

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
Civil Case No 175 of 2009

DONATUS CHRISTOMS AND OTHERS.....PLAINTIFFS

VS

BOARD OF TRUSTEES OF NSSF.....DEFENDANT

Ruling

Date of last Order: 17-02-2011

Date of Ruling: 21-02-2011

JUMA, J.:

This is my ruling on the Notice of Preliminary Objection which the Defendant Board of Trustees of the National Social Security Fund (NSSF) filed on 16 December 2010. In that notice, Defendant is moving this Court to dismiss the suit with costs because,

- i) Plaintiffs Donatus Christoms and others, have no cause of action against the Defendant;
- ii) The Plaint is defective for containing the matter of law;
- iii) The Plaint was not signed by the Plaintiffs but was signed by an unauthorized person.

Fifteen Plaintiffs filed their suit on 14th December 2009. When the case was mentioned for the first time on 22 February 2010 only five

Plaintiffs, Donatus Christom Ngonyani, Laiton Daniel Lwinga, Said Mohamed Salum, Rashid A. Mnyasa, Kuja Jordani Kauka-appeared. Together with its written statement of defence filed on 3rd March 2010, the Defendant filed a notice of Preliminary Objection which as amended is the subject matter of this Ruling.

Submitting on why he thinks that the Plaintiffs have no cause of action against the Defendant, Mr. Semgalawe premised his submission on definition of cause of action provided by in the case of **John M. Byombalirwa V Agency Maritime Internationale (Tanzania) Ltd 1983 TLR 1 (CA)** where the Court of Appeal clarified that,

..... the expression "cause of action" is not defined under the Civil Procedure Code, but it may be taken to mean essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit.

Mr. Semgalawe submitted that the fourth paragraph of the Plaint, which the Plaintiff titled as "Statement of the Facts" does not state whether TAZARA remitted the contributions to the Defendant or not. The learned Advocate submitted further that the fourth paragraph only states the duty to remit as provided for by the **National Social Security Fund Act** and to ground a cause of action there must have been material facts stating that the Plaintiffs' employer (TAZARA) contributed to the Defendant Fund.

On 13th January 2011 Mr. Stephen S. Tonya of the Pato Legal Consultant & Advocate filed Plaintiffs' response to the Defendant's submission on the three points of objection. Mr. Tonya contended

in his replying submission that the Plaintiffs have undisputed cause of action against the Defendant because each Plaintiff was contributing member of the Defendant's Fund and the Defendant had a corresponding duty to provide the Plaintiffs with their retirement pension and other benefits under the National Social Security Fund. Mr. Tonya further submitted that the Defendant has without any lawful reason neglected to fulfil its statutory duty. According to the learned Advocate, the Defendant cannot shift the burden of cause of action to Tanzania Zambia Railway Authority (TAZARA) who is in essence only a collecting agent of the Defendant Fund.

I have heard the submissions of both Mr. Semgalawe and Mr. Tonya with regard to whether the Complaint discloses any cause of action. From the outset I must say that the Complaint before me was not elegantly drafted. This inelegance may have contributed to clouding of cause of action.

As to what amounts to cause of action is now prettily settled by case law in Tanzania. For instance, Rugazia, J. in **Aikangai Alphonce Riwa Vs. Kinondoni Municipal Council & Others, Land Case No.113 of 2004 (Land Division DSM)** quoted with approval the case of **Jackson Vs. Spital (1890) LR 5 CP 542** which defined a cause of action to be the acts on the part of the defendant which gives the plaintiff his cause of complaint.

Using the case of **Jackson Vs. Spital (1890) (supra)** as my guide on what a cause of action entails, I was able to discern material facts

from the Plaintiff constituting acts of the Defendant which gives the Plaintiffs cause of action in this suit. These material facts are that before their retirement in 2000, the Plaintiffs were not only employed by Tanzania-Zambia Railway Authority (TAZARA), they were also members of the Defendant National Social Security Fund (NSSF). As members of the NSSF, Plaintiffs contributed 10% of their monthly wages. The remaining 10% was paid by their employer (TAZARA). The Plaintiffs claim that following their retirement Defendant failed to pay their retirement pensions contrary to the provisions of the **National Social Security Act, 1997**.

