IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO. 1 OF 2015

ERENEST NDUTA NYORORO ..... PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LTD
ALEXANDER FORBES (T) LTD } **..... DEFENDANTS**

17th April & 18th May, 2015

RULING

MWAMBEGELE, J.:

The plaintiff Ernest Nduta Nyororo instituted this suit claiming against National Bank of Commerce (the first defendant) and Alexannder Forbes (the second defendant) jointly and severally for recovery of Tshs. 54,000,000/= for the damage by fire of his landed property which was insured by the second defendant. As can be gleaned from the plaint, the dispute revolves around a contract of insurance whereby, the defendants had refused to honor its obligations of indemnification upon loss. Along with its written statement of defence, the second defendant raised a preliminary objection grounded on three legal points couched thus:

i. The suit before this honorable court is a nullity and incompetent as the plaintiff herein has no cause of action against the second defendant;

ii. That the plaintiff is purely defective and was wrongly admitted in this honorable court; and

iii. That the plaint does not conform to the mandatory requirement of Rule 19 of the High Court (Commercial Division) Procedure Rules, 2012.

The preliminary objection was heard before me on the 17.04.2015. On that date, the plaintiff was represented by Mr. Muna, learned counsel whereas the first and second defendants were, respectively, represented by Mr. Jonathan and Mr. Jabir learned counsel.

Mr. Jabir addressed me on the objections. I intend herein to only recite the submissions briefly lest I make this ruling unnecessarily long. On the first ground, his main contention is that since the plaintiff admitted to have been paid by the defendant in respect of the damage caused, the second defendant is not in breach of any terms of the agreement and therefore there is no cause of action against her. To this he referred me to several authorities namely Orders VII rule 11(a) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002, ***Stanbic Bank Ltd Vs Trupia and Tiara*** [2002] TLR217, ***Mashado Game Fishing Lodge and 2 Others Vs Board of Trustees of TANAPA*** [2002] TLR 319 as well as the celebrated case of ***John Byombalirwa Vs Agency Maritime international (T)*** [1983] TLR 1. He emphasised that aligning on the principles enunciated in

the authorities with the facts of the present case, the plaintiff has no cause of action against the second defendant.

As to the second ground, his argument is basically that the plaint offends order VII Rule 1 of the CPC because it refers to the defendants as "respondents". Referring me to section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002, he stated that compliance with the said provision is mandatory, and thus invited me to strike out the suit. To cement his prayer, he referred me to the case of ***Arusha Art Ltd Vs Alliance Insurance Corporation*** Commercial case No. 12 of 2011(Unreported) whereby my brother at the Bench; Mruma, J. struck out the suit for non compliance with the said provision of Order VII.

On the third point, he contended that the font used is not Times New Roman, the font size not "12" and the spacing is not "1.5" as mandatorily provided for by rule 19 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (the Rules). He stated that though he could not tell the type of the font or its size, certainly it was not what is prescribed by rule 19 of the High Court (Commercial Division) Procedure Rules, 2012. He maintained further that in terms of rule 19(1) of the Rules, 2012, any pleading that does not conform to the said rule shall be rejected and invited this court to dismiss the suit with costs.

Mr. Muna for the plaintiff responded briefly. With regard to the first ground he referred me to the ***Byombalirwa*** case and submitted that in deciding whether there is a cause of action, it is the plaint which should be

looked at and not the defence. He maintained that matters intended for defence should be reserved during the defence.

As to the second ground he conceded that looking at the plaint, the defendants have been referred to as respondents but quickly added that it was rather a clerical mistake which can be cured by amendment. He maintained that the plaint cannot be rejected simply because the defendants have been referred to as respondents.

Mr. Muna learned counsel also conceding to non compliance with rule 19 of the Rules, he also added that the remedy is not to reject the plaint but the court can order amendment. He submitted that not always when the word "shall" is used means a mandatory function. However, he was not in command of the authority to that effect though he professed to know such an authority from the court of Appeal. Surmising, he put that these are matters of procedure and procedural rules should not be used to defeat substantive justice. It was then his prayer that the court should order amendment.

Rejoining, Mr. Jabir argued that on the basis of rule 2 (2) of the Rules, leniency period which the counsel for the plaintiff is seeking cannot be exercised by this court because three years have lapsed ever since the Rules have been into force. Referring to the case of ***Frank Kibanga Vs ACCU Limited*** (CAT) Civil Application No. 23 of 2001 at page 23, he contended that amendment cannot be allowed after a preliminary objection has been raised because doing so would be pre-empting the

objection. He further submitted that correction cannot be allowed at this stage because this is not a court of sympathy as it was heard by this court (Mruma, J.) in the ***Arusha Art*** case (Supra).

