

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

AT DAR ES SALAAM

CIVIL CASE NO. 18 OF 2021

MICHAEL JOACHIM TUMAIN NGALO..... PLAINTIFF

VERSUS

JITESH JAYANTILAL LADWA.....DEFENDANT

RULING

Date of Last Order: 31st March, 2022

Date of Ruling: 29th April, 2022

E.E. KAKOLAKI, J.

The Plaintiff herein filed a civil suit against the defendant claiming among other things an order for retraction of the offensive /defamatory words authored, written, edited and/or published by the defendant, an order for unconditional apology to him and publication of the said retraction and apology by letter and the manner it was done. Other orders sought are, an order for permanent injunction restraining the defendant, his agents, assignees, employees and/or servants or any person working on the defamatory words/allegations regarding the plaintiff; payment of general damages in excess of Tshs. 1 Billion, payment of exemplary damages in excess of Tshs.500 Million, interest on the decretal amount at the court rate of 12% per annum from the date of judgment till full and final payment,

costs of the suit and interest thereon and any other relief(s) the Court may deem fit and proper to grant in the circumstances.

Upon being served with the plaint, the defendant filed a written statement of defence raising a preliminary objection on point of law to the effect that, this court has no jurisdiction to entertain and determine the suit. Replying the WSD, the plaintiff also raised the preliminary objection on points of law contending that, there is no valid and proper defence duly filed by the Defendant as the one in record and/or served on the plaintiff is falsely and purportedly verified by the Defendant in person while in fact it is signed and or endorsed by Mr. Elly Musyangi, his Advocate.

As the point of objection by the plaintiff aimed at displacing the WSD that also carried a notice of preliminary objection on the jurisdiction of this Court to entertain the suit, it was ordered that, the point of objection raised by the plaintiff be disposed of first and be so done by way of written submissions. Mr. Mpaya Kamara, learned advocate filed submissions for the plaintiff whereas the ones in opposition were filed by Mr. Sisty Bernard, learned counsel for the defendant.

It was Mr. Kamara's submission in support of plaintiff's point of objection that, the verification clause in defendant's WSD indicating his names as **Jitesh Jayantilal Ladwa**, purportedly verified and signed by him was in fact signed by Mr. Elly Musyangi, his advocate on his behalf on the reason of his absence, the act which contravened mandatory provisions of Order VI Rule 15(3) of the CPC. He said, the learned counsel's act implies that, **first**, the Defendant was absent hence unable to sign the defence, **second**, due to the said absence the Defendant authorised his counsel to sign and verify the pleading (WSD) on his behalf ; **third**, that the verification clause purports to have been verified by the self-same Defendant, Jitesh Jayatilal Ladwa as provided under Order VI Rule 14 of the CPC, while in fact it is signed by the defendant's counsel. It was his further contention that, as the verification clause was purportedly made and signed by both defendant and his advocate the act which is false and criminally punishable, it cannot be taken to have fixed any responsibility upon the said defendant, thus affect the jurisdiction of this court. On the strength of his submission, Mr. Kamara prayed to the court that, the purported defendant's illegally verified WSD be strike out with costs.

In his reply submission to the point of objection, Mr. Benard for the defendant vehemently resisted the raised ground of objection and the

submission to support is terming the same as misconceived, trivial, meritless and baseless on the reason that, it does not have the effect of striking out the defence. He said, the objection raised is devoid of merit as it is not capable of disposing the matter *in limine* within the definition and parameters set in the famous case of **Mukisa Biscuits Co. Limited Vs. West End Distributors Ltd** [1960] E.A, and does not go to the root of the matter for being easily cured by an amendment of the WSD. In his view, the alleged defect by the plaintiff does not render the pleading void and/or irregular. To fortify his stance he relied on the case of **A/S Noremco Construction (NOREMCO) Vs. Dar es salaam Water and Sewerage Authority (DAWASA)**, Commercial Case No.47 of 2009, (HC –unreported) and **JV Tangerm Construction Co Ltd and Another Vs. Tanzania Ports Authority**, Commercial Case No.117 of 2015, (HC –unreported).

