

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)

CIVIL APPEAL NO. 96 OF 2016

**MWANANCHI ENGINEERING AND
CONTRACTING CO. LTD APPELLANT**

VERSUS

AHMED MBARAKA RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Msuya, J.)

Dated 28th day of October, 2013

In

Civil Case No. 131 of 2005

JUDGMENT OF THE COURT

10th April, & 29th May, 2019

LILA, J.A.:

The appellant's seizure from the respondent of a stone crusher no. 941011829800 which was allegedly bought by one Godwin Gabone in a public auction in execution of a court decree and later sold to the respondent formed the crux of the civil action in Civil Case No. 131 Of 2005 in the High Court. In that case, which was **filed on 22nd August, 2005**, the respondent sought for the following reliefs:-

- (a) A declaration that the stone crusher No. 941011829800 belongs to the plaintiff by virtue of his having bought it on the market overt and that it has never belonged to the defendant;
- (b) The defendant pay the plaintiff the sum of Shs. 540,000,000/= as per para 4 herein;
- (c) The defendant pay the plaintiff the sum of Shs. 2,000,000/= per day from the date of filing the suit till when the crusher is delivered to the plaintiff as per para. 10 herein;
- (d) The defendant pay the plaintiff interest on the decretal amount at the court's rate from the date of judgment till when payment is made in full;
- (e) The defendant pay the plaintiff's costs of and incidental to the suit;
- (f) Any other relief(s) that the Honourable Court may deem fit.

After consideration of the evidence of both sides, the High Court (Msuya. J. as she then was) was satisfied that the respondent had proved

his claims and proceeded to enter judgment in favour of the respondent (then plaintiff) as prayed in the **amended plaintiff**.

Aggrieved, the appellant filed the present appeal against the whole decision of the High Court fronting six grounds of appeal that:-

1. The Learned High Court judge erred in law in acting on a plaintiff whose Advocate on record had not signed the same contrary to the mandatory provisions of Order VI Rule 14 of the Civil Procedure Code, Cap 33 R.E 2002.
2. The Learned High Court judge erred in law in granting "judgment as prayed in the amended plaintiff," which amended plaintiff was not part of the pleadings in Court and did not exist.
3. The Learned High Court judge erred in law in going ahead with a suit whose lifespan had expired since 2007.
4. The Learned High Court judge erred in law in entertaining a suit without jurisdiction and, or, in non-compliance with the law.
5. The Learned High Court judge erred in law in holding that the change of legal status of MECCO Corporation did not affect the ownership of assets and liabilities.

6. The Honourable High Court judge erred in law in granting special damages without proof thereof.
7. The Honourable High Court judge erred in law in ignoring the principles governing assessment and award of damages.
8. The Honourable High Court judge erred in law in failing to evaluate the evidence on record thereby coming to a faulty finding, holding and faulty conclusion.

Subsequent to the filing of the memorandum of appeal, the appellant lodged written submissions in support of the appeal. The respondent, in opposition, filed reply submission.

In the written submission, the appellant contended, in respect of ground one of appeal that, in terms of Order VI Rule 6 of the Civil Procedure Code Cap. 33 R.E. 2002 (The CPC), it is mandatory for the party and his advocate to sign the plaint. He accordingly faulted the trial judge for acting on a plaint which was signed by the respondent alone. It is stressed that failure by the advocate to sign the plaint rendered it defective liable to be struck out. He referred us to the persuasive decision of the High Court (Rugazia, J.) in **Tanzania Portland Cement Vs Haruna**

Mpangaos and 169 Others, Civil Case No. 173 Of 2003, **State Trading Corporation Employees' Savings and Credit Society Limited Vs Fares Maro and Another**, Land Case No. 91 of 2006 and **Uteshi M. Sungura Vs Ahmed Ngwengwe and Another**, Land Case No. 231 of 2004 (All unreported).

