

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR-ES-SALAAM DISTRICT)
AT DAR ES SALAAM**

CIVIL APPEAL NO 181 OF 2017

(Originating from Kisutu Resident Magistrates' Court in Civil Case No. 365 of 2016)

JOEL M. MABIBA LIMITED.....APPELLANT

VERSUS

CRDB INSURANCE BROKERS LIMITED.....1ST RESPONDENT

REAL INSURANCE TANZANIA LIMITED.....2ND RESPONDENT

BRITAM INSURANCE TANZANIA LIMITED3RD RESPONDENT

JUDGEMENT

Date of last order 05th June 2018

Date of Judgement 29th June 2018

R.K. SAMEJI, J.

On 28th December 2016 the appellant herein instituted a suit before Kisutu Resident Magistrate Court, before Hon. V.M. Nongwa, the SRM against the respondents praying for the following relief(s):-

- (a) That, the defendants jointly and severally be ordered to indemnify the plaintiff at the tune of Tanzanian Shillings Eleven Million Eight Hundred Seventy Six Thousand and Six Hundred*

- (Tshs. 11,876,600/=) only being repair cost incurred in respect of damaged motor vehicle;*
- (b) Interest on the above amount at commercial rate of 25% per annum from 1st July 2015 when the plaintiff spent on repairs up to the date of judgement;*
- (c) Interest on items (a) and (b) above at court's rate from the date of judgement till payment in full;*
- (d) General and punitive damages for the misconduct of the defendants to be assessed by the court;*
- (e) Costs of the case to be borne by the defendant; and*
- (f) Any other order or relief(s) this Honourable Court may deem fit.*

During the hearing of the matter before the trial court the 2nd and 3rd respondents raised notice of preliminary objection that, *'The Plaint is defective for contravening Order VI Rule 14 of the Civil Procedure Code, Cap. 33 [R.E. 2002].*

The trial court considered and determined the point of objection and on 19th July 2017 Hon. Nongwa, SRM delivered her Ruling, where she upheld

the point of preliminary objection raised and entirely dismissed the Plaint with costs.

Being aggrieved by that decision the appellant lodged this Appeal with five (5) grounds of appeal couched in the following terms that, the learned trial Magistrate erred in law and fact by:-

- (1) *finding that the plaint is not signed by the appellant's advocate and failing to consider that the same is signed by the appellant's advocate at the drawn and filed by section of the plaint;*
- (2) *not according any reasons whatsoever for refusing the grounds and reasons advanced by the appellant's advocate in arguing the preliminary objection raised by the 2nd and 3rd respondents;*
- (3) *not considering at all or advancing reasons for refusing the case law authority relied upon by the appellant's advocate in arguing the preliminary objection;*
- (4) *holding that the appellant's advocate prayed to amend te signature;*

(5) *not making a finding or holding on where exactly on a plaint an advocate's signature is to be fixed.*

At the hearing of this appeal, the appellant was under the services of Mr. Nicholaus Mugarura, the learned Counsel, the 1st respondent was represented by Mr. Tumaini Msechu, the learned Counsel, while the 2nd and 3rd respondents were under the services of Mr. Peter Leornard Kaozya, the learned Counsel as well. By consent of the parties, the Appeal was argued by way of written submissions. This was adequately done and I am grateful to the Counsel for the parties for the energy and industrious research involved in canvassing the issues herein.

Submitting in support of the 1st and 4th grounds of Appeal, Mr. Mugarura argued that, the Plaint served to the respondents was signed by the appellant's advocate at the '*drawn and filed by*' section and the said fact has been noted by the trial Magistrate at page 3 of his Ruling. Mr. Mugarura argued further that, it was wrong for the trial Magistrate to conclude that, the pleadings (Plaint) were not signed. He said, the trial Magistrate, if found that the signature was misplaced she had a legal duty to explain where exactly the appellant's advocate signature was supposed to be affixed, but she did not.

Mr. Mugarura referred to page 4 and 5 of the trial court's Ruling and fault the trial Magistrate for indicating that the appellant's advocate prayed to amend the signature, Mugarura said, that was not true.

As for the 2nd and 3rd grounds of appeal Mr. Mugarura argued that the trial Magistrate failed to advance reasons as why she did not consider the submission made by the appellant's Counsel together with the authorities he had since cited on the position as where the advocate's signature should be affixed. Mr. Mugarura argued further that, even if the plaint could have not been signed by the plaintiff's advocate the remedy was to strike out the matter, but not dismissal as it was done by the trial Magistrate.