Surmising, he stated that to hold that "respondents" instead of "defendant" is a mere typo error cannot be entertained because the advocate's lack of diligence cannot be accepted. To buttress his proposition, he referred me to the case of ***Elisa Ole Markos Vs Erick Raymond Rowberg & 2 others***, Misc. Civil Application no. 89 of 2009.

I have heard the counsel's rival arguments with a deserving attention. I think, this is not a matter to strain my mind. I will deal with the issues as hereunder.

In dealing with the first point, I will lend guidance from the celebrated landmark case of ***Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd*** [1969 E.A 701. This follows an alarm which has been raised by Mr. Muna to the effect that the matter of admission of having been paid by the second defendant is rather a matter for the defence which should be reserved for the defence. Thus, I feel obliged to determine whether this first point falls within the ambit of the ***Mukisa Biscuits*** case. Happily, this Court has had an opportunity to espouse the qualities of a preliminary objection as enunciated in that celebrated case in a number of cases in this jurisdiction. On such case is ***Unique Car Rentals & Travel Agency Vs Precision Air Services***, Commercial Case No.45 Of 2013. They go thus:

i. The points of law must either be pleaded or must arise by clear implication from the pleadings;

ii. The points must be points of law which do not require close examination or scrutiny of the documents; and

iii. Determination of the points of law in issue must not depend on the discretion of the court.

Having gone through the plaint, I am certain that the first point of preliminary objection indeed falls short of the above qualities. In my view, the plaintiff having sued the defendants jointly and severally for the balance or shortfall, it cannot be said with precision that indeed he maintains no claim against the second defendant. To say so, there is need of adducing further evidence rather than a mere statement as to receipt of some monies from either of the sued defendants. Thus, this is a factual point which requires close examination and scrutiny of documents as well as exercising the discretion of this court in so far as the credibility and or otherwise of the said documents is concerned. This exercise cannot be done at this stage. As was held by the Court of Appeal in the case of ***The Soitsambu Village Council Vs Tanzania Breweries Limited & Another***, Civil Appeal No. 105 of 2011 (Unreported)

> "... where a court is to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law ... It will treat as a preliminary objections only those points that are pure law, unstained by facts or evidence...",

I find this point of lack of cause of action in the circumstances shown by the counsel for the defendant, be stained by facts and evidence and hence not to qualify as a preliminary objection. It is for this reason I overrule it.

I will now skip the second point of objection and move on to the third. I chose this not by default but deliberately for the reason that, my finding on it will determine the fate of the suit proceedings or of these objection proceedings.

I must state outrightly that the learned counsel were not at issue as to the fact of non compliance with rule 19 (1) of the Rules of this Court. The only qualm seems to be rather on the consequences thereof. Whereas Mr. Jabir learned counsel insist that the plaint be rejected, Mr. Muna maintains that the court should rather order amendment.

They do not propose their respective suggestions without reasons. Mr. Muna puts that amendment is apposite because this is a mere procedural requirement that should not defeat substantive justice. He also maintains, though admittedly without an authority to that effect that not always the use of the word "shall" imply a mandatory function.

On the other hand Mr. Jabir puts that in terms of section 53 (2) of the interpretation of Laws Act, Cap.1 R.E 2002, where the word "shall" is used, that means the function is imperative. Therefore, it would appear from his arguments, and rightly so in my view, compliance with the said rule is

mandatory and upon failure it is equally imperative for the court to reject that non complying pleading.

On another angle armed with several authorities, Mr. Jabir puts that allowing amendment will be tantamount to pre-emptying the preliminary objection raised. He has referred me to the case of ***Arusha Art*** and finally stated that this is not a court of sympathy but court of law.

Without a flinch, I must agree with Mr. Jabir learned counsel in substance that where a term "shall' is used, compliance is imperative, and indeed allowing an amendment of the pleading would be tantamount to pre-emptying the preliminary objection raised and further that failure to comply with rule 19 (1) renders the particular pleading fit for rejection in terms of sub rule (2) thereof. I will demonstrate my congruency with Mr. Jabir.

