

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

AT DAR ES SALAAM

CIVIL CASE NO 144 OF 2021

TARGET BOREWELLS LIMITEDPLAINTIFF

VERSUS

SHABAN COSLA1ST DEFENDANT

ABDALLAH M. MKATA2ST DEFENDANT

ESCON BOREWELLS COMPANY LIMITED3RD DEFENDANT

RULING

MRUMA.J.

The plaintiff filed this suit against the defendants claiming against them jointly and severally for among other things a declaratory order that the plaintiff is the lawful owner of movable properties mentioned as: -

- i. Motor vehicle Truck with Registration No. T392 BLJ with a box-body, worth Tanzania shillings. 25,000,000/=
- ii. Motor vehicle with Registration No. T476 DER worth USD 25,000.00 with accessories worth USD 35,000.00.
- iii. Motor Vehicle with Registration No. T252 DKM with a Drill Rig equipment mounted on it, worth USD 115,515.00

- iv. Motor Vehicle Truck mounted with rig platform with Registration No. T394 DBP worth USD 14,790.00 and accessories worth USD 30.000.00.

The 1st and 2nd Defendants filed Written Statement of Defence in which they denied the Plaintiff's claims. On top of their written statement of defence the two raised a notice of preliminary objection on points of law that:-

- i. That, in as the current suit and its application emanates from Civil Case No. 99 of 2021 whose judgment was rendered and the present Plaintiff/ Applicant lodged an application for objection proceedings through Misc. Application No. 18 of 2021, the present suit and the application contravene the mandatory provisions of Order XXI Rule 62 of the Civil Procedure Code Cap 33 RE 2019;
- ii. This court is not clothed with jurisdiction to determine and adjudicate both the main suit and an application for injunction as the preferred complaints are res judicata;
- iii. That the purported suit and an application for injunction lodged by the Applicant / plaintiff is an appeal or revision in disguise;
- iv. That, the plaintiff suit did prefer against the parties who did not form part in the objection proceedings to wit Misc. Civil Application No. 18

of 2021;

- v. That the plaint is defective for containing improper verification contrary to the mandatory provisions of the Civil Procedure Code Cap 33 RE 2019.
- vi. Both the main suit and the application for injunction are in total abuse the court process.

At the hearing of these preliminary objections the Plaintiffs were represented by Mr. Emanuel Safar, learned advocate and the Defendants were represented by Sylvanus Mayenga learned advocate. The preliminary points of objections were argued by way of written submissions. Mr Mayenga abandoned the 2nd and 4th preliminary objections and argued the rest.

Submitting in support of preliminary objections Mr Mayenga gave a brief background of this suit. He stated that originally there was a suit before the Resident Magistrate Court of Dar Es Salaam at Kisumu which was registered as Civil Case No. 99 of 2012 which was instituted by the 1st Defendant and that several applications were filed after that suit. Among those applications is Miscellaneous Civil Application No. 18 of 2021 filed by the present Plaintiff. It was an objection proceedings in which the present Plaintiff was resisting attachment and sale of some

equipment which she claim to be hers. The learned counsel also informed the court that there was an execution proceedings filed in the same Resident Magistrate court at Kisutu. The learned counsel contended that the present suit relates to the suit filed at Kisutu. He therefore submitted that in terms of Rule 62 of Order XXI, of the Civil Procedure Code Cap 33 R.E. 2019, all issues arising out of execution must be dealt with by executing court.

I find no difficult in rejecting this point. In the famous case of **Mukisa Biscuits Manufacturing Company Limited Versus West End Distributors Ltd (1969) E.A. 296** the then East Africa Court of Appeal considering what constitutes a preliminary objection said at page 700:

".....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract givingrise to the suit to refer the dispute to arbitration....."

At page 701 the court went on to hold that:

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion"* [Emphasize mine].

Existence of RM Civil Case No. 99 of 2021 at the Resident Magistrates' Court of Dar Es Salaam at Kisutu and Miscellaneous Civil Application No. 18 of 2021 in which the Plaintiff herein is said to be the Applicant are all matters of fact which has to be ascertained therefore not capable of being argued as a preliminary objection.

Secondly, I am in agreement with Mr Safari's reply on this point that the case that involved the Plaintiff herein at the Resident Magistrates' court of Dar Es Salaam at Kisutu was objection proceedings. Rule 62 of Order XXI of the Civil Procedure Code [Cap 33 R.E. 2022], where a claim or objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the

result of such suit, if any the order is conclusive. Thus, in law the Plaintiff has right to institute his claim in this court and given the pecuniary value of his claim, this suit was instituted in the right court.

On the third point of preliminary objection, Mr Mayenga contends that the Plaint contains improper verification. He said that the person who verified the Defendant's plaint didn't verify it in accordance with the requirement of Rule 15 (2) of Order VI of the Civil Procedure Code. The learned counsel emphasized that it is important for any officer who verifies pleadings on behalf of a company to verify it properly. I had an opportunity to go through the plaint verification clause inclusive and I find nothing fatal in the verification clause of the plaint. Rule 15 (2) of Order VI of the Civil Procedure Code provides that;

"(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true".

Mr Ravula Srinivasa Reddy, the Managing Director of the Plaintiff stated clearly that what he stated under paragraphs 1 up to 31 are true to the best of his knowledge. He made reference to all paragraphs in the plaint from paragraph 1 to 31 which means that all paragraphs between paragraph 1 and 31 are covered therefore duly verified.

But assuming that the verification clause was problematic (which is not the case) then the next question would be what would be the consequences of an improperly verified plaint? Sub-rule (2) of Order VI quoted above doesn't prescribe the sanction for improperly verified plaint. In my view all problems which are associated with drafting of pleadings are curable by invoking the provisions of Section 3A and 3B of the Civil Procedure Code. The law is silent on consequences to give room for the court to dispense real justice in the circumstances of each case. In the case of **Jamal S Mkumba & another vs. Attorney General Civil Application No. 240 of 2019** in this case the court had this to say; -

"On account of the facts presented to us and for the interest of justice, we think this is one of those cases which demands for substantive justice in its determination. But further to that, we are satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so

as to accord a chance to the applicant to insert a proper verification clause according to law and parties be heard on merit”.

On the fifth point of objection Mr Mayenga argued that the fact that the counsel for the Plaintiff was made part to the one of the expected pieces of evidence to be tendered in this court thus he is not competent to draw the plaint and represent the plaintiff under Regulation 96(2) of the Advocates (Professional Conduct and Etiquettes) Regulations, 2018 (the etiquette Regulations) published on 9th of March 2018 under Government Notice No. 118.

In reply Mr. Safari contested that this point does not fit to be a point of preliminary objection and cited the case of Mukisa Biscuit said that this point attract evidence so he prayed this court to dismiss this point of objection.

I agree with Mr. Safari that this point does not pass the test set in Mukisa’s case. It attracts evidence to ascertain whether or not Mr Safari did things which qualify him to be a witness rather than an advocate in this matter. Consequently I dismiss all preliminary objections raised. The Plaintiff will have his costs of successfully arguing these preliminary points.

Order accordingly.



A handwritten signature in blue ink, appearing to read "A.R. Mruma", is written over the printed name.

A.R. Mruma

Judge

Dated at Dar Es Salaam this 20th Day of October, 2022.