

IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM
COMMERCIAL CASE NO. 61 OF 2010
AFRICAN BANKING CORPORATION.....PLAINTIFF

VERSUS

- 1. WILLIAM DOUGLAS HUME CLAXTON.....1ST DEFENDANT**
- 2. GULAMALI SHAN BOKHARI.....2ND DEFENDANT**
- 3. ANTHON BUDERNHUST.....3RD DEFENDANT**
- 4. POWER ROADS (T) LIMITED.....4TH DEFENDANT**

RULING.

4.11.2011 & 10.11.2011

Nyangarika , J

The Plaintiff through the services of REX ATTORNEY'S has raised preliminary points of objections to the effect that the joint written to statement of defense filed by the defendants on 15th day of July 2010 is incurable defective and be struck off because of the following reasons;

1. It has not been signed by the defendants contrary to **Order VI Rule 14 of the Civil Procedure Code, 1966.**
2. Alternatively, it has not been signed by the 4th defendant in accordance with **Order XXVIII rule 1 of the Civil Procedure Code.**



When the objection came up for hearing, Mr Sinare, Learned counsel, appeared for the Plaintiff and Mr.Mluge, Learned counsel, appeared for the defendants.

Citing **Massawe and Company versus Jashbai P. Patel &18 others (1998) T.L.R445 (H.C)** and **Stella Mwanyika versus CBS, civil case No.7 of 2006, Arusha Registry, (H.C)** , Mr Sinare, argued on the first point that the written statement of defense was signed by an advocate without authorization on record . He submitted that under the law and according to the authorities he has cited, the authority in question, is not a matter of private arrangement but must be recorded by the court.

Mr. Sinare, submitted that as the Law stands, an Advocate, or recognized agent of a party must be a donee of the express authority to sign pleadings. He submitted further that if any other party does that work of signing or verifying pleading, he should satisfy the court by Affidavit or otherwise, that he is acquainted with the facts of the case.

In emphasis, Mr. Sinare, submitted that an Affidavit will not be required if the one making the verification is a recognized agent of the party.

Finally, Mr. Sinare concluded by saying that there is nowhere in the written statement of Defense shown that the learned counsel for the defendants was authorized to sign the pleadings or was an authorized agent.

On the second limb of the objection, Mr . Sinare, submitted that, in terms of **Order XXVIII rule 1 of the Civil Procedure Code (Cap.33 R.E 2002)**,an advocate who signs pleadings on behalf of the party, should possess express instructions from either of among the three officers covered therein, so that, in the event of the need of clarification of the issue(s) , such officer can be consulted. Mr. Sinare invited me to strike out, the written statement of Defense, with costs.

In rebuttal, Mr. Mluge, learned counsel for the defendant , vehemently , maintained that once an instruction is given to an Advocate, such instructions has no limitation and therefore an Advocate can sign or |and verify pleadings. He argued that there are no requirements of filling an Affidavit or any other instrument or otherwise, to show that the authorization has been given as argued by Mr. Sinare.

On the second objection, Learned counsel for the defendants submitted that the provisions of **Order 28 rule 1 of CPC** do not require any authorization for an advocate, either from the secretary or Director or Principal officer of the 4th defendant for signing or verifying the pleadings by an Advocate.

Mr. Mluge invited me to overrule the objection with costs for lack of merit and he was actually of the view that the cited cases support his arguments.

Since both sides relied on the cited cases, I must confess at the outset that the two cases of **Massawe and Company (supra)** and **Stella Mwanyika (Supra)**, as cited by Mr. Sinare, learned Counsel for

the plaintiff to fortify his arguments on the points, were both decided by this court.

In the case of of **Kiganja and Associated Gold Mining Company Ltd versus University Gold WL (2002) TIR 129 at page 130**, Kalegeya, J (as he then was) held, *interalia*, that :

" It is desirable that decision of courts on similar situations should not be in conflict and should avoid giving false impression that the result of cases in court of law perhaps depends more on the personality of judges than on the law of the land , so a judge should not lightly discern from the considered opinion of his brother or sister"

That decision was followed in another case of **ULC (Tanzania) Limited versus National Insurance Certification Corporation and another (2003) T.L.R 219 (HC)**, when this court sitting with Bwana J(as he then was) held that *" Judges of the same court should not give conflicting decisions over similar, issue (s) , unless it is absolutely necessary"*

The position was settled by the full bench of the court of appeal in the case of **Ali Linus and 11 other versus Tanzania Harbour Authority and Labour conciliations Board of Temeke (1998) T.L.R 5(C.A)**, where it was held, *interalia*, that *"it is not a matter of courtesy but a matter of duty to act judicially that requires a judge not lightly to discern from the considered opinion of his brethren."*

courtesy but a matter of duty to act judicially that requires a judge not lightly to discern from the considered opinion of his brethren."

