IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.47 OF 2009

A/S NOREMCO CONSTRUCTION (NOREMCO) ..... PLAINTIFF

VERSUS

DAR ES SALAAM WATER AND SEWERAGE AUTHORITY (DAWASA) ..... DEFENDANT

Date of last order: 14/08/2009

Date of final submissions: 02/10/2009

Date of ruling: 23/10/2009

RULING

MAKARAMBA, J.:

The Plaintiff, a limited company incorporated in Norway having certificate of compliance in Tanzania, on the 19th day of June 2009, filed a Plaint in this Court suing the Defendant, a statutorily established parastatal organization, for payment of certain sums of monies being an amount the Plaintiff claims is due and payable to the Plaintiff arising from a decision of an adjudicator made on 19th December, 2006.

On the 17th day of July 2009 the Defendant filed its written statement of defence together with a Notice of Preliminary Objection that on the first day of hearing the Defendant will move this Court to strike out the suit with costs to the Defendant on three main grounds, that:

1. *The Plaint does not disclose a cause of action against the Defendant*
2. *The suit is incompetently before this Court because the matter and issues arising there from are res judicata between the Plaintiff and City Water Services Limited and hence should be subjected to execution proceedings.*
3. *The suit is defective because of non joinder of a proper and necessary party known by the name City Water Services Limited.*

On the 28th day of July, 2009 the Defendant filed a further Notice of Preliminary that:

4. *The verification clause contained in the Plaint is defective because it does not state the date on which and the place at which it was signed.*

On the 27th day of July, 2009, the Plaintiff in its Reply to the Written Statement of Defence also raised preliminary objections on points of law that:

(a) The Written Statement of Defence has been filed out of time without leave of the Court; and

(b) The Defence is not properly signed contrary to the mandatory provisions of Order VI Rule 14 of the Civil Procedure Code [Cap.33 R.E. 2002].

The learned Counsel for the Plaintiff prayed that the Defense be struck out with costs and the Plaintiff be given leave to prove the case ex parte.

It is trite to point at the outset that in deliberating on the preliminary objections raised by both parties I will be guided by the principle in **MUKISA BISCUIT MANUFATURING CO. LTD VS WESTY END DISTRIBUTORS LTD [1969] EA 696** that objections should be raised on a pure point of law, and cannot be raised if any fact has to be ascertained. Further, that a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit. I am also guided by the principle set out in **JOHN M. BYOMBALIRWA V AGENCY MARITIME INTERNATIONALE (TANZANIA) [1983] T.L.R. 1**, that in determining whether or not a Plaint discloses a cause of action, it is the Plaint and not reply to the defence or any other pleading that should be considered.

In the course of making submissions in reply to the submissions by of the Defendant on the preliminary objections, the learned Counsel for the Plaintiff raised a concern over the impropriety of the notices of preliminary objection of the Defendant, by filing the notices separately and not through the written statement of defence as per the law required. The learned Counsel for the Defendant in rejoinder submitted on this point that the learned Counsel for the Plaintiff in raising without any notice the new preliminary objection that the Defendant's Notices of Preliminary Objection are improperly before the Court has literally ambushed and taken the Defendant by surprise. It was the further contention of the learned Counsel for the Defendant that it is an established law that a party should raise its preliminary objection by giving notice so as not to take the opposite party by surprise. In support of this point, the learned Counsel for the Defendant cited Order VIII Rule 2 of the *Civil Procedure Act* [Cap.33 R.E. 2002], and

insisted that the said Order is emphatic that a preliminary point of law that a party raises should not take the opposite side by surprise. The learned Counsel for the Defendant surmised that the Plaintiff's new ground of objection is not therefore properly before the court for want of notice to the Defendant. This is a clear breach of Order VIII Rule 2 of the Civil Procedure Code, the learned Counsel for the Defendant contended and buttressed this point by citing the decision of Masati, J. (as he then was) in **JOSEPH OBETO V ALI SULEMAN KHAMIS (High Court) Commercial Case No.16 of 2006** (unreported), where the Court overruled a preliminary objection on the ground that it was not preceded by notice.

