USANGU LOGISTICS (T0 LTD vs TANZANIA NATIONAL ROAD AGENCY, MINISTRFY OF INFRASTRUCTURE DEVELOPMENT & ATTORNEY GENERAL

IN THE HIGH COURT OF TANZANIA
(C0MMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 58 OF2007

R U L I N G

Deadline for submissions - 30/10/2007
Date of Ruling – 9/11/2007

MASSATI, J.

Through the services of M /S MASAKA & CO =. ADVOCATES, the Plaintiff, USANGU LOGISTICS (T) LTD, has filed a suit in this Court against the Defendants to claim for orders; that the impounding of his truck and trailer by the 1st Defendant was unlawful, for the release of the said truck and trailer, special damages to the tune of Tshs 98,000,000/=, loss of business at the sum of Tshs. 1,500,000/= per day, general damages of not more than shs. 250,000,000/=, interests and costs.
The Defendants are jointly defended by the Attorney – General, who is also the 3rd Defendant. In their joint defence, the Defendants have raised the following preliminary objection:-

> "*That the suit contravenes the Court's Registry Rules as it has been filed in the wrong registry and this court has no territorial jurisdiction.*"

For this, the Defendants pray for the dismissal of the suit.

The Plaintiff would not let it prevail. In its reply to the Written Statement of defence, the Plaintiff described the preliminary objection as:-

> "Vexatious, frivolous and unfounded for want of metis.

And so prayed that the same be overruled. As if that was not enough he also launched an attack on the statement of defence, against which he directed two legal missiles on the verification clause:-

> "(a) The name of the person verifying the averments contained in the defence is not disclosed.
>
> (b) TABRIADS by itself not being a natural person is incapable of supplying information to the person verifying the contents of the

written statement of defence."

And so prayed that the same be struck out with costs I ordered the consolidation of the two sets of preliminary objections and their disposal by written submissions. Counsel have now presented their arguments.

Since the Defendants have raised the question of jurisdiction of this Court, I will begin with their objection. The argument of the Defendants, presented by the learned state attorney, is this: Since the cause of action in this case arose in Mwendakulima, Kahama, Shinyanga and since s. 6 (4) of the Government Proceedings Act 1967, requires all suits against the government to be instituted in the registry of the High Court within the area where the claim arose, it was wrong for the Plaintiff to file this suit in the present Court. Therefore the Court lacks territorial jurisdiction. In support of that argument, the learned Counsel for the defence referred to the Court of Appeal Civil Revision No. 50 of 1998 (unreported) **JAMES GWAGILO VS. ATTORNEY GENERAL .** For this reason, the Court was beseeched to strike out the suit with costs.

Against that argument, Mr. Masaka learned Counsel for the Plaintiff, put up the following counter argument. Since the 1st Defendant is a legal entity capable of sing and being sued on its own, the joinder of the government and the Attorney General does not turn it, into a government suit, therefore s. 6 (4) of the Government Proceedings Act did not apply. Therefore in terms of s. 189a) and 9b)s of the Civil procedure Code Act, the suit was properly instituted in the present Court within whose jurisdiction, the 1st Defendant is headquartered. He submitted that **GWAGILO's** case was not applicable in the circumstances of this case, not only because, in that case the Attorney General was the only Defendant, but also that the decision in that case was at variance with the enabling statute in the Civil Procedure Code. The case of **NBC VS. JACKSON NAHMAWA SINZO BAKWILA** [1978] lrt. N. 39, was referred to me as authority for the statement that:-

> *"Where case law and statute are at variance, the latter takes precedence over the former."*

Therefore, concluded the learned Counsel, the Defendants" objection should be dismissed.

In rebuttal, learned state attorney submitted thus. So long as the Attorney General was joined as a necessary party, the proceedings were "proceedings against the government", and so s.6 (4) of the Government Proceedings Act, was applicable and so was the principle set out in **GWAGILO'S** case, that it was s. 18 (c), of the Civil Procedure Code Act, and not s. 18 (a) and (b), which applied to proceedings against the government. As for the rationale for joining necessary parties the learned state attorney referred the Court to the statement of

DEVLIN J in **AMON VS. RAPHAEL TUCK & SONS** [1959] All ER. 273 at p. 287.

With these, the learned Counsel reiterated the Defendant's prayers that the suit be struck out with costs.

AAs rightly pointed out by Mr Masaka learned Counsel for the Plaintiff, I think there are two issues here which call for de termination. First, are the proceedings before me government proceedings? Two, if so, whether the suit has been properly instituted in this Court:?