It was his further submission that, in the advent overriding objective principle (oxygen Principle) introduced under section 3A of the Civil Procedure Code, [Cap 33 R.E 2019], the defect is curable by allowing amendment of the WSD. He glued his stance by citing case of **Yakobo Magoiga Gichere Vs. Penina Yusuph**, Civil Appeal No.55 of 2017 (CAT –unreported). Mr.

Musyaga implored upon this court to find the objection is without merit and proceed to overrule/dismiss it with costs.

I have carefully considered the fighting submissions by the both learned counsels for the parties and perused the impugned WSD. The issue for determination is **whether there is no valid WSD for want of proper verification.**

What is gathered from the plaintiff's submission is that, Mr. Kamara does not oppose the defendant advocate's act of verifying the WSD's verification clause as the same is permissible under Order VI Rule 14 of the CPC. What is being challenged is the defendant advocate's act of signing the verification clause bearing defendant's names contrary to the provisions of Order VI Rule 15(3). To appreciate his complaint I find it imperative to quote the impugned excerpt as extracted from the defendant's WSD. It reads:

VERIFICATION:

*"I, **JITESH JAYANTILAL LADWA**, being the defendant herein **DO HEREBY** verify that what is stated in paragraph **1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20 and 21 inclusive above** are according to my knowledge and are all true.*

Verified at Dar es salaam this 30th day of April 2021

Signed

*Defendant Counsel dully authorised to
Sign on his behalf due to the absence as
per order VI Rule 14 of the Civil Procedure
Code Cap 33 R.E 2019."*

It is not in dispute that signing of verification clause subject of the plaintiff's objection is regulated by Order VI Rule 15(3) of the CPC which provides that:

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

Notably the above provision makes it mandatory that, verification shall be signed by the person making it as rightly submitted by Mr. Kamara. In this case Mr. Benard does not contest the fact that, the WSD's verification clause bearing names defendant's names was signed by his advocate who did not aver the same and in contravention of Order VI Rule 15(3) of the CPC. However, in his further submission, the submission which I embrace he is arguing that, the omission is not fatal as it is curable under oxygen principle. This court in the case of **Philip Anania Masasi Vs. Returning Officer (Njombe North Constituency) and 2 Others**, Misc. Civil Cause No. of 1995 when confronted with similar scenario to the present one where the verification clause was assailed had this to say:

“want of, or defect in verification does not make pleading void; it is a mere irregularity which is curable by amendment.”

Similarly in the case of **A/S Noremco Construction (NOREMCO)** (Supra) this court ruled that failure to show place and date of verification in the plaint was not a fatal error and could be easily be cured by an amendment. All in all the Court of Appeal in its wisdom on similar question when deciding the case of **Agatha Mshote Vs. Edson Emmanuel & others**(Civil Appeal No.121 of 2019)[2021]TZCA 323(20 July 2021); www.tanzlii.org whereby the defect in a verification clause was subject of discussion, the Court observed that:

“...it is glaring at page 16 of the record that the respondent’s counsel signed the joint written statement of defence on account of being dully authorized by the respondents as verified therein and such, the law was not at all contravened.”

From the above position of the law I am satisfied that, though in this matter there was an omission by the defendant’s advocate purporting to sign the verification clause bearing the defendant’s names, the same was not fatal. I therefore disagree with Mr. Kamara’s proposition that, the omission rendered the whole WSD invalid. Instead I am at one with Mr. Benard’s position that,

the omission is curable under the oxygen principle through amendment of the WSD. In the event the issue is answered in negative.

As the the omission by the defendant's advocate has not been found to be fatal, I overrule the preliminary objection and proceed to order defendant to amend the WSD so as to make good the omission within fourteen (14) days from the date of this ruling.

Costs shall be in the course.

It is accordingly ordered.

DATED at Dar es salaam this day of 29th Day of April, 2022



E. E. KAKOLAKI

JUDGE

29/04/2022.

The ruling has been delivered at Dar es Salaam today on 29th day of April, 2022 in the presence of Mr. John Chuma advocate holding briefs for advocate Kamara Mpaya for the Plaintiff and Mr. Sisty Benard advocate for the defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
29/04/2022

