

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL CASE NO. 196 of 2003

ERNEST MANENO SHIJA PLAINTIFF
VERSUS
MAZINGA CORPORATION..... DEFENDANT

Date of last Order: 19/09/2006

Date of Ruling: 06/11/2007

RULING

Mlay, J.

Mzinga Corporation is the named Defendant, in a suit filed by ERNEST MANENO SHIJA, claiming from the defendant, payment of terminal benefits payable under the Employment Ordinance and subsistence allowance, following termination of employment. A Written Statement of Defence signed and verified by a State Attorney was filed on 7/11/2003. Mzinga Corporation has made two applications to this court. The first application filed on 25/05/2005, is for extension of time within which to file a Written Statement of Defence out of time. This application has been brought under sections 68 (e), 93 and 95 of the Civil Procedure Code, 1966

and section 14 of the Law of Limitation Act, 1971, and it is supported by the affidavit of MATHIAS MHANDO LUJENO MAHILA, a Principal Officer of the Applicant/ Defendant.

The Principal officer has deposed in part, as follows:

1.
2. That Mizinga Corporation is a public Corporation established under the Public Corporation Act No. 17 of 1969, Order of Government Notice No. 219 published on 13th September 1974.
3. That Mzinga Corporate is being manned by the Minister for the time being responsible for the Ministry of Defence and National Service and the government owns one hundred percent (110%) shares of the corporation.
4. That under section 5 (1) of the GN. No.219 of 13th September 1974 the funds of the Corporation are provided by the Parliament of the Government of the versed of the Corporation.
5. That in any suit that is instituted against the Corporation the ATTORNEY GENERAL must be joined as a necessary part (sic) in order to enable the Government to be properly represented and allow the court to effectual and completely adjudicate upon and settle all the question involved in the suit.
6. That in all previous cases Mzinga Corporation was suited jointly with the ATTORNEY GENERAL as the

second defendant for the interest of the Government and the ATTORNEY GENERAL honestly (sic) filed written statement of Defence on behalf of the Government and Mzinga Corporation provided the ATTORNEY GENERAL with all relevant documents to support the defence believing that the corporation was equally represented by the ATTORNEY GENERAL as there was no second defendant.

7. The Attorney Generals Chambers has been representing Mzinga Corporation throughout from the beginning of this suit.
8. That the applicant prays that the honourable court be pleased to allow the defendant to file a written statement of Defence out of time.

The Respondent/ Plaintiff filed a counter affidavit, denying the contents of paragraphs 3,4,6 and 7 of the applicants supporting affidavit and objecting to the prayer in paragraphs 8 of the affidavit on grounds that the Applicant/ Defendant didn't disclose sufficient reason for reason for such an to be application granted.

The Applicant/ Defendant filed another application on 28/9/2004 under Order 1 rules 3 and 10 (2) and section 95 of the Civil Procedure Code 1966. In this second application, the applicant is seeking the order that:

“This honourable court may be pleased to grant Order of joining THE ATTORNEY GENERAL as a second defendant in this suit”.

This application is also supported by the affidavit of MATHIAS MHANDO LUTENDO MAHILA, the principle officer of the Applicant/ Defendant, who is also the deponent of the supporting affidavit of the first application for extension of time to file a written statement of Defence.

At the hearing the two applications were ordered to be consolidated and heard together. Mr. Komba appeared for the Applicant / Defendant while Mr. Rweyagira represented the Respondent/ Plaintiff. In his submissions, Mr. Komba started with the second application to join the ATTORNEY GENERAL. Mr. Komba contended that the need to join the Attorney General arises from the fact that the Defendant is a corporation sole established by GN 219/1974. He stated further that, being a corporate sole, the Defendant is under the Minister for Defence and National Service and that the government owns 100% of the shares. He argued that the government has interest in this case because if the Plaintiff succeeds, the Plaintiffs claim will be paid by the Treasury, in terms of paragraph 5 (1) of GN 219 of 1974.

He submitted that for these reasons the Attorney General to be made a party is necessary and that is why in the early proceedings, the applicant was being represented by a State Attorney who also prepared the present Written Statement of Defence. With this Mr. Komba ended his submissions on the second application.

On the first application which is for extension of time in which to file a written statement of Defence, Mr. Komba submitted that the application has been made because the present written statement of Defence was filed on behalf of the Defendant by the Attorney General, on the basis of the decision in the case of MPANDA DISTRICT COUNCIL VS NDEKONIA NGIRIE 1988 TLR 178.

Mr. Rwenyagira on the application to join the Attorney General, objected on grounds that the Defendant is a limited liability company. He conceded that the Government has an interest in the company, but argued that, this does not give the company an automatic right to be represented by the Attorney – General. He contended that the Attorney General was only holding brief of Mzinga Corporation but they were not appearing.

