

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM  
COMMERCIAL CAUSE NO 24 OF 2000

KIGANGA AND ASSOCIATES GOLD MINING  
COMPANY LIMITED ..... PLAINTIFF  
VERSUS  
UNIVERSAL GOLD N.L.....DEFENDANT

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RULING

KALEGEYA, J:

Mr. Majithia for the Defendant has taken up two preliminary objections. First, that the plaintiff could not file this case before this Commercial Division of the High Court without first paying costs as ordered in (HC) Civil Case No. 126/99. Secondly, that the plaint is defective because the verification clause does not specifically mention the particular principal officer of the Company who verified it contrary to O.28, Rule 1 CPC, nor does it disclose the grounds of “beliefs,” contrary to O. 6, Rule 15 CPC.

Mr. Mnyele, advocate, appeared for the Plaintiff.

Elaborating further on the grounds for the objections, Mr. Majithia insisted that the wording in the ruling handed down in (HC) Civil Case No. 126/99 can only mean that before filing a suit in this registry costs in the withdrawn case had to be paid first. As to the effect of lack of specification of the principal officer who signs on behalf of a Corporation he referred to (HC) Civil Case No. 279 of 1999, **Tundu Antiphas Mughai Lissu vs Gulf Air Company. G.S.C (DSM Registry, unreported).**

In reply Mr. Mnyele countered by stating that the words “on terms” contained in the ruling in Civil Case No. 126 of 1999 do not connote “subject to”, adding further that in any case they could not have paid costs not yet claimed as they are yet to be served with a bill of costs. Regarding the objection on verification, Mr. Mnyele argued that the



first limb has no support because O. VI, Rule 15 CPC permits any of the two categories of persons to verify a pleading: the party himself or any other person conversant with the facts, and that as a matter of common practice principal officers of Corporations verify pleadings. As to the 2<sup>nd</sup> limb, Mr. Mnyele conceded the error of including in the verification clause the wording “and belief” without stating grounds thereof. He then proceeded to pray either for leave to amend the pleading by deleting the offending words or in the alternative called upon the Court to expunge them under S. 97 of the CPC.

In a rejoinder, Mr. Majithia, argued that S. 97 CPC is applicable in proceedings and not pleadings, and as for amendment he insisted that there is no application upon which the Court can act. Mr. Majithia charged also that Mr. Mnyele had evaded making reference to O. 28 CPC and the decision by Msumi, JK, in LISSU case.

I will start with ground one which does not deserve to arrest us even for a while.

Facts agreed upon as being uncontroverted are that the suit now filed with this Court was first filed with the main High Court Registry at DSM as Civil Case No. 126 of 1999. Parties rested in the same capacities as they appear now. At one time, in the proceedings, the plaintiff applied to the Court for orders as follows:-

*“(a) That the honourable Court may be pleased to grant leave to the plaintiff to withdraw the suit from the High Court (General Division) and thereupon permit it to file the same in the High Court (Commercial Division, Mutatis Mutandis).”*

After hearing the parties the Court held (for clarity let the relevant part be quoted at length):

*“ From the quoted provision of the law, the court has such powers to grant permission to the plaintiff to withdraw the plaint with liberty to re-file it on such terms as it thinks fit. The applicant wants to re-file the same suit at the*



*commercial Division of the High Court. The respondent's counsel is afraid that if leave is granted, then he would loose his costs. He therefore submitted that there are no sufficient grounds to warrant this court to grant the leave. However, the fear of the learned counsel may be taken care of as the court is empowered, to grant the leave sought on such terms as it thinks fit. The main reason for the applicant to withdraw and re-file is only that the commercial Division of this court is more suited for the determination of this case and I see it as a sufficient ground for allowing him to withdraw and re-file subject to the terms which may be made by this Court.*

*As it can be seen from the proceedings, all the pleadings where completed. The case was to go for mediation before this application was made. The counsel for the defendant/Respondent must have spent both time and energy in the preparation of the case. Hence, the application to withdraw the plaint and refile it at the Commercial Division of the High Court **is granted on terms that the applicant pays the costs of this suit to the Respondent.**" (emphasis mine)*

Mr. Majithia's argument is that the underlined words in the last paragraph have the effect of barring the plaintiff from filing the present suit until the costs in Civil Case No. 126 of 1999 have been paid.

With greatest respect to Mr. Majithia that kind of interpretation cannot be accepted in the circumstances.

I have so concluded because of various reasons.

First, as any lawyer conversant with the Civil Procedure Code will concede, the words "on such terms" or "on terms" are dotted everywhere in that code whenever it is provided that the Court's indulgency can be moved by a party to exercise its discretion-in certain aspects – i.e. applications. The words simply mean that the Court can, in exercising its discretion, set certain terms. I agree that in certain situations the Court may set as condition's precedent for the doing of a certain act or enjoying a certain favour but





on those such occasions the order would expressly so provide. The words “in terms” here were employed in their general applicability in that the application to withdraw with liberty to re-file the matter in the Commercial Division was allowed but the plaintiff was condemned in costs.

