

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

CIVIL CASE NO. 02 OF 2022

MKONGO BUILDING AND CIVIL WORKS

CONTRACTOR LIMITED..... PLAINTIFF

VERSUS

PRINCIPAL SECRETARY OF

MINISTRY OF MINERALS 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

RULING

Date of last Order: 04/08/2022

Date of Ruling: 04/08/2022

MLYAMBINA, J.

The Plaintiff through the service of Senior Counsel Edson O. Mbogoro filed the instant suit praying for Judgement and decree against the Defendants jointly and severally as follows:

- (i) *A declaration that the Defendants are liable for breach of contract.*
- (ii) *An order for the Defendants jointly and severally to pay the Plaintiff the Principal sum of TZs 50,911,844.*
- (iii) *An order for interest on the Principal sum at 15% per annum from 2017 to the date of Judgement.*

- (iv) *Interest on the decretal sum at Court rate from the date of Judgement till payment in full.*
- (v) *An order for general damages of such sum as this Honourable Court might deem fit and just to grant.*
- (vi) *Costs of this suit.*
- (vii) *Any Other Orders or relief(s) as this Honourable Court might deem fit and just to grant.*

In their joint Written Statement of Defence (WSD) drawn and filed by Egidy S. Mkolwe, State Attorney from the Office of the Solicitor General Ruvuma Regional Office, the Defendants raised a *plea in limine lits* as follows:

- (i) *That, the suit is bad in law as it is premature before this Honourable Court.*
- (ii) *That, the suit is bad in law as the first Defendant is a non-existing body.*
- (iii) *That, the suit is incurably defective as the Plaintiff has failed to verify the facts adduced in the Plaint in paragraphs 13 and 14 which oust the jurisdiction of this Court.*

Whereof, the Defendants prayed before this Court to dismiss this suit with costs.

On 4th day of August, 2022 when the matter was called for mention before the Court's precinct, Senior Counsel Edson O. Mbogoro told the Court that the first and second points of legal objection are arguable. But he will consider such points in case there will be a dire need of re – instituting the suit.

To exemplify his legal maturity, Senior Counsel Edson O. Mbogoro conceded with the third point of objection. While knowing that the third point suffices to dispose the suit, Counsel Mbogoro prayed the suit be struck out with no costs.

In reply, learned State Attorney Emmanuel Bakari noted how Counsel Mbogoro is a gentleman, as he conceded with the preliminary objection without any disturbance.

I have given due consideration to the submission of the Counsel before the Court. I condone to their legal maturity on two points: *First*, the act of Counsel Mbogoro of reading and appreciating the efficacy of the third point and concede at earliest point of time. *Second*, the act of Emmanuel Bakari State Attorney of appreciating how gentle Mr. Mbogoro behaved on the raised preliminary objection. Though I have a

different view on the remedy thereof, I join hands with both Counsel on the point of waiving costs.

It has to be appreciated that one of the grounds of waiving costs is the conduct of the Party. This is clearly stated in **Mulla's the Code of Civil Procedure** 12th Edition, 1953 at page 150. Indeed, in the case of **Independent Electoral Boundaries Commission Ex – Parte Mohamed Ibrahim Abdi and Others**, Miscellaneous Application No. 344 of 2017 which was cited with approval by this Court in the case of **Juma Mganga Lukobora and 7 Others v. Tanzania Medicine and Medical Devices Authority (TMDA) and 3 Others**, Miscellaneous Civil Application No. 642 of 2020 High Court of Tanzania at Dar es Salaam (unreported), the Court observed:

In determining the issue of costs, the Court is entitled to look at *inter alia the conduct of the parties*, the subject of the litigation, the circumstances which led to the institution...and *the stage at which the proceedings were terminated*...[Emphasis added]

The case at hand was filed on 7th June, 2022, set for first mention on 12th July, 2022 and this 4th August, 2022 was a second mention to verify whether pleadings are complete.