I am also mindful of the fact that judges of the same court should seldom give conflicting decisions (See also **J.S. Mutungi Versus University of Dar-Es-Salaam [2001] T.L.R 261 (C.A).**)

My reading of **Order 6 rule 14 and order 28 rule 1 CPC**, tells me that when the pleading has been drawn, the party pleading or his Advocate must sign such pleading. If, however, 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 authorized by him to sign the same or to sue or defend on his behalf.

Besides, unless otherwise provided by any law, every pleading must be verified at the foot and signed and dated by the party or parties pleading, or by same person proved to the satisfaction of the court to be acquainted with the facts of the case.

The person verifying must specify the references to the numbered paragraphs of the pleadings what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

In our case of hand, the joint written statement of Defense was signed and verified by the Advocate who appeared for the defendants beneath with the words *"Advocate for the defendants duly authorized and instructed to depose to the facts of his case"*.

The main contentious issue between the counsels for both parties is whether the above words qualify to be termed a proper authorization for an Advocate to sign and/or verify pleadings as envisaged under the provisions of **Order 6 rule 14** and **order 28 rule 1 of the CPC**.

The answer of Mr. Sinare is no while that of Mr. Mluge is yes.

My brother, Mackanja J (as he then was) in **Massawe and company (Supra)**, citing **Mogha's Law of pleadings in India, 14th Edition**, has ruled that the court should be satisfied, by Affidavit or otherwise, that there is sufficient reason for dispensing with the signature of the party, and that the person who proposes to sign the pleading on his behalf is an authorized person.

Further that the authorization to a person other than a party to sign the pleading can also be stated in the pleading in a separate paragraph or in a note at the end. Also that it is not necessary that a person authorized should be authorized specifically to sign the pleading. A General Authority to sue or defend on behalf of the party is sufficient.

In **Stella Mwanyika case (Supra)**, Chocha, J held that a statement by Advocate that he has been authorized to sign is not enough and a specific authority from the party is needed to support the fact that an advocate has been authorized to sign. Further that the duty does not end at the signing, but extends to the ability to depose the facts of the case, meaning that the advocate should be in a position to feature as a witness.

Therefore , His Lordship, Mr. Chocha, J. held that the powers for an Advocate under **Order 6 rule 14 and Order 28 rule 1 of CPC**, should be exercised carefully and rarely as an advocate is not legally expected to be both an Advocate and a witness in the same case. This position that an advocate is not expected to be both an advocate and a witness in the same case, also appears, in the cases of **Republic versus Philips (1844) 1Cox CC 17 from England, Robinson versus Palmer 1851 2ALL ER 223 from Canada and an Indian case of Re West Hopetown Tea Company (1886) ILR 9 All 180**).

The position is that an advocate is not expected to be both an Advocate and a witness in the same case. Thus, the authorization conferred should be clear to the advocate that such power to an Advocate is only limited to the signing of the Pleadings and not to the deposition of the facts of the case.

The above position was adopted in our jurisdiction in the case of **Akena Adoko chamber versus Mohamed , Masanja (1980) TIR 134(HC) and the Registered Trustee social Action Trust Fund versus Happy sausages Ltd, civil Application No 40 of 2000(C.A) (unreported)**).

In the case of **Kiganja and Associates Gold Mining company Limited versus universal Gold WL (2002) TIR 129 (HC)**, this court, sitting with Kalegeya, J. (as he then was), held, *interalia*, that:

(iii) the provisions of **Order 28 rule 1 and Order 6 rule 15 (1), (2) and (3) of the CPC**, read together, clearly preserve who can verify a

pleading by a company; it is either a Direction or a secretary or any of its principal official and **Order 6 rule 15 of CPC** indicates how the verification is to be done, which is by signing.

(iv) The requirement for verification is primary aimed at countering possible abuse of the court process and fixing responsibility, and, in suits involving companies, verification made in the manner in this case suffices, should the verifier not be a principal officer of the company, the other party can take it up as a challenge and the provision of **Order 28 rule 3 of CPC** will come into play.

The words *"Advocate for the defendants duly authorized and instructed to be depose to the facts of this case "*as indicated in the written statement of defense, which appears underneath the signature of the Advocate , does not, in my view, suggest that the defendants were absent and could not sign the pleadings in a reasonable time.

I entirely agree with Mr. Mluge, that, **Order 6 rule 14 of the C.P.C** gives discretion to the court under the proviso 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 authorized by him to sign the same or to sue or defend on his behalf.

This position was settled by the full bench of the court of appeal in the case of **Nimrod Elireheman Mkono versus State Travel Services Limited and Masoo Saktay (1992) T.L.R 24(C.A)** where it was held as follows: *"The proviso to Order 6 rule 14 of C.P.C. allows an*

Advocate by reason of absence of client or for other good cause to sign on behalf of his client”.