Submitting in respect of grounds two and eight, jointly, the appellant contended that the trial judge wrongly entered judgment **as prayed in the amended plaint** because such amended plaint did not exist.

In respect of ground 3, the appellant submitted that the trial judge proceeded with the hearing of a matter whose scheduling order (speed track) had expired on 8/6/2012 without any application for amendment or departure being sought and granted in terms of Order VIII rule 4 of the CPC hence the proceedings thereafter are a nullity because the court ceased to have jurisdiction to deal with it. In substantiating that assertion he referred the Court to the High Court decision in the case of **NBC Vs Nabro and Another**, Commercial Case no. 44 of 2001 (Unreported).

Further, arguing on ground four of appeal, the appellant contended that since the substantive claim in the case was Tshs. 55,000,000/=, the

matter, in terms of section 13 of the CPC, ought to have been tried by the court of the lowest grade competent to try it which is the District court which, under section 40(2)(b) of the Magistrates Court Act, Cap. 11 R. E. 2002 (The MCA), has the pecuniary jurisdiction not exceeding Tshs. 100,000,000/=. He added that loss of profit which are essentially specific damages were not strictly proved and he cited to us the case of **Mikoani Traders Limited vs Engineering and Distributors Limited** cited in **Tanzania China Friendship Textile Co. Ltd Vs Our Lady of Usambara Sisters**, Civil appeal No. 84 of 2002 (unreported). The submission also elaborated grounds six and seven which concerned failure by respondent to prove special damages and the trial judge's failure to consider principles governing assessment and award of damages. In elaboration he referred us to the case of **PMM estates (2001) Ltd Vs TIPPER**, Civil Case No. 73 of 2003, **M/S Ermoil Marketing Co. Ltd Vs The Arusha Municipal Council**, Commercial Case No. 5 of 2006 (Both unreported) and **Tanzania Saruji Corporation Vs African Marble Co. Ltd** [2006] 2 E. A. 613.

As regards ground five, the appellant submitted that at the time the suit was instituted at the High Court on 21/8/2005, by Public Corporations

(Specified Corporation Declaration) Order, GN No. 543 of 1997, the appellant was a specified corporation running by the name Mwananchi Engineering and Contracting Corporation hence the one to be sued instead of the appellant. In sum, the appellant prayed the appeal be allowed with costs.

In his reply submission, the respondent took the position that the requirement to have the plaint signed by both the advocate and the party is a procedural one and is not necessary. He cited the High Court decision in the case of **Godfrey Basil Mramba Vs The Managing Editor and Two Others**, Civil case No. 166 of 2006 (Unreported), in which the High Court was of the view that the logic behind that requirement is hard to find and it sets different conditions to a represented matter and an unrepresented matter. He also quoted an extract from Mulla: The Code of Civil Procedure 16th Edition, Volume 2 which commented on a similar provision of the Indian Code of Civil Procedure that failure by the advocate to sign is not a fatal irregularity and can be amended at any stage by ordering the same be signed. Arguing on the cited cases by the appellant, the respondent said that they are persuasive because they are High Court decisions.

Submitting in respect of ground 2 and 8, the respondent conceded that there was no amended plaint. He stated that the record is clear that the case was decided on the basis of the evidence adduced guided by issues raised using the plaint , amended written statement of defense and amended reply to the amended written state of defense. Therefore, he stated, the trial judge made a clerical error in the judgment which could be corrected by moving the High Court under section 96 of the CPC. He accordingly invited the Court to make a correction because the appellant did not do so before the trial court.

In respect of ground 3, the respondent contended that the issue that the hearing of the suit proceeded while the speed track had expired is being raised before the Court for the first time hence it should not be considered. Arguing more, he said that the delay was attributed by both the parties and the court and the law (Order VIII A (4) of the CPC) does not provide for who should move the court to revise the scheduling order. He cited the case of **Nazira Kamru Vs MIC Tanzania Limited**, Civil Appeal No. 111 of 2015 (Unreported) to support his contention.