The main complaint by the learned Counsel for the Plaintiff seems to be against the manner in which the learned Counsel for the Defendant has raised the preliminary objections by filing notices thereof separately and not through the usual way by including them in the written statement of defence as per the law required. I am at one with the submissions by the learned Counsel for the Plaintiff in rejoinder that as per the law and the practice as it stands now, a notice of preliminary objection can be contained in the pleading or filed separately. In this suit, although the notice and the written statement of defence were prepared separately, they were filed simultaneously in court. I think this issue should not detain us longer than is necessary. Suffice to point out here that, indeed, as prescribed under Order VIII Rule 2 of the *Civil Procedure Code Act*, a preliminary objection is to be raised in the defence. In my view, however, that Order is not exhaustive on the modes by which preliminary objections can be raised. I am fortified in this view, and indeed, as submitted by the learned Counsel for the Defendant and rightly so in my view, by the fact

that the rationale behind Order VIII Rule 2 of the *Civil Procedure Code Act* is guarding against catching the opposite side off guard by insisting on the need for the Defendant to raise in the defence all matters pertaining to the suit being unmaintenable and all such grounds of defence. In any event, a preliminary objection on matters such as for example, jurisdiction and limitation of time, as submitted by the learned Counsel for the Defendant and rightly so in my view, can be raised at any point in time even and on appeal. This, in my view, clearly demonstrates that there is more than one mode in which preliminary objections on point of law can be raised in civil proceedings. Objections can be raised either in the written statement of defence or separately by a notice or even suo motu by the Court itself and particularly where they relate to jurisdictions or the limitation period. I do not therefore find anything objectionable in the manner in which the learned Counsel for the Defendant has raised the preliminary objections by filing separate notices thereof instead of raising them in the written statement of defence. In that regard therefore the fact that the learned Counsel for the Plaintiff too has raised preliminary objections in the course of making submissions levels out any argument on impropriety of the notices by the Defendant, particularly considering that the learned Counsel for the Defendant has been able to traverse and respond to the objections raised by the learned Counsel for the Plaintiff. This goes to show that lack of prior notice on the preliminary objections raised by the learned Counsel for the Plaintiff in the course of making submissions as complained about by the learned Counsel for the Defendant has in anyway not prejudiced or embarrassed the Defendant. I accordingly dismiss the objection of the

learned Counsel for the Plaintiff on the impropriety of the notices of preliminary objection by the learned Counsel for the Defendant.

Let me now address the substantive preliminary objections raised by the learned Counsel for the Plaintiff. It is the contention of the learned Counsel for the Plaintiff that the written statement of defence has been filed out of time and without the leave of the Court; and that the verification clause in that defence is not properly signed contrary to the mandatory provisions of Order VI Rule 14 of the Civil Procedure Code [Cap.33 R.E. 2002]. The learned Counsel for the Plaintiff urged this Court to strike out the written statement of defence with costs and the Plaintiff be given leave to prove the case ex parte.

The learned Counsel for the Plaintiff submitted that as the Plaint was filed in Court on 19th June 2009, a copy of which and summons were served on the Defendant on 23rd June 2009, as per Order VIII Rule 1(2) of the Civil Procedure Code, the Defendant was required to have filed the Defence by 13th July 2009, and therefore in filing it on 17th July 2009, this was out of the statutorily prescribed time of twenty one days, and this has been done without the Defendant first seeking the leave of the Court as specifically required by law. The learned Counsel for the Plaintiff cited the case of **TANZANIA HARBOURS AUTHORITY VS. MOHAMED R. MOHAMED Civil Case No.80 of 1999,** where the CAT insisted on the strict observation of rules of court, as well as the case of **MOBRAMA GOLD CORPORATION LTD VS. THE MINISTER FOR ENERGY AND MINERALS AND OTHERS [1998] T.L.R. 425** where Mapigano, J. (as he then was) referring to the English case of **CASTELOW VS. SOMERSET**

COUNTY COUNCIL **[1993] All E.R. 952**, gave the rationale behind observance of rules of court, which are devised in the public interest to promote expeditious dispatch of litigation and that the prescribed time-limits are not "*targets to be aimed at or expressions of pious hope but requirements to be met.*"

The learned Counsel for the Defendant in reply submitted that the summons to file defence together with the Plaint, were served on Dar es Salaam Water and Sewerage Corporation (DAWASCO) on 23 June 2009, and not the Defendant, DAWASA. It is further submission of the learned Counsel for the Defendant that DAWASCO in turn served the said summons to file defence together with the Plaint on the Defendant herein, DAWASA, on 01 July 2009. According to the learned Counsel for the Defendant, in terms of Order VIII Rule 1(2) of the Civil Procedure Code, the deadline for filing the defence was therefore 22 July 2009 and on the 17 July 2009, when the Defendant filed the defence it was within time.