It is the view of this Court, as well noted by learned State Attorney Emmanuel, that Counsel Mbogoro has not only disturbed the Court and the adverse parties but also has served time and costs to the Defendants and to the Court.

At earliest opportune time of the proceedings, Counsel Mbogoro upon being served with the preliminary objection, he found the third point, if argued would dispose off the suit. As such, he conceded without going into the merits of the suit. In so doing, Counsel Mbogoro appreciated the meaning and rationale of preliminary objection stated by the Court of Appeal in the case of **Hezron M. Nyachiya v. Tanzania Union of Industrials and Commercial Workers and Another**, Civil Appeal No. 79 of 2001, Court of Appeal of Tanzania at Dar es Salaam (unreported).

The Court has further gone through the objected paragraphs 13 and 14 of the Plaint. For clarity the said paragraphs states:

13. *That, at its meeting held on 20th February, 2022 the Plaintiff Company resolved that this sit be instituted. Copy of the said resolution is annexed hereto and marked "MBC6".*
14. *That, the cause of action arose within Tunduru Town and although the subject matter of the suit is Tsh 50,911,844 the second Defendant*

can only lawfully be sued in this Court hence this Honourable Court has jurisdiction to determine the suit.

In his verification, however, the Plaintiff's Principal Officer one Alfani Juma Pandu never verified the objected paragraphs. The verification clause of the Plaintiff states:

I, Alfani Juma Pandu being the Principal Officer of the Plaintiff Company, to wit its Managing Director hereby verify that what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 are true to the best of my own knowledge.

It follows therefore that, as legally correctly, objected by the Defendants, paragraphs 13 and 14 of the Plaintiff have not been verified. The issue here remains as to; *whether it was proper to concede with the preliminary objection and pray the suit be struck out.*

Sukumai Ray in the text book on the **Code of Civil Procedure**, Universal Law Publishing Company New Delhi, 2nd edition, commenting on a provision *in pari materia* with our *Order VI Rule 15 of the Civil Procedure Code [Cap. 33 R.E. 2019]*, in the India Code of Civil Procedure, made the following remarks.

*"The defect or the absence of a verification of the
plaint is one of procedure and is a mere irregularity. It
is a curable defect and it can be rectified even after
the expiry of the period of limitation".*

Being guided with the afore authority, it is the firm findings of this Court that the defects of verification are a procedural issue. I would have therefore expected for Counsel Mbogoro to concede with the objection but beseech the Court to amend the verification.

Be as it may be, Counsel Mbogoro correctly intimated that the second point is arguable. I equally find the second point do not need one to obtain a PhD in law to understand that in this Country there is a legal entity in the name of Ministry of Minerals as split from the Ministry of Energy and Minerals in 2017. As such, and by virtue of *Section 16 (2) of the Government Proceedings Act [Cap. 5 R. E. 2019]*, it was proper for the Plaintiff to sue the Principal Secretary of Ministry of Minerals because he/she is the Chief Accountable Officer of the Ministry. (Also see the case of **Karata Ernest and Others v. Attorney General**, Civil Revision No. 10 of 2010, Court of Appeal of Tanzania at Dar es Salaam (unreported)).

I further find the first point of objection do not need a miracle to sustain it. Though Counsel Mbogoro, thinks it is arguable, the wording of

paragraph 26.1, 27.1, 27.2 and 27.3 of the Contract attached to the Written Statement of Defence of which has not been objected, is very clear on the procedure for dispute settlement. It was premature for Counsel Edson Mbogoro to have preferred this suit.

In the event, the suit is hereby marked struck out with no costs. It is so ordered.

Y. J. MLYAMBINA
JUDGE
04/08/2022



Ruling delivered and dated 4th August, 2022 in the presence of Counsel Edson Mbogoro for the Plaintiff and learned State Attorney Emmanuel Bakari for the Defendants.

Y. J. MLYAMBINA
JUDGE
04/08/2022