As rightly submitted by Mr. Sinare, there is no any indication in the pleading or otherwise, whether the defendants were unable to sign the joint statement of defense by reason of absence or for other good cause, and had authorized the Advocate to sign or| and verify on their behalf.

Now, what is the consequence of failure by a party to sign and or verify his pleading?

My brothers, Mackanja , J. in the case of **Massawe and Company (supra)** has held that such defect renders the pleading a nullity and, therefore of no effect, while Chocha , J. in the case of **Stella Mwanyika (supra)** , held, that the defects, is as if, no officer from the defendant came to court to depose the facts of the case for and on behalf of the defendants.

Since **Order 6 rule 14 and Order 28 rule 1 of CPC** is the exact reproduction of corresponding provisions **of India Civil Procedure Code, 1908,** the commentaries to the **India Code** as well as the decision by competent Indian courts are undoubtedly of great value and assistance provisions of our **Civil Procedure Code.**

Also since English Law was applied in the sub- continent of India, especially in Indian, **India Code of Civil Procedure 1908,** English authorities and analysis thereof, have great value and assistance in our **Civil Procedure Code.**

In India Jurisdiction, Indian courts have held that the requirement are mere matters of procedure and that, if say a plaintiff or defendant or their authorized agents, omit to sign or verify the pleading and the defect is discovered before judgment, the Plaintiff or defendant, as the case may be, may be ordered to amend the Complaint or written statement of defense by signing it. In other words, the omission to verify a pleading is not a defect that would nullify a pleading or affect the jurisdiction of the court (See **Mangwe versus Ma Hme (AIR) 1923 Rangoon 206**)

The learned authors, **Judge S.C.Sarkar and Advocate Prabhas C. Sarkar**, in their book titled "**Sarkars, the Law of Civil Procedure, 8th Edition, on page 621**", commented that the rule does not require any proof that the party was absent or unable to sign at the particular time.(**see B.R.Sharma versus Navakchand, A 1967, A,487**).

The object of signature and verification is to fix upon the party, the responsibility for the statement and to guarantee of good faith.(**see Basdeo versus Smidtt, A, 55, FB, Ross versus Scriven, 43 C, 100**). Mere absence is not a good cause of not signing. It is only absence of such a kind as makes the signature impossible that would justify the applicability of the proviso. The words "*other good cause*" leave the matter in the discretion of the court.

In the case of **Transgem Trust versus Tanzania Zoisite Corporation Limited (1968) H.C.D No. 501**, the Plaintiff had not signed the complaint, but they undertook to sign it later and Platt, J., held, that

signing of a Plaint was a matter of procedure and that the defect does not affect the merit of the case or the jurisdiction of the court.

In the case of **Kiganja and Associates Gold Company Ltd (supra)** it was held that *"even if the court were to hold that the verification was defective, it would not have resulted in throwing out the whole pleading save that would have attracted an order of amendment"*.

Signing is merely a matter of procedure. So it is immaterial whether it is signed by a party or someone else on behalf of a party. (See **Sarju versus Badri, A 1939 N 242**). Omission to sign or defect in signature or verification may be cured at any stage by amendment. (**see Syed Mohiuddin versus Pirthi, 19 CWN 1159, Sasi versus Rasik, 17, cwn 989, Ram versus Dhirendra, 54 C 380, Qanayat versus Sajidunnisa, A. 1951, Basdeo versus Smidtt (supra), Johnson versus Rameshar, A, 1928 P 51, Radhakishen versus Wali MD, A 1956 Hyd 133**).

It is thus, with great reluctance that, I hold the contrary view, regarding the consequences of failure by a party to sign and/or verify his pleadings.

I therefore sustain the objection raised, but instead of striking out the written statement of defense, I make an order that the defendants should rectify the defects by way amendment within seven days from today .Costs shall follow the event.

It is so ordered.



K.M.Nyangarika,

Judge

10th November, 2011 at 11.00a.m.

Coram: Hon. K.M.Nyangarika, Judge.

For the Plaintiff } Both are absent.
For the Defendant }

CC: J.K.Bampikya.

Order:

- 1) The Ruling is ready but both parties are absent.
- 2) The Deputy Registrar should send a warning letter to both Counsels for failure to appear on the date and time set by the court for the Ruling with the consent of the Counsels.
- 3) The ruling will be read today at 1.p.m.



K.M.Nyangarika,

Judge

10.11.2011 at 11.00a.m.

At 1.00p.m.

10th November, 2011

Coram: Hon. K.M.Nyangarika, Judge.

For the Plaintiff - Dr. Nguluma, Advocate and Mr. Mwandambo, Adv.

For the Defendant - absent.

CC: J.K.Bampikya.

Order:

- 1) Ruling delivered today in the presence of Dr. Nguluma and Mr. Mwandambo, Advocates for the Plaintiff but in the absent of the defendant and their Advocate.



K.M.Nyangarika,

Judge

10.11.2011 at 1.00 p.m.

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