

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL CASE NO. 61 OF 2021

AVECENNA INTERNATIONAL ACADEMY PLAINTIFF

VERSUS

AFRICAN FOUNDATION FOR EDUCATION AND

DEVELOPMENT (AFEDEV) TANZANIA DEFENDANT

RULING

Date: 04/04 & 03/05/2023

NKWABI, J.:

The plaintiff in this Court is praying for judgment and decree against the defendant as follows:

1. That, an order for permanent injunction restraining the defendant or their agent from further collecting rental fees T.shs 95,823,350/= for the year 2020, and T.shs 120,000,000/= for the year 2021 or doing whatsoever thereon till final determination of the main suit.
2. That an order for T.shs 400,000,000/= being specific damages for loss caused by the defendant after creditors demand and plaintiff did pay those creditors.
3. That, the defendant be ordered to refund the plaintiff T.shs. 2,400,000,000/= (Tanzanian shillings two billion and four hundred

thousand) being general damages for pains, suffering, disturbances and inconveniences caused by the defendant to the plaintiff.

4. That, the plaintiff ordered to deduct all his claimed to the amount due to him by the defendant.
5. That, the defendant be ordered to pay interest on the decretal amount, at the court's rate of 3% per annum from the date of judgment till final payment.
6. The defendant be ordered to pay the costs of the suit
7. Any other relief(s) this honourable Court may deem fit and just to grant.

The counsel for the defendant, through a notice of preliminary objection, raised two points of objection which are:

1. That, the plaint contravenes the mandatory provisions of Order VI rule 14 of the Civil Procedure Code, Cap 33 R.E. 2019.
2. That, the plaint offends the provisions of Order VI rule 3 and 5 and Order VII Rule 1(b), (f) and (i) of the Civil Procedure Code Cap 33 R.E. 2019.

The preliminary objection was disposed of by way of written submissions. Mr. Abubakar Salim, learned counsel, submitted for the defendants. The plaintiff had her submissions drawn and filed by Mr. Bitaho Baptister Marco, also learned advocate.

On the first limb of the preliminary objection, the counsel of the defendant maintained that Order VI rule 14 of the Civil Procedure Code, Cap 33 R.E. 2019 is couched in mandatory terms that every pleading shall be signed by the party and his advocate (if any) ... He cited **Shaaban Iddi Jololo & 3 Others v Republic**, Criminal Appeal No. 200 of 2006 where it was stated that:

"In the context, section 53 (2) of the Interpretation of Laws Act, (Cap 1 R.E. 2002) is important. It provides that where in written law the word shall is used in conferring a function, such word shall be interpreted to mean that the function must be performed."

He also cited **The Registered Trustees of Masjid Haq Zaid Khamsini Buguruni v. Kambi Furahisha & 12 Others**, Land case No. 20 of 2008 where it was stated that:

*"As the word is shall it means where a party has an advocate
then that advocate has to sign the pleading as well."*

The counsel for the plaintiff conceded that the violated provision is couched in mandatory terms, but pointed out that the defect is curable as the plaint was lodged when the advocate was absent. And the exception is allowed by the provision. He cited **Jacquiline Ntubayaliwe Mengi & 2 Others v Benson Benjamin Mengi & 5 Others**, Misc. Civil Appllcation No. 486 of 2019 HC (unreported), **Kiganga & Associates Gold Mining Co. Ltd v. Universal Gold N.L.**, Commercial Cause No 24 of 200 HC (unreported) and **Godfrey Basil Mramba v. The Managing Editor & 2 Others**, Civil Case no. 166 of 2006 HC (unreported) but all were in respect of a verification clause. He argued it can be cured by the oxygen principle. He prayed the objection be dismissed.

Mr. Salim was not amused by the submission of his learned friend. He insisted that is not panacea citing **Puma Energy Tanzania Ltd v. Ruby Roadways (T) Ltd**, Civil Appeal No. 3 of 2018 CAT (unreported) where it was opined authoritatively that:

"... Overriding objective is not meant to overhaul the rules of procedure but facilitate their application ... The overriding objective is not a panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefits of its application judicially ascertained."

Mr. Salim added that one cannot be permitted something that is not properly before the Court and worse still when an objection has been advanced. The defective plaint has been in Court since 2021 and it is surprising now that the plaintiff is seeking to amend the same after such a long time of laying in Court.

I have duly considered the submissions of both parties, much as the counsel for the plaintiff has conceded the anomaly that the counsel for the plaintiff did not sign on the plaint which is a mandatory requirement of the law. I would also add that even the way the plaintiff signed leaves a lot to be desired. The plaintiff is a legal person as indicated in the plaint. But the plaint was signed by a person whose capacity is stated as "Plaintiff). It is unclear whether the plaint was signed by a principal officer of the plaintiff or not. The anomalies cannot be allowed to go unchecked by this Court. The cases

of **Jacquiline Ntubayaliwe Mengi & 2 Others** (supra), **Kiganga & Associates Gold Mining Co. Ltd** (supra) and **Godfrey Basil Mramba** (supra) are distinguishable and therefore irrelevant in the circumstances of this case.

On the 2nd limb of the preliminary objection, the counsel for the defendant contended that the plaint does not contain a statement showing that the defendant committed any wrong to the plaintiff. The wording in Order VII Rule (1) (e) and (f) are couched in mandatory terms. So, the plaint does not disclose a cause of action. He referred this Court to its decisions in **Ahmed Chilambo v. Murray & Roberts Contractors (T) Ltd**, Civil Case No. 44 of 2005, Maneto, J.K (as he then was) where he stated:

"It is true that Order VII R. 1(f) of the Civil Procedure Act, 1966 requires among other things ... (f) the facts showing the court has jurisdiction "The law did not want to impose the duty to the court to determine whether it has jurisdiction or not. That duty is upon the Plaintiff. That duty is equally wide because it covers both pecuniary and territorial jurisdiction. ... To end up I would say that there is no cause of action in this suit, and the plaint is not in conformity to

the requirement of a plaint under Order VII r (f) of the Civil Procedure Code, 1966. The objection is accordingly sustained and the plaint is dismissed with costs for reasons stated."

In **Lucas Malya v. Mukwano Industries Limited**, Commercial Case No. 60 of 2004, Massati, J. (as he then was) on the import of Order VII Rule 1 (f) of the Civil Procedure Code, stated:

"In my view, therefore, this rule is vital and goes to the root of the Court's jurisdiction and it cannot be broken. The omission is therefore fatal and renders the plaint incurably defective. In the event, I find, hold and order that the plaint is incurably defective, it is hereby struck out with costs."

The counsel for the defendant prays the plaint be struck out with costs.

The counsel for the plaintiff concedes the legal point of objection and attributes it with a slight mistake in not including the clause for cause of action which helps in determination of the Court's jurisdiction. He prays that the preliminary objection be sustained. In alternative this Court issues an order that the applicant amends her pleading and not to strike out the matter.

On that submission of the counsel for the plaintiff, the counsel for the defendant urged that it is not expected of the Court to sustain the raised preliminary objection and still go ahead making an order for amendment. He added, an order for amendment would be appropriate in a situation where the pleading is properly before the Court and no objection has been raised to the effect. He insisted the suit be struck out with costs.

In **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Chiara Malavasi** [2002] TLR a cause of action was defined to mean:

"Facts which gives a person a right to judicial redress, or reliefs against another as found on the plaint and its annexure."

... in determining if the plaint discloses a cause of action against the defendant, a plaint must be considered within its four corners including its annexures."

The effect of a plaint not disclosing a cause of action was stated in **Auto Garage & Others v. Motokov** [1971 EA 514 and the case of **Juraji Shariff & Co. Fancy Store** [1960] EA 374 that:

"For the plaint must disclose a cause of action against defendants, short of that, defendants must be discharged."

I am not moved by the submissions of the counsel for the plaintiff. Where a plaint is improperly signed and does not disclose a cause of action cannot be allowed to linger in a Court of law. The plea by the counsel for the plaintiff for invocation of the overriding objective principle is, with respect, rejected. The above discussion disposes of the matter.

But I also find it opportune to advise the plaintiff on another anomaly that I see on the plaint. The board resolution or shareholders' resolution is not annexed to the plaint. That contravenes the authority of **Ursino Palm Estate Ltd v. Kyela Valley Foods Ltd**, Civil Application no 28 of 2014 which quoted with approval **Bugerere Coffee Growers Ltd v. Sebaduka & Another** [1970] 1 EA 147. Also, the case of **Pita Kempap limited v. Mohamed Abdulhussein**, Civil Application. No. 128/2004 C/F 69 of 2005 CAT (unreported). If the plaintiff wishes to institute a fresh suit against the defendant it is imperative that she attaches such a resolution.

In the circumstances, the preliminary objection is sustained on both limbs of the preliminary objection. Consequently, the plaint is ruled to be incompetent and is struck out with costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 3rd day of May, 2023.

