

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO. 3 OF 2015

TAHAFRESH HANDLING LIMITED

t/a TANZANIA AGRICULTURAL

PRODUCTIVITY PROGRAMME..... PLAINTIFF

VERSUS

CMC MOTORS GROUP LIMITED. LIMITED.....DEFENDANT

RULING

Mansoor, J:

Date of Ruling- 20TH NOVEMBER 2015

The defendant raised the following preliminary objections against the plaint:

1. The plaint is bad in law as it does not contain the name of the Drawer;
2. The plaint did not comply with the provisions of GN No. 206 of 2014;
3. The verification clause of the Plaint is defective.

By the leave of the Court, the objections were determined by written submissions.

The Defendant's Counsel Mr. Julius Karata had taken an objection that the Plaint is defective and ought to be dismissed as the name of the Drawer in the plaint is the name of Ngalo & Co. *Advocates*, the entities which are not enrolled as advocates and so they cannot draw legal instruments or pleadings, and this offends the provisions of the Advocates Act, Cap 341 R: E 2002;

Mr. Colman Ngalo, the Advocate who was representing the Plaintiff opposed the objection vigorously stating that drafting and drawing of pleadings is governed by the Civil Procedure Code, Specifically Order 6 and 7, and there is no specific requirement under the Civil Procedure Code which requires that a plaint must be endorsed by the name of the Advocate. Advocate Ngalo also submitted that there is no specific provision in the Advocates Act that prohibits law firms from drawing and endorsing pleadings in the name of the law firms.

The Advocate for the Defendant relied heavily on the decision of Judge Mihayo Thomas (as he then was) in the case of **Proper Consult (T) Limited vs Receiver Manager Tanzania Sewing Thread Manufacturers Limited & Tanzania Gender Networking Programme, Civil Case No. 215 of 1997** (unreported), at page 11, where he held:

"The "Professional Centre" of the South Law Chambers" is not an advocate and cannot therefore file documents."

The Same Hon Retired Judge Mihayo had held in the case of **Lucas A Nzegula (Son and Heir of Zuhura John) vs Isaac Antihuman and Royal Insurance (T) Limited, Civil Appeal No. 66 of 2008** (unreported), at page 11, that

"Two, as I said above, the submissions by the respondent were filed by C&M Advocates. It would appear the advocate who signed as "Advocate for the second respondent is one Oscar Epaphra Msechu telling by the rubber stamp used. Now, C&M Advocates is not an Advocate in terms of Sections 2 and 6 and 8 of the Advocates Act (Cap 341 RE 2002). C&M Advocates cannot therefore file a document. The document must be filed by an individual advocate having the conduct of the matter "for and on behalf" of C&M Advocates."

It is not in dispute that the law provides that every pleading, and other paper presented to Court must be signed by at least one advocate of record in the advocate's name or by a party personally if the party is unrepresented. Sections 2 and 8 of the

Advocates Act [Cap 341 R: E 2002] could only be construed to the effect that for a person to practice as a legal practitioner or Advocate, he must have his name on the roll of legal practitioners or advocates; therefore *Ngalo & Co Advocates* not being so enrolled cannot be recognized as a legal practitioner at law.

Section 2 of the Advocates Act is defining an advocate as any person whose name is duly entered as an advocate upon the roll and such a person shall be entitled to practise as a an advocate if and only if his name is on the roll.

The plaint in question was drawn by "*Ngalo & Co. Advocates*. This is a partnership firm or a firm, duly registered under the Business Names Act, Cap 214 R: E 2002. The partners in this firm or partnership are Advocates who are enrolled as advocates and they hold in their individual names certificates to practise as legal practitioners. With respect, this Firm or Partnership is not the legal practitioner or advocate recognized by the Advocates Act and thus it is not a person entitled to practice as an advocate under the Advocates Act.

Ngalo & Co. Advocates are not advocates or legal practitioners recognized by law. There are not known any such persons as *Ngalo & Co. Advocates* called to the bar and enrolled under S. 2 of the Advocates Act and their names are not registered in the roll of Advocates. *Ngalo & Co. Advocates* cannot legally sign and or file any pleading in the Courts.

The endorsement of Court pleadings is an irregularity in procedure and so the pleadings endorsed by persons not enrolled as a legal practitioner or advocates renders such process/pleadings defective.

While the Civil Procedure Act by its Order 6 and 7 requires pleadings to be signed by "an advocate or by the party", the Advocate Act do not allow a law firm to draw or endorse pleadings in its name. Whereas the endorsements of pleadings or instruments is the conduct of advocates and this is governed by the Advocate Act or Rules and not the Civil Procedure Code or Rules. Unless amendment is made to the Advocates Act and remove the requirement of signing by "legal practitioner or advocate" and replace the same with "law firm, the law is clear that pleadings must be drawn and endorsed by advocates whose names appear in the roll.

Despite the defect, dismissing the case on this defect can scarcely qualify for substantial justice. The Court of Appeal in the case of **Samwel K vs Hidaya Didas (Civil Application No. 20 of 2012 (unreported))** was clear in laying down its intentional approach of substantial justice in Tanzania that the primary fundamental duty of the Courts is to do substantial justice by deciding not on a mere technicality at the expense of a hearing on the merits. Notwithstanding that the endorsement of the plaint by a law firm is irregular, surely, in casting the lot of the Court with justice over form, where the Court of Appeal held in the above cited case to the effect that the spirit of justice does not reside in formalities, or words but on substantial

justice. After all, the law is not meant to be but the handmaid of justice, and the law should often serve to render justice.

In the spirit of the case by the Court of Appeal, I shall not dismiss the plaint but I shall order the Counsel for the Plaintiff to amend the plaint so as the endorsement to be done by an Advocate who appear in the roll of Advocates.

Since the first preliminary objects sufficed to render the Plaint to be amended, and since the effects of the rests of the objections raised is to struck out the plaint or order an amendment, I need not determine the rest of the objections.

The amended Plaint shall therefore be filed in Court shall be filed within two week from the date of this Ruling

Preliminary objection sustained.

DATED at ARUSHA this 20TH day of NOVEMBER, 2015

MANSOOR

JUDGE

20TH NOVEMBER 2015.