In his response to the preliminary objection by the learned Counsel for the Plaintiff that the defence has been filed out of time and without leave of the court, the learned Counsel for the Defendant fronted a multi-pronged attack. That the service of the summons to file defence on 23 June 2009 was on DAWASCO and not the Defendant herein, DAWASA, and therefore it amounts to no service for three reasons. First, DAWASCO and the Defendant herein, DAWASA, are two different and separate entities. Secondly, DAWASCO is not constituted an agent of the Defendant herein, DAWASA, to warrant service on DAWASCO on behalf of the Defendant herein, DAWASA. Thirdly, even if DAWASCO is deemed to be an agent of

the Defendant herein, DAWASA, which is strongly disputed, Order V Rule 12 of the Civil Procedure Code provides for service of summons on the Defendant in person where it is practicable.

The learned Counsel for the Defendant submitted further that where there is improper service, the party concerned was, as per the decision in **AMIRI V. YUSUFU RAJAB [1995] T.L.R. 26,** not informed of what was required of him to do timely as per the summons and further that time started to run against the Defendant from the date of the proper service of summons, which was 01 July 2009.

I have examined the record on record. On the 10/07/2009, in the absence of the Counsel for the Plaintiff, one Mr. Francis Kamuzora appearing for the Defendant informed this Court that they have served on 01/07/2009, and prayed to file written statement of defense by 17/07/2009 which prayer this Court duly granted. In compliance with this the Defendant duly filed its written statement of defense on 17/07/2009. I do not therefore find any logic in the argument by the learned Counsel for the Plaintiff that the written statement of defense has been filed out of time and without the leave of this Court. Accordingly, the preliminary objection is hereby dismissed.

The learned Counsel for the Plaintiff also raised a preliminary objection that the written statement of defense was not properly signed. It was the submission of the learned Counsel for the Plaintiff that the law requires pleadings to be signed by a party and its advocate if any and that the signature of the person drawing and filing the pleading is different from signing the pleading itself, as signing does not signify that the drawer is

verifying the authenticity of the information in the pleading but simply confirming that such party did draw and file the pleading. It was the further argument of the learned Counsel for the Plaintiff that since the defence was drawn and filed by Mkono & Advocates as is confirmed by the signature of Koyugi learned Advocate it follows that an advocate from this firm ought to have signed the pleading together with the principal officer of the Defendant. The learned Counsel for the Plaintiff argued that since this was not done it was a breach of the specific requirement of Order VI Rule 14 of the Civil Procedure Code. The learned Counsel for the Defendant in response submitted that a signature that is in the drawn and filed clause is sufficient to comply with the requirement of the law that pleadings should be signed by advocate.

It would appear that the controversy between the Counsels is on the requirement of the law as to the signing of pleadings, whether it should be on the content part of the pleading and on the verification clause. Order VI Rule 14 of the Civil Procedure Code provides that every pleading must be signed by the party and his advocate (if any). The said Order however provides further that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. With due respect to the learned Counsel for the Plaintiff, I do not find anywhere in the said rule where it is indicated as to the place in the pleadings where the signatures should be affixed. If anything the learned Counsel for the Plaintiff is taking issue with a practice as to signing of pleadings and not the requirement of the law. In that regard a good or best practice signing pleadings remains as such and does not make for the law.

This is evident from the question the learned Counsel for the Plaintiff posed that if the learned Counsel for the Defendant seriously believes that the law does not require signing to be on the content part of the pleading why did he take trouble to sign twice in the notice of both the preliminary objections? I need not beleabour much asking myself whether notices of preliminary objections are pleadings as envisaged under Order VI Rule 14 of the Civil Procedure Code and therefore require affixation of signatures in the manner the learned Counsel for the Plaintiff considers befitting the requirements of the law, if there is any. Suffice however to point out here that even if I were to determine that indeed the learned Counsel Plaintiff has been able to establish that the written statement of defence was not properly signed, which I do not think, this is the kind of error which is not that fatal and can very easily be cured by an amendment. Accordingly, the preliminary objection by the learned Counsel for the Plaintiff that the written statement of defense is defective for want of proper signing is hereby dismissed.