On the application for extension of time to file a written statement of Defence out of time, Mr. Rwenyagira submitted that there are authorities to the effect that without 21 days upon giving sufficient reasons, a further 21 days extension may be given. He contended that so far there is no written statement of Defence and that what has been filed by the Attorney General has not been authorized by the Defendant. He further argued that Order VI Rule 15 (1) provides that the plaintiff shall be verified by a party to the pleading or by some other party proved to the satisfaction of the court to be acquainted with the facts of the case. He contended that, the fact that the defendant has applied for extension of time to file written statement of defence, means they did not authorize the Attorney General to file a defence. He submitted that the Defendant is estopped from adopting the written statement of Defence.

In reply Mr. Komba argued that Order VI Rule 15 is clear that once the court is satisfied that a person is conversant with the facts, the court can authorize the person to file the pleading. He further argued that in the verification clause, the State Attorney indicated the source of information was the Defendants, which means the State Attorney was authorized and the written statement of Defence was filed within the scope of Order VI Rule 15.

The first application is for extension of time within which to file a written statement of Defence out of time. The reason given by the applicant in the supporting affidavit can be found only in paragraph 6 of the affidavit.

The reason is that, the written statement which has already been filed, was honestly filed by the Attorney General on behalf of the Government and Mzinga corporation. Mr. Komba in her submissions contends that the written statement of Defence was filed on behalf of the Defendant by the Attorney General and if I understand Mr. Komba, the need to file another written statement of Defence by the Applicant/ Defendant himself, arises from the decision of this court, (Mwalusanya, J) in the case of MPANGA DISTRICT COUNCIL VS NDEKONIA NGIRIE 1988 TLR 178. In that case the Attorney Generals Chambers offered the services of a State Attorney to the Mpanda District Council in respect of a civil suit. A preliminary point was raised at the hearing, whether the State Attorney had **locus standi**. For reasons which I need not go into, the court decided that in that case, the State Attorney had “undaunted **locus standi**. In the present case however, **locus standi** is not the issue. The issue is whether the applicant/ Defendant should be granted extension of time in which to file a written statement of Defence. The Mpanda District Council case is therefore not relevant to this case. There is of course, a supplementary question on whether,

having filed a written statement of defence through the services of the Attorney Generals Chambers, the Applicant/ Defendant needs to file another Written Statement of Defence, this time around, directly by the Defendant Corporation. Even then, this would not be an issue of **Locus standi** and therefore the decision in the MPANDA DISTRICT COUNCIL case would still be inapplicable.

Assuming, but without deciding that the Applicant / Defendant need to file a written statement of Defence in lieu of the one filed on behalf of the Applicant/ Defendant through the services of the Attorney Generals Chambers, and also assuming as the applicant /defendant has done, that the application cannot be made under Order VIII rule 1 (2) of the Civil Procedure Code, Cap 33 RE 2002 due to lapse of time for extending the time under that provision, the Applicant/ Defendant has to show “**reasonable or sufficient cause**” to extend the period for the institution of this application, in terms of section 14 (1) of the Law of Limitation Act, Cap 89 RE 2002. That the applicant/ Defendant believed that the written statement of Defence filed by the Attorney General on behalf of the Defendant and which was filed on the instructions and information supplied by the Applicant, would in my considered opinion, constitute a reasonable or sufficient cause to extend the time. It is not in dispute that the government or the Attorney General has not been named as a party in the plaint

filed by the Respondent/Plaintiff or that the Attorney General was otherwise summoned to appear or to file a written statement of Defence to the plaint. There is to reason therefore for the Attorney General to have filed the written statement of Defence other than upon instruction and upon information from the Applicant Defendant, as deponed in the verification clause of the written statement of defence and as deponed in paragraph 6 of the supporting affidavit.

We now come to the supplementary issue, as to whether the Applicant/Defendant needs to file a new written statement of Defence, in lieu of that one filed on behalf of the Applicant/Defendant by the Attorney Generals Chambers. Order VI Rule 14 provides as follows:

*“14 Every pleading shall be signed by the party and his advocate (if any), provided that where a party pleading is, by reason of absence or for other good cause unable to sign the pleading, **it may be signed by any person duly authorized by him to sign the same** or to sue or defend on his behalf”.*

The written statement of Defence filed behalf of the Applicant/ Defendant has been signed by a State Attorney and

it is in evidence that the Attorney General was instructed and given information by the defendant to file the written statement of defence. The Written Statement of Defence filed on behalf of the Applicant/ Defendant is a pleading signed by a "*person duly authorized by him to sign the same*", within the meaning of Order VI Rule 14. Since the written statement has been verified and signed by the said State Attorney and in the verification the State Attorney has shown that what is stated in paragraphs 2,3,4 and 5 is based on information received from the defendant, which information he believes to be true, the written statement of Defence has been properly verified in terms of Order VI Rule 15 of the Civil Procedure Code, Cap 33. I am therefore unable to find any justification in law, for the applicant/ Defendant to file a fresh Written Statement of Defence, in lieu of the one already filed on his behalf. Since the Applicant/ Defendants has already filed a Written Statement of Defendant through the services of the Attorney Generals chambers and there is no justification in law to have a fresh Written Statement of Defence, I do not find there is a reasonable sufficient cause for extending or the time for filing a fresh Written Statement of Defence. For this reason the application for extension of time to file a written statement of defence is rejected.

