

IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM
COMMERCIAL CASE NO.139 OF 2019

BANK OF AFRICA TANZANIA LTD.....PLAINTIFF

Versus

OM-AGRO RESOURCES LTD.....1st DEFENDANT

FATUMA SAID ALLY.....2nd DEFENDANT

MASHAKA HEBERT MSUMAI.....3rd DEFENDANT

NAZIR MUSTAFA KARAMAGI.....4th DEFENDANT

EMIR NAZIR KARAMAGI.....5th DEFENDANT

PRATHEESH KUMAR

THANKAPPAN PILLAI.....6th DEFENDANT

JUMA HASSAN KILIMBAH.....7th DEFENDANT

Last Order: 18th Feb. 2021

Ruling: 19th March 2021

RULING

NANGELA, J.:

This ruling arises from a case in which the Plaintiff is suing the Defendants claiming from them, jointly and severally, for payment of **USD 1,251,193.43** as well as **TZS 82,252,487.50**. These amounts are alleged to be outstanding Credit and Overdraft Facilities alleged to have been advanced to the 1st Defendant (borrower) and

guaranteed by the rest. The Plaintiff is alleging that the Defendants have defaulted repayment and thus seeks redress from this Court.

Following the parties' failure to mediate their differences, their dispute proceeded to a full hearing stage. A hearing date was thereby set and the Plaintiff's case opened on **2nd February 2021** with one witness namely, **Ms Litty Kisuda**.

On that very day, when the Plaintiff's first witness (**PW-1**) entered appearance to testify, the learned counsel for the Defendants objected to the admissibility of certain documents which **PW-1** sought to be admitted into evidence.

The documents sought to be admitted were:

- (i) an Offer Facility Letter**
issued by the Plaintiff to the Defendants;
- (ii) an application to the Bank by the client, dated 9th August 2017 and**

(iii) Minutes of Board Resolution of the Client (borrower) dated 9th November 2017 *((i) and (ii) being documents alleged to have been sent to the Plaintiff by the Client (borrower)).*

Initially, I had made another minor ruling following an objection made against admission of **PW-1's Witness Statement** which was earlier filed in this Court as her testimony in chief. Subsequent to that ruling, therefore, when **PW-1** sought to tender into evidence the above named documents as exhibits, Mr Kasaizi, the Defendants' learned counsel, raised an objection to their admission. I afforded a full opportunity to both learned counsels for the parties to address this Court in respect of the objection raised by the Defendant's. I will summarise their submissions hereunder.

Addressing the Court, Mr Kasaizi, who appeared for the 1st, 2nd, 4th, 5th and 7th Defendants submitted that, he was objecting the admissibility of the documents sought

to be tendered into evidence for the one reason that they are not attached to the Plaintiff.

Furthermore, Mr Kasaizi contended that, there is no indication anywhere that the Plaintiff was to bring such documents, and, that, the learned counsel for the Plaintiff was not indicating that the documents were being tendered as additional documents. He admitted, however, that, the Facility letter was attached to the Plaintiff but not the rest.

Responding to that brief submission, Mr Irungu, the learned counsel for the Plaintiff, submitted, with an apology to the Court, that, it was unfortunate that he had not made it clear to the Court the documents sought to be tendered were forming part of the annexure to the Plaintiff.

Mr Irungu told the Court that the Facility Letter and the Application Letter Dated 8th August 2017 were annexed to the Plaintiff as Annexure **BOA-1**. The rest were annexure **BOA-8** forming part of the additional list of documents filed on 22nd June 2020, pursuant to the Order of this Court dated 28th February 2020, and that, the same were served on the Defendants.

Mr Irungu contended, therefore, that, the documents were already filed in court and what they are intending to bring into evidence is their originals.

Mr Kasaizi was not contented by that reply submission made by Mr Irungu. In his rejoinder submission, he insisted to be unmoved from his position insisting that the documents are not part of the pleadings.