Regarding ground 4, the respondent disputed the appellant's allegation that the substantive claim in the suit was Shs.55,000,000/= and stated that there was a claim of special damages of Shs. 540,000,000/=in paragraph 4 of the plaint in addition to the declaration regarding ownership of the stone crusher. He added that the same issue was raised and overruled by the High Court.

Responding in respect of ground 5, the respondent submitted that in the produced Public Corporations (Specified Corporations Declaration) Order, GN No. 543 of 1997, the word "Company" is crossed by hand and the word "Corporation" is handwritten which is not how amendments to or correction of errors in Statutory Instruments are made. He accordingly alleged that the incorporation was hurriedly made when the suit was in court.

In respect of grounds 6 and 7, the respondent stated that all along the submission before the trial court the appellant relied much on the argument that a wrong party was sued and not the quantum of damages hence the trial judge found that it was not disputed whether the reliefs are

justifiable or not. In all, the respondent urged the Court to dismiss the appeal with costs.

Before us, when the appeal was called on for hearing were Mr. Julius Kalolo Bundala and Mr. Rosan Mbwambo, the learned counsel, who appeared for the appellant and Dr. Masumbuko Lamwai, the learned advocate, who represented the respondent.

Counsel of the parties adopted their respective written submissions and sought to elaborate on few matters.

Mr. Bundala addressed us in respect of the status the appellant had at the time the suit was instituted. He contended that by then it was a specified corporation hence could not be sued without leave of the Court. He referred us to the Court's decision in **Said Mhimbo and Others Vs State Travel Service Ltd and Tourism Services Tanzania and Presidential Parastatal Sector Reform Commission (PSRC) (Objectors)**, HC Civil Case No. 296 of 1997. He also said, according to the averments in paragraphs 9, 10 and 11 of the plaint the respondents claims were for general damages not special damages hence the High Court had no jurisdiction to entertain the suit.

Mr. Mbwambo elaborated on grounds 2, 6, 7 and 8 generally. He said the respondent did not prove his claims. **First;** the sale agreement between the respondent and Gabone was not received and admitted as exhibit though it is referred to as P1, **secondly;** according to the sale agreement, what was sold to the respondent was a machine without any description and even the receipt issued by Rhino Auction Mart shows that a stone crusher was auctioned but the number thereof was not indicated. **Thirdly,** as the respondent gave the description of the stone crusher as a machine assembled with other parts, then what he bought was just part of the machine hence improper to give him the whole machine. In respect of the damages claimed that is loss of business, he said the special damages were not strictly proved by producing business contracts he entered and income he could have earned. He made reference to the case of **Zuberi Augustino Vs Anicet Mugabe** [1992] TLR 137, **Rugarabamu Mwombeki Vs Charles Kizigha** [1984] TLR 350 and **Stanbic Bank Tanzania Limited Vs Abercombie and Kent (T) Ltd**, Civil Appeal No. 21 of 2001, CAT at DSM (Unreported).

In elaborating the reasons for opposing the appeal, Dr. Lamwai disagreed with the learned counsel for the appellant. In respect of the sale

agreement, he said it was admitted as part of the "makubaliano" appearing at page 15 of the record. He stated that the machine sold was properly identified at page 99 of the record. He further said the appellant took an objection on the sale of the crusher machine which objection was dismissed and he never utilized the available remedy under Order XXI Rule 62 of the CPC hence he cannot be heard complaining now.

Arguing in respect of the appellant's status at the time the suit was instituted, Dr. Lamwai said, though it is an issue of law, the same ought to have been raised at the earliest opportunity. He said it was not an issue before the High Court. He insisted that the appellant was not a specified corporation but was a private company. On the issue of ownership of the stone crusher, Dr. Lamwai said, after analysis of the evidence the trial judge was satisfied that the stone crusher belonged to the respondent. He further said, the claim of suing a wrong party was, under Order 1 Rule 13 of the CPC, supposed to be raised before issues were framed and the same was dismissed by the High Court and reasons were given.