With due respect to Mr. Muna learned counsel, it is not all rules of procedure whose compliance should be regarded as mere technicalities. This is because, procedural rules are not enacted for purpose of fanciful satisfaction of the legislator or promulgators but for compliance (See: ***Barclays Bank Tanzania Ltd Vs Tanzania Pharmaceutical Industries &*** **another**, Commercial Case no.147 of 2012). Further, I am enlightened by ***VIP Engineering Ltd Vs Said Salim Bakhressa Ltd,*** civil Application No. 47 of 1996 (CA) to observe that where as some rules are vital and go to the root of the matter that they cannot be sidestepped;

others are not of such nature and may be ignored but only if there is substantial compliance as a whole.

The question here becomes, whether rule 19 (1) of the Rules can be overlooked or ignored? Or rather what is the nature of that rule?

I must state the obvious that I cannot claim to deal with this question as a novel one. It has been dealt with by this court in several instances, some being presided over by my brothers at the Bench Nyangarika, J. (***Mohamed Karama Vs Freight Forwarders Limited*** Commercial case No. 14 of 2013 (unreported) and Nchimbi, J. ***Exim Bank (T) Ltd Vs Kobil (T) Ltd***, Commercial case no.35 of 2013 (Unreported). Their Lordships' conclusions therein notwithstanding, going through the said decisions, their mind appear to be certainly composed that counsel's compliance with the rule is a must. While my brother Nyangarika, J. upheld the preliminary objection in this respect and instead ordered the defendant whose WSD offended rule 19 (1) to pay Tshs. 150,000/= as well as costs of the plaintiff for that offence, Nchimbi, J. for the sake of operation of rule 2 (1) requiring exercising leniency during the first year of operation of the rules during which the offence was committed had exercised his discretion to let the plaint live. To be precise on his mind as well, I will partly reproduce what he stated hereunder:

> "... I nevertheless keep in view the Rules of this Court are still new; let it be a turning point for judicial officers and advocates at large to

embrace these rules with zeal so that speedy justice can be achieved by seeing to it that they are complied with without fail".

Henceforth, be it as it may, I am not prepared to hold otherwise and depart from that established direction. The reasons are not far to fetch. Firstly, compliance is an imperative function to be performed by the pleader, and rejection is an imperative course to be taken by the court following non compliance. Secondly, the purpose of this rule as gleaned from the prescribed standards of a pleading is to ensure uniform standards in pleading in order to enhance clarity, coherence, and certainty of pleadings so as to promote speedy and quality justice. This is also clearly restated in the said two decisions aobe.

I hastily add here that contrary to the popular view held by counsel for the parties, this requirement of complying with formats or forms in courts is not an invention of this court or of the Chief Justice for that matter. Certainly, it follows suit and falls from section 101 (1) and (2) of the CPC. Therein, the Chief Justice is empowered to approve, as he did in respect of rule 19 (1) of THE Rules, for use any forms or format as the case may be, in pleadings and where such form or format is so approved, compliance becomes imperative.

Therefore, no wonder, a prescribed course to follow non compliance is rejection. Rejection, as the term literal mean, is a refusal to accept something. This meaning is deduced from the meaning of the term

"rejection" provided by the Black's Law Dictionary, (8th Edn, at page 1335). Therefore, it has the effect of rendering the particular pleading not accepted and therefore as good as never presented or not submitted as the case may be. In my considered opinion, it is a negative incentive to compel compliance with the rules of procedure and not otherwise. It follows therefore that, since courts are enjoined to promote respect of the rules, adopting and implementing the clear precepts of the law is not a mere technicality but rather, a means to enhancing administration of quality justice. Here, I wish to re-echo what was stated in ***Zuberi Mussa Vs Shinyanga Town Council***, Civil Application No. 100 of 2004 (unreported), that:

> "rules of procedure are intended to be that of handmaids rather than mistresses ... their function is to facilitate the administration of justice".

That, in my view, is the object and intention of the promulgator of these rules – His Lordship the Chief Justice, to promotie orderly and organized pleadings for smooth administration of justice.

It is therefore logical and desirable to reject a pleading which fall short of the prescribed standards. I thus reject the plaint for failure to comply with rule 19 (1) of the Rules.

In the circumstance, and for the reason that a rejected pleading is as good as not presented or submitted, the question of amendment does not arise, for you cannot amend that which is not in the court record or more precisely which does not exist in the first place. As a matter of civil procedure law and practice, amendment in terms of Order VI rule 17 of the CPC would be allowed where such pleading has been accepted and remains in the court record. This is exemplified by the fact that a pleading subject of amendment is in the court record both before the amendment and after the amendment.

