IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 61 OF 2015

BANK OF AFRICA (T) LIMITED ..... PLAINTIFF

VERSUS

INTERSALES TANZANIA LIMITED
HAPPY KAITIRA BURILO } **..... DEFENDANTS**
IRENE EPHRAIM MAGULA

19th October & 12th November, 2015

RULING

MWAMBEGELE, J.:

This a ruling in respect of a preliminary objection raised by the defendants in their joint statement of defence to the effect that the plaint is defective for being drawn by an anonymous and thus should be struck out with costs. The preliminary objection (henceforth "the PO"), by agreement of the learned counsel for the parties which was blessed by the court, was disposed of by way of written submissions. The written submissions were filed in court as scheduled by this court on 15.09.2015.

Arguing for the PO, Samwel Shadrack, learned counsel for the defendants is brief and to the point. He submits that the plaint which was filed by the plaintiff through the services of Frostee Attorneys contaravened the provisions of section 44 (2) of the Advocates Act, Cap. 341 of the Revised Edition, 2002

(henceforth the "Advocates Act"). The learned counsel goes on to submit that the plaint ought to have shown the name and signature of the person who had drawn it. Failure to do so, he submits, is a fatal irregularity which makes the suit incompetent. The learned counsel cites two unreported decisions of this court in support of this argument. These are ***Lucas A. Nzegula (son and heir of Zuhura John) Vs Isaac Athumani and Royal Insurance (T) Ltd***, Civil Appeal No. 66 of 2008 and ***Magnet Construction Ltd Vs Peter J. Makorere***, Revision No. 14 of 2003. He thus asks this court to strike out the suit with costs.

On the other hand, the learned counsel for the plaintiff, whose name has not been disclosed in the written submissions, counter-argues that the PO is misconceived and brands it as a delaying tactic by the respondent. It is submitted that section 44 (1) of the Advocates Act makes reference to the provisions of section 43 of the same Act which relates to unqualified persons who prepares documents or instruments to be filed in court. The plaint under attack, it is submitted, has been signed by the plaintiff's advocate; Evarist Sekaboyi who is an advocate and therefore the provisions of section 43 read together with section 44 (1) of the Advocates Act cannot apply in the present case. To bolster up this argument, ***George Humba Vs James M. Kasuka***, Civil Application No. 1 of 2005, an unreported decision of the Court of Appeal, is cited.

The plaintiff's counsel also refers to the provisions of article 107 (2) (e) of the Constitution of the United Republic of Tanzania, 1977 that the court should dispense justice without being tied up with technicalities and as was

held by the Court of Appeal in ***Samwel Kimaro Vs Hidaya Didas***, Civil Application No. 20 Of 2012 (as per Msoffe, J.A):

> "In dispensing justice the courts are no doubt rendering or giving a very valuable service to the society at large and to the consumers of our justice system in particular. If so, the society/consumers must continue to have trust and faith in our system. These will be lost if cases are sometimes struck out on flimsy, cheap or too technical reasons. I think it is to the best interests of anyone that cases should reach a finality without being hindered in the process by preliminary objections which could be avoided or which do not ultimately determine the rights of the parties."

I have considered the rival learned arguments by the counsel for the parties in their written submissions for and against the PO. What is at issue between the learned counsel is whether the plaint is fatally defective for not indicating the name and signature of the drawer of the plaint. This matter will not detain me because it was succinctly dealt with by the Court of Appeal in ***George Humba*** (supra); a case cited and supplied by the learned counsel for the plaintiff. In that case, like in the instant, there was fronted a preliminary objection to the effect that the notice of motion lodged by the applicant was incurably defective and therefore should be struck out as it offended the mandatory provisions of section 44 (1) and 44 (2) of the

Advocates Act. The Court of Appeal, having analyzed the tenor and import of the provisions of sections 43 and 44 of the Advocates Act, had this to say:

> "In the present case, the notice of motion shows a legible signature of Mr. Kayaga as advocate for the applicant and that it was signed at Tabora on 9th May, 2005. At any rate, Mr. Kayaga, as already pointed out, was not an unqualified person who is the targeted person in section 43 of the Act, Cap. 341 of the Revised Edition, 2002."

In view of the foregoing, it is obvious that the provisions of sections 43 and 44 of the Advocates Act are intended to cater for unqualified persons; not for advocates who are qualified persons and officers of this court. I take judicial notice that Mr. Evarist Sekaboyi is not an unqualified person and as he is an officer of this court and courts subordinate thereto except for primary courts. The PO raised by the learned counsel for the defendants is therefore wanting in merit and must be overruled.

Before I pen off, I wish to state something in respect of the argument by the defendants' counsel to the effect that the provisions of the Constitution required that justice should be dispensed with without being impeded by undue regard to technicalities. Much as I agree that this is the position of the law in this jurisdiction; that is, procedural irregularities and legal technicalities in our jurisdiction should not and are not used to thwart substantive justice. This stance was articulated by the Court of Appeal *in* ***the Judge In-charge High Court Arusha Vs N.I.N. Munuo Ng'uni***, Civil Appeal No. 45 of 1998

(unreported) and ***Zuberi Mussa Vs Shinyanga Town Council***, Civil Application No. 100 of 2004 (unreported). However, I wish to remind the learned counsel that it is a principle of constitutional law that the Constitution should be resorted to sparingly, especially in situations where an issue can be resolved without recourse to it. This stance was stated by an unreported decision of this court [Lugakingira, J. (as he then was)] in ***Shabani Msengesi Vs National Corporation***, MWANZA Civil Appeal No. 44 of 1994 in which His Lordship quoted a Zimbabwean case *of* ***Minister of Home Affairs Vs Pickle and Others***, (1985) LRC (Const) 755 in which it was held:

> "It is a cardinal principle of constitutional law that where an issue can be resolved without recourse to the Constitution, the constitution should not be involved".

Much as it is the practice of courts in this jurisdiction to ignore procedural irregularities which are formal and cause no prejudice to the other party, it is my considered view that the Constitution should be resorted to only in circumstances where there is no clear provision in the law that can cater for a particular situation. In the instant case, the issue under dispute can be resolved without making a resort to the Constitution as the matter, as correctly put by the learned counsel for the plaintiff, was adequately dealt with in the ***George Humba*** case (supra). It will therefore be inappropriate to involve the Constitution in the circumstances. The Constitution, as the highest law of our land and grund norm, is "sacred". It should, in my considered view, be resorted to sparingly. The learned counsel in this jurisdiction are asked to jealously guard this principle.

In the upshot, and for the reasons stated earlier, the preliminary objection raised by the defendants' counsel is overruled with costs.

Order accordingly.

DATED at DAR ES SALAAM this 12th day of November, 2015.

J. C. M. MWAMBEGELE

JUDGE