Let me now consider the substantive preliminary objections raised by the learned Counsel for the Defendant that the Plaint does not disclose a cause of action against the Defendant; that the matter is res judicata; that his Court should strike out the suit on the ground of non-joinder of necessary and proper party and that the verification clause in the Plaint is defective.

The argument of the learned Counsel for the Defendant is that as the Plaint claims in paragraph 5, the Meter Installation Agreement between Plaintiff and City Water was terminated by mutual agreement of the

parties on 13 December 2004 and the Lease Contract between City water and the Defendant was terminated on 01 June 2005. The Plaintiff claims further in paragraph 13 of the Plaint that the Defendant was assigned all the contracts between the Plaintiff and City Water upon termination of the lease, on 01 June 2005. The learned Counsel for the Defendant submitted that once a contract is terminated by agreement of the parties, the attendant rights and obligations thereto are completely discharged and cannot be revived, citing the case of **ANDRE ET CIKE SA V. MARINE TRANSOCEAN LTD [1981] QB 694** as authority for this statement.

The learned Counsel for the Plaintiff in reply submitted that the contention of the learned Counsel for the Defendant that duties and liabilities of a contract are not capable of being assigned is unfounded if the contract itself is assignable. It is the further contention of the learned Counsel for the Plaintiff that nowhere in the Plaint, it has been suggested that entitlements of the Plaintiff for work already done up to the time of assigning of the contracts was forsaken. The learned Counsel for the Plaintiff submitted further that the Plaintiff carried out its contractual obligations under the FIDIC contract, but the Defendant did not pay the Plaintiff for work done. It is the further contention of the learned Counsel for the Plaintiff that the Plaintiff is therefore demanding for the payment of the outstanding amounts in accordance with the contract. It was the further contention of the learned Counsel for the Plaintiff that since the Defendant admits that the City Water's agreement and obligations have been assigned to the Defendant, it makes the preliminary objection superfluous and the matter should be adjudicated on merits.

I have carefully weighed the submissions of both Counsels on the preliminary objection that the Plaint does not disclose a cause of action. There are certain matters evident therefrom. As submitted by the learned Counsel for the Plaintiff and rightly so in my view, as a matter of principle, a cause of action constitutes facts or allegations which if proved, entitle the Plaintiff to a judgment and decree, and that this is not the same as the evidence required to prove the facts contained in the pleadings. This finds support in Order VII Rule 11 of the Civil Procedure Code that the cause of action should be clear from the pleading without a need for further clarification. As to what constitutes a cause of action no other authoritative statement can be relied upon than ***P.C. Mogha, The Law of Pleadings in India*** (Eastern Law House, Calcutta 14th Edition, 1987, which both learned Counsels seems to have sought refuge in to support their arguments as to what constitutes a cause of action.

The learned Counsel for the Plaintiff has very ably summarised the *litis contestatio* in the following words: that there is an allegation of a contract; that the Plaintiff claims to have complied with its obligations under the contract; that the Plaintiff claims that it was not paid for the work done; that the Plaintiff claims that the contract was later assigned to the Defendant who also continues to enjoy the benefits of the contract; and that the Plaintiff claims that all demands of the Plaintiff for payment of the amounts outstanding have not been headed to. I was asking myself and having followed the arguments of the learned Counsel for the Defendant, what other better way there is for the Plaintiff to plead a cause of action worth to be adjudicated upon by this Court than this one. With due respect to the learned Counsel for the Defendant, and without in any way being

disrespectful to his submissions and the plethora of authorities cited therein with regard to what kind of contractual rights and benefits are capable of assignment and which duties and obligations of a contract are not capable of being assigned, these are matters which require evidence to establish. They cannot, and on the authoritative statement in **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD [1969] EA 696,** be said to be on a pure point of law. In the event and for this reason, the preliminary objection that the Plaint does not disclose a cause of action is accordingly hereby dismissed.