I was also able to discern the material facts that the Plaintiffs would like this Court to declare that they have a legal right to their pensions and other benefits which they believe is under the control of the Defendant's Fund. They want also this Court to order the Defendant to pay each one of the Plaintiff his monthly pension accrued since their respective date of retirement at compound interest rate of 15% to the day of determination of this suit. Apart from paying them their costs, the Plaintiffs further want the Defendant to pay each one of them a general/exemplary damages computed on daily subsistence rate of Tshs. 50,000/= as compensation. From the foregoing, I do not agree with the submission by Mr. Semgalawe, on behalf of the Defendant that the Plaintiff has not disclosed any cause of action. The objection by the Defendant that Plaintiffs have no cause of action against the Defendant is hereby dismissed.

On the second point of objection that the Complaint is defective for containing the matter of law, Mr. Semgalawe refers to Order VI Rule 3 of the **Civil Procedure Code** which directs that pleadings including the Complaint must contain only the material facts on which the party relies on. In the understanding of the learned Advocate, the Complaint is defective and should be struck off because it contains sections of the **National Social Security Fund Act** which Plaintiffs allege that the Defendant breached. The learned Advocate sought the support of a book "The Law of Civil Procedure," 8th Edition by SARKAR- stating that a party to a suit cannot plead law, but he may in his pleadings raise any point of law.

Responding to Mr. Semgalawe's submission that the Complaint is defective by reason of containing matters of law; Mr. Tonya replied that there was no way the Plaintiffs would have pleaded in their Complaint without using the provisions of the **National Social Security Fund Act, 1997** which the Plaintiffs believe the Defendant breached. The learned Advocate pointed out that the matters of law which the Plaintiffs pleaded in their Complaint are inextricably linked to the facts constituting their cause of action.

In my opinion the submissions by the two learned counsel centre on interpretation of Order 6 Rule 3 of the **Civil Procedure Code** which require:

"Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or

defence, as the case may be, but not the evidence by which they are to be proved.

Describing a provision in the India Code of Civil Procedure which is in *pari materia* with Order 6 Rule 3, the case of **Virendra Kashinath Ravant & Anr Vs. Vinayak N.Joshi & Ors [1998] INSC 532** has in my view correctly observed that the object of Order 6 Rule 3 is two-fold. First is to enable the opposing party to appreciate the particular facts of one's case so that one's case may be met by the other side. Second is to enable the court to determine what is really at issue between the parties. The words in the sub-rule "a statement in a concise form" are definitely suggestive that brevity should be adhered to while drafting pleadings. But brevity should not be at the cost of setting out necessary facts, but it does not mean niggling in the pleadings. And elaboration of facts in pleadings is not the ideal measure and that is why the sub-rule embodied the words "and contain only" just before the succeeding words "a statement in a concise form of the material facts."

While it is correct to observe that Plaintiff's Complaint was not drawn in a concise and precise way, this in my opinion does not mean that the Complaint violated the two objectives of Order 6 Rule 3 of the **Civil Procedure Code**. From the foregoing I hereby find that the facts pleaded in the Complaint enabled the Defendant to appreciate the material facts upon which the Plaintiffs' case is founded. I am in addition satisfied that the facts in the Complaint are sufficient to enable this Court to determine what is at issue between the Plaintiff and

the Defendant. The second ground of objection has no merit and is hereby dismissed.

As regards the third point of objection, Mr. Semgalawe submitted that as long as it was signed by the Advocate but not by the Plaintiffs, the Plaint contravened Order VI rule 14 of the **Civil Procedure Code, Cap. 33** which states that every pleading is to be signed by the party and his Advocate (if any) unless that signing is prevented by reason of absence or for other good cause, that's when the Plaint may be signed by any person duly authorized. Mr. Semgalawe supports his submission by citing the case of **Georgia Celestine Mtikila vs Dar es Salaam Nursery School and Another**, Court of Appeal (1998) TLR 512 where Court of Appeal discussed the consequences of the finding that the written statement of defence was not properly signed and held that it would be open to the trial judge in terms of Order 8 rule 14 (2) (b) of the **Civil Procedure Code** to order *ex parte* proof against the party who did not sign the written statement of defence.

On behalf of the Plaintiffs, Mr. Tonya does not agree with the contention that the Plaintiffs did not sign the Plaint. Instead, Mr. Tonya refers to **annexure "Po- MAJINA YA WASTAAFU WA TAZARA WASIOLIPWA PENSHENI ZAO NSSF KINYUME NA ACT NO. 28 YA NSSF, 1997"** which each Plaintiff signed, signifying the signing of the Plaint. In other words, since the **annexure Po** which was signed by the Plaintiffs is part of the Plaint, the Plaintiffs should be regarded to have signed the Plaint. Further, Mr. Tonya believes that the Advocate's signature on the Plaint is envisaged under Order 6 Rule

14 where a party is prevented from signing by reason of absence or any good cause.

