that comes after it is duly identified, cleared and admitted. Besides, if that is to happen, then, it is clear that, the rules of this Court have never ousted the principles that govern tendering and admissibility of documents and other articles. Such document or article may be tendered by a witness provided that he falls within the categories of persons who may tender an exhibit in Court.

The category include persons who are its maker or, a person who at one point was in possession of it, was a custodian of it or actual owner, was its addressee or even any person with knowledge of the exhibit. It is also clear that, an officer from an entity from which the document or article relates may also tender it in Court. See the cases of **Thomas Ernest Msungu @Nyoka Mkenya vs. Republic**, Criminal Appeal No.78 of 2012, CAT (unreported); **DPP vs. Mizrai Pribakhshi & 3 Others**, Criminal Appeal No.493 of 2016, CAT (unreported).

Thirdly, it is not disputed that the witness himself had referred to certain documents in his witness statement which are:

(i) Tanzania Standards TZS 725:2004 ISO/IEC 17025:1999 (E) General Requirements for the Competence of Testing and Calibration Laboratories- Annexure TBS-1.

(ii) TZS 559: 2010 Palm Olein- Specification- Annexure TBS-2.

As such, the intent shown by the Defence counsel to inquire from the witness whether the above documents are the ones already tendered and admitted as exhibits D-1 and D-2, by showing the witness such exhibits, that alone cannot, in my considered view, prejudice anybody or take anyone by surprise as Mr Mgongolwa wants this Court to believe. Those documents were already referred to in the witness statement and were also known to the Plaintiff because they had been earlier tendered and admitted into evidence as Exh.D-1 and D-2.

Furthermore, while I do understand that the object of pleadings is to prevent either party from being taken by surprise at the trial, and to enable the parties to know what case they have to meet, in this particular case, the

documents referred to in the Dw-3's witness statement were also attached to the WSD filed by the Defendants.

Having said that, I find, in my view, that, the pressing question which needs to be asked in relation to the objection raised by the counsel for the Plaintiff is whether a witness is at liberty to make reference to a document which has already been tendered by another witness and admitted into evidence. In other words, when can a witness refer to /rely on or use a document which has already been admitted as exhibit if he, himself has made mention of them in his statement?

As it might be noted earlier, I posed that question to the learned counsels for the parties herein. Mr Mgongolwa submitted that, the only available opportunity to the witness to explain or give extra-particulars of a document which was tendered by another witness is through his or her witness's statement. Ms Lupondo and Mr Hangi had a different opinion, holding that, the witness may refer to such a document at the time he is testifying in chief or during cross-examination and re-examination.

Agreeably, it is clear that, that kind of a question was not an issue for which an answer is readily available from the **TOTAL's case** (supra). The **TOTAL's case** (supra) did not address such a scenario, and, in my view,

that is a pertinent issue that would need to be addressed had the objection been raised at an appropriate point.

Assuming that the objection came at an appropriate time, the answer to that question would, in my view be that, since the document is well known to both parties and is part of the Court's record, in a proper context, any of the parties is at liberty, at any stage, to use it in the course of rendering his or her testimony in Court. Doing so, in my view, cannot by any stretch of imagination, prejudice any of the parties, nor take any of them by surprise.

Having said that, I do hereby overrule the objection raised by Mr Mgongolwa and proceed to allow the Defence counsel to make use of the Exhibit D-1 and D-2 which had been earlier tendered and admitted into evidence.

DATED at DAR-ES-SALAAM ON THIS 29th DAY OF NOVEMBER, 2021.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

.....

HON. DEO JOHN NANGELA
JUDGE