

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

**COMMERCIAL CASE NO 76 OF 2011**

**KLEB CO. LTD.....PLAINTIFF**

**VERSUS**

**MGEN TANZANIA INSURANCE COMPANY  
LIMITED.....DEFENDANT**

**RULING**

**Bukuku, J.**

The plaintiff filed the main suit on 19<sup>th</sup> September, 2011. On 4<sup>th</sup> October, 2011 the defendant filed a written statement of defence wherein he raised the following preliminary objection on point of law as follows:-

*"That this plaint is bad in law for contravening Order VI Rule 15(3) of the Civil Procedure Code Act (Cap 33 R.E 2002)."*

The preliminary objection was argued viva voce. The plaintiff was represented by Mr. Aliko Learned Counsel for the plaintiff, while Mr. Temu, Learned Counsel, Represented the defendant respectively.

Arguing in support of the preliminary objection, Mr. Temu made reference to Order 6 Rule 15 of the Civil Procedure Code arguing that, the order is in reference to verification, and looking at the plaint filed in this court it is obvious that the verification is neither dated nor discloses where it was made. Furthermore, Mr. Temu submitted that, the requirement for showing the date and place where it was made is mandatory due to the use of the word "shall", and that failure to comply with the requirement is not fatal to the suit but it renders the plaint defective, hence such defect leads to the consequences that the plaint has to be struck out with leave to file a fresh plaint.

It is his further averment that, the plaint being defective as it is, such an omission cannot be cured by amendment, and since the the courts are guardians of procedural law, he prays this court to strike out the plaint with leave to re file a fresh suit if the plaintiff so wishes. In support of his submission, Mr. Temu referred this court to the case of **Leisure Tours V. Air Tanzania Company Ltd, Commercial case No. 56 of 2009**, where Honorable Justice Makaramba struck out the plaint with leave to re file a fresh plaint. Mr. Temu concluded his submission by saying that, the court should as far as possible observe the rule of stare decisis (i.e. Standing by its own decision) unless there is good reasons to depart from it. He thus prayed the plaint filed in court to be struck out.

On the other hand, the preliminary objection is resisted. Mr. Aliko, Learned Counsel for the plaintiff submitted that, he disagrees with most

part of the defendant's submission save that the defect observed is not injurious to the suit, due to the fact that the rules of the court were set to act as a vehicle to enable this court to dispense with justice. He cited the case of **D.P Valambhia V. Transport Equipment Ltd. (1992) TLR 246**, where Mfalila, J. held that:

*"Rules of the court were created as a vehicle to enable the court to dispense with justice between the parties and although the general rule is that the court will lean towards strict compliance to the rules, it may depart in cases where it is clear that strict application would not be in the interest of justice."*

Mr. Aliko surmised persuasively that, this is a circumstance which is fit for this court to depart from the general rule for the interest of justice. He further submitted that, this court is at liberty to order amendment of the plaint in order to allow a timely justice, and that it is not true that the only option available for the plaintiff is to file a fresh plaint, but, an amendment of the plaint is an option. Mr. Aliko made reference to the case of **Kiganga and Associates Gold Mining Co Ltd V. Universal Gold N.L, Commercial case No. 24 of 2000**, Where Hon. Kalegeya, J. 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 serve that, it would have attached an order for amendment."*

In the premise, Mr. Aliko prayed that, the preliminary objection be dismissed and the plaintiff be allowed to amend the plaint, and each party to bear own costs.

In his brief rejoinder, Mr. Temu submitted that, in view of Mr. Aliko, Learned Counsel for the plaintiff conceding that the defect can be cured by an order for amendment of the plaint, he does not see much variance of the substance between his submission and Mr. Aliko's given the fact that, the defect does not render the whole suit defective. As such, it can be cured by an order for striking out the suit with leave to re file, or order an amendment, and that since it is mandatory in law, the defect has to be cured. With regard to an order for costs, Mr. Temu submitted that it is the court's discretion whether to order costs or not.