Besides, Mr Kasaizi rejoined that, the additional list was served on him late and he was unable to consider them on the 23rd June 2021 when he appeared in court to agree on the issues to be proved in this case. As well, Mr Kasaizi went ahead to denounce the whole bundle of other documents, which were filed as additional documents even if they were yet to be tendered, arguing that they were not pleaded in the Complaint, filed on 27th October 2019.

He referred to this Court the provisions of Order XIV rule (1) of the Civil Procedure, Cap.33 R.E 2019 and submitted that, the additional documents ought to have been mentioned in the Complaint. He contended that, when

the Defendant filed their Written Statement of Defence (WSD) the Plaintiff did not bother to file a reply to it.

Relying on the decision of the Court of Appeal of Tanzania in the case of **Eusto K Ntagalinda v Tanzania Fish Processors Ltd, Civil Appeal No.23 of 2012 (CAT) (Mwanza) (unreported)**, Mr Kasaizi submitted that, since the documents were not part of the pleadings, they should not be admitted, and, that, this will include the entire list of additional documents filed in this Court.

Mr Irungu could not contain himself or hold his horses given that broad submission by Mr Kasaizi. He rose to offer a swift response and submitted that, the documents the Plaintiff has sought to be admitted are in two sets.

The first set concerns documents which were initially annexed to the Complaint and the second set is comprised of documents filed in Court under the list of additional documents, and marked "**BOA-8**". It was his views that, what Mr Kasaizi seems to argue is that, he

was not made aware of the documents marked "**BOA-8**" at the time of Final Pre-trial Conference.

Mr Irungu submitted that, after this Court concluded the final PTC and scheduled the case for hearing, already Mr Kasaizi was in possession of the documents having been served. If he had realised that the issues framed did not match the issues he had agreed to, argued Mr Irungu, Mr Kasaizi still had a remedy of praying for the amendment of the issues framed.

Mr Irungu submitted further that, as a matter of practice in this Court and other specialised division of the High Court, no documents are to be filed after the Final PTC. All should be filed before, a fact which the Plaintiff complied with, when it filed the additional list of documents and, hence, the documents are valid, he submitted.

Mr Irungu distinguished the case relied upon by Mr Kasaizi, noting that, material facts constituting the two are distinct. He pointed out that the dispute in the **Ntagalinda's case (supra)** was based on an oral contract. Furthermore, Mr Irungu contended that, the

documents sought to be admitted in Court in the cited case, were neither attached to the plaint nor in the list additional documents to the plaint. He referred to this Court to **page 11, 2nd paragraph of the Ntagalinda's case (supra)**. Mr Irungu argued, therefore, that, those two aspects distinguish the two cases.

Besides, it was Mr Irungu's submission that, Mr Kasaizi had failed to comprehend the gist of the Court of Appeal's decision, since the Court did refer and held that other documents should be listed in the list of additional documents. He argued that, Mr Kasaizi seems to be confused by the phrase "**list annexed to the plaint**" appearing on that **page 11, 2nd paragraph of the Ntagalinda's case (supra)**.

Mr Irungu was of the view that, taken generally, when one files a list of additional document, that list is presumed to be annexed to the Plaint. He also referred to page 13, paragraph 3 regarding the consequences which the Court of Appeal pointed out in the Ntagalinda's case, but argued that, the decision is rooted on page 12, 2nd paragraph which states the remedy under Order VII rule

18 of the CPC, Cap.33 R.E 2019, where one fails to attach a document to the Plaintiff and in the list of documents.

Mr Irungu argued, therefore, that, the case would have been relevant only if the Plaintiff was attempting to tender exhibits under Order VII rule 18 of the CPC, Cap.33 R.E 2019 and, failed to give reasons regarding why they should be admitted, something which is not the case here.

