IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 8 OF 2015

NOVONECA CONSTRUCGTION COMPANY LIMITED
MELCHIOR MARTIN BAGULE .... **PLAINTIFFS**

VERSUS

NATIONAL BANK OF COMMERCE LTD
TUKUYU BRANCH, NATIONAL BANK OF COMMERCE LTD ... **DEFENDANTS**

11th July & 3rd October, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a preliminary objection raised by the defendants' counsel to the effect that the suit is bad for being instituted against a non-juristic person. The defendants' counsel thus prays that the suit be dismissed with costs. The ruling was initially slated to be pronounced on 11.08.2016 but could not as I was on a special assignment outside Dar es Salaam which took sixty good days. Now that the special assignment is over, I am now set to give the ruling.

The preliminary objection (henceforth "the PO") was argued by way of written submissions, the learned counsel for the parties having so agreed and the court blessed their agreement. The kernel of the PO is, essentially, in respect of the impleading the second defendant. The defendants' counsel argues that

the second defendant – Tukuyu Branch, National Bank of Commerce Ltd - ought not to have been impleaded because she has no legal personality as it is a branch of the first defendant. It is argued that only legal persons are legally allowed to maintain actions in court against other legal persons. Tukuyu Branch, National Bank