The two counsel's submissions considered, It seems the point that the plaint filed is defective is not in controversy. Both counsels subscribe to the defect. The only issue for determination is whether the plaint filed should be struck out with an option to seek leave to re file as prayed by counsel for the defendant or that since the defect does not render the suit defective, the court be pleased to order an amendment as prayed by learned counsel for the plaintiff.

I will start by revisiting the law.

Order VI Rule 15(3) of the Civil Procedure Code provides as follows:

*"15(3)- The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."*

As a general rule of verification, every pleading must be verified by the party or by one of the parties pleading or by some other person acquainted with the facts of the case. The person verifying the pleading must specify what paragraphs he verifies upon his knowledge and what paragraphs he verifies upon information received by him and believed by him to be true. The verification must be signed on an affidavit by the person verifying and must contain the date on which and the place at which it was signed.(emphasis mine).

The object underlying this provision is to fix upon the party verifying or on whose behalf verification is made the responsibility of the statement that it contains, and to prevent as far as possible disputes as to whether the suit was instituted or defended with the knowledge or authority of the party who has signed the verification or on whose behalf it has been signed.

Both counsels rightly submitted that, the plaint as filed, is defective. There is no argument with their findings. It is true that the verification is neither dated nor does it disclose the place where it was made. Now, bearing that in mind, what is the remedy, if any? It is my considered view that, a defect in the matter of signing and verification of pleadings is merely an irregularity and can be corrected at a later stage of the suit with

the leave of the court. Either, in my considered opinion, the suit cannot be dismissed nor an order be passed against a party on the ground of defect or irregularity in signing or verification of the plaint or written statement of defence. Instead of rejecting such a defective plaint, the court may give an opportunity to the party to file a proper affidavit. There is a dearth of authorities on this position. It may be suffice to cite the following few cases: **NOREMCO construction V. Dar Es Salaam Water an Sewerage Authority, Commercial case No. 47 of 2009; Manzur Jessa V. Tanzania Revenue Authority, Commercial case No. 58 of 2002; Usangu Logistics V. Tanzania Revenue Authority & Tanzania National Road Agency & Others, Commercial case No. 10 of 2006.**

MOGHA'S Law of Pleadings 17<sup>th</sup> Edition at page 56 had this to say about verifications:

*"Want of signature or verification or any defect in either, will not make the pleading void, and the suit 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 of defence, as these are matters of procedure only. It has been treated to be mere irregularity and curable by amendment. The defect may be cured by amendment at any stage of the suit."*

Now, back to the preliminary point.

While Mr. Temu concedes that failure to comply with the requirements of O.VI Rule 15 (3) of the CPC is not fatal to the suit, he prays this court to strike out the plaint with leave to re file a fresh plaint, instead of requiring the plaintiff to amend the plaint as prayed by counsel for the plaintiff. His main argument being that, the court should as far as possible, observe the rule of stare decisis (i.e. Standing by its own decision) unless there is good reasons to depart from it. He then went on and cited the case of **Leisure Tours V. Air Tanzania (supra)** where Hon. Makaramba, J. struck out the plaint with leave to refile.

Let me address the issue raised by Mr. Temu, regarding conflicting decisions of the Judges of the same Court. I am alive that it is a well respected principle in judicial circles that judges of the same Court should seldom give conflicting decisions over similar issues unless it is absolutely necessary. In the case of **J.S Mtungi V. University of Dar Es Salaam and others (2001) TLR 261**, the Court of Appeal of Tanzania held thus:

*" .... It is not a matter of courtesy but a matter of duty to act judiciously which requires a judge not lightly to dissent from the considered opinion of his brethren.....One expects (in case of dissent) sufficient reasons to be given for the results, to be different from those in an earlier case... This is necessary to avoid giving parties and the general public a false impression that the results of cases in Courts of law perhaps depend more on the personalities of judges than the law of this land..."*