Adding his voice to that of his colleague, Mr Nyaisa who appeared also for the Plaintiff, contended that, Order XIII rule 2 of the CPC, Cap.33 R.E 2019 further gives the Court a wider room to admit documents. He argued that, the Court of Appeal did not address Order XIII rules 1 or 2 of the CPC, Cap.33 R.E 2019, and, hence, it is distinguishable.

Mr Nyaisa submitted that, under Order XIII rule 1 and 2 of the CPC, Cap.33 R.E 2019, the Court may admit a document even if it was being introduced for the first time, provided reasonable explanations are given to that effect. He relied on the case of **National Bank of**

**Commerce Ltd v Nabro Ltd and Another,
Commercial Case No.44 of 2001, (unreported).**

From such submission, Mr Nyaisa urged this Court to overrule the objection, since the list of additional witness was properly filed before the Final PTC and under the order of the Court and, that, even those filed in court later can still be allowed under Order XIII rule 1 of the CPC, Cap.33 R.E 2019.

Mr Kasaizi stuck to his submission still, arguing that, Order XIII rule 1 and 2 of the CPC, Cap.33 R.E 2019 was likewise canvassed in the **Ntagalinda's case** (supra), at page 12. He contended that, the Plaintiff should have prayed to the Court to have the documents admitted as additional document if they were not pleaded in the Plaint. So, he urged this Court to reject the documents.

Having summarised the rival submissions as I have done herein above, the issue I am to respond to is whether the objection raised by Mr Kasaizi is merited.

I should point out that, Mr Kasaizi has rather urged this Court to even reject documents which were yet to be introduced into evidence by the **PW-1**, but were part of

the list of documents filed in this Court, following the order of this Court which was given to parties prior to the final pre-trial conference. Since he introduced the matter and made submissions regarding those documents, I will also consider them here.

It is worth noting that, Mr Kasaizi's contention is that, the additional list of documents was served on him late and was unable to consider them on the 23rd June 2021 when he appeared in court to agree on the issues to be proved in this case. However, when the Court convened the final pre-trial conference, Mr Kasaizi did not raise any issue or complaint that he was served with the list of documents lately and so had been unable to prepare his case when the stage of drawing up issues arrived. That being the case, it is improper for him to raise such an issue at this stage.

Looking at Mr Kasaizi's submission, I find that, the documents he has raised issues with, are in two sets. The **first** set includes documents which were annexed to the Plaintiff and, the **second** set includes all those which were

filed as list of additional documents, a right which the parties reserved during the first pre-trial conference.

As regards the documents which were annexed to the Plaintiff, i.e., the **Facility Letter** and the **Application Letter Dated 8th August 2017**, these indeed appear to be annexed to the Plaintiff as **Annexure BOA-1** collectively.

Since the documents labelled as **Annexure BOA-1**, were attached to the Plaintiff, I see no reason as to why Mr Kasaizi giving such an omnibus statement that they be rejected. What was being produced in court was their original. And, he has not raised any query regarding their authenticity or otherwise. That being the case, I find that such documents should be admitted. I see no reason why they should be rejected.

In fact, the documents labelled as **Annexure BOA-1**, meet the requirements of Order VII rule 14(1) of the Civil Procedure, Cap.33 R.E 2019. Order VII rule (1) of provides as follows:

"14.-(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the

*plaint is presented and **shall** at the same time deliver the document or a copy thereof to be filed with the plaint..”*

The second limb of Mr Kasaizi’s submission has challenged a document named as “**Minutes of the Board Resolution**”, which **PW-1** alleged to be originating from the Defendants. This document forms part of documents which were filed in this Court on 22nd June 2020 under the list of **additional documents**. They were filed under Order VII rule 14 (2) of the Civil Procedure Code. Mr Kasaizi has challenged their admissibility contending that they were not mentioned or made part of the plaint filed in this Court and the Plaintiff should have obtained leave of the court.

The Plaintiff has argued otherwise, to the effect that, the list was valid having been filed under the order of Court which granted leave to the parties to file their lists of additional documents.

