

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE NO 162 OF 2021**

**ANSELM TRYPHONE NGAIZA alias SOGGY DOGGY
ANTER.....1ST PLAINTIFF.
FLORENCE MARTIN KASSELA alia DATAZ 2ND PLAINTIFF
ENRICO FIGUEIREDO alia ENRICO.....3RD PLAINTIFF**

VERSUS

HOMEBOX OFFICE, INC DEFENDANT

RULING

MKWIZU, J:

By a plaint, the plaintiffs have instituted a suit against the defendant for the infringement of their copyrights in a song named "*Sikutaki tena*" allegedly used by the defendant in a movie Titled "*Sometimes in April*" without their mandate the allegations that were all denied by the defendant. According to the plaint, the plaintiffs are seeking the following:

- a) An order payment of Ten Million US Dollars, which is equivalent.
to Twenty -two Billion Eight hundred and Seventy- Nine Million and one hundred Thousand Tanzania Shillings only.
- b) Payment of punitive damage that will be assessed by this Honourable court.

- c) Interest at 18% from the date when the infringement was made to the date of the judgment.
- d) Interest at the Court's rate of 12 % from the judgment date to the date of payment
- e) A public apology on the defendant's official websites and Tanzania's social media for theft that has been done
- f) Costs of this suit be borne by the Defendant
- g) Any other relief(s) as the Honourable court may deem fit and just to grant.

Before the commencement of the hearing just after the Final Pretrial conference, the plaintiffs filed a notice of Objection that the WSD is not properly verified and signed, the preliminary point reads: -

The Written Statement of Defence filed by the defendant is incurably defective for contravening order XXVIII rule 1 of the Civil Procedure Code (Cap 33 R.E 2019)

Today, the plaintiffs are represented by Mr. Erick Mwandry advocate assisted by Salmini Mmway and Albert Mlokozi Mukoyogo advocates while the defendant are represented by August Nemes Mrema assisted by Othiambo Koyuki advocate.

Since as stated above, the respondent had raised a preliminary objection challenging the competence of WSD, the objection had to be determined first. Mr. Salimin Mmway's arguments on the preliminary objection are to the effect that the Written statement of defence filed by the defendant is defective for being signed by wrong and unrecognized personnel. He said, Order VI Rules 14 and 15 provided for the signing and verification of the pleadings which are under Order VI Rule 1 of the CPC defined to include

the WSD, and further that Order XXVIII Rule 1 requires the pleadings against or by a corporation to be verified by either a director of the company, companies' secretary, or any principal officer of the company who is able to depose the facts of the case.

He contended that the WSD filed by the defendant on 24th January 2022, was filed by one of the defendant's counsels duly authorized to sign the pleadings. At the bottom of the said WSD, there is a statement purporting to give one August Nemes Mrema, defendants advocate power and authority to sign pleadings in accordance with Order VI Rule 14 and Order III Rule 1 of the CPC. According to Mr. Salmin Mmwary, the signing and verification by Mr. August Nemes Mrema were contrary to the requirements of Order XXVIII of the CPC because August Nemes Mrema is not among the persons mentioned in Order XXVIII.

Mr. Mmwary was of the view that the defendant's counsel could not as well derive power to sign the pleadings out of Order III rule 1 or VI cited in the WSD. He said Order III (1) deals with parties' appearances whereas Order VI Rule 14 and 15 of the CPC deals with the signing and verification of pleadings by individuals and not corporations. He relied on the Court of Appeal decision in **Benson Enterprises Ltd V Mire Artan**, Civil Appeal No 26 of 2020 pages 8 to 13 urging the court to strike out the defendant's defence and order for an *ex-parte* hearing with costs.

In reply, the defendant's counsel opposed the preliminary objection contending that the preliminary objection is misconceived and lacks legal basis. He said, Order XXVIII Rule 1 of the CPC referred to applies where a corporate party is signing a pleading through its own officers, the director, company secretary, or principal officer thereof. This principle

does not apply where the pleadings are signed by a duly authorized person on behalf of a party. The relevant provision in the latter case is Order VI Rule 14 of the CPC expressly referred to by the defendants on page 13 of the impugned WSD where Mr. August Nemes Mrema, signed the pleading in his express capacity as a person duly authorized to sign the defence by the defendant and not as a principal officer of the Defendant. To bolster his argument, Mr. Koyugi cited the cases of **Tubone Mwambeta V Mbeya City Council and Others**, Land Case No 1 of 2023 (H/C) Unreported.) on page 9; **Masawe and Company V Jashbal Patel and 18 others**, (1998) TLR page 445 to the effect that an advocate can be duly authorized to sign pleadings under order VI Rule 14 and such authority must be given expressly.