Secondly, if Mr. Majithia’s argument was correct it would mean that not only would the refiling of the suit in the Commercial Division be barred but also Civil Case No. 126/99 would still be on list (that, is, not yet withdrawn) till the costs are paid! This is so because the plaintiff’s application was two limbed: to have the suit withdrawn from the general High Court registry, and leave to have it refiled in the Commercial Division. The Court gave a green light to both limbs “on terms” that Plaintiff/Applicant pays the Respondent’s costs. If then Mr. Majithia is saying that the refiling of the suit cannot be effected unless costs are paid first then he should go further and say that the withdrawal has not yet been effected for the same reason! The absurdity of that argument needs no highlighting.

Thirdly, upholding Mr. Majithia’s argument would be tantamount to blatant violation of the Law. The rules governing the filing of a suit in the Commercial Division registry, apart from the obvious one of lack of filing fees, recognise only two impediments which can block the filing of suit therein-where the dispute is not a commercial case, and where the intended suit concerns a commercial matter which is pending before another Court or Tribunal of Competent jurisdiction or which falls within the competency of a lower Court. No Court would be mandated to set other conditions regarding the filing of such suit in this registry.

Fourthly, as Mr. Majithia knows too well, unless unchallenged, generally, before a party enjoys costs awarded in a certain case he has a long string of procedures to go through. The bill of costs has to be filed, argued by parties before the Taxing master after which a ruling is given and an aggrieved party has an appellate avenue at his disposal. This process can take years taking into consideration the bottlenecks suffocating our system. Is Mr. Majithia suggesting that the Court could give an order which has in its



content suggestions that the refiling of the suit could only be done at the end of all the said procedural impediments?

On this aspect therefore the preliminary objection has no legs on which to stand. The suit was properly filed before this Court and the question of costs awarded in another case can be pursued in the applicable and relevant manner and have no bearing with the said filing.

We now turn to the 2<sup>nd</sup>, two limbed, preliminary objection. We will start with the first limb that the verification clause was not properly verified.

In support of his arguments, Mr. Majithia cited the decision of the Court (Msumi, JK) in Civil Case No. 279 of 1999 wherein it was stated,

*“ The second ground for the plaintiff’s preliminary objection is that in the verification clause of the written statement of Defence the identity of the principal officer who signed it on behalf the defendant’s Company has not been disclosed. According to order 28 rule 1 of CPC pleadings of a company in a suit may be verified by the secretary or director or any other principal officer of the corporation who is able to depose to the facts of the case. From the wording of this provision it is important that the identity of the post held by such principal officer in the company must be specified. In other words if such officer is neither secretary nor director, his position in the company must be specified. It is not enough just to say that the verifying person is a principal officer of the company able to depose to the facts of the case. For this reason the written statement of defence is defective hence the preliminary objection is upheld. However, for the interest of justice defendants are granted leave to amend the written statement of defence to enable them rectify the aforementioned defects. The said amended written statement of defence to be filed within 15 days from the date of this ruling.”*



O. 28, Rule 1 of the CPC referred to provides as follows: -

“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.*”

I have carefully addressed myself to the gist of the arguments fronted by Mr. Majithia; the quoted excerpt from the decision in Civil Case No. 279 of 1999 and the Order of the CPC in question, but, with the greatest respect to the JK, I have been unable to position myself in agreement with the decision in the said case hence unable too to accept the submission launched by Mr. Majithia on the issue.

I am mindful of the fact that judges of the same Court should seldomly give conflicting decisions. The basis of this in any judicial system needs no clarification. Some light on the logic behind can be gathered from observations made by the highest Court of the land (the Court of Appeal) made in (CA) **Misc. Civil Application No. 17 of 1994, J.S. Mutungi vs University of Dar es Salaam and 2 others (DSM Registry)** and which are as follows:

*“ With due respect to the learned Jaji Kiongozi, it is not a matter of judicial courtesy but a matter of duty to act judicially which requires a judge not lightly to dissent from the considered opinion of his brethren. The Learned Jaji Kiongozi appears to hold the view that to allow the application in the present case would amount to usurping the powers of hearing an appeal by the Minister responsible for Labour affairs. Since the same court, presided over by Mapigano, J., in the earlier case originating from the same place and involving the same Respondents had granted a similar application, one expects sufficient reasons to be given for the results in the present case being different from those in the earlier case. This is necessary to avoid giving the parties and the general public a false impression that results of cases in courts of law perhaps depend more on the personalities of judges than on the law of this Land.”*





It is thus with great reluctance that I hold the contrary view.

O. 28, Rule 1 should be read together with O. 6, Rule 15(1), (2) and (3) of the CPC. O. 28(1) has already been quoted. O. 6, Rule 15(1)(2) and (3) provide as follows:-

*“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.*

*(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 verifies upon information received and believed to be true.*

*(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.”*

The two provisions of the law taken together, in my view, clearly prescribe who can verify a pleading filed by a company as is the plaintiff in this case. It is either the **Director, a Secretary or any of its Principal officer**. O. 6, Rule 15(3) CPC sheds light on how the verification is to be done: **by signing**. And, of course, the person signing should indicate in what capacity is he signing. In the case before us the plaint explicitly tells us who effected the verification:

*“ Principal officer of the Defendant conversant with the facts of this case.”*

Not only are we informed of the status of the person signing but also we are told that this particular “Principal officer of the Plaintiff is “conversant with facts of this case “ as per requirements of O. 6, Rule 15(1) and O. 28(1) CPC. It is my considered view that up to that point the law has fitly been complied with. In neither provision do I read the requirement that if signed by a Principal officer he must specify who he is (which requirement, if it were correct, would apply as well to situations where verification is



done by a Director because it is common knowledge that a Company has more than one Director and in varying capacities as it the case with Principal officers).

I do appreciate, and we all know, that the requirement for verification is primarily aimed at countering possible abuse of the Court process and fix responsibility. In suits involving Companies verifications made in the mode of the type now at hand suffices. However, if the other party is in doubt as to whether the verifier is or is not a Principal officer of the Company he can take it up as a challenge and if he convinces the Court as to the need the said officer may be required to prove his status to the satisfaction of the Court either by affidavit or otherwise as the Court may deem proper. It is not of less significance that the same O. 28, CPC, Rule 3 CPC offers a cushioning for any clarity or issue that may accrue by providing,

*“ O. 28 – 3. The court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.”*

In conclusion therefore I hold that in suits involving Companies, verifications endorsed with the phrase,

*“ Principle officer of the Defendant conversant with the facts of the case”*

and duly signed are not defective at all entailing an order for amendment. Of course, even if I had held that the clause is defective still this would not have resulted into throwing out of the whole pleading save that it would have attracted an order for amendment. This disposes the first limb of the 2<sup>nd</sup> preliminary objection.

We now come to the last limb. Both parties are agreed that the words in the body of the verification “and belief” are legally unsupported as no grounds thereof are laid.





The question is what should this Court do? Reject the plaint as Mr. Majithia impresses, or order for amendment or expunge them under S. 97 CPC as advanced by Mr. Mnyele.

A defect in a verification clause to a plaint is just a procedural error the consequence of which is not to have the plaint thrown out as Mr. Majithia impresses but rather which attracts an amendment if necessary. In fact, if the defect is of insignificance it can be ignored. It is not disputed that the words “and belief” have been irrelevantly included in the clause. In my considered opinion this is a fit case where the Court can act under S. 97 of CPC and order to have the same struck out. S. 97 CPC provides:

*“97. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.”*

However, Mr. Majithia stands on the opposite end urging that the section is inapplicable. Again, with respect, the argument that the said section is irrelevant at this stage as we are not yet within precincts of “proceedings” is very surprising, to say the least. Why? The answer is obvious. The moment a suit or action is filed, proceedings in that particular matter will have been commenced. It is not surprising that Mr. Majithia though posing the argument did not attempt to tell us at what time, precisely, in his view, do proceedings envisaged under S. 97 CPC commence.

Defining the term “proceeding” in relation to Courts, **Blacks Law Dictionary, (6<sup>th</sup> Edition, at page 1204)** persuasively has the following:-

*“ In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgement.....*



..... All the steps or measures adopted in the prosecution or defence of an action.....

.....The word may be used synonymously with "action" or "suit" to describe the entire course of an action at law or suit in equity from the assurance of the writ or filing of the complaint until the entry of a final judgement, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace all matters that occur in its progress judicially.

Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.

.....In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object."

I fully associate myself with the above illustrative definition which unreservedly counter the opposite argument as launched. Pleadings are part of the proceedings. I cannot conceive how otherwise they could be separable.

Considering the nature of the procedural defect at hand it is hereby ordered that the two offending words "and belief" contained in the verification clause be struck out. This disposes the 2<sup>nd</sup> limb of the objection.

In conclusion, it stands clear that the objections had no foundation to support them and are, consequently, all dismissed.

L.B. KALEGEYA

JUDGE

I Certify that this is a true and correct copy of the original order judgement ruling  
.....  
Registrar  
Commercial Court  
Dar es Salaam  
Dated 7/8/ of 2000

