IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 170 OF 2014

CHINA PESTICIDE (T) LIMITED ..... PLAINTIFF

VERSUS

SAFARI RADIO LIMITED ..... DEFENDANT

19th May & 18th June, 2015

RULING

MWAMBEGELE, J.:

The plaintiff, China Pesticide (T) Limited, is a private company registered under the laws of Tanzania and carries on the business of trading, processing and exporting agricultural produce. It sued the defendant, Safari Radio Limited, to recover a total sum of Tshs. 86,007,100/= being money advanced for the supply of sesame produce in the year 2013.

Alongside with the statement of defence, the defendant put this court and the plaintiff on notice which runs to the following effect:

> TAKE NOTICE THAT on the first day of hearing of the suit or on any other date the same shall stand adjourned to, the defendant shall raise a

preliminary objection against the presence of the suit in Court on the points that

a. The Plaint is incurably defective for failure to comply with the mandatory provisions of Order VI rule 14 of the Civil Procedure Code, Cap. 33 R.E 2002; and
b. The Verification Clause in the Plaint is incurably defective for failure to disclose the name of the testator.

On the foregoing grounds in the Notice, the defendant stated that it would pray for the striking out of the plaint with costs.

On the 19.05.2015 I granted parties audience so that they could address me on the preliminary points raised. The plaintiff and defendant were represented by Mr. Lucky Mgimba and Mr. James Bwana respectively. These had chosen not to file written skeleton argument. That notwithstanding, I proceeded to hear them in that the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 permit the course of action.

Mr. Bwana arguing in respect of the first preliminary point of objection, basically, contends that since the plaintiff did not sign the plaint which bears its counsel's signature only, and since the said counsel did not state to be signing the same for and on behalf of the plaintiff, then the same contravenes the provisions of Order VI rule 14 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") and should therefore be rejected in terms of Order VII rule 11 (c) and 12 of the CPC. He reinforced

his point by maintaining further that as for pleadings involving companies, the same must be signed by the company secretary or director or any other principal officer of that company. In the case at hand, he submitted, none of the persons authorized to sign the said pleadings on behalf of the company has done so.

As for the second point, Mr. Bwana's contention is that the verification clause has not revealed the name of the person who verified the pleading. He stated that the law requires natural persons to verify pleadings, not the corporation as appearing in the plaint and therefore the same must be rejected with costs.

Mr. Mgimba briefly responded putting in the main that the plaintiff is required to sign the pleading and any person may sign on behalf and further that the word used is "may" it is discretionary to have the signature of the authorized person. He maintains that since the plaint contains the signature of the plaintiff's counsel then it must be taken to have been signed on behalf of the plaintiff. He contends further that presuming the said plaintiff's signature is mandatory, the defect is not fatal as to render the plaint defective fit for being struck out. To cement his proposition he referred me to the case of ***Usangu Logistics Vs TANROADS & 2 Others***, Commercial Case No. 58 of 2007 (Unreported).

On the second point, Mr. Mgimba conceded but was quick to submit that the absence of the testator's name on the verification clause is a mere procedural mistake which does not go to the root of the case. To this, he cited the case of ***Polymed (T) Limited Vs Bagco Limited***, Civil Case No. 360 of 1998

(unreported) whose *ratio decidendi* is to the effect that defects in a verification clause do not make a pleading void but rather it is a mere irregularity which is curable by amendment. On that basis the learned counsel then asked me to allow amendment and strike out the preliminary points of objection.

Mr. Bwana rejoined stating that it is mandatory for a party to sign a pleading, failure of which authorization to do so on his behalf is necessary to be shown by a party who signs on behalf. He did not cite any authority to reinforce this point. He also maintained that the ***Usangu*** case is distinguishable in that it dealt with defects in verification clause than the main body of the plaint as in the present case. He argued that a prayer for amendment is rather intended to circumvent the raised preliminary objection and therefore the correct course is to strike out the suit.

I have heard the contending views of the learned advocates on these preliminary points of objection. Apparently, the contentions revolve around the provisions of Order VI rule 14 and Order XXVIII rule 1 of the CPC. For ease of reference, I reproduce them hereinbelow. Order VI rule 14 reads:

> "Every pleading shall be signed by the party and his advocate (if any) provided 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 other person duly authorized by him to sign the same or to sue or defend on his behalf"

And Order XXVIII Rule 1 provides:

> "In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."

That being the clear letter of the law, the questions which come to the fore are: does the plaint bear the said signatures; that is, of the advocate and the party? And is it verified in terms of Order XXVIII rule 1? Obviously and indisputably it does not. It is only signed by the advocate for the plaintiff and it is the plaintiff's name appearing on the verification clause. This is clearly an irregularity and therefore a contravention of the law as it stands. In my view, the remaining question, on which both learned counsel have been labouring to answer in their respective submissions is whether the said irregularity is fatal to the plaint or otherwise curable?

I think both learned counsel are aware, as well as I do, that this is not a virgin area; it has been traversed before in our courts. Defects of such nature have been dealt with extensively by this court. I will mention just a few here. The ***Usangu Logistics*** and **Bagco** cases (Supra); the cases cited to me by Mr. Mgimba, learned counsel, are just among many cases in the basket. Other cases are: ***Philip Anania Masasi Vs Returning Officer, Njombe North Constituency, the Attorney General & Jackson Makweta*** Miscellaneous Civil Cause No. 7 of 1995 and ***Msetti Auction Mart (T) Ltd***

Vs SIDO, Commercial case No. 1 of 1999 (both unreported*)* which were all referred to in the ***BAGCO*** Case (supra). All of the decisions did not mince words, as rightly put by the counsel for the plaintiff, that a defect in verification and/or signature to a pleading, is an irregularity curable by amendment and that that can be done at any stage of the pleadings.

