

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

COMMERCIAL CASE NO. 52 OF 2007

**HAMIDU NDALAHWA MAGESHA MANDAGANI.....PLAINTIFF
VS**

**RAYNOLD MSANGI.....1ST DEFENDANT
REDA FARM & LIVESTOCK PARTNERS.....2ND DEFENDANT
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R U L I N G

Date of Last Submission – 27/9/2007

Date of Ruling – 8/10/2007

MASSATI, J

The Plaintiff has filed a suit in this case against the two Defendants for specific performance of an understanding to form a joint venture business of livestock keeping and trading project. This can be garnered from clause 4 of the plaint.

In response the Defendants have filed a written statement of defence which is prefaced by a number of preliminary objections. The objections are that:

- (1) No leave was sought to file a representative suit.
- (2) Lack of locus standi over ranching sublease.
- (3) Incompetence of Court jurisdiction.

On receipt of this statement of defence the Plaintiff filed a reply in which he joined issue with the Defendant in their statement of defence, and also filed two preliminary objections namely: -

- (a) That the present written statement of defence be struck out as it has been filed and signed by a person not a party to the case.
- (b) That the said Dagan Kimbwereza has no locus standi to address the Court on behalf of the 1st Defendant.

On 31/8/2007, I ordered the parties to argue their preliminary objections by written submissions. Although, as a rule of practice no preliminary objection could be raised against another preliminary objection, I allowed the Plaintiff to also argue his preliminary objections because they call into question the competence of the written statement of defence which had raised the first preliminary objections on board.

In order to reach the Defendants' written statement defence, the Plaintiff's preliminary objections must be determined first.

As hinted above the Plaintiff's preliminary objections centre around the locus standi of a Mr. Dagan Kimbwereza to sign the

statement of defence and to address the Court on behalf of the 1st Defendant.

The Plaintiff who is represented by Mr. Ngudungi, learned Counsel, submitted briefly, that since Mr. Kimbwereza, who signed the statement of Defence and appeared in Court is neither a party nor an advocate, nor a partner in the Second Defendant firm and as the power of attorney filed along with the plaint which was in itself ineffectual, he had no power to represent the Defendants. According to the learned Counsel, the power of attorney was in effectual because not only the donor was present in the country and physically and mentally fit, but also that it was not registered, as it was a registrable document.

On the other hand, the defendants first denied to have ever been served with the Plaintiff's submissions although they proceeded to file a **"Rejoinder on the Submission"** by the Defendants which begs the question which submission were the Defendants responding to if they were not served with the Plaintiff's principal submission.

Be that as it may, what I can gather from the Defendants' submission is that the 1st Defendant being a natural person could appear in Court on his own behalf and on behalf of the 2nd Defendant firm.

The first Defendant in this case is REYNOLD MSANGI. There is no dispute that on 22/8/2007 and 31/8/2007 a Mr. Kimbwereza appeared on behalf of the 1st Defendant. There is also no dispute that he is the one who filed the written statement of defence, describing himself as the "**Lead Partner**" of **REDA FARM LIVESTOCK PARTNERS**, and also holding a power of attorney for RAYNOLD E. MSANGI, the first Defendant.

Mr. Ngudungi's argument is that Mr. Kimbwereza is not a party to the suit. Secondly, the power of attorney exhibited by him to represent the 1st Defendant is ineffectual, it being not duly registered.

In my view, given the inscription at the foot of the written statement of defence, Mr. Kimbwereza, who described himself as a lead partner and in view of non disclosure of the partners in the 2nd Defendant, firm it is a question of fact, whether Mr. Kimbwereza is a party to the suit or not. Questions of fact cannot be resolved at the stage of preliminary objections, unless the said fact is not disputed. Since this fact is disputed by the Plaintiff, I find and hold that it is not a fit matter to be decided at this stage.

I agree, on the other hand, that in principle, a power of attorney is to be used to represent persons who are absent from the local jurisdiction of the Court, or with physical disability. However,

once again, I am of the firm view that whether or not a person is in or outside the local jurisdiction of the Court or whether or not he is physically or mentally unfit are questions of fact, and as held above, unless the same are not disputed they cannot properly be determined at this stage. On whether, the power of attorney is further ineffectual on account of non registration, I would not agree with Mr. Ngudungi. Although it is desirable to register a power of attorney, and it is normally registered under the Registration of Documents Act (Cap 117 – RE 2002) a power of attorney is not listed among those documents of which registration is compulsory under s. 8 of the Act. I would think that the registration of a power of attorney is only optional under s. 11 of the Act.

For all the above reasons I would find and hold that the preliminary objections raised by the Plaintiff are without merit. They are accordingly dismissed.

Having dismissed the Plaintiff's preliminary objections I now go to the preliminary objections raised by the Defendants.

The Defendants' principal objection is that as the partnership revolved around a sublease from NARCO ranch, the matter was therefore a land dispute. Therefore the Commercial Court had no jurisdiction.

Mr. Ngudungi, learned Counsel, rightly in view, submitted that the jurisdiction of the Court depends on the cause of action. Since the present dispute is for specific performance of a contract it had nothing to do with land. Therefore this Court is clothed with jurisdiction.

In my considered view, the jurisdiction of the Court is determined by the cause of action and the prayers sought by the Plaintiff. In the present case the Plaintiff's cause of action is for "*specific performance of an understanding to form a joint venture business of livestock keeping...*" as gathered from paragraph 4 of the plaint. In paragraph 11 of the plaint, the Plaintiff prays for an order of specific performance, or alternatively for a declaration that the intended joint venture has failed and the 2nd defendant be removed from the leased ranch.

The above cause of action and prayers are neither rooted on land nor depend on land ownership. There is therefore no land dispute between the parties. I will accordingly reject this point of objection. This disposes of the second and third objections.

The first objection is on want of leave to file a representative suit.

The Defendant's objection is founded on the provisions of O.1 rule 8 of the Civil Procedure Code. They submit that since the 2nd Defendant's partners are not mentioned by name, all the partners are being sued, and ought to have been preceeded by leave of the Court.

Mr. Ngudungi's reaction was that since the argument was not advanced in the Defendants' submission they must be taken to have abandoned it.

Although the Defendants appear to have abandoned this point in their submissions, the point was nevertheless raised and substantively argued in their written statement of defence. I cannot ignore it.

The position of the law is that according to O. XXIX of the Civil Procedure Code (cap 33 – RE 2002) two or more persons carrying on business in a name other than their own, may sue or be sued in the name of the firm. According to paragraph 3 of the plaint the 2nd Defendant is a partnership firm, which fact is not disputed by the Defendants.

The above being the case. O. 1 rule 8 of the Civil Procedure Code Act, does not apply. The Defendants' objection on this point therefore is devoid of substance.

For the above reasons all the Defendants preliminary objections are found to be lacking in substance. They are also accordingly dismissed.

In fine then, I find no merit in the preliminary objections raised by both the Plaintiff and the Defendants and I hereby proceed to dismiss them. As both parties have not succeeded in their objections, each party shall bear their own costs.

It is so ordered.

S.A. MASSATI

JUDGE

8/10/2007

1,439 words

I Certify that this is a true and correct
~~original~~ Judgment Ruling
Sign _____
Registrar Commercial Court, Dsm.
Date 11 / 10 / 07