Therefore in my view, amendment in the circumstance is not refused for purpose of avoiding to pre-empty the preliminary objection but rather it is refused because, as the rules dictate, the plaint having been rejected, there is nothing in the court upon which to order amendment.

At this juncture, I must state that I do not find it differently from my brother Nchimbi, J. in the ***Exim Bank*** case (supra), to the effect that this court has a role to play particularly in inspecting the documents before they are entered into the register. I wish to add here that, the fact that it has escaped the attention of the Registry Officer or Deputy Registrar for that matter, will not insulate the pleading itself from the dire consequences as provided for by the Rules. It is for this reason the learned counsel are enjoined to ensure that the pleadings to be filed in court are in order and comply with the Rules.

This stance brings me to my final lap of this ruling which I attempt by way of post script and for the sole purpose of setting the future smooth operation of rule 19 (1) and (2). I propose to do so without prejudice to the foregone decisions of this court in respect of rule 19.

Having restated and adopted the position hereinabove in respect of a course to be taken where a pleading does not comply with rule 19(1), I wish to add here in respect of a noncomplying written statement of defence.

The current position has it that such a pleading be it a plaint or WSD, must be rejected if not complying with the said rule. As I intimated, the consequence is as if no pleading was filed. This automatically removes that particular pleading from the court record.

The risk would seem to be fairly manageable if the victim is a plaintiff in that, there is an option of re-instituting the same, of course only suffering payment of the same fees once again. However, as for the defendant, the risk is high in that, although the window to have the defence re-filed technically exists, it is almost negligible in practice. This is for two reasons; one, that the other party (plaintiff) may promptly, upon rejection of the defence, take adverse step against the defendant such as application for a default judgment in terms of rule 22 (2). Secondly, the rules are silent in terms of what recourse to take in the event that a pleading is rejected.

It is for these reasons, I hastily add here that, since a rejected suit can be filed automatically subject to the law of limitation and payment of prescribed court fees, equally, rule 19 (2) should be construed to imply that a rejected defence can be re-filed subject to time limit set discretionarily by the court as well as payment of requisite fees for filing such a defence. To me this is a desirable course for the following reasons.

Firstly, I have intimated earlier on that the purpose of rule 19 is to compel compliance to the standards of format of pleadings as promulgated by the Chief Justice, and the duty of this court is promote respect of the same in order to attain easy administration of justice. It is thus not intended as a way of frustrating justice or cutting down the load of this court and neither can this court apply the rule in jubilation with such a motive. After all, as was stated in ***Cooper Vs Smith*** (1984) 2G CL. D700 at 710 as quoted in the ***Barclays Bank*** case (Supra).

> "... the object of courts is to decide the rights of parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their right"

Secondly, as I have found and held, rejection means non acceptance of the pleading. Therefore allowing one to re-file the same does not in strict sense imply allowing amendments so as to pre-empt the preliminary objection. As I said earlier on, you cannot amend that which is not before the court rejection.

That apart, such course does not in any way prejudice the other party, and neither does it perpetuate impunity. This is certainly what was held by my brothers at the Bench Nyangarika, J. and Nchimbi, J. in the ***Karama*** and ***Exim Bank*** cases above. Thus, a noncomplying party does so at his own peril as to costs in terms of time and resources to have his interest protected by this court or else may lose the same.

It is for the forgoing discourse, I wish to pause here and observe that counsel should deal with each other courteously when conducting their cases. Rules of this court and particularly rule 19 is not designed to assist the learned counsel in their delay game, but far from it, it is designed to fast track the process. It is thus desirable and called for, for the counsel to notify each other of the shortcomings of the pleadings once they receive the same well before appearance in court. It is thus unnecessary and uncalled for to raise this notice of non compliance as a preliminary objection which will consume precious time and resources of the parties and court.

This is for the obvious reason that all what this court will do, as I have declared to do, is to reject the document in order to compel compliance with the rule and nothing more. Thus, the substance of the matter remains untouched and therefore, the problem as against the party who thought rejection is in his favour remains ***ceteris peribus***.

All said herein above, I will refrain from entertaining the second ground of objection, for assuming it was to be upheld, it would not yield any other

result than what has been yielded by this third point. Let me re-echo it with qualification here that the plaint stands rejected with costs.

Order accordingly.

DATED at MWANZA this 18th day of May, 2015.

J. C. M. MWAMBEGELE
JUDGE