The issue of verification of the plaint and what it should contain has been exhaustively dealt with by the High Court and also the Court of Appeal and therefore it is not a new territory. In supporting their respective submissions in this particular case, both learned counsels relied on two different Commercial cases, decided on this issue of defects on verification. I am aware of both of the rulings made. In **Commercial case No. 24 of 2000: Kiganga and Associates Gold Mining V. Universal Gold N.L** my learned brother Kalegeya, J made an order for amendment of the plaint, and in **Commercial case No. 56 of 2009: Leisure Tours and Holidays Ltd. V. Air Tanzania (Supra)** my learned brother Makaramba,J. struck out the plaint with leave to re-file.

As already stated, I am mindful of the fact that the Judges of the same Court should seldom give conflicting decisions (**CAT Misc. Civil Application No. 17 of 1994 followed by this Court in Commercial case No. 260 of 2001 Tanzania Breweries Company Ltd. V. Tanzania Revenue Authority and Commercial Case No. 24 of 2000, Kiganga and Associates Gold Mining V. Universal Gold N.L**). With due respect to Mr. Temu, having carefully gone through the **Kiganga Associates case** ruling (supra) and that of **Leisure Tours** (Supra), I found that, both my learned brothers are agreed that the omission to verify a pleading is a mere irregularity and therefore is not a fatal defect but curable. The issue is the manner of curing the defect. In upholding the preliminary objection, Hon. Makaramba underscored the procedure which the learned counsel for the plaintiff opted in making the amendment. He observed that, such a procedure would not have accorded with pleading practices recognized in this country under the laws. As such, he ordered the striking out the plaint with leave to re-file the same, knowing that, such an anomaly can be cured.

As already mentioned, the court has powers to order amendments to a defective affidavit and it will always do so if no injustice would be



occasioned to the other party. It is my considered opinion that, the omission to place the date and place where the verification was signed can be taken care of by an amendment, since such an omission in the pleading is a mere irregularity

In conclusion, I wish to observe that, want of signature or verification or any defect in the pleading will not make the pleading void, and a suit cannot be dismissed as these are matters of procedure only. It has been treated to be mere irregularity and curable by amendment. The rules of procedure are intended as aids for a fair and for reaching a just decision. Their function is to facilitate justice and further its ends and not to obstruct it. A procedural law is not a tyrant but a servant, not an obstruction but an aid to justice, not a mistress, but a handmaid to the administration of justice. Not a penal enactment for the punishment and penalties, nor a thing designed to trip people. It has always been observed that, no proceeding in a court of law should be allowed to be defeated on mere technicalities.

Having observed so, I find the omission in this matter to be a procedural irregularity which can be cured by an amendment. After all, no injustice can be occasioned to the defendant for this court ordering an amendment. In the upshot and for the reasons stated, the preliminary objection raised by the defendant is dismissed. Given that the defect is curable, the remedy will be for the plaintiff to seek leave to amend. In the circumstances, I shall make no order as to costs. Each party is to bear its own costs. It is accordingly ordered.

  
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**A.E BUKUKU**

**JUDGE**

**12<sup>th</sup> APRIL, 2012**

**Mr. Aliko:**

Madam Judge, I pray leave to amend the plaint within seven days from today. If it pleases you, On 19<sup>th</sup> April, 2012 I shall file an amended plaint.

**Mr. Temu:**

If there will be no other changes, let the court take the Written Statement of Defence to have been duly filed.

**Order:**

1. Leave to amend the plaint is hereby granted.
2. Plaintiff to file the amended plaint by 19<sup>th</sup> April, 2012.
3. First Pre Trial Conference on 23<sup>rd</sup> May, 2012 at 9.00 am

  
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**A.E BUKUKU**

**JUDGE**

**12<sup>th</sup> APRIL, 2012**