

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

CIVIL CASE No. 153 OF 2019

NYUSTA PETER KABEZI T/A NYUDIAH ENTERPRISES.....PLAINTIFF

Versus

HERODIUS SULUS MBOROWE

T/A NYUDIAH ENTERPRISES.....1st DEFENDANT

BARTHOLOMEW J. MBOROWE.....2nd DEFENDANT

ABIA HERODIUS.....3rd DEFENDANT

NATIONAL MICROFINANCE BANK (PLC).....4th DEFENDANT

RULING

30th June, 2020 - 16th July, 2020

J. A. DE - MELLO J;

This Ruling is on point of **Preliminary Objection** raised by the Plaintiff in his reply to **Joint Written Statement of Defence** of the 1st, 2nd, and, 3rd Defendants stating that;

- 1. That, the Joint Written Statement of Defence of the 1st, 2nd, and 3rd Defendants violates Order VI Rule 14 for Want of the Signatures of the 2nd and 3rd Defendants.**


Wherefore, the Plaintiffs prays for the **Joint Written Statement of Defence** be **Struck Out** with costs.

On **14th May, 2020** written submissions was preferred by Parties and which the Court granted ordering the Plaintiff to file hers on **9th June, 2020** Reply by the Defendants ton **23rd June, 2020**, and, Rejoinder on the **30th June, 2020**. It has however come to my attention that, both Parties have complied to their respective submissions, except for rejoinder that, the Plaintiff ought to do so on **3rd July, 2020** but did on **30th June, 2020**.

Perusal from the alleged Written **Statement of Defence** dated on **7th November, 2019** indicates signatures by the **1st Defendant** and, his Advocate and, not the **2nd** and **3rd Defendants**. This, Counsel for the Plaintiff alludes, violates **Order VI Rule 14** of the **Civil Procedure Code, Cap. 33, R.E 2019**;

"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"

Further and, considering that, Written Statement of Defence starts with the following phrases;

"The above named 1st and 2nd and 3rd Defendants severally and jointly humbly reply to the Plaintiffs' claims as follows...", it therefore clearly stipulates that, the **1st Defendant** is in no capacity acting under them, contrary to **Order I Rule 12(1)** and, **(2)** of the **Civil Procedure Code, Cap. 33, R.E 2019** which would empower him to sign on their behalf as it stipulates; 

(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding

(2) The authority shall be in writing signed by the party giving it and shall be filed in court

In absence of any written authority, verification of a single Defendant amongst the three (3) violates **Order VI Rule 15(1)** and **(3)** of the **Civil Procedure Code, Cap. 33, R.E 2019**

Resisting the objection, Counsel for the **1st, 2nd, and, 3rd** Defendants submitted that, **Order VI Rule 14** of the **Civil Procedure Code, Cap. 33, R.E 2019** provides for a party who, 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 Advocate was duly instructed to do so as per **Order III Rule 1** of the **Civil Procedure Code, Cap. 33, R.E 2019** which provides;

"Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorized by him in that behalf"

Counsel observes that, **Order 1 Rule 12 (1)** cited by the Plaintiff deals with representative suits, which is not a case at hand, where each Defendant is defending the suit in his/her own capacity. He pleaded with the Court to invoke the principle of overriding objectives brought by Written Laws **(Miscellaneous Amendments) No.3 Act, 2018 (Act No. 8 of 2018)** to deal with cases justly, have regard to substantive justice as opposed to technicalities as the case was in **Yakobo Magoiga Gichere vs. Peninah Yusuph, Civil Appeal No. 55 of 2017 Court of Appeal of Tanzania, at Mwanza.**

In a brief rejoinder, Counsel for the Plaintiff cautions the 'mislead' by the Defendant, by using **Order VI Rule 14** of the **Civil Procedure Code, Cap. 33, R.E 2019** which provides, that, where the party by any reason is absent then his Advocate may sign on his behalf, whose essence does not provide for partly signing of pleadings leaving out other parts of the pleadings not signed and **Order I Rule 8** the **Civil Procedure Code, Cap 33, R.E 2019** one which deals with the representative suit and, not as suggested by the Defendants. It is glaring so, as alleged that, the signature in the Written Statement of Defence has the **1st Defendant** alone. **Order VI Rule 14** stipulates and, I reiterate 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."

The word '**shall**' used is mandatory for the pleadings to be signed by the party to it and his/her advocate and in case of any reasons or good cause it may be signed by a person duly authorized.