As for the 5th ground of appeal, Mr. Mugarura reiterated his submission and prayed the court to allow the appeal with costs and order the suit to proceed with the hearing at the trial court with another Magistrate.

In response Mr. Tumaini argued that, pursuant to Order VI Rule 14 of the Civil Procedure Code, it is mandatory that the plaint should be signed by the plaintiff and his/her advocate. He said, the plaint usually contains a special part that is specifically indicated for signing by the plaintiff's

advocate and the same should appear conspicuously and cannot be hidden in the '*drawn and filed by*' section. Tumain referred to the case of **Juma Salehe Makongo v Exim Bank (T) Ltd**, Commercial Case No. 17 of 2013, High Court Arusha, (Unreported) and argued that since the language used is '*shall*', which imply a *mandatory* requirement, then failure to observe the same is fatal and has since rendered the entire matter incompetent before the trial court, hence she was supposed to strike out the same.

On his side Mr. Kaozya argued that, the appeal before this court should be dismissed as the appellant has failed to establish any sufficient reasons to enable the Court to grant the same. He argued further that, Order VI Rule 14 of the Civil Procedure Code provides in clear terms that, pleadings must be signed by both plaintiff and the advocate, if s/he enjoys legal representation. He said, in this case there was no doubt that the appellant had obtained legal representation from *Nico Law Chamber*, who did not sign the plaint, as the same was only signed by the plaintiff's authorized officer. He pointed out that, the requirement for an advocate to endorse at the '*drawn and filed by*' section is governed by section 44 of the Advocate Act, Cap. 341 [R.E 2002] and not Order VI Rule 14 of the Civil Procedure

Code (supra). Mr. Kozya distinguished the case of **East Africa Cables Limited V Spencon Services Limited** cited by Mr. Mugurura was not decided in accordance with Order VI Rule 14 of the Civil Procedure Code. He thus insisted that, since the word used in the provision is '*shall*' then it was a mandatory requirement for both advocate and the plaintiff to sign the pleadings.

In a brief rejoinder, Mr. Mugarura reiterated his submission and emphasized that names of the appellant's advocate were clearly and visibly indicated in the verification clause. He also insisted that, the law does not state where specifically such signature is to be affixed.

I have given careful consideration to the submissions and arguments advanced by both parties and the record of the entire Application. I have noted that, the prime issue for my determination at this juncture is *whether the appeal before me is meritoriously.*

Having perused the record herein, I will direct my mind to the Ruling and Order of the trial court issued on 2nd June 2017 in respect of the *Civil Case No. 365 of 2016*, which is the subject matter of this Appeal. The trial Magistrate decided to dismiss the suit after observing that the same is

incompetent for being supported by a Plaint that was not signed by the Counsel for the plaintiff.

Pursuant to Order VI Rule 14 of the Civil Procedure Code, (supra) the Plaint is required to be signed by the plaintiff and his/her Counsel, if any. For the sake of clarity, the said provision states that:- ***"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".[Emphasis added].***

From the above provision, it is clear that, a party and his advocate must sign the pleadings. Since what is supposed to be signed is the pleadings, I have to go back to the definition, as to what is meant by pleadings. The term pleadings is defined by Order VI Rule 1 of the Civil Procedure Code to mean the plaint and written statement of defence. Therefore, what is required to be signed by the party and his advocate is the "*Plaint*" for the plaintiff and the "*Written Statement of Defence*" for the defendant.

I am alive to the fact that, one of the main argument by Mr. Mugarura is that, the advocate for the plaintiff has appended his signature in the Plaint

under the "*drawn and filed by*" section. It was his view that, since the law is silent on where the Advocate signature should be affixed and the trial Magistrate has not stated, where the same should be placed then, she was required to find out that, the Complaint was properly signed.

Though, I do agree with Mr. Mugarura that the law is silent on this issue, but with due respect, I am unable to agree with him that a signature of the advocate appended at the '*drawn and filed by*' section is adequate to prove that the Complaint is properly signed. I must emphasize that pleadings are statements made by a party to the case before verification. Those are statements of facts which a party to the case or an advocate drafting the pleadings is responsible for. Parties are agreeable as to the purpose of signing pleadings. If the purpose is to vouch safe that the claim is not a mere fiction, then the signature must come immediately after the statements are closed.