Let me now deal with the related preliminary objection that this Court should strike out the suit on the ground that it is res judicata. It was the submission of the learned Counsel for the Defendant that in terms of paragraph 9, 10 and 11 of the Plaint, the Plaintiff referred the dispute against City Water to an adjudicator who on 19th December 2006 determined it wherein City Water was found liable to pay to the Plaintiff herein certain sums of monies, which decision is binding on the parties to the adjudication proceedings and which decision has not been challenged by City water or the Defendant herein. It was the further submission of the learned Counsel for the Defendant that in terms of paragraph 3 and 6 of the Plaint, the Plaintiff's claim that was submitted to adjudication relates to a balance of outstanding payments for works carried out for City water in pursuance of the Meter Installation Agreement and therefore there is no gainsaying that the matters that are at issue in this suit were directly and substantially at issue in the already finalised adjudication proceedings between the Plaintiff and City Water. The learned Counsel for the Defendant submitted further that at the time of the adjudication

proceedings, only City Water and the Plaintiff (NOREMCO) were parties, but the Plaintiff has craftly sidestepped City Water and sued the Defendant. The learned Counsel for the Defendant was quick to add that in the finalised adjudication proceedings, City Water was sued in the title and capacity of a debtor of the Plaintiff, but in this suit, the Defendant is being sued under the notion that it is an assignee of City Water's debts owed to the Plaintiff herein; hence the Defendant's title herein is a purported debtor of the Plaintiff thus the defendant is litigating under the same title as City Water's which in effect brings this suit within the purview of section 9 of the Civil Procedure Code. The learned Counsel for the Defendant surmised that given that the adjudicator's decision has become final and binding on the parties and that the adjudication was intended to finally settle the contractual rights and entitlements of the parties, the adjudicator's decision finally and conclusively determined the dispute between City Water and the Plaintiff. The learned Counsel for the Defendant reasoned in his submissions that had City Water enforced the said decision to the letter neither the Plaintiff nor City Water would have retained any further claims arising out of the Meter Installation Agreement.

As regards the application of the doctrine of res judicata to arbitration proceedings, the learned Counsel for the Defendant has summoned to his arsenal ***Sarkar's Law of Civil Procedure***, 11th Edition, 2006 at page 177 and concluded that the effect of an arbitration award is to preclude either party from bringing fresh proceedings in respect of the cause of action which has been determined by the award. In buttressing this point, the learned Counsel for the Defendant drew inspiration from **FIDELITAS SHIPPING CO. LTD V V/O EXPOTCGLEB [1966] 1 QB 630,** and prayed

that this suit is incompetent and therefore the Plaintiff is barred from bringing fresh proceedings in respect of the same dispute that was the subject of adjudication.

It would seem that in the considered estimation of the learned Counsel for the Defendant, the adjudicator's decision has become binding on the Plaintiff herein and City Water who were parties to the adjudication proceedings and as such on the authority of **PEGRAM SHOPFITTERS LTD V TALLY WEIJIL (UK) LTD [2003] 3 All ER 98** and **AMEC V. WHITEFRIAS CITY ESTATES (DYSON) [2005] 1 All ER 723**, in England it is settled law that a valid decision of an adjudicator becomes legally enforceable as an award. It is rather unfortunate that the learned Counsel for the Defendant has denied this Court the opportunity of knowing whether the legal position in Tanzania in so far as the law on enforceability and validity of valid decision of an adjudicator is concerned is the same as that obtaining in England.

I am at one with the submissions of the learned Counsel for the Defendant with regard to the doctrine of res judicata and its application to arbitration proceedings. There are two issues still begging – whether the parties in the adjudication proceedings are the same as the parties in the present suit; and whether the present suit amounts to execution proceedings as the learned Counsel for the Defendant would wish this Court to believe. In order to resolve these issues, the controversy over the application of the doctrine of res judicata in this suit, and a determination of the preliminary objection that in this suit there is non-joinder of necessary and proper party have to be tackled.