Order VII rule 14 (2) of the CPC provides as hereunder:

*“14 (2) Where the plaintiff relies on **any other documents** (whether in his*

*possession or power or not) as evidence in support of his claim, **he shall enter such documents in a list to be added or annexed to the plaint.***

Under the Order VII rule 18 (1) of the CPC, the law provides that:

"18.-(1) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit."

My reading of the above provisions is that, documents not in possession of the Plaintiff at the time of filing the Plaint may still be introduced to the Court. Under Order VII rule 14(2) it is provided that such documents need to be listed in a separate list to be filed in Court and, once that is done, they shall form part of the Plaint.

In the **Ntagalinda's case** (supra), the Court of Appeal clearly made a position, at page 11 of the typed decision, stating as follows:

*"Other documents **that need not be attached at that stage**, must be listed (Order VII rule 14 (2)) and **the list annexed to the Plaintiff.**"*

In this case, when the Plaintiff was filed, the list regarding documents which were to be filed at a later stage was not immediately annexed to it. However, it is on record that, on 28th February 2020, both parties **sought from the Court leave to reserve their rights to file a list of additional document** and, by the orders of this Court, their prayers were granted.

It has been argued by the Plaintiff's counsel, that, the list filed before this Court convened its Final PTC, was filed in line with those orders of the Court. The question that follows, therefore, is: *Was the list filed in compliance with Order VII rule 14(2) of the CPC or should it be considered under Order VII rule 18 (1) or Order XIII (1) (1) and (2) of the CPC?*

The **Ntagalinda's case (supra)**, has dealt with the avenues available under the law to receive a document not initially filed or annexed to the Plaint, and, it is clear from that case, that, such avenue is still wide. It includes Order VII rule 14(2) or Order VII rule 18(1) or even under Order XIII rule 1(1) of the CPC.

Looked at from the context of this case, as I stated herein above, on 28th June 2020 parties prayed to this Court to be allowed to reserve their rights to file their lists of additional documents and, that, the Court granted their prayers.

That being said, even if it were to be argued that the list of the additional documents filed thereafter did not fall under Order VII rule 14 (2) of the CPC, in my view, one could still consider such a list under rule 18 (1) of the same Order VII.

Mr Nyaisa has argued that, the documents were filed pursuant to the Court orders which allowed the parties to file their lists of additional documents. I think he is correct because, indeed, it is true that, this Court

granted orders to the parties when they prayed to reserve their rights to file lists of additional documents.

It is worth noting, as well, that, the filing by the Plaintiff was before the Court conducted the Final PTC, therefore, was in exercise of the right which the parties had reserved. In so doing, the Defendant had time to consider them prior to the time when the issues were framed. The Defendant's learned counsel cannot, therefore, be heard of saying that the defendant has been prejudiced. Had the Defendant been prejudiced after being served, the learned counsel would have raised that matter with the Court when the final PTC was convened.

Even so, if one was to argued that the documents were not earlier annexed to the Plaint and no list of such documents were annexed to it either, one would still take it that their prayer to reserve their rights to file a list of additional documents was made and leave granted on the 28th February 2020 and the same could be considered to be under Order VII rule 18 (1).

With such a view in mind, I would have preferred to close the chapter regarding the validity of production of the documents filed on 22nd June 2020 and hold that, leave having being granted, their production with a view to have them admitted as exhibits cannot be challenged, provided that such is done under the appropriate rules in the CPC (although that, conclusion, does not mean that they will not be subjected to the test of admissibility under the provisions of the Evidence Act).

As correctly stated in the **NBC's case (supra)** allowing a party to produce documents in his possession does not necessarily mean that they will be admitted as evidence without passing through the rigors of the rules of evidence. However, that would be only a one way of looking at things and at the avenues available to the Plaintiff.

To ice the cake, I would definitively say that, since the disputed documents were filed before the Court settled for the issues to be determined in this case, and since they are accompanied by an accurate list, they can be considered, as Mr Nyaisa validly argued, under **Order**

XIII rule (1) (1) and (2) of the CPC. These provisions state as follows:

1.-(1) The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced.