On the complaint about damages, Dr. Lamwai contended that the respondent claimed special damages in paragraph 9 of the plaint and that

no contracts to prove loss of business could be produced because then the crusher was in possession of the appellant.

Regarding failure by the advocate to sign the plaint, Dr. Lamwai argued that Order VIII Rule 14 of the CPC uses the word "if any" to mean that it is not mandatory hence failure by the advocate to sign it is not fatal. He stated that the advocate signed as the one who drew the plaint hence it was sufficient.

We have given a deserving weight to both the written submissions filed and the arguments of the counsel of the parties before us. In both situations, a pertinent legal issue concerning the status of the appellant at the time the suit was instituted raised in ground 4 of appeal, features prominently. As such, we therefore propose to deal with it first.

The record of appeal at pages 234 to 236 bears out the attempt made by one Maugo Obadia Kwabi (DW1) to explain the status of the appellant at various times between the year 1983 and 2011. We, however, found it hard to follow the sequence of events that happened touching on the status of the appellant. Relevant to the case at hand is the period when the suit was instituted. As indicated above the suit was instituted on

21/8/2005. We will accordingly confine our discussion on the status of the appellant during that period only. Our profound research efforts were lucky as we came across Government Notice No. 543 of 1997 which was published on 22/8/1997. According to that Government Notice, Daniel N. Yona, then Minister for Finance exercising the powers conferred upon him by section 38(1) and section 44(1) of the Public Corporations Act, 1992, made the following orders, we hereunder reproduce it, in part, thus:-

"GOVERNMENT NOTICE NO. 543 published on 22/8/97

THE PUBLIC CORPORATIONS ACT, 1993

(NO.2 OF 1993)

ORDER

Made under sections 38(1) and 44

*THE PUBLIC CORPORATIONS (SPECIFIED
CORPORATIONS DECLARATION) ORDER.*

1997

WHEREAS, in carrying out its functions pursuant to section 22(1)(a) of the public Corporations act, 1992, the Commission has recommended to the Minister that certain public corporations should be declared to be specified public corporations:

AND WHEREAS subsection (1) of section 38 and section 44(1) of the said act empowers the Minister upon the recommendations of the Commission by order published in the Gazette to declare a public corporation to be a specified public corporation or a Government minority shares to which the provision of the said act shall apply:

NOW THEREFORE. I DANIEL N. YONA. Minister for Finance, in the exercise of the powers conferred upon the Minister by section 38 (1) and section 44(1) of the Public Corporations Act 1992, do hereby make the following Orders.

- 1. This Order may be cited as the Public Corporations (Declaration of Specified Public Corporations and Specified Government Minority Shares) Order, 1997 and shall come into effect on day of 1997*
- 2. The public corporations specified in the First Schedule to this Order are hereby declared to be Specified Public Corporations and the provisions of the Public Corporations Act, 1992 shall apply to them with effect from the date of commencement of this Order.***
- 3. The public corporations specified in the Second Schedule to this Order are hereby declared to be "Specified Government Minority Shares" and the provisions of the*

Public Corporations Act, 1992 shall apply to them with effect from the date of commencement of this Order.

FIRST SCHEDULE.

- 1. Tanzania Industrial Services Consulting Organisation (TISCO).*
- 2. National Shipping Company Limited (NASACO)*
- 3. Tanzania Electric Supply Company Limited (TANESCO).*
- 4. Tanzania Harbours Authority (THA).*
- 5. Tanzania Posts Corporation (TPC).*
- 6. Tanzania Telecommunications Company Limited (TTCL).*
- 7. Dar es Salaam Water Sewerage Authority (DAWASA).*
- 8. Tanzania Railways Corporation (TRC).*
- 9. Bima Motors Limited*
- 10. Tanzania Karatasi Associated Industries (TKAI).*
- 11. State Motor Corporation.*
- 12. State Mining Corporation (STAMICO).*
- 13. Mingoyo Saw Mills Limited.*
- 14. Tanzania Concrete Articles (TACONA).*
- 15. Mwananchi Engineering Construction Company (MECCO).***
- 16. Tanzania Audit Corporation (TAC).*
- 17. Air Tanzania Corporation (ATC).*
- 18. National Transport Corporation (NTC).*