In our case at hand, the Advocate for the **1st, 2nd, and 3rd** claimed to have been authorized by the **2nd** and, **3rd Defendants** to sign the pleadings on their behalf. Under **Order I Rule 12(1)** and, **(2)** of the **Civil Procedure Code, Cap 33, R.E 2019** which would empower him to sign on behalf of other defendants stipulates that;

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding (2) The authority shall be in writing signed by the party giving it and shall be filed in court.

There is however, not even any written authority filed in this Court as per law authorizing the Counsel to sign on behalf of the **2nd** and, **3rd** Defendants. Verification of a single Defendant amongst the three (3) in the absence of authorization in that respect violates **Order VI Rule 15(1)** and, **(3) of the Civil Procedure Code, Cap 33, R.E 2019**. Also an advocate verify only matters which are in personal knowledge only and he has to state on the verification clause which the counsel of the **2nd** and **3rd** defendant did not do so. In the case of **Lalago Cotton Ginnery and Oil Mills Company Limited vs. The Loans and Advances Realization Trust, Civil**

Application No. 80 of 2002, Court of Appeal of Tanzania at Dar es Salaam, in this case it was held that;

"...an advocate can swear and file an affidavit in proceedings which he appears for his client, but on matters which are in advocate's personal knowledge only."

In the case of **Jacquiline Ntutabaliwe Mengi & 2 Others vs. Benson Benjamin Mengi & 5 Others**, Misc. Civil Application No. 486 of 2019, **High Court of Tanzania, Dar es Salaam Registry** one of many things held that;

"The omission to verify a pleading is a mere irregularity" citing several provisions and authorities on what the Court will do if pleadings are not signed as shown hereunder;

In **MULLA, THE CODE OF CIVIL PROCEDURE, 16th Edition, Volume II** in it reads at page **1181** that;

"A pleading which is not verified in the manner required by this rule may be verified at a later stage of the suit; even after the expiry of the limitation period. The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code. The expression 'any error, defect or irregularity in any proceeding in any suit' includes signing and verification as laid down in Order 6 Rule 14 and 15 and could be cured at any stage".

In **SRI. G.C. MOGHA in THE LAW OF PLEADINGS IN INDIA, 14th Edition, published by Eastern Law House** where it reads in **pages 58 and 59** that;

"Want of signature or verification or any defect in either will not make the pleading void, and a suit cannot be dismissed nor can a defence be struck out simply for want of, or a defect in the signature or verification of the plaint or written statement, as these are matters of procedure only. It has been treated to be a mere irregularity and curable by amendment. The defect may be cured by amendment, at any stage of the suit, and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was amended. If the defect is discovered in appeal, the appellate Court may, if it thinks fit, have the defect removed, but where the defect is such that it does not affect the merits of the case, no notice of it need be taken".

This position was also maintained in **F.A. Sapa vs. Singora [1991] 3 SCC 375** where the Court underscored that:-

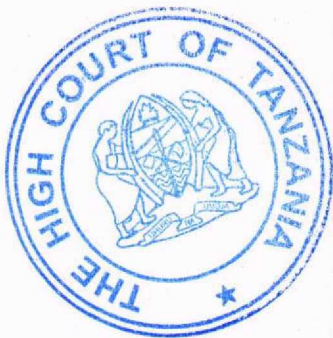
"The object of requiring verification is clearly to fix the responsibility for the averments and allegations in the petition on the person signing the verification and at the same time discouraging wild and irresponsible allegations unsupported by facts".

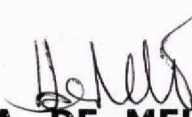
The Indian position from the **Indian Code of Civil Procedure** is in '*pari materia*' with **Order VI Rule 15** of the **Civil Procedure Code** (*supra*). Besides, reference was made to High Court decisions in the cases of **Kiganga and Associates Gold Mining Company Limited vs. Universal Gold N.L, Commercial Cause No. 24 of 2000 (Dar es Salaam Registry) (Unreported)** and **Godfrey Basil Mramba v. The**

Managing Editor & 2 Others, Civil Case No. 166 of 2006, (Dar es Salaam Registry), (Unreported) where the Court made orders for amendment of the plaint.

Thus, I find that, want of signature(s) or verification or any defect, does not render pleadings void, for the Court to Struck or dismiss. The anomaly to me, does not go to the root of the matter and, can, through the oxygen principle be cured. Based on the discretion bestowed on me, judiciously exercised, I order the amendment of **Written Statement of Defence** on the missing signatures of the **1st, 2nd, and 3rd** alone, within **seven (7) days**, as the hearing of substantive suit proceeds on merit.

It is so ordered.




J. A. DE-MELLO
JUDGE
16th July, 2020