It is the submission of the learned Counsel for the Defendant that in terms of paragraph 3 of the Plaint, it is money payable under the adjudication decision and award that this suit seeks to recover by enforcing the adjudicator's decision and award. In the view of the learned Counsel for the Defendant therefore, City Water is a necessary party whose presence in these proceedings is essential for the effective enforcement of the adjudicator's award and therefore its non-joinder is fatal to the case if the defendant succeeds in showing that the Plaintiff had no cause of action against the Defendant. In buttressing this point, the learned Counsel for the Defendant has cited **JUMA B. KADALA V LAURENT MUKANDE [1983] TLR 103** and relied on the commentary of ***Sarkar's Law of Civil Procedure***, 11th Edition, 2006 at page 882. The learned Counsel for the Defendant surmised that given the non-joinder of City Water, neither the Court nor the Defendant herein can establish whether the adjudicator's decision and award has been enforced and discharged by City Water, against whom the adjudicator's decision was entered directly.

In reply, the learned Counsel for the Plaintiff submitted and rightly so in my view, that by simple logic by the Defendant distancing itself by contending that the adjudication was between the Plaintiff and City Water and that the Defendant was and is not privy to the proceedings, the Defendant cannot therefore seek comfort in the plea of res judicata. It was the further submission of the learned Counsel for the Plaintiff that the Plaintiff is suing on the award arising from the adjudication between the Plaintiff and City Water, which is not a party in the present proceedings and that the Defendant was not a party to the concluded adjudication proceedings. I am at one with the learned Counsel for the Plaintiff that the

Plaintiff cannot execute a judgment against the Defendant which was not afforded an opportunity to defend itself. As I have already determined when disposing of the preliminary objection that the plaint does not disclose a cause of action, the determination of this suit on merits is necessary to establish whether the Defendant is liable for duties and liabilities of City Water before the Plaintiff can be able to execute the award which in effect is City Water's liability. I am at one with the learned Counsel for the Plaintiff that the learned Counsel for the Defendant has failed to appreciate that the Plaintiff is suing on the award and is not seeking to execute it against the Defendant. The Plaintiff is suing on the award arising from the adjudication between the Plaintiff and City Water, which is not a party in the present proceedings and that the Defendant was not a party to the concluded adjudication proceedings. I do not see therefore how the Plaintiff is to proceed with execution proceedings against the Defendant as the learned Counsel for the Defendant seems to suggest. Furthermore, since it is not disputed by the Defendant that City Water assigned its rights and obligations under the contract, it will be a contradiction in terms, as the learned Counsel for the Plaintiff argued and rightly so in my view, for the Defendant on the one side to concede that it inherited all the rights and liabilities of City Water and on the other hand to again claim that City Water is a necessary party.

In the event and for the reasons I have endeavoured to explain above I accordingly dismiss both the preliminary objections that this matter is res judicata and non-joinder of necessary party.

On the preliminary objection raised by the learned Counsel for the Defendant that the verification clause in the Plaint is defective for not showing the place and date of verification, the learned Counsel for the Plaintiff has readily conceded. With due respect to the learned Counsel for the Defendant this is not a fatal error attracting the drastic measures proposed. It is an error which is curable by simple amendment of the pleadings. I am therefore at one with the learned Counsel for the Plaintiff that this error is not that fatal and is easily curable as was aptly stated by Samata, J (as he then was) in **PHILIP ANANIA MASASI VS RETURNING OFFICER (NJOMBE NORTH CONSTITUENCY) AND 2 OTHERS Misc. Civil cause No. of 1995** (High Court) (unreported), that "want of, or defect in, verification does not make pleading void; it is mere irregularity which is curable by amendment."

In the upshot and for the reasons I have explained above the preliminary objections raised by the learned Counsel for the Defendant, to the extent indicated above, are hereby dismissed with costs, which costs shall be in the cause. Equally, the preliminary objections raised by the learned Counsel for the Plaintiff, are to the extent shown above also dismissed with costs, which costs shall also be in the cause. It is accordingly ordered.

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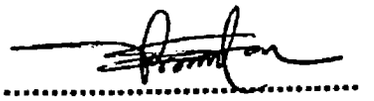
R.V. MAKARAMBA

JUDGE

23/10/2009

Ruling delivered in Chambers, this 23rd day of October, 2009 in the presence of Mr. Koyugi learned Advocate for the Defendant and in the absence of the Plaintiff.



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R.V. MAKARAMBA

JUDGE

23/10/2009