19. *Tanzania Saruji Corporation (SARUJI).*
20. *Kampuni ya Uchukuzi Dodoma (KAUDO).*
21. *Kampuni ya Uchukuzi Ruvuma (KAURU)*
22. *Kampuni ya Uchukuzi Mtwara (KAUMU).*
23. *Kampuni ya Uchukuzi Mwanza (KAUMA).*
24. *Kampuni ya Uchukuzi Tabora (KAUTA).*
25. *Kampuni ya Uchukuzi Mbeya (MBEYA RETCO)*
26. *Shirika la Usafiri Dar es Salaam (UDA).*
27. *Dar es Salaam Airport Handling (DAHACO).*
28. *Tanzania Central Freight Bureau (TCFB).*
29. *Tanzania Coastal Shipping Line Co. (TACOSHILI).*
30. *Kampuni ya Uchukuzi Iringa (IRINGA RETCO).*
31. *Kampuni ya Uchukuzi Kagera (KAGERA RETCO).*
32. *Kampuni ya Uchukuzi Rukwa (RUKWA RETCO).*
33. *Kampuni ya Uchukuzi Morogoro
(MOROGORO RETCO).*
34. *Kariakoo Market Corporation.*
35. *Kiwira Coal Mines Company Ltd.*
36. *Tanzania Leather Associated Industries (TLAI).*
37. *Serengeti Safari Lodge Ltd.*
38. *Mafia Island Lodges Ltd.*
39. *Mount Meru Hotels Ltd.*
40. *Integrated Concrete Industries Ltd.*
41. *Capital Construction Equipment Co. Ltd.*
42. *Capital Supplies Co. Ltd.*

43. *Tanzania Cordage Company Ltd.*
44. *Tanzania Carpet Company Ltd.*
45. *Biashara Consumers Service's Limited (BCS).*
46. *Stationary and Office Supplies Tanzania Limited
(S & O).*
47. *Board of Internal Trade (BIT).*
48. *Embassy Hotels Limited.*

SECOND SCHEDULE

1. *Investment Promotion Services (IPS).*
2. *Bahari Beach Hotels Limited.*

*Dar es Salaam.
7th August, 1997*

*DANIEL N. YONA
Minister for Minister"*

(Emphasis added)

The respondent, in the written submission, contended that the word "Company" is crossed and the word "Corporation" written by hand. From the afore quoted extract of the Government Notice, that argument does not find purchase with us for, the quoted Government Notice does not reflect that. Similarly, the argument that the issue of whether the appellant was a specified corporation was not raised before the High Court is misplaced because it being an issue of jurisdiction can be raised at any stage. (See **Mathias Eusebi Soka (As personal representative of the**

late Eusebi M. Soka) and The Registered Trustees of Mama Clementina Foundation and Two Others, Civil Appeal No. 40 of 2001 (Unreported). We are also of the firm view that the issue whether or not the order establishing the appellant as a specified corporation was hurriedly made when the suit was already instituted in court could be resolved before a proper forum challenging its validity. This is not a proper forum.

