

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 109 OF 2007

1. MUHUMBI KIBWANA AND OTHERS.....PLAINTIFFS

VERSUS

SIRAJI MWASHA & ANOTHER.....DEFENDANTS

R U L I N G

Chinguwile. J.

This suit has been lodged by H.H Mtanga, Advocate on behalf of Muhumbi Kibwana ,Gabriel Herman,Elfrida Chale ,Samwel Ndongo,Mohamed Bulanget,Mwal Bernad,God Shabani,Beat Damian,Said Ngatopya,Ramadhani Maganga and Sophia Juma against Siraji Mwashu,Director of Kinondoni Municipal Council Dar es Salaam,. They were seeking for the following relief for the demolished premises;

- Damages of 52,860,160/-,
- Costs of the suit.

However, through Mr. Mlinga learned Counsel, the First Defendant raised a notice of preliminary objection to the following effect.

(a) The Plaintiff have no cause of action against the 1st Defendant

(b) The plaint can not be maintained as is bad in law as it contravenes mandatory provisions of Order 1 Rule 8 and Order VI Rule 14 of the Civil Procedure Act Cap 33 R.E. 2002.

(c) The verification clause is fatally defective as it contravenes Order VI Rule 15 (1), (2) and (3) of the Act.

The objections were argued by way of written submissions.

Arguing the first point Mr. Mlinga learned Counsel referred this Court to the definition of the term cause of action which is found in the books of Sarkar `s **Law of Civil Procedure 8th Edition Volume 1 at pg 545 and Words and Phrases Legally Defined at page 227**. This Court was also referred to the decisions of this court **in Civil Case No 46 Of 1995 between Crestale (UK) Limited (in Compulsory Liquidation) and (Bondeni Seeds Ltd., J. B. Shirima and Others Vs Humphrey Meena t/a Comfort Bus Service [1992] T.L.R 290**, and that of the Court of Appeal in the Case of **John Byombalira Vs. Agency Maritime International Tanzania (1983) T. L. R. 1**.

He contended that; the plaint

does not contain any facts of wrong doing by the 1st Defendant on his capacity as Chairman. It was submitted that, as the 1st defendant was only discharging his duties and responsibilities, nothing wrong was committed by him. He argued that his client should not be held liable for fulfilling his ethical duties.

In his second ground learned Counsel is submitting that, the plaint is bad in law for violating the mandatory provisions of **Order 1 Rule 8 and Order V1 Rule 14** With regard to the requirements of Order V1 Rule 8 it was the learned Counsels submission that the same has been contravened since the plaint has been signed by the counsel for the Plaintiff's on their behalf. According to the Counsel for the 1st Defendant, the cited provision requires; where numerous persons having the same interest in a suit wish to sue, they may file a representative suit, subject to the permission of the court that .The learned Counsel further submitted that since there is no proof that this is a representative suit, the Learned Counsel for the plaintiff's could not sign on behalf of the plaintiffs. On Order V1 Rule14, the learned Counsel pointed that it has been signed by Mr. Mtanga learned Counsel alone on behalf of the plaintiffs.

The court was once again referred to the decision of this court in the case of **Hans Nagorsen versus BP Tanzania Limited (1987) TLR pg 181** where a similar situation occurred hence it was held that- "he could have signed with the plaintiff but he can not certainly sign a plaint alone on behalf of the plaintiffs as an advocate." This according to him renders the plaintiff defective.

Lastly the learned Counsel submitted that the verification clause is defective for contravening the mandatory provisions of Order VI Rule 15(1) of the Act, which requires pleadings to be verified by the person dully acquainted with the facts of the case. The learned counsel argued that as the verification was signed by the counsel for the plaintiff, the act was in violation of the cited mandatory procedure. He was wondering how he could be conversant with the facts of the case, while he was only supplied with information. He therefore invited this case to strike out the case for the reason that it was defective.

He therefore prayed that the case should be struck out with costs.

The objections were vehemently resisted by Mr. Mtanga. The learned Counsel for the plaintiff submitted that there is a cause of action against the 1st Defendant, he had used his position as Chairman of Serikali ya Mtaa to demolish the kiosks. According to the Counsel the act was not sanctioned by the Kinondoni Municipal Council and that he is now using that area as packing bay for his customers and as through way to his residence.

With regard to the contention that there is no cause of action against the 1st Defendant, it was vehemently argued that, there is a cause of action against the 1st Defendant as presented in the pleadings before this court. To him, every fact necessary for proving the case constitutes a cause of action.

On the issue of contravening the provisions of Order 1 Rule 8 of the Civil Procedure Code, the learned Counsel argued that this is not a mandatory provision since the word used is may .He submitted that since all Plaintiffs agreed that their Counsel should sign the pleadings on their behalf ,there was no need of notice from the court. The counsel contended that under Order 111 Rule 1 an advocate dully appointed or any authorized agent may sign on their behalf.

Regarding the issue of verification, the learned counsel conceded that it was defective because it was signed by him alone. However it was his submission that such defect does not affect the substantive part of the plaint. According to him the defective parts could be expunged from the court's record or overlooked. The learned Counsel invited this court to overlook the anomaly in order to ensure that justice is done. The court was referred to the decision of Justice N.P.Kimaro in Misc Civil Case No 7 of 2004. In addition to this authority, the counsel also cited the decision of the Court of Appeal in the case of **D.T. Dobie(Tanzania) Limited and Phantom Modern Transport(1985) Civil Application No 141 of 2001(unreported)** in support of his submission that technicalities should not be adhered firmly. The counsel asserted that since he was dully instructed to action the plaintiffs` behalf, the fact that he had signed both the plaint and the verification clause did not occasion any miscarriage of justice.

