

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 60 OF 2004

LUCAS MALLYA.....PLAINTIFF  
VERSUS  
MUKWANO INDUSTRIES LIMITED .....DEFENDANT  
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Date of Submissions – 12/9/2005

Date of Ruling – 19/9/2005

R U L I N G

MASSATI, J:

The Plaintiff has filed a suit in this Court for refund of monies had and received by the Defendant for the purchase of goods, and for damages and loss of profit and goodwill. In turn the Defendant has not only disputed the claim, but also raised two preliminary objections to the suit. The preliminary objections are: –

(1) *That the plaint is incurably defective for not including a clause showing that this Court has jurisdiction in the matter.*

*and*

(2) *The plaint is incurably defective for not being verified.*

The Plaintiff is represented by Mr. Mwitta Waissaka, learned Counsel, while the Defendant is represented by IMMMA Advocates. The preliminary objections were argued in writing.

Let me begin with the second objection. The learned Counsel for the defence has submitted that the plaint lacks a verification clause, contrary to O. VI rule 15 of the Civil Procedure Code 1966. He submitted that a verification clause without a signature was no verification at all. Mr. Waissaka, learned Counsel submitted that the plaint was verified and so the objection was devoid of merit. He borrowed a sentence from MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD [1969 E.A. 696; which condemned the increasing practice of improper raising of preliminary objections. He therefore prayed for the dismissal of this objection.

After looking at the plaint, and upon studying the learned Counsel's submissions I am satisfied that the plaint in the Court file is properly verified and signed. If the copy supplied to the Defendant lacked the verification clause and signature it could be cured by surrendering it for the Plaintiff's signature. Otherwise, I agree with Mr. Waissaka that this objection has no merit and the same is accordingly dismissed.

On the first preliminary objection the learned Counsel for the Defendant submitted that under O. VII (1) (f) of the Civil Procedure Code it is mandatory for the plaint to disclose facts showing that the Court has the requisite jurisdiction. He submitted that since the wording in the said order is mandatory, failure to observe it renders the plaint defective and therefore

striking. On the other hand, Mr. Waissaka learned Counsel for the Plaintiff submitted that the omission was an oversight which could be cured under the Court's inherent jurisdiction. He relied on s. 95, 96 and 97 of the Civil Procedure Code 1966. He also cited the Tanga Registry unreported case of JACOB GWAGILO MWANDIKO vs PETER ANDREW FEER Misc. Application No. 51 of 2000 for the proposition that the real purpose of litigation is to address the matter in issue in order to attain justice. Unfortunately Mr. Waissaka has not attached the copy of the ruling of my brother Mkwawa, J. So I am at a disadvantage to know the setting and context in which my learned brother made the said remarks.

There is doubtless, a thick impenetrable wall of case law, that rules of procedure are merely handmaids of justice (See IRON & STEELWARE LTD VS. C.W. MARTYR [1956] 23 EACA 175 at p 177. But as Samatta J.A (as he then was) said in VIP ENGINEERING & MARKETING LTD VS SAID SALIM BAKHRESSA LTD. Civil Application No. 47 of 1996 (unreported).

*“...Procedural rules are enacted to be complied with. Usually there is a legal principle behind every procedural rule. But these rules differ in importance. Some are vital and go to the root of the matter, these cannot be broken. Others are not of that character, and may therefore be over looked provided there is a substantial compliance with the rules read as a whole and provided no prejudice is occasioned.”*

There is no dispute that the plaint in this case does not contain a clause pleading that this Court has jurisdiction. The only issue is as to the effect of that omission. The Eastern Africa Court of Appeal had occasion to comment on such omission in ASSANAND AND SONS (UGANDA) LTD VS EAST AFRICAN RECORDS LIMITED [1959], EA 360. Although the case originates from Kenya, the Court considered O. VII rule (1) (f) of the Kenyan Civil Procedure (Revised) Rules 1948, which is in pari materia with our O. VII (1) (f), of the Civil Procedure Code 1966. It was argued in the ASSANAND case that failure to comply with O. VII rule (1) (f) was no more than an irregularity, curable by amendment. This is the argument advanced by Mr. Waissaka, learned Counsel in the present case. Delivering the unanimous decision of the Court SIR KENNETH O' CONNOR, P had this to say at p 364:

*“Paragraph (f) of Order VII rule (1) (1) places upon a Plaintiff the obligation of pleading “ the facts that the Court has jurisdiction”.*

*This is a matter of great importance for if the Court has no jurisdiction any judgment which it gives is a nullity. A mere assertion that the Court has jurisdiction is not enough.*

*The objects of this requirement would seem to be, first that the Court should be able to exercise some critical function and to draw a reasonable inference that if the facts alleged are established, it would appear to have jurisdiction, and second, that the Defendant should know what facts were alleged and have an opportunity of controverting them if desired.”*

In that case the Court held that the defect was incurable, even though the plaintiff contained the “*magical*” clause.

*“ The cause of action arose at Nairobi within the jurisdiction of this honourable Court.”*

In the present case, not even the above “*magical*” clause is pleaded. It cannot, I think, be contended that the omission is not fatal. This is a Commercial Court. It is pertinent that the facts show that the transaction between the parties was of a commercial nature within the jurisdiction of this Court. In my view therefore the 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 plaintiff incurably defective.

In the event, I find hold and order that as the plaintiff is incurably defective it is hereby struck out with costs.

Order accordingly.

**S.A. MASSATI**

**JUDGE**

**19/9/2005**

1,065 words

I Certify that this is a true and correct  
of the original order Judgement Rulling

Sign *[Signature]*  
Registrar Commercial Court Dsm.

Date 19.9.2005