It is therefore my considered view that a signature of the advocate showing who drew and filed the complaint would not be sufficient to satisfying the requirement of the law under Order VI Rule 14 of the Civil Procedure Code. The signature of an advocate envisaged under this provision must come immediately after the closing of the statements. Therefore, in this

case there was non-compliance with the rules of procedure. By the way and as clearly argued by Mr. Kiozya the issue of an advocate endorsing at the '*drawn and filed by*' section is governed by section 44 of the Advocate Act, Cap. 341 [R.E 2002] and not Order VI Rule 14 of the Civil Procedure Code (*supra*) discussed above.

As well noted elsewhere in this Judgement, omission of signing of the Complaint is a procedural matter, which renders the suit incompetent before the court. This issue was discussed at length by the eminent jurist Sarkar's Law of Civil Procedure, 8th edition Vol. I at page 621 where he states that:-

"Signing is merely a matter of procedure so it is immaterial whether it is signed by him or someone else on the plaintiff's behalf. Omission to sign or defect in signature or verification **may be cured at any stage by amendment.**" [Emphasis added].

Furthermore, Mulla on the Code of Civil Procedure, 15th edn, volume II at page 1172 states that:-

"The signing of a complaint is merely a matter of procedure. If a complaint is not signed by the plaintiff or by a person duly authorized by him in that behalf, and the defect is discovered at any time before

*judgment, the court may allow the plaintiff to amend the
plaint by signing the same. ... The omission to sign or verify a
plaint is not such a defect as could affect the merits of the
case or jurisdiction of the court. It can be set right even
after the period of limitation for filing the suit.” [Emphasis
added].*

Among others, this Court is as well guided by the principle enunciated by the Court of Appeal of Tanzania in the case of **Emmanuel Luoga V The Republic**, Criminal Appeal No. 281 of 2013 Court of Appeal of Tanzania at Iringa (unreported), where the Court stated that:-

*“ We are of the view that, upon being satisfied that the appeal
was incompetent for reasons it assigned, it ought to have
struck out the appeal instead of dismissing it the reason is
clear that by dismissing the appeal, it implied that there
was a competent appeal before it which was heard and
determined on merit, which is not the case”. [Emphasis
supplied].*

Following the above authorities, I should insist that, remedy for an incompetent matter before the court is to be struck out and not dismissal. This is to allow time for the concerned party to rectify the said defects and allow the matter to be determined on merit.

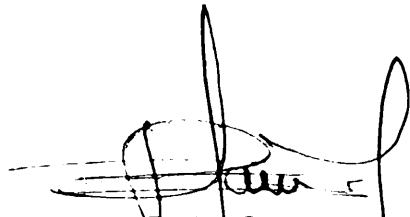
In the matter at hand and as it was submitted by Mr. Mugarura after the trial court noted that, the plaint was not signed by the Counsel for the plaintiff, the proper remedy was to grant leave for the plaintiff to amend the same or struck out the entire matter, but not to dismiss it.

It is therefore my considered view that, there is considerable merit in the submission by Mr. Mugarura on that, it was not proper for the trial Magistrate to dismiss the suit, as the same had since denied the plaintiff an opportunity to have his case determined on merit, hence a miscarriage of justice.

In the circumstance and based on the above authority and taking into account that the applicant's case is yet to be determined on merit, the Appeal is allowed. I hereby quash and set aside the impugned Ruling and Order made by the trial court in respect of *the Civil Case No. 365 of 2016*. Furthermore and for interest of justice, I remit the file back to the trial court

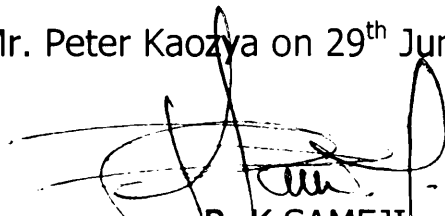
for the case to be tried by a different Magistrate. I make no order as to costs.

It is so ordered.



R. K. SAMEJI
JUDGE
29/06/2018

COURT- Ruling delivered before Mr. Ernest Kitua, the learned Counsel for the appellant and Mr. Peter Kaozya on 29th June 2018.



R. K. SAMEJI
JUDGE
29/06/2018