(2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

As it may be noted above, **Order XIII Rule 1(1) of the CPC**, allows both parties to produce "at the first hearing of the suit", all the documentary evidence of every description in their possession or power, or **which they intend to rely and which has not already been filed in court**".

The phrase "**at the first hearing of the suit**" which appears in Order XIII rule 1 (1) of the CPC, Cap.33 R.E 2019, was discussed in the Indian case of **Ashoka Marketing Ltd. vs Rothas Kumar and Ors.** on 28 March, 1966 (Equivalent citations: AIR 1966 Cal 591, 70 CWN 729 (*available online from <https://indiankanoon.org/doc/1695880>*)). In that case, the Calcutta High Court considered **Order XIII rule 1 (1) of the Indian Civil Procedure Code, 1908**, (a provision which is *in pari materia* to **Order XIII rule 1 (1) of the CPC, R.E 2019**).

On paragraph 18 of that case, the Court observed, and I quote, *in extenso*, that:

*" Now, the scheme of the Code is such that the date fixed by the summons, for appearance of the defendant, **cannot be the date of hearing of the suit or the date contemplated by Rule 1 of order XIII of the Code, for production of documents, if the suit be a contested one.** The scheme of the Code is such that interrogation and discovery, **production and inspection of documents should all be completed before a case be taken up for hearing on evidence.** I*

*respectfully agree ... that the word 'hearing' is one of those comprehensive words which may be used with a more or less extensive meaning according to the context. In the context in which they are used, the words "at the first hearing of the suit" in Order XIII Rule 1, mean that hearing, after the pleadings are completed and before issues are framed under Order XIV. Up to that stage, production of documents are permissible, **without cause being shown**, as contemplated by Rule 2 of Order XIII, but thereafter "good cause" must be shown for late production of documents."*

Taking into account all provisions discussed here above, it is my humble view that, the **Ntagalinda's case (supra)**, which has been relied upon by Mr Kasaizi, does not work in his favour. In fact, much as it has expounded the various scenarios through which additional documents may be received in Court, the case works in favour of the Plaintiff in this present suit as opposed to what Mr Kasaizi contends for.

I thus find, **first**, that the documents indicated as "**BOA 1**" were validly annexed to the Plaint and satisfied

the requirements of Order VII rule 14 (1) of the CPC. As such, there is no question about them.

Second, the documents marked as "**BOA 8**" are under a list of additional documents filed pursuant to the Orders of this Court granted to the parties on the 28th June 2020, when they sought and reserved their rights to file a list of additional documents.

Consequently, such documents are open for production, consideration and admission under **Order VII rule 18 (1) of the CPC**, the reasons being that, the parties had reserved their right to file such documents and, that, such reserved right was well exercised by filing them **prior to the final pre-trial conference when the Court settled for issues.**

Third, other documents may, as well, be produced in court for consideration under Order XIII rule 1 (1), and (2) of the CPC. However, those which were not produced in line with what **rule 1 of Order XIII** provides, may be produced under **Order XIII rule 2 where sufficient explanation is given.** It means, therefore, that, such documents will still be received in Court unless challenged

under a different law relating to admissibility of documents.

In view of the above considerations, the objection raised by Mr Kasaizi is devoid of merit and I hereby proceed to overrule it. I would also wish to state that, in some way, Mr Kasaizi jumped the gun because some of the documents were yet to be brought to the attention of the Court.

All said and done, the Plaintiff is hereby directed, to proceed with the examination-in-chief of **PW-1** where the Court previously ended.

It is so ordered.

DATED at DAR-ES-SALAAM this 19th March, 2021.



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

.....
**DEO JOHN NANGELA
JUDGE,**

**High Court of the United Republic of Tanzania
(Commercial Division)
19 / 03 / 2021**