In rejoinder the Mr. Mlinga insisted that the 1st defendant being the Chairman of Serikali ya Mtaa was merely discharging his duties by implementing the decisions if the Kinondoni Municipal Council.

Therefore he should not be held liable. He also insisted that the plaint was incurably defective hence it should be struck out with costs.

I have considered the submissions by both counsels and all the cases which have been cited in support of their arguments.

I will now start to deal with the first ground of objection. The 1st defendant does not dispute the fact that he did what he did in the course of discharging his duties as Chairman of Serikali ya Mitaa so as to implement the decisions of the Kinondoni Municipal Council. In my view this fact alone proves that he an agent of the Kinondoni Municipal Council. And under the principles of vicarious liability his principal should be responsible for the deeds of its agents. However in the instant case we are still in the initial stages of hearing and there is no evidence which has been adduced to support the allegations by both parties. This being the case, it is not possible at this stage to state with certainty that there is no cause of action against the 1st Defendant. As I see this issue can as well be dealt during trial. That said I find this preliminary objection to have no merit and dismiss it.

In the second preliminary objection it was argued that, the plaint offends the mandatory provisions of **Order 1 Rule 8 and Order V1 Rule 14 of the Civil Procedure Code Cap 33 R.E.2002**. Again looking at the Plaint and as conceded by the counsel for the Plaintiffs the case which is before me, has been filed by Mr. Mtanga on behalf of the twelve plaintiffs. However the learned counsel for the plaintiffs argues that, he has been authorised to do so since he also resides in the same vicinity. Reading through the provision of **Order 1 Rule 8** cited above, it is very clear the provision requires that permission of the court to sue or defend is required when people having same interests are desirous of mandating one of them to do so in their behalf. In the instant case Mr. Mtanga is not one of the plaintiffs. He has not even indicated that he has same interests as the plaintiffs. The learned Counsel for the Plaintiff is urging this court to hold that since Order 111Rule 1 of the Civil Procedure Code provides for recognized agents he should be considered as one. Of course this provision provides for among other things appearance by recognized agents or by advocates.

I think this Mr Mtanga's submission on this is wrong interpretation of the provision. The provision clearly provides for

appearances by either recognised agents or by advocates in courts. It does not provide for the signing pleadings or verification clauses.

According to Blacks Law Dictionary, appearance means” a coming into court as a party of interested person, or a lawyer on behalf of a party”. In my view, the act of signing is different from that of coming into court.

So it is the act of entering into a court which is referred in this order and not otherwise. With regard to the issue of **Order V1 Rule 14** again one does not have to go further looking for evidence. Indeed the plaint has been signed by Mr. Mtanga alone. As correctly pointed by The Counsel for the 1st defendant, Order V1 Rule 14 is very clear on the roles of each person in any pleading. It is stated that the pleadings must be **signed by the party and his advocate (if any)** The same provision requires that where a party is unable to sign by reason of absence or for good cause he may entrust that duty to **any person dully authorized to sign or sue or defend on his behalf**. In the instant case, there is no proof that these principles have been met. This provision is mandatory and in terms of section 53 of the **Interpretation of Laws Act Cap 1 R.E 2002**, it must be adhered. In the premises, I am in agreement with the counsel for the 1st

defendant's submission that the plaint is defective since it has been signed by Mr. Mtanga alone I therefore uphold this preliminary objection.

Turning to the last point of objection, again it is conceded that the verification clause was signed by the counsel for the plaintiffs alone because he resides in the same vicinity and that he is conversant with the issue. He further urged this court to overlook the defect by deleting it. He also submitted that substantial justice would be defeated if the plaint struck out on technical grounds and that this will amount to denying ones constitutional right.. The court was referred to the decision of this court in **Commercial Case no 16 of 2006** where Massati J. (as he the was) which also based its decision on **Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002** In that decision, the court stated that if (technicalities) are adhered too closely it could lead to the defeat of substantial justice. In the cited case the issue was in relation to the lack of verification clause. In my opinion, the defect on a verification clause is curable so I am not going to labour much on this.

As a whole I think it was wrong for the Counsel for the plaintiff to sign for the plaintiffs in contravention of **Order V1Rule 14 of the Civil Procedure Code Cap 33 R.E. 2002**. This is not a technicality which should be overlooked by this Court because I can not ignore the specific rules of procedure which are our guiding principles. I am fortified in my reasoning by the decision of the Court of Appeal in **Civil Application No 100 of 2004** between **Zuberi Mussa and Shinyanga Town Council**, where in a similar situation it was held by Rutakangwa JA that- “A purposive interpretation makes it plain that it should be taken as a guideline for courts action and not as an iron clad rule which bars courts from taking cognizance of salutary rules of procedure which properly employed help to enhance the quality of justice delivered. In the cited case the advocate for the applicant was inviting the Court of Appeal to over look the defect on the basis of Article **107 A (2) (e)** of the Constitution of the United Republic of Tanzania, I think this Article did not intend to replace all procedural laws.

Having so held, I find myself with no other alternative but to uphold the second preliminary objection. The case is therefore struck out with costs.

A.F. Chinguwile

JUDGE

10/9/2008