S. N. Dhingra and G. C. Mogha; the learned authors of **Mogha's Law of Pleadings in India** (18th Edition, Eastern Law House, 2013) have this to say on defects of signature or verification, at page 63:

> "**Want of signature or verification or any defect in either will not make the pleading void, and a 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, as these are matters of procedure only**. It has been treated to be a mere irregularity and curable by amendment. **The defect may be cured by amendment, at any stage of the suit**, and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was originally presented, and not on the date on which it was amended".
> [My emphasis].

And Sudipto Sarkar and V. R Manohar; the learned authors of **Sarkar: the Code of Civil Procedure**, 11th Edition reprint 2011, state at page 1050:

> "Signing is merely a matter of procedure. So it is immaterial whether it is signed by him or someone else on plaintiff's behalf ... It would be unfair and unjust to reject the plaint merely on the ground that the plaint was not properly signed and or verified ... **omission to sign or defect in signature or verification may be cured at any stage by amendment**".
> [Emphasis supplied].

And to sink the nail even deeper, the same stance is expressed by Sir Dinshah Fardunji Mulla; the learned author of **Mulla: the Code of Civil Procedure**, 18th Edition, 2011 at page 1738 as follows:

> "... where the verification of a plaint or petition is defective, that should not normally be rejected but an order should be made for its amendment"

The foregoing explains the position of the law in India from which we imported our Civil Procedure Code. The position of the law in this jurisdiction is not dissimilar. His Lordship Massati, J. (as he then was) was confronted with an identical situation in ***Usangu Logistics*** (supra). Agreeing with the foregoing position in **Mogha Mogha's Law of Pleadings in India**, His Lordship observed that the stance has been followed in this jurisdiction and

quoted an excerpt from ***Phillip Anania Masasi*** (supra) in which Samatta, JK (as he then was) had this to say:

> "As I apprehend the law, want of or defect in verification does not make a pleading void, it is a mere irregularity which is curable by amendment."

The foregoing explains the position of the law in this jurisdiction. As can be seen, the stance that defects in signing and verifying pleadings is a mere procedural irregularity which can be cured by amendment at any stage has religiously been followed in this jurisdiction. The learned counsel for the plaintiff has extended an invitation to me that if I make a finding as I have done hereinabove, I should proceed to strike out the preliminary objection and allow amendment. To the contrary, the learned counsel for the defendant puts that that course cannot be opted in existence of a preliminary objection since the same would be a circumvention thereof and therefore the only course available is to strike out the plaint. I am afraid, none of their propositions entices me because they are altogether either not vindicated by law or not just and fair in the circumstances.

In the light of the discussion above, I find and hold that the plaint has defects in the signature and verification clause but, as rightly pointed out by Mr. Mgimba, learned counsel for the plaintiff, the same are curable by amendment and that they do not attract the sanction of the plaint being struck out as advocated for by Mr. Bwana, learned counsel.

Before I pen off, let me, quickly, point out at my dissatisfaction at the way Mr. Bwana, learned counsel, handled this case which dissatisfaction I pointed out to the learned counsel at the end of the hearing of the objection. In the course of hearing, the learned counsel was making powerful arguments some of which there is a plethora of case law in support. The learned counsel never bothered to cite any. Let it be remembered that an advocate is an officer of the court and has a duty to assist the court to see to it that it arrives at a fair and just decision. A judicial proceeding in a represented civil suit has a tripartite arrangement – the presiding judge or magistrate, the advocate for the plaintiff and the advocate for the defendant – all of whom are aimed at building one and the same hut; justice. Each among the trio is supposed to play its part well. That is when substantive justice will be attained justifiably.

On the need to cite authorities, my sister at the Bench; Mkuye, J. in ***Manfred Peter Mtitu Vs Filikunjombe Deo Haule & 2 Others*** Miscellaneous Civil Cause No. 2 of 2010 (unreported) had this call upon all advocates in the Roll:

> "Prudently, advocates for the respondents were supposed to assist the court at least by citing a relevant piece of legislation if not a particular section or even a case law which is dealing with the allegation. On the requirement of citing authorities, I invite all advocates in the roll to hear the cry and advice given by the late Mr. Justice Mkude in circular dated 29th May, 1980 which was addressed to all professional staff and confirmed by the Court of Appeal of Tanzania, in the matter

> of the **Honourable Mr. Justice Thomas Leo Mkude and in the matter of Memorial Tributes,** Reference File No. 1 of 1985, CAT at Dar es Salaam (unreported)".

Madam Justice Mkuye then went on to quote the call:

> "There has been a noticeable decline in the quality of our professional work which may lead to serious consequences in the time to come. The legal opinions we write are not supported by authorities as they should be. **From the courts we hear of submissions which are never supported by authorities as they should be.** Our pleadings are faulty and sometimes confusing. Experience has shown that all this is caused by lack of proper preparation and research. (Emphasis supplied)."

The foregoing excerpt fully shares my sentiment. In court proceedings, especially in represented civil proceedings, every participant must play its part well in the dispensation of justice.

That said, I would, in the upshot, uphold with costs the preliminary objection raised by the defendant's counsel; Mr. Bwana. However, instead of rejecting the plaint as urged by Mr. Bwana, learned counsel, I order that the same should be rectified to comply with the letter of the law as discussed above.

The amendments should be presented within seven days from the date of this ruling.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of June, 2015.

J. C. M. MWAMBEGELE
JUDGE