

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

COMMERCIAL CASE NO. 97 OF 2005

NATIONAL OIL (TANZANIA) LTD.....1ST PLAINTIFF
EXIM BANK (TANZANIA) LIMITED.....2ND PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (T) LTD – DEFENDANT

R U L I N G

KIMARO, J.

Deadline for submissions – 09/01/2006

Ruling – 9/02/2006

The plaintiffs have jointly filed a suit against the defendant praying for judgment and decree against the defendant for payment of T.shs 175,809,754/=.

It is averred in the plaint at paragraph 4 that the amount of T.shs 175,809,754 was drawn by the 1st Plaintiff on the 2nd Plaintiff in favour of the Commissioner of Customs and Excise.

It is alleged that the 1st Plaintiff is a customer of the 2nd Plaintiff and maintains bank account(s) with her. The first plaintiff is a tax payer and it was in the course of business that cheque No.815213 for the said amount was drawn by the

1st Plaintiff on the 2nd Plaintiff in discharge of tax obligations to the Commissioner for Customs and Excise.

It is averred further that the 2nd Plaintiff cleared the cheque, debited the 1st Plaintiff's Account and paid into the Defendant's Account with the Bank of Tanzania the amount of the cheque in the normal course of business.

Subsequent to the above transaction, the 1st Plaintiff received a demand from Customs and Excise Department for payment of inter alia T.shs 175,809,754/= which amount was already paid vide cheque No.815213. Upon making inquiry from the Commissioner on the fate of the amount of T.shs 175,809,754/= paid to the Commissioner vide cheque No. 815213, the Commissioner of Customs and Excise denied receipt of the money.

It is pleaded by the plaintiff that several demands have been made to the defendant for the refund of the money but they have not been successful and that is why they have filed this suit against the defendant.

Apart from denying the claim, the defendant has raised three points of preliminary objection:

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a) *The 2nd Plaintiff be struck out for not demonstrating any justifiable cause of action against the defendant because*

i) *The facts pleaded do not show that the 2nd Plaintiff has any claim against the Defendant;*

ii) *The facts pleaded do not disclose losses/damages suffered or which may be suffered for which the Defendant is or will be liable.*

b) *The Plaintiff's plaint is incurably defective for lack of verification. Alternatively the verification clause is incurably defective and bad in law as it offends the rules of procedures regulating the verification of pleadings.*

c) *There is no resolution of the Board of any of the Plaintiffs' Company authorizing them, or any of them, to institute the suit.”*

The preliminary objection was argued by written submissions.

The Advocate from FK Law Chambers who are representing the defendant opted to make his submissions by starting with the second point, followed by the third and lastly by the first point.

The second point of objection is on the verification. The Advocate supported his submissions by Section 80 of the Civil Procedure Code 1966, Orders VI rule 15 and XXVIII rule 1 of the Civil Procedure Code and Section 2 of the Companies Act, Chapter 212 of the Laws.

His argument is that the plaint is not properly verified because the verification clause does not make a distinction of the paragraphs which are based on own knowledge, information or belief. Instead, there is an omnibus verification which says that all facts are true on own knowledge. The Advocate said this can not logically be correct because the plaint has been filed by two companies and what is averred in the plaint clearly shows that all paragraphs can not be true to the two officers own knowledge. There are matters which are only known to one of the companies in exclusion of the other.

Another argument raised is that the title of the persons who signed the verification have not been disclosed and it is difficult to ascertain whether they are persons acquainted with the facts of the case. Another defect pointed out is that the

date of the verification and place of verification has not been shown. The Advocate cited Mogha on the Law of Pleadings 14th Edition, (Revised), 1987 to show the object of verification. It is to fix responsibility upon someone for the statement made.

Section 2 of the Companies Ordinance was cited to show a category of persons who are officers of the Company. In the Advocates opinion, they are officers who can make the verification but their title has to be disclosed

The Advocate for the defendant argued that the defect is not curable and prayed that the preliminary objection be upheld and the plaint be struck out. He said that although the Indian Code of Civil Procedure from which our Civil Procedure Code was adopted allows defects on verification to be remedied, our Civil Procedure Code does not contain a provision like Section 99 of the Indian Code of Civil Procedure which allows a defect in verification to be remedied.