We now come to the second application, which is for joining the Attorney General as a party to the suit. The reasons given

are that the applicant is a public corporation or as, Mr. Komba argued, is a corporation sole which is under the Ministry of Defence and National Service and that the Government owns 100% of its shares.

The Applicant is in fact a public corporation established under the Public Corporations Act 1979 vide GN 219 of 1974, and not a corporation sole, as thought by Mr. Komba. Pursuant to the enactment of the Public Corporations Act, Cap 257 RE 2002, section 4A of the Act provides as follows:-

“every public corporation existing on the coming into operation of this Act shall be deemed to be established pursuant to this Act.....”

Section 4 – (2) of Cap 257 RE 2002 provides that:

Every public corporation established by an order made under this section shall :-

- a) Have perpetual succession and a common seal;*
- b) In its corporate name be capable of suing and being sued; and***
- c) Subject to the provisions of this Act and of any order made in that behalf by the president, be capable of purchasing and*

*otherwise acquiring and of alienating
any property, movable or immovable”.*

Section 8 of the Act establishes a Board of Directors for each public corporation and the Board is granted powers:-

*“upon the terms and conditions which it
may deem fit and for the purposes of
proper and efficient conduct of the
business and activities of the public
corporation:-*

a)

*b) **appoint at any salaries and upon
such terms and conditions** which it
may decision which it may deem fit any
other **officers and employees of the
corporation** when it deems necessary or
desirable for the effective discharged of
the purposes and functions of the public
corporation”.*

Government Notice No. 219 of 1974 which established
MZINGA CORPORATION pursuant to paragraph 3 thereof,
provides in paragraph 5 (1) that the funds of the corporation
shall consist of:-

- a) *Such sums of money as may be provided by Parliament for the purposes of the corporation,*
 - b) *Such sums of money as the Board may subject to sub paragraph (2) raise time to time by way of loan an loans;*
 - c) *Such sums [of] money as may become vested in the corporation in any manner whatsoever.*
- 2) *The corporation may from time to time borrow such sums of money as it may require to meet any of its obligations and further purposes of its business and may secure such loans in such moment as the Board may with the approval of the Minister, authorize.*

Finally, paragraph 7 of GN 219/74 provides that:-

*“Al salaries, fees and other allowances whatsoever payable to the Chairman of the Board the general manager and other officers and servants of the Corporation **shall be paid out of the funds the corporation”.***

From the above provisions of the Public Corporation Act and of the Mzinga Corporation (Establishment) Order, GN 219/1974, the Applicant/ Defendant is a body corporate, capable of suing and being sued in its own corporate personality.

The reasons advanced for the need to join the Attorney General on grounds that it is a public corporation or that the Government has an interest in the corporation has no legal basis. Even the ground that the monies of the corporation are voted by Parliament is not entirely correct, in the light of the provisions of paragraphs 5 of 6N 219/74 which clearly show that there are other sources of funding the corporation.

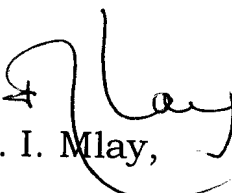
At any rate, once the sum have been voted by parliament, the sums become part of the funds of the corporation out of which salaries and allowances of employees as those being claimed by the Respondent/ Plaintiff, become payable. There is not basis for joint the Attorney General an account of the sources of funds of the Corporation being voted by Parliament or of the Government being the sole share holder.

Neither the Public Corporations Act nor the Government Proceedings Act provide that proceedings against a public corporation become proceedings against the government. In fact, civil proceedings against the Government are governed by

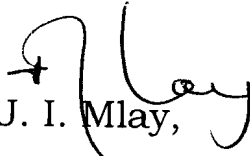
different requirements of giving notice to the Attorney General in compliance with PART III of the government Proceedings Act, Cap 5 RE 2002, which requirements would be contravened by granting this application.

It would appear that the need to join the Attorney General as a party is misconnected and without a legal basis. If the need to join the Attorney General is, as it appears to be the case, required to secure eventual payment of the decree by the Government if the Plaintiff succeeds, the proper route is to make an application for leave to present a third party notice, but not an application to join the Attorney General as a party to the suit.

Upon due consideration and for the reasons given above, both the application for extension of time in which to file a Written Statement of Defence out of time and the Application to join the Attorney General, are without basis and they are accordingly dismissed, with costs.


J. I. Mlay,
JUDGE.

Ruling read in the presence of Mr. Rwenyagira Advocate of the Respondent / Plaintiff and the Plaintiff and in the absence of the Applicant/ Defendant this 6th November, 2007.



J. I. Mlay,

JUDGE.

06/11/2007

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