

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

**COMMERCIAL CASE NO. 25 OF 2015**

**AFRISIAN GINNING LIMITED ..... PLAINTIFF**

**VERSUS**

**MABRUKI SAMLI RAJABU ..... DEFENDANT**

11<sup>th</sup> August & 10<sup>th</sup> September, 2015

**RULING**

**MWAMBEGELE, J.:**

This is a ruling in respect of a preliminary objection raised by Mr. Kannonyele, learned counsel for the Defendant Mabruki Samli Rajabu. The preliminary objection (henceforth “the PO”) has two points and is couched thus:

“TAKE NOTICE that on the first day of hearing of this suit the defendant shall raise [a] preliminary objection on points of law and move the honourable court to entirely dismiss the suit with costs on the following points:

- (i) The formatting of the pleadings hopelessly contravenes Rule 19 (1) of the High Court (Commercial Division) Procedure Rules, 2012; and
- (ii) That the agreement/contract is unenforceable one for contravening provisions of the Law of Contract Act for:
  - a) Consideration and object of the contract (agreement) being unlawful;
  - b) The contract being void for uncertainty; and
  - c) The contract/agreement being contingent.”

The PO was argued before me on 11.08.2015 during which both parties were represented. Mr. Kannonyele, learned counsel appeared for the defendant while Mr. Mwarabu, learned counsel advocated for the plaintiff; Afrisian Ginning Ltd.

On the first point, Mr. Kannonyele argued in support of the PO that the plaint is against the dictates of rule 19 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (henceforth “the Rules”). The rule requires, *inter alia*, that the format of pleadings presented for filing to the court shall be in *Times New Roman* font type, twelve font size and 1.5 line spacing, he submitted. The learned counsel argued that the present plaint does not conform to the guidelines in the rule and therefore it ought to have been rejected at the outset.

On the first point of the PO, Mr. Mwarabu, learned advocate for the plaintiff, conceded that the pleading complained of; that is the plaint, was not in full

conformity with the dictates of rule 19 (1) of the Rules. He stated that, indeed, the plaint, admittedly, is not in Times New Roman font type, not in 12 font size and not in 1.5 line spacing. But Mr. Mwarabu, learned counsel, was quick to pray that the defect having not been detected at the time of filing, the plaintiff should be allowed to amend the plaint in terms of rule 24 (1) of the Rules and it (the plaintiff) be condemned to pay costs of the amendment.

The submissions of both learned counsel for the parties on the first point of the PO are enough to dispose of this matter. Mr. Mwarabu, learned counsel for the plaintiff has conceded that the plaint is not in strict compliance with the provisions of rule 19 (1) of the Rules. He, however, prays that the plaintiff be allowed to amend the plaint in terms of rule 24 (1) of the Rules, the ailment having been not detected at the outset and he is ready for the plaintiff to be condemned to pay costs for the amendment. Respectfully, I am afraid I am not able to agree with the learned counsel. The provisions of rule 19 (1) of the Rules are couched in mandatory terms. This can be inferred from the use of the word "shall" in the provisions. The sub-rule reads:

"The format of pleadings presented for filing to the Court shall be in paragraphs, 'Times New Roman' font type, twelve font size, 1.5 line spacing and shall not be in more than ten pages."

The use of the word "shall" connotes that the sub-rule is mandatory. This is perceived so in terms of the provisions section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002. This sub-section reads:

“Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.”

It is obvious therefore that the plaintiff ought to have conformed with the sub-section to the letter. Having not done that, the plaintiff, I am afraid, cannot seek refuge under rule 24 (1) of the Rules because taking that path will be tantamount to pre-empting the preliminary objection which is illegal. It is trite law in this jurisdiction that once a PO has been raised, any course of action pre-empting the same is illegal. That this is the law has been stated in a number of cases. One such case is ***Mary John Mitchell Vs Sylvester Magembe Cheyo & ors***, Civil Application No. 161 of 2008 (unreported) in which the Court of Appeal reiterated its earlier position it stated in ***Method Kimomogoro Vs Board of Trustees of TANAPA***, Civil Application No. 1 of 2005 (unreported) in which it stated:

“This court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of.”

There is a string of cases holding this position. Such cases include ***Shahida Abdul Hassanali Kassam Vs Mahedi Mohamed Gulamali Kanji*** Application No. 42 of 1999 (Unreported), ***Almas Iddie Mwinyi Vs National***

***Bank of Commerce & Another*** [2001] TLR 83, ***Alhaji Abdallah Talib Vs Eshakwe Ndoto Kiweni Mushi*** [1990] TLR 108, ***The Minister for Labour and Youth Development and Shirika la Usafiri DSM Vs Gaspa Swai & 67 Others*** Civil Appeal No. 101 of 1998 (unreported) and ***Frank Kibanga Vs ACCU Ltd***, Civil Appeal No. 24 of 2003 (unreported), to mention but a few.

In all these authorities, the court did not mince words: a preliminary objection should not be pre-empted. This being the case, I respectfully decline the invitation by Mr. Mwarabu, learned counsel for the plaintiff, to allow the plaintiff amend the plaint. The first point of preliminary objection is accordingly sustained.

This alone disposes of this matter before me. I do not see the relevance of deciding on the second point of the preliminary objection as the outcome will not make any difference. In the result, this suit is accordingly struck out with costs.

Order accordingly.

DATED at DAR ES SALAAM this 10<sup>th</sup> day of September, 2015.

**J. C. M. MWAMBEGELE**

**JUDGE**