The argument that because the 1st Defendant is a legal entity capable of sing and being sued, therefore the suit is not a government proceeding, may sound attractive, but legally untenable. In paragraph 2 of the plaint the Plaintiff acknowledges that the 1st Plaintiff is a government agency established under GN 283 of 2000. The government notice which establishes the 1st Plaintiff is made under s. 3 95) of the Executive Agencies Act (Cap 245 RE 2002). It is true that under S. 3 (60 (a) and (b) of that Act, the Executive Agency may enter into contract or sue and be sued but the power to sue and be used is restricted. According to s. 3 (6) an executive agency shall be:

(a) Be capable of sing and being sued in its own name **only in contract** (Emphasis supplied) and in that respect all laws applicable to legal proceedings other than the Government Proceedings Act, 1967, shall apply to legal proceedings to which the Agency is a party.

But in other matters not relating to contracts s. 6 (c) provides:-

> *"...however any legal proceedings which but for this paragraph, would have been instituted by or against the executive agency, may only be instituted by or against the Government in accordance with the Government Proceedings Act."*

In the present case there is no averment that the Plaintiff's cause of action against the 1st Plaintiff is founded on contract. This means that s. 3 (67)((c) of the Executive Agencies Act is applicable. It follows as day follows right, that in the wording of that section and on the facts, the present proceedings are government by the Government Proceedings Act, 1967 (Cap 5 RE 2002). I would, in the event, agree with the learned state attorney, although for different reasons, that the present suit is a government proceeding, and therefore governed by the Government Proceedings Act.

I now go to the second issue whether the suit was properly instituted in this Court. The starting point is s. 6 (4) of the Government Proceedings Act which

reads as follows:-

> "(6) (4) All suits against the Government shall be instituted in the High Court by delivering in the Registry of the High Court within the area where the claim arose."

The **ratio decidendi** in **GWAGILO'S** case was that since the Plaintiff was terminated and received the letter of termination in Dar es Salaam, and since s. 18 (a) and (b) of the Civil Procedure Code 1966, did not apply to the government, the Plaintiff could only institute his sit in Dar es Salaam. However, **GWAGILO'S** case was decided prior to the commencement of the commercial division of the High Court. After the establishment of the Commercial Division, I think the situation has now changed.

Rule 5A of the High Court Registries Rules stipulates:-

> "There shall be a Commercial Division of the High Court within the Registry at Dar es Salaam and at any other registry or sub registry as may be determined by the Chief Justice, in which proceedings concerning commercial cases may be instituted."

Rule 7 (1) of the Rules further provides:

> *"(1) Original proceedings in the Court may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for the area in which the cause of action arose or where the Defendant resides.*
>
> *Provided that where original proceedings in a commercial case are instituted in a District or sub registry such proceedings shall as soon as practicable be transferred to the Commercial Division before further steps are taken in the proceedings except where all parties agree to have the commercial case determined by the High Court at such District or sub registry of the High Court."*

As I see it, the combined effect of s. 6 (4) of the Government Proceedings Act, Rules 3, 4, 5, 5a, and 7 (1) of the high Court Registries Rules, is this: There is only one High Court Registry based in Dar es Salaam and such District Registries or sub registries as the Chief Justice may establish. Original proceedings may be instituted either in the Registry at Dar es Salaam or in the District Registry for the area in which the cause of action arose. What this rule implies, is that the High Court Registry, has **territorial jurisdiction** to receive all original proceedings. The Commercial d=Division of the High Court is a division, within the Registry at Dar es Salaam . It therefore, like the Dar es

Salaam Registry, enjoys **territorial jurisdiction** in commercial cases. Therefore, in my view, although s. 6 (4) requires all suits against the Government to be instituted in the Registry of the High Court within the area in which the cause of action arose, in the case of a commercial case, once instituted, such a case ought to be transferred to the Commercial Division.

I am settled in my mind, that s. 6 (4) of the Government Proceedings Act, was enacted as an exception to the general rule enshrined in Rule 7 of the High Court Registries Rules, and s. 18 of the Civil Procedure Code. Its intention was to enable citizens with suits to settle with the government have a loser access to justice. But with the formation of the Commercial Division of the High Court and the amendment to Rule 7 (1) by adding the proviso, the situation has changed but not necessarily in contradiction to S.6(4) of the Government Proceedings Act. While this section enjoins all suits against the Government to institute in the High Court by delivering in the Registry of the High Court within the area in which the cause of action arose, the effect of the proviso to Rule 7 (1) of the Registries Rules is that, in the case of Commercial Cases, such cases shall bet transferred to the commercial Division before further steps are taken in the proceedings. This means unless s. 6 (4) of the Government proceedings Act is also amended to expressly disapply the proviso to Rule 7 (1) of the High Court Registries Rules, that the Commercial Division of the High Court is clothed with jurisdiction to determine any suit against the government, regardless of where the cause of action arose. Whether or not the parties consent to the transfer of a case is in my view, a different matter affecting only the practice and not the jurisdiction of the Court. In any case the issue of consent to transfer does not feature in the present case.