The response by the Advocate from Epitome Advocates who are representing the plaintiffs is that the invitation for the striking out of the plaint should be rejected because a defect in verification is not a ground for striking out the plaint.

The Advocate for the plaintiffs submitted that the arguments made by the Advocate for the defendant on non disclosure of the titles of the persons verifying the plaint, non disclosure of date and place of verification and failure to specify which paragraphs are verified to knowledge information and belief is all misconceived. He said an omission to insert a date, or want of signature or any defect in the verification does not render the pleadings void. He cited the case of **Buyogera Julius Bamambo Vs The Attorney General & Arcade Denies Ntagazwa** HC (TBR) Misc. Civil Cause No.129 of 1998.

Briefly, those were the arguments raised in respect of this preliminary objection. I must say, and with due respect to the Advocates for the plaintiff, that the verification of the plaint is defective. The plaint is verified by two Officers; one from each of the plaintiffs' company. Each Officer must specify paragraphs which are true to knowledge, information and belief. The Advocate for the defendant submitted correctly that such a requirement has not been met. What is pleaded in the plaint is clear indication that all the information pleaded can not logically be true to own knowledge. There are matters which are true to the knowledge of the 1st plaintiff but they cannot be true to the knowledge of the 2nd plaintiff and vice versa. The Advocate for the defendant gave examples of the paragraphs in the plaint. Equally true is the fact that the

verification is not dated and the place of verification is not disclosed. All these defects offend Order VI rule 15 of the Civil Procedure Code.

However, I will not, and again with due respect to the Advocate for the defendant, agree that the defect is not curable. There is a chain of authorities showing that the defect is curable. Article 107(2)(e) of the Constitution of the United Republic of Tanzania 1977 requires the court to do substantive justice and do away with technicalities which defeat justice. Much as the verification is defective, the plaintiffs are allowed to remedy the defects.

Regarding the third objection on a Resolution of the Board authorizing the institution of the suit, I will outrightly say that this point does not fall into a category of preliminary objections. The case of **Mukisa Biscuits Co. Ltd V West End Distributors Ltd** (1969) EA 696 is clear on matters which can be argued in preliminary objections:

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- i) *They must be points of law either pleaded or must arise as a clear implication from the pleadings.*
- ii) *They must be pure points of law which do not require close examination or scrutiny of documents.*

- iii) *Determination of points of law in issue must not depend on the discretion of the court.*"

They are matters which can be determined without having evidence. Any matter which has to be determined after receipt of evidence falls outside matters to be argued as preliminary objections. In the **Bank of Tanzania Vs Devram P. Valambia** Civil Application No.15 of 2002 (CAT) unreported, it was held that:

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The aim of a preliminary objection is to save time of the court and of parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily."

The preliminary objection raised requires inquiry to establish whether the plaintiffs had authority to institute the suit. Once the court ventures into inquiry, evidence is required. The matter cannot therefore be argued as a preliminary objection. (See the case of **Citibank Tanzania Ltd V TTCL & Others** Civil Application No.63 of 2003 (CAT) unreported. I will thus dismiss the objection.

The last objection is that the second plaintiff has no cause of action. To determine whether the plaintiff has a cause of action or not one has to look at the plaint and the annextures. Reference is made to the case of **John M. Byombalirwa Vs Agency Maritime Internationale (Tanzania) Ltd** [1983] TLR I. The plaint and the annextures show that the 2nd Plaintiff has a cause of action. All preliminary objections are dismissed with costs. The plaintiff is granted time to remedy the defects in the verification clause.

N.P.KIMARO,

JUDGE

7/02/2006

Date: 9.02.2006

Coram: Hon. N.P.Kimaro, Judge.

For the 1st Plaintiff } Mr. Mwandambo
For the 2nd Plaintiff }

For the Defendant – Mr. Duncan.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The preliminary objections are dismissed with costs. The plaintiffs are given time to remedy the defects in the verification clause. The same to be done by 17/02/2006.

N.P.KIMARO

JUDGE

7/02/2006

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I Certify that this is a true and correct
of the original/order judgement Rullir
Sign Dubise
Registrar Commercial Court Dsm.
Date 9/2/2006