The law through Order 6 Rule 14 of the CPC is clear that Plaintiff like every other pleading must be signed:

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 authorised by him to sign the same or to sue or defend on his behalf."

Looking at above provisions of Order 6 Rule 14 of CPC, the law is clear that each Plaintiff must have signed the Plaintiff or show sufficient reason to justify an Advocate to sign on their behalf. In a suit where there are many Plaintiffs the need to sign the Plaintiff becomes even more important to signify their acceptance to be tied to any outcome of the case filed on their behalf. In my opinion, Order 6 Rule 14 together with the definition of what a pleading is does not support Mr. Tonya's submission that by signing **annexure Po** which was appended to the Plaintiff, the Plaintiffs complied with the law requiring pleaders to sign their pleadings. Order 6 Rule 1 provides,

1. "Pleading" means a plaintiff or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII.

Further, the learned Advocate has not advanced any reason or good cause which prevented the Plaintiffs from signing their Plaint. Therefore, there was no justifiable reason for the Plaintiff's Advocate to sign the Plaint on behalf of the Plaintiffs.

Having made a finding that the Plaint filed by the Plaintiffs was not signed as required by Order 6 Rule 14 the next following question for my determination is the consequences which should follow that finding. It is my opinion that in the interests of justice Plaintiffs should be given time to amend their Plaint. This Court (Oriyo, J. as she then was) in the case of **Dorica Mpambije Vs. Aaron N. Mpambije & Loserian Sangale, Civil Case No. 241 of 2002 (HC, at DSM)** was of the similar view that a Plaint which is either unsigned or unverified or both, though defective for violating the law, was not fatal within the guidance of Article 107 A (2) (e) of the **Constitution of United Republic of Tanzania, 1977**. These provisions of the Constitution oblige the courts to reach their respective decisions without too much reliance on technicalities to the extent of denying justice to parties. Plaintiff in **Dorica Mpambije vs. Aaron N. Mpambije & Loserian Sangale (supra)** was ordered to amend the plaint to rectify the defects.


Having worked for so long till their retirement substantive justice requires this Court to hear the Plaintiffs who are suing to get their pension. Likewise substantive justice expects this Court to hear the Defendant on whether it holds pension funds belonging to the Plaintiffs. Rules of procedure should not in the special

circumstances of this case, stand on the way. There is another reason why this Court thinks that amendment of the Plaintiff will be the best option in the interests of justice. Although the Plaintiffs filed their case way back on 14th December 2009, most of the following year (2010) was spent waiting for the Defendant to finalize its scrutiny of documents with the view of settling the matter out of court. Records of this Court show that on 9th April 2010 Defendant Fund was represented by Advocate Opiyo who informed this Court about on-going inspections to ascertain various claims against the Defendant. Mr. Opiyo requested and was granted a 30-day adjournment to conclude the inspection of TAZARA documents. Again on 12th May 2010, Mr. Opiyo requested further adjournment because the inspection was still taking place and the documents were in his words bulky and that the Defendant did not wish to wrangle with its hitherto clients (i.e. Plaintiffs) in courts of law. This Court allowed further adjournment. On 1st July 2010 the Defendant was absent and I had no alternative but to reschedule the hearing of the Preliminary Points of Objection.

Mr. Opiyo appeared for the Defendant and prayed for more time-till August, 2010 explaining that former employers of the Plaintiffs had agreed in writing to pay Plaintiffs' contributions and more time was needed to finalize the process. On 8th September 2010 the matter had to be adjourned further because an Advocate scheduled to represent the Defendant was hospitalized. Mr. Opiyo said nothing about on- going inspections when he appeared on

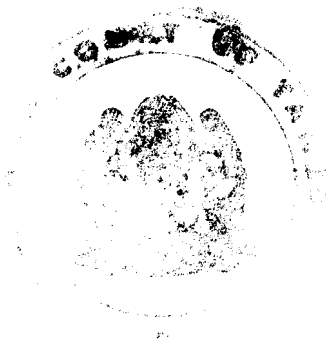
25th October 2010. He prayed to file additional grounds of objection.

From the foregoing, all the three points of objection which the Defendant filed on 16th December 2010 are hereby dismissed. Plaintiffs are granted 30 days within which to amend and file their Plaint. No order is made on costs.



I.H. Juma
JUDGE
21-02-2011

Delivered in presence of: Mr. Stephen Tonya (Advocate for the Plaintiffs) and Mr. Semgalawe (Advocate for the Defendant).



I.H. Juma
JUDGE
21-02-2011