For the above reasons, I would think that the principle in **GWAGILO'S** case would not apply in the case of commercial cases in full view of the present legal situation. I would hold that the case is properly before this Court, because even if it were instituted in Tabora High Court District Registry within whose area the cause of action arose, it would have been transferred to this Court anyway, so long as there is no dispute that it is a commercial case. I would accordingly disallow the Defendants' preliminary objection.

The next set of preliminary objections are those raised by the Plaintiff against the defects in the verification of the written statement of defence.

As set out above, the gist of the Plaintiff's objection is that the verification clause is not signed by a person acquainted with the facts of the case, not authorized, and whose identify is not disclosed. According to Mr. Masaka, this offends O. VI rule 15 of the Civil procedure Code Actg. On the other hand, the learned state attorney's argument is that as a state attorney, duly instructed by the 1st Defendant, she/he was not only authorized to sign the verification, but

also a person acquainted with the facts of the case. Besides, argued the learned state attorney, there is no law, which requires the signatory of a verification clause to make his identity known. The learned state attorney however, concurred with M. Masaka that O. VI rule 15 of the Civil procedure Code 1966 governed verification of pleadings.

I think both counsel are wrong as to the law applicable. Having found that this is a proceeding against the government, I think the applicable law is 0.VI rule 15 of the Government Proceedings (Procedure) Rules. Happily, however the wording of the rules is the same.

According to Order VI (15) of the Government Proceedings (Procedure) Rules, which is in pari material with the same rule in the Civil Procedure Code 1966, every pleading has to be verified at the foot by the party or by some other person proved to the satisfaction to the Court to be acquainted with the facts of the case. It also provides that the person verifying, shall specify by reference to each paragraph, what he verifies of his own knowledge and what he verifies upon information. It also provides for the signing of the verification by the person making it.

MOGHA in his book, **LAW OF PLEADINGS IN INDIA,** 16th ed. P. 54 gives the following comment:

> *"In a sit by or against the government the pleading shall be signed by such person as the government may, by general or special order appoint in that behalf and shall be verified by any person whom the government may so appoint and who is acquainted with the facts of the case."*

On the objects of the verification and signature, the learned author further comments (p.52):-

> *"…While signatures are necessary to show that the pleading has been filed with the knowledge and approval of the party, the object of verification is to fix responsibility for the statements made therein upon someone before the court proceeds to adjudicate upon them."*

I agree with the state attorney that there is no rule that requires the full identification of a person who verifies a pleading, but I think it is desirable to do so, if the object of verification is to be achieved. But, whether such a person is authorized or **really** acquainted with the facts, is, I think, a matter of evidence that could not properly be probed into in a preliminary objection on a point of law.

I have carefully looked at the verification clause of the Written Statement of

Defence complained about by the Plaintiff. I am satisfied that it is properly verified and signed by the state attorney; whether the state attorney was authorized to sign or acquainted with the facts, or really informed by TANROADS, is a matter of evidence, which we cannot go into at this stage. All that the Court can look at in handling a preliminary objection on a point of law is the face value of the pleading. As to whether **TANROADS** could supply the requisite information, my view is that as a legal entity and obviously through its officers, I think it can although like in the case of the person who verifies it is desirable to identity the informant "*officer.*" *I do not, however, think that the non disclosure of the name of the information is in itself fatal. With those observations, must conclude that I am unable to find anything wrong with the verification of the Written Statement of Defence.*

But even if I were to find that the verification and the signature were defective, would I been titled to strike out the Written Statement of Defence as suggested by Mr. Masaka? I think not. Why? According to **MOGHA** (supra) p. 55:-

> "*What of signature or verification or any defect in either will not make the pleading void, and the sit cannot be dismissed, nor can a defence be struck out simply for want of or a defect in the signature or verification of the plaint or written statement as these are matters of procedure only. The defect may be cured by amendment at any stage of the suit.*

This reasoning has been followed by the Courts in this country. Thus, in **PHILIP ANANIA MASASI VS RETURNING OFFICER, NJOMBE NORTH CONSTITUENCY, THE ATTORNEY GENERAL & JACKSON MAKWETA** (Misc. Civil Cause No. 7/95 (unreported) Samatta JK. (as he then was) held:-

> "*As I apprehend the law, want of or defect in verification does no make a pleading void, it is a mere irregularity which is curable by amendment.*"

At the end of the day, I find that not only is the verification clause in the Written Statement of Defence, not defective in any way, but also that even if it were, it is curable by amendment and does not attract the sanction of being struck out advocate for by Mr.Masaka, learned Counsel. His preliminary objections too, must fail.

In the event, I find and hold that both sets of preliminary objections are devoid of substance and must fail. I must now dismiss them, and order that each party shall bear their own costs.

Order accordingly,

S.A. MASSATI
JUDGE
9/11/2007