Seemingly in the alternative, the defendant's counsel challenged the preliminary objection for being raised without leave of the court to depart from the scheduling order as mandatorily required under Order VIII B Rule 23 of the CPC. His contention on this point was that the scheduling order was made on 28/4/2023 and the plaintiff's counsels did not reserve any right to prefer any preliminary point. The preliminary objection was filed on 15th August 2023 and the plaintiffs have not satisfied the court that departing from the scheduling order is necessary and further that it is in the interest of justice to do so as required under Order VIII B rule 23 of the CPC. He maintained that the plaintiffs are, in that Order, required to bear the cost of any such departure from the scheduling order. The case of **Litenga Holdings Ltd V Metall Impex GMBH**, Misc. Civil Application No 68 of 2020(H/C) Unreported) page 7 and 8, was cited in relation to this point with a prayer to have the preliminary objection expunged from the records with costs.

Further, the preliminary objection was challenged for being brought in contravention to the provisions of Order VIII Rule of the CPC which requires the preliminary objection to be raised promptly in the pleadings. Arguing this point, Mr. Koyungi said, the plaintiffs' counsel has not raised an argument that there is a jurisdiction issue or time limitation issue to allow them to prefer the objection at this time one day before the hearing. He viewed the point raised as a delaying tactic employed by the plaintiffs.

Responding to the positions of the cited case of **Bensons Enterprises Limited (supra)**, Mr. Koyugi said, the case is Highly distinguishable because, *first*, there was no preliminary objection to the effect that the person who signed the defence was not a principal officer. That matter arose at the Court of Appeal. *Two*, when determining the issue as to whether the signatory of the plaintiff was a principal officer of the plaintiff, the Court of Appeal of Tanzania analyzed evidence to dispose of that issue which is not the case here. To him, there is no evidence in this court at this stage to assist in ascertaining whether Mr. Mrema was duly authorized or was a principal officer of the Defendant. *Three*, in this case, Mr. Agust Nems Mrema signed in his capacity as a person duly authorized to sign while in the cited case, the plaintiff signed in his purported capacity as a principal officer of the plaintiff's company. He also relied on **Nyusta Peter Kabezi T/A Nyudiah Enterprises v Herodious Sulus Mborowe and 4 Others**, Civil case No 153 of 2019(H/C Unreported) pages 6 and 7 where this court ruled that the omission to sign or verify pleadings is a curable irregularity and will not invalidate pleadings. He invited the court to apply the oxygen principle in the matter in case it finds the defence defective to permit the defendant to quickly amend the defence and cure the defect.

In rejoinder, Mr. Mmway's advocate said, the prayer for amendment brought by the defendant's counsel cannot be granted after they had raised the preliminary objection and that the Overriding objective cannot be used blindly to cure the mandatory provisions of the law especially when the defect goes to the root of the case. While admitting that Advocate Mrema signed the defence as a duly authorized person, he maintained the argument that that authorized person is not among the persons allowed to assign the pleadings under Order XXVIII cited. He maintained his greater position stating that even Tubona 's case cited by the defendants agreed with their position and he distinguished the cases cited by the defendants for different from the facts of the case at hand and that it is a decision of this court that cannot be used to distinguish the decision of the court of appeal. He lastly implored the court to find the defect in the WSD fatal and proceed to strike it out with costs with an order to proceed with the plaintiff's case *ex-parte*.

I have duly considered the arguments made by the learned counsel for the parties. It is an indisputable fact that the defendant's Written statement of defence was signed by one August Nemes Mrema advocate as an officer duly authorized by the defendant. This fact is well reflected in the verification clause of the Impugned WSD, and the statement made by the signing officer at the end of the WSD.

Parties agree as to the position of the law in Order XXVIII Rule 1 of the CPC that requires the pleadings by a corporation to be signed by the Director, company secretary, and the principal officer well conversant with the facts of the case and Order VI Rules 14 and 15 of the same CPC that provides for the situation where an authorized person may sign a pleading on behalf of a party on but with a different view on its applicability. The

plaintiff's argument is, however, that that provision applies to other parties, not a corporation whose signing and verification is solely governed by Order XXVIII (1) of the CPC while the defendant's counsel contends that the provision is also applicable to corporations.

Truly, Order VI deals with pleadings generally. Rules 14 and 15 of the said Order require the pleadings defined under Rule 1 of the same Order to include a written statement of defence, to be signed and verified by a party well acquainted with the facts of the case. In a suit for or by a corporation, pleadings are to be signed and verified by the company secretary or by any of its directors or other the principal officer of the company who is able to depose to the facts of the case. Order XXVIII rule 1 of the CPC provides that:

"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 another principal officer of the corporation who is able to depose to the facts of the case."

And as argued by the parties, Order 6, Rules 14 and 15 provides that in certain circumstances a pleading may be signed by any person duly authorized to sign the pleading.

"14. Every pleading shall be signed by the party and his advocate (if any); provided that, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."