It is evident from the above extract of Government Notice No. 543 of 1997, therefore, that the appellant became a Specified Corporation right from 22/8/1997. That remained to be the status of the appellant till the 31/8/2006 when it was disestablished by the Mwananchi Engineering Contracting Corporation (Disestablishment) Order, Government Notice No. 133 of 2011 which was published on 1/4/2011. For avoidance of doubts, we wish to reproduce it, thus:-

"Government Notice No. 133 published on 1/4/2011

THE PUBLIC CORPORATION ACT

{CAP 257}

ORDER

(Made under section 50(a))

THE MWANANCHI ENGINEERING CONTRACTING
CORPORATION

- 1. This Order may be cited as the Mwananchi Engineering Contracting Corporation (Disestablishment) Order, 2011 and shall be deemed to have come into force from 31st August, 2006.**
- 2. The Mwananchi Engineering Contracting Corporation (Establishment) Order, 1983 is hereby disestablished and shall be deemed to have been so disestablished from the date of effectiveness of this order.**
3. The shares of the Mwananchi Engineering Contracting Corporation shall be vested in the Mwananchi Engineering and Contracting Company Limited and divided as specified in the Schedule to this Order.

SCHEDULE

<i>Division of Shares</i>	<i>Amount</i>
<i>i. sisi Construction and Company Limited</i>	<i>75%</i>

ii. The Government

25%

*Dar es salaam
8th March, 2011*

*HON. JAKAYA M. KIKWETE
President"*

(Emphasis added)

In the light of the above quoted Government Notice, the appellant's status as a specified corporation lasted from 22/8/1997 to 31/8/2006. The suit which was instituted by the respondent against the appellant on 21/8/2005 was therefore instituted within the time when the appellant was a specified corporation. And, as the establishment Order clearly states, the provisions of the Public Corporations Act, 1992 applied. It follows, therefore, that under the provisions of section 43(1) of the Public Corporations Act, 1992 as amended by Act No. 16 of 1993, the Presidential Parastatal Sector Reform Commission (PSRC) became the official receiver and the provisions of the Bankruptcy Ordinance became applicable. Section 9(1) of the Bankruptcy Ordinance states:-

"on the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as

*directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or **shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.***” (Emphasis added)

In view of the above, we are agreed with the learned counsel for the appellant that at the time the suit was instituted the appellant was a specified corporation. The respondent was therefore obliged to seek and be granted leave to sue before the suit was instituted. That position was succinctly stated by the Court in the case of **Said Mhimbo and Others Vs State Travel Services Ltd** (supra) which was rightly cited by the appellant’s counsel. That position was restated by the Court in the case of **Mathias Eusebi Soka (As personal representative of the late Eusebi M. Soka) and The Registered Trustees of Mama Clementina Foundation and Two Others** (supra) where the Court categorically stated that:-

*"We have no doubts at all that the unambiguous words of section 43 of the Act are that once a corporation has been declared a specified Corporation the PSRC becomes its official receiver and the provisions of the Ordinance are engaged. That is the position as borne out by the authorities referred to us by Mr. Maruma: **Said Mnimbo and Others Vs State Travel Services Ltd.**, Civil Case No. 296/1997 (DSM Registry) and **Ali Haji Damdusti V.BP (T) Ltd & BP Import and Export Co. Ltd.**, Civil case No.53/1999 (DSM Registry), and others by this Court."*

In the matter at hand, no leave of the court was sought and granted before the suit was instituted. Consequently, the High Court lacked jurisdiction to entertain the matter. Therefore, ground 4 of appeal succeeds. The proceedings before it were therefore a nullity. We invoke the powers of revision bestowed to us under section 4(2) of the Appellate Jurisdiction Act, cap. 141 R.E. 2002 and hereby accordingly quash the

proceedings and judgment and also set aside all the orders made by the High Court.

Since this ground sufficiently disposes the appeal, we see no reason to consider other grounds of appeal.

In fine, the appeal is allowed with costs.

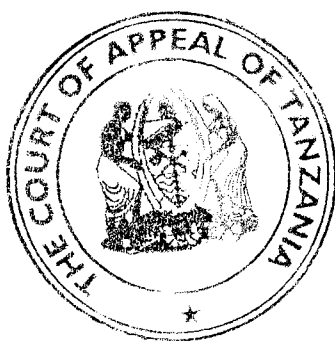
DATED at DAR ES SALAAM this 27th day of May, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL