

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA**

COMMERCIAL CASE NO. 11 OF 2015

**GULF BULK PETROLEUM (T) COMPANY PLAINTIFF
VERSUS
PROJECT MANAGER, CHINA HENAN
INTERNATIONAL COOPERATION
GROUP CO. LTD, KYAKA-BUGENE
ROAD PROJECT DEFENDANT**

17th & 17th April, 2015

RULING

MWAMBEGELE, J.:

The plaintiff in this suit is a legal entity registered under the Companies Act, Cap. 212 R.E 2002. It has brought this suit under summary procedure in terms of Order XXXV of the Civil Procedure Code Cap.33 of the Revised Edition, 2002 against the defendant, a legal entity as well, praying for the judgment and decree as follows:

- (a) Payment of the Tanzania Shilling three hundred and forty million six hundred thirty five thousands only [Tshs. 340,635,000/=] as pleaded in paras 3, 6 and 7 of the plaint

- (b) General damages naturally arising in the usual course of things to be assessed by this honorable court;
- (c) Interest on the claimed sum as well as damages to be assessed at the Commercial Bank rate from the date of accrual of the cause of action until the delivery of the judgment;
- (d) Interest on the decretal amount from the date of delivery of the judgment up to the full satisfaction of the same;
- (e) The defendant be condemned to bear costs of this suit; and
- (f) Any other relief(s) this Honorable court deems just to award.

The kernel of the suit as can be gleaned from the plaint is failure by the defendant to pay for the fuel supplied by the plaintiff to her on credit. It is stated that up to August the closing balance was at the said tune of Tshs. 340,635,000/=. The plaint has it further that the defendant attempted to effect payments vide issuing postdate cheques which were all dishonored upon presentation for encashment with a "refer to the drawer" endorsement. It is stated that due to such failure to pay, the plaintiff has been subjected to unnecessary inconvenience by denying him opportunity to inject the unpaid money to the revolving fuel transactions or other business ventures for profit generation hence a claim for general damages arising naturally in the usual course of things. All attempts, made by the plaintiff to have its money paid by the defendant have proved futile not even the threat to sue through a demand notice, hence this suit.

This matter was called before the judge in chambers on the 12.03.2015. Mr. Rutahindurwa, learned counsel for the plaintiff informed this court that

since it was the seventeenth day since the service of summons upon the defendant, he still had time to file an application for leave to defend the suit. It was slated to come on the 17.04.2015 for orders.

Come that date, before me, Mr. Mr. Rutahindurwa once again appeared for the plaintiff. He told this court that it is about 53 days since the defendant had been served and there was neither an application for leave filed, nor leave granted to the defendant to appear and defend the suit. He there and then, guided by Order XXXV rule 2 (a) of the CPC, prayed for judgment to be entered in favour of the plaintiff as prayed in the plaint. Thereafter I adjourned the matter briefly in order to prepare this ruling.

I wish to state at this stage that a summary judgment is not automatic upon failure by the defendant to obtain leave. Rather, as I have recently held in the case of ***Bank of Africa Tanzania Limited Vs Mallase Sitta Makalanga & another***, Commercial Case No. 26 of 2014 (Unreported), summary judgment, in terms of Order XXXV of the CPC, will be entered upon the conditions stipulated in the Order being satisfied by the person seeking to rely on that provision. I went further and stated that among those conditions are, firstly proof of service of the plaint as well as summons to the defendant and secondly, his failure to obtain leave to defend.

The question in the circumstance remains, as was the case in ***the Bank of Africa*** Case (supra), whether the defendant was properly served so as to warrant summary judgment against him. Mr. Rutahindulwa has informed

this court that the defendant was served and that there is proof of service. To substantiate this allegation, he referred me to the affidavit of the process server, one Silas Lucas Isangi as well as to the summons thereof which was purportedly served to the defendant. I have seen the relevant summons. There in an endorsement on the said summons which reads: "ROBERT NYAISHAIJA AFISA UTUMISHI-CHICO" followed by a signature and dated "23/2/2015 KARAGWE".

The process server in the said affidavit swears to the effect that the said summons was received and signed by one Robert Nyaishaija; Human Resources Officer of China Henan International Cooperation Group, Kyaka - Bugene Road Project.

At this juncture, I pause to think as to whether there was a proper service effected on the defendant. My eyebrow was raised by the parties as they appear in this suit. In the plaint, the defendant appears to be the "PROJECT MANAGER, CHINA HENAN INTERNATIONAL COOPERATION GROUP CO. LTD, KYAKA-BUGENE ROAD PROJECT". The question which pokes my mind at this stage is whether service to the Human Resources Officer of China Henan International Cooperation Group Company Limited, Kyaka - Bugene Road Project can be deemed as proper service to the defendant; the Project Manager of the same Company. In my considered opinion, an answer thereto is in the negative. I say so because, the defendant, having been sued in his capacity as a project manager, service cannot be said to be properly effected on the Human resource Manager.

The situation would however be different had the Company been sued in this suit.

Contrary to that, the plaint, as indicated, shows that the "Project Manager" at China Henan International Cooperation Group Company Limited, for the Kyaka - Bugene Road Project, is the one being sued. This clear interpretation is further fortified by the Notice of Intention to sue by the learned counsel for the plaintiff (Annexure Rwelu 3) which is directed to the Project Manager, CHICO Kyaka - Bugene Road Project, attention being drawn to a certain Yang Wang. Further to this are the electronic mail correspondences annexed as Rwelu 2 which in themselves are rather couched in personal terms.

Based on the prayer above made by the learned counsel for the plaintiff, I am inclined, in my mind, and certainly so, to think that Mr. Rutahindulwa learned counsel, had in mind the Cooperation being the defendant. But, given his law school classes coupled with vast experience amassed from the years of professional practice, he must be well aware or otherwise reasonably presumed to be so, that a company as a separate legal entity is capable of suing and being sued in its own name - see: ***Salomon Vs Salomon and Company*** [1897] AC 22. It does not therefore augur well that a Project Manager can be sued on behalf of the Company by which he is employed to perform such duties as project management. That apart, he must also be well aware that in terms of order V Rule 12 of the CPC, service has to be made on the defendant in person serve where he has an agent empowered to accept summons.

The learned counsel did not attempt to describe the status of the person who received summons in relation to the defendant sued. Neither was it stated in the sworn affidavit of the process server that the said human resources officer who purportedly received and signed summons was the agent of the defendant empowered to receive summons.

The blemish on the said service purported to have been effected on the defendant on the 23.02.2015 tarnishes it all and it is on such basis I hereby refuse the prayers made by Mr. Rutahindurwa learned counsel for the defendant. As the defendant did not enter appearance, I make no order as to costs. It is so ordered.

DATED at MWANZA this 17th day of April, 2015.

J. C. M. MWAMBEGELE
JUDGE