15.-(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. (Emphasis added)

A plain reading of the above provisions does not depict the restrictions suggested by the plaintiff's counsel. The expression "*signed by any person duly authorized by him to sign the same*" in Rule 14 above is not restricted to the individual litigants only as proposed by the plaintiff's counsel. It is directed to the situation where the party *is for the reason of absence or other good cause, unable to sign the pleading*. This also applies to "*Other persons ... acquainted with the facts of the case*" appearing under rule 15 of Order VI above. Meaning that either Order XXVIII, rule 1, or Order VI, rule 14, can be applied to companies upon good cause as stated above. A similar position was held also in the Indian case of **Calico Printers' Association, Ltd. v. Karim and Brothers** ILR 55 Bom 151. Considering Order XXIX Rule 1 and VI Rule 1 of the Indian Civil Procedure Code which is primary material to our Order XXVIII Rule 1 and VI Rule 14 of the Civil Procedure Code, the court said, in the case of companies, the plaint can be signed by either a secretary or a Director or other principal Officer under order 29, rule 1, Civil Procedure Code, or any person duly authorized by the Company under Order 6, rule 14

In this case, Mr. August Nemes Mrema signed the pleading in his express capacity as a person duly authorized to sign the defence by the defendant and not as a principal officer of the Defendant. The verification in the said WQSD contains a clear declaration of the information that Mr. August

Nems Mrema was able to depose his own knowledge and the facts that he obtained from the defendant's principal officer. The verification clause reads:

"I AUGUST NEMES MREMA, Advocate for the Defendant and being a person duly authorized to sign the pleadings on behalf of the Defendant, and able to depose to the facts of the case, DO HEREBY VERIFY that what is stated in paragraphs 3,4,4.1,4.2, 4.3, 5, 5.1,5.2, 5.3,5.4,5.5,5.6,5.7,5.8,5.9,5.10,5.11,5,12,5.13,5.14,5.16,5.17,5.18,6,6.1,6.2,7,7.1,7.2,7.3,8,9,9.1,9.2,9.3,9.4,10,11,12,13,14,15,16 and 19 herein above is true to the best of information received from CHRISTINA N. BARREIRO, a principal officer of the Defendant. I further verify that what is stated in paragraphs 1,2,12.2,17, and 18 herein above is true to the best of my own knowledge. "

And the last page of the impugned WSD contains an express statement of the mandate by the defendant's counsel and the laws upon which such a mandate was derived from. The statement partly reads:

"...I do represent the Defendant and I have been duly appointed by the said Defendant as its Agent with full power and authority in the absence from Tanzania of its principal officers to sign these pleadings for the Defendant on their behalf as per Order III Rule 1 and Order Vi Rule 14 of the Civil Procedure Code, (Cap 33 RE 2019). "

The last statement asserts the absence of the defendants as the reason for the signing of the WSD by the defendant's counsel. Since the issue of

the absence of the defendant in the country is not in dispute, I am of the view that the defendant's counsel did all that the law required of him and the only viable conclusion here is that the Written Statement of defence is properly verified in terms of Order VI Rule 15 of the Civil Procedure Code, Cap 33.

I am on this persuaded by the decision of this court in **Shija vs Mazinga Corporation** Civil Case 196 of 2003 [2007] TZHC 18 (6 November 2007). In that case, the WSD by Mzinga Corporation, and public corporation was signed and verified by a State Attorney. Later Mzinga Corporation made an application for an extension of time within which to file a Written Statement of Defence out of time on the reason that the filed one was by the Attorney general. Relying on the provisions of Order VI Rule 15(1) of the CPC, the respondents argued that there is no written statement of Defence filed within the time and that what was filed by the Attorney General was unauthorized by Defendant. Refusing an application for an extension of time, Hon Mlay J, (as He then was) held:

"The written statement of Defence filed on behalf of the Applicant/ Defendant has been signed by a State Attorney and it is in evidence that the Attorney General was instructed and given information by the defendant to file the written statement of defence. The Written Statement of Defence filed on behalf of the Applicant/ Defendant is a pleading signed by a "person duly authorized by him to sign the same", within the meaning of Order VI Rule 14. Since the written statement has been verified and signed by the said State Attorney and in the verification the State Attorney has shown that what is stated in paragraphs 2,3,4 and 5 is based on information

received from the defendant, which information he believes to be true, the written statement of Defence has been properly verified in terms of Order VI Rule 15 of the Civil Procedure Code, Cap 33. I am therefore unable to find any justification in law, for the applicant/ Defendant to file a fresh Written Statement of Defence, in lieu of the one already filed on his behalf ...”(bold is mine)

I have read the cited case of **Banson Enterprises Limited** cited to me by the plaintiff's counsel. With due respect to the learned counsel, that case is distinguishable. In that case, the verifier of the plaint was not a director, company secretary or principal officer envisaged under Order XXVIII (1) and had not obtained any authority from the plaintiff's company to act on her behalf under Order VI Rule 14 of the CPA as it is in this case. The preliminary objection is thus overruled with costs.

Order accordingly.

DATED at DARE ES SALAAM this 16th day of August 2023.



E.Y. MKWIZU
JUDGE
16/8/2023