

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 87 OF 2021**

**CRSG (T) TRADING CO.LTD .....PLAINTIFF**

**VERSUS**

**ULLAYA SHOMARY MOHAMED T/A USHOMO**

**ENTERPRISES..... 1<sup>ST</sup> DEFENDANT**

**ULAYA SHOMARI.....2<sup>ND</sup> DEFENDANT**

**GEORGE JAPHET KIBOKO.....3<sup>RD</sup> DEFENDANT**

**RULING**

Date of last Order: 03/03/2022.

Date of Ruling: 11/03/2022.

**E.E. KAKOLAKI, J**

This is a ruling in respect of the preliminary points of objection raised by the Defendants against the Plaintiff's suit premised on two grounds going thus:

1. That the claims in Civil Case No.87 Of 2021 are incompetent before the court as they have already been determined by the Resident Magistrate Court of Kibaha at Kibaha in Economic Case No.3 of 2019, thus determination of the Civil Case No.87 of 2021 by this honourable Court shall be contrary to the principles of issues Estoppel.

2. That, the plaint is defective for not being endorsed by the drawer.

Briefly before this court the plaintiff a company dealing with bitumen business amongst other dealings, is suing the defendants for breach of Contract of Cargo Transportation. Having a need to transport bitumen to its customer, the plaintiff entered into a contract of cargo transportation with the 1<sup>st</sup> defendant. The same was signed by the 3<sup>rd</sup> defendant who was identified as the officer of the 1<sup>st</sup> defendant. In the course of performing their responsibilities under the contract, the 1<sup>st</sup> defendant was duty bound to undertake the transportation and deliver 1716 drums of bitumen cargo to plaintiff's client with successful delivery evidence but failed to deliver it. following that breach parties entered into and signed a Memorandum of Understanding (MoU) for defendants to compensate the plaintiff a total of USD 257,400 equivalent to Tshs. 569,594,000/= for breach of the existing contract, which again was not heeded to by the defendants. It is from the said breach of contract, the plaintiff is seeking a declaratory judgment against the defendants that, the contract and MoU at dispute were breached or in alternative that defendants committed fraud, compensation to the tune of Tshs. 569,594,000/= be paid for failure of the defendants to deliver 1716 drums of bitumen to the intended recipient, general damages, interest on

the claimed amount at commercial rate of 25% and costs of the case. It is worth noting that before institution of this suit, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants before the Resident Magistrate's Court of Kibaha at Kibaha vide Economic Criminal Case No. 3 of 2019, were booked with criminal charges, the case which forced them to enter into plea agreement with the DPP. The said agreement was registered in court on 05/12/2019 and orders issued, one of which ordered them to repay Tshs. 594,594,400/= within 12 months as per agreement. It appears the order was not complied with, the resultant course which was the plaintiff to institute this court basing on the contract of cargo transportation and MoU as alluded to herein above.

In their joint Written Statement of Defence, the Defendants denied the claims raised against them and on top of that they raised the preliminary points of objection as alluded to herein above. It is the court's practice that when preliminary objection is raised, has to be dispose of first. With leave of this court the preliminary objections were argued by way of written submissions. The plaintiff enjoyed the service of Mr. Albert Mkuhi, learned Advocate while the defendants are represented by Mr. Andrew Miraa, learned Advocate.

Submitting in support of the first ground of objection Mr. Miraa argued that, the claims in this Civil case No.87 of 2021 are incompetent before the court for already been determined by the Resident Magistrate Court of Kibaha in Economic case No.3 of 2019, thus determination of the present suit by this Court goes contrary to the principles of issue estoppel. Mr. Miraa contended that, under the principle of estoppel once a fact or law is tried and adjudged by a competent court on a former occasion and a finding reached on that issue, the same cannot be re-agitated in the subsequent suit. The Counsel invited this court to be persuaded by the Australian case of **Blair Vs.Curran** [1939] 62 CLR 464,531 which is the source of the principle of issue estoppel and the Court of Appeal decision in the case of **Issa Athuman Tojo Vs.The Republic**, Criminal Appeal No.54 of 1996 (CAT-unreported). Mr. Miraa was of the view that, for the principle to apply two conditions must be met as referred in the case of **Issa Athuman Tojo** (supra). He mentioned them to be:

- (1) *Parties in the two trials must be the same.*
- (2) *The fact in issue proved or not in the earlier trial, must be identical with what is sought to be re-agitated in the subsequent trial.*

Mr. Miraa informed the court that the two conditions are met in this matter. On the first condition he contended the plaintiff being victim (complaint) in the said Economic Case No.3 of 2021 was a party to it, since he has an interest in the outcome of that case and his name was also in the record of that case for being mentioned as a victim. On the definition of who is a party he relied on Law online dictionary and Mulla, the Code of Civil Procedure 16<sup>th</sup> Edition at page 231. As to the second condition he said the issues in this suit and Economic Case No.3 of 2019 are identical as they both form their foundation upon the alleged Cargo Transportation Contract and later on a MoU dated 19/2/2019. He argued, the basis of the repayment of Tshs.594,594,000/= in Economic Case No.3 of 2019 resulted from the complaints made by the plaintiff against the defendants with respect to a cargo Transportation agreement which claims are maintained in this matter including claims on execution of MoU entered between the plaintiff and the defendants on the 19<sup>th</sup> February,2019. He was of the view that, since the issues in both cases and parties are identical it suffices to conclude that, the principle of issue estoppel is applicable in this case as the claims by the plaintiff have already been determined in Economic Case No. 3 of 2019. Thus to allow her to pursue this suit is tantamount to abuse court process as she

trying to benefit from the court on the same matter using two different avenues which is contrary to what the court held in **Harish Ambaramjina (By His Attorney Ajar Patel) vs. Abdulrazak Jussa Suleiman** [2004] 343 TLR, where it was held that;

*"A recourse to two legal avenues in two different courts at the same time in respect of the same matter is an abuse of the process of the court".*

On the strength of the above submission Mr. Miraa invited this court to dismiss the suit with costs as the claims in this court have already been decided in Economic Case No.3 of 2019.

Turning to the second point of objection Mr. Miraa asserted that, the plaint is defective for not being endorsed by the drawer. He told the court that, in this case the plaintiff is unqualified person in terms of the provisions of Section 43 of the Advocates Act, [Cap 341 R.E 2019], as the provisions of section 44 (1) of the Advocates Act, requires a document prepared by unqualified person to be endorsed. He said the plaint before this court is seem to be filed by the plaintiff, but the name, address and/or signature of the person who prepared and filed the plaint is missing something which makes him conclude that the plaint is not properly endorsed. He contended

further that, it is a settled principle of law that, a document prepared for purposes of legal proceedings must be endorsed by the drawer, and to strengthen his argument this court was invited to be persuaded and follow the decision in the case of **Amina Mhongole Vs. Medical Stores Department (MSD)**, Revision No.331 of 2016 (HC).According to him since the plaint contravenes the mandatory requirements of section 44(1) of the Advocates Act [Cap 341 R.E 2019], it is incompetent and has to be struck out.

In his reply submission to the defendant's submission in support of the preliminary objection Mr. Nkuhi submitted that, defendant's submission in chief are misconceived and the raised preliminary objections ought to be dismissed with costs. He was in agreement that the principle of issue Estoppel in Tanzania is found in the case of **Issa Athuman Tojo** (supra) and cases from other jurisdiction such as the case of **Garthwaite Vs. Garthwaite** [1964],2 All ER 233 at page 247, **Connelly vs. Director of Public Prosecutions** [1964]2 All ER 401 at pages 422,423,442,443,445 and ,446; **Inspector General of Government and Another Vs. The Attorney General and 2 others**, Misc. Application No.744 of 2014, (Uganda High Court) at Nakawa from page 15 to 17. He said that, the

essence of the principle of issue of estoppel is well elaborated in **Sakar Law of Evidence**, 19<sup>th</sup> Edition at page 2412 as it is not a bar to a subsequent trial on different cause of action or charge but rather a bar to the admissibility of evidence upsetting the finding of the former trial. According to him, the defendants' objection on issue of estoppel is premature and runs bankrupt to the very essence and operation of the principles as the defendants cannot object admissibility of evidence at this stage of the suit. He argued, parties in the two mentioned cases are not the same or identical, issues are not the same and the claims or allegations in the subsequent proceedings differ as the same must be legally inconsistent with the court final and conclusive finding in the earlier trial and not merely incidental to the claim and relief sought in subsequent proceedings. As to the submission that the plaintiff is pursuing two courses he resisted it submitting that, the plaintiff is not taking recourse to two legal avenues at the same time in this case as alleged since the one at hand is distinct and independent basing on breach of contract and MoU. It was his view that application of issue estoppel in this matter would cause injustice as Economic Case No. 3 of 2019 was preferred by the DPP in which the plaintiff being a victim had no any say or active role to play in a way that he could marshal all his rightful claims. Hence the sentence to pay



compensation cannot be said to have the effect of estopping the victim to file a civil suit.

As to the second point of objection, Mr. Mkuhi contended that, the preliminary objection by the defendants is misconceived and ought to be dismissed with costs for want of merit. According to him for the provisions of section 43 and 44(1) of the Advocates Act to apply, the documents must be drafted by unqualified person for gain, fee or reward, which is not the case in this matter as the plaintiff could not have been unqualified to prepare his own pleadings. For this objection to be sustained by the court, the defendants must render a proof that, the documents were prepared by unqualified person for gain, fee or reward in which they have failed to do. To him the case of **Amina Mhongole** (supra) is not applicable in this case. In light of the above submission Mr. Nkuhi prayed this court to dismiss with costs the raised objections.

On the other side the defendants were not ready to leave the floor easily as they submitted their rejoinder to the plaintiff's reply submissions. Mr. Miraa almost reiterated his submission in chief while adding that, to allow the plaintiff to prosecuted the present suit will amount to opening Pandora box where matters will be infinitely prosecuted something which contradicts the

governing principle of the litigations in court that, they must come to an end. As to none endorsement of the plaint by its drawer, it was his rejoinder that, the plaintiff being a corporation governed by the terms of Order XXVIII Rule 1 of the CPC, its pleading are signed by the director, secretary or principle officer. In this suit he argued, the plaint is signed by the principal officer but as who to filed it, the name and signature of that person are not indicated something which contradicts the provisions of Order XXVIII Rule 1 of the CPC as well as section 43 and 44 of the Advocates Act. He thus insisted on his earlier prayer of dismissal of the suit with costs.

I have dispassionately considered the submissions by the learned counsels from both parties as well as the plaint subject of contest and its annexures. To start with the first point of objection all parties are at one on existence of two conditions for proving the principle of issue estoppel as stipulated in the case of **Issa Athuman Tojo** (supra). They only part their ways on the issue whether the principle applies to the present matter. Mr. Miraa says it does as the claims by the plaintiff in this matter for compensation of Tsh.594,594,000/= was determined to finality by the Resident Court of Kibaha at Kibaha in Economic Case No.3 of 2019 where defendants were ordered to compensate the complainant/victim. And that, since the plaintiff

was complainant/victim and an interested party in that economic case it is concluded he was a party to it hence the principle of issue estoppel is applicable as parties are the same and the issues sought to be determined herein are the same to the ones determined in Economic case.

On the other hand Mr. Nkuhi is of the opposite view submitting that, the principle is inapplicable as parties in the two mentioned cases are not the same or identical and claims or allegations and facts in issues proved or determine in the earlier case are not the same as ones sought to be adjudged here. I agree with Mr. Nkuhi that the two conditions for application of the principal of issue estoppel are not met in this matter as contended by Miraa. I will explain why! To start with the first condition which requires parties to be identical, there is no dispute that parties in the Economic case were **Republic vs. George Japhet @Kiboko and Shomari Ulaya** while the parties in the present suit are **CRSG Tanzania Trading Company Limited Vs. Ulaya Shomary Mohamed t/a Ushomo Enterprises, Ulaya Shomary and George Japhet @ Kiboko**. Thus mere presence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this matter cannot lead this court to conclude that parties are the same since the plaintiff is different from the complainant in the said Economic case. It follows therefore the argument by Mr. Miraa that,

since the plaintiff was a victim and interested party in Economic case hence should be treated as a party therein is wanting as she never featured anywhere as a party be it in charge sheet or plea agreement. It is the plea agreement which resulted into compensation order which is not even mentioning the plaintiff as beneficiary. Therefore the first condition is not met.

As to the second condition that, the proved or determined issues in two trials must be same, I also shoulder up with plaintiff counsel's proposition that, the fact in issue in the earlier case are not identical to the ones sought to be proved in this matter. My finding is premised on the fact that plaintiff's claims for compensation are based on the breach of contract of cargo transportation and MoU signed between the parties in this suit while the fact in issue in the earlier case was whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants offence of Stealing by agent, the offence which they were convicted and sentenced with on their own plea after the registration of the plea agreement hence an order for compensation to the tune of Tshs.594,594,000/= to be paid within 12 months from the date of conviction 5/12/2019. In view of the above one will note therefore that, it does not need a magnifier for anyone to see the difference of the facts at issue in these two cases. On the strength of the

above deliberations this court finds that, the first ground of preliminary objection is devoid of merit and therefore overrule it.

Next for determination is the second point of the objection, where the defendants submit that, the plaint is defective for not being endorsed by the drawer, while Mr. Nkuhi contests that it is not as under Section 43 of the same Act, the requirement for endorsement of the name of the drawer comes in only where an instrument is prepared by any unqualified person for gain, fee or reward. And that plaintiff cannot be unqualified to prepare her own pleading as she is not doing so for gain, fee or reward hence the case of **Amina Mhongole** (supra) is inapplicable in the circumstances of this case. The question of endorsement of the name and signature of the drawer in the pleadings is of paramount importance as propounded under Section 44(1) of the Advocates Act, except the instruments specified under section 43(3) of the same Act and it extends to plaints, Written Statement of Defence and applications. This court has been insistent on that importance. In the case of **Mohamed Shahara & Others Vs. Tanzania Electric Supply Co.Ltd**, Revision 296 of 2017 [2018] TZHCLD 46, [www.tanzlii.org](http://www.tanzlii.org) where the applicant's pleadings were not endorse with name

and signature, the Court had the following observation which I fully subscribe to:

*"...Section 44(1) provides for instruments to be endorsed with name and address of drawer, which includes the application before this Court."*

In the light of the above cited case I hold the provision of section 44 (1) of Advocates Act, does not exonerate the plaintiff from the requirement of endorsing her pleadings on the reason that, she is not unqualified person and was not acting for gain, fee or reward as Mr. Nkuhi would want this court to believe. I so find as the plaintiff being a company cannot sign or endorse document on its own but rather through its Secretary, Director or Principal Officer able to depose to the facts of the case while governed by the provisions of Order XXVIII Rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019]. Order XXVIII Rule 1 of the CPC reads:

*1. In suits by or against a corporation, any pleading may be **signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation** who is able to depose to the facts of the case. (Emphasis is mine)*

In this matter the plaint was verified by one Sun Yang who is a principal officer to the plaintiff. Since the plaintiff as a company and legal person could not draw and filed the pleadings on its own unless done through natural persons, I find that, her act of mere mentioning "Plaintiff" as the person who drew and filed the plaint is in violation of the provision of the provision of section 44(1) of the CPC, for want of name and signature of the drawer which is mandatory.

Having so found the next question is what consequences should befall the plaintiff for non-compliance of section 44(1) of Advocates Act. The provision of section 44(2) of the Advocates Act provides the answer that no any authority shall accept or recognise such document. The said section 44(2) of the Act reads:

*(2) It shall not be lawful for any registering authority to accept or recognise any instrument unless it purports to bear the name of the person who prepared it endorsed thereon.*

Looking at the above provision the same is coached in mandatory terms restricting to accept or recognize the pleading not bearing the name and signature of the drawer. Though not put to court as prayer by Mr. Nkuhi, I am aware of existence of the principle of overriding objective which intends

to discourage further employment of technicalities in adjudication of matters. However, in my humble opinion it does not apply in the circumstances of this matter where the law directs the court not to accept or recognize the plaint violating the provision of section 44(1) of the Advocates Act. I so find as the essence of endorsement of pleadings by its drawer is to establish its authenticity. Therefore anomaly in this matter is not a mere technicality, but a procedural irregularity which has offend the provision of the law. In the end, I uphold this preliminary point of objection.

In the circumstance, this suit is incompetent and I accordingly struck it out of the Court register. For the ends of justice, I grant the plaintiff with leave to re-file a competent suit (pleadings) within fourteen (14) days from today.

I do so with costs.

It is so ordered.

DATED at Dar es salaam this 11<sup>th</sup> day of March, 2022.



E. E. KAKOLAKI  
**JUDGE**  
11/03/2022.



Ruling delivered at Dar es Salaam in chambers this 11<sup>th</sup> March, 2022 in the presence of Mr. Albert Nkuhi for the Plaintiff and Mr. Andrew Miraa, for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively and Ms. Asha Livanga, court clerk.



E. E. KAKOLAKI  
**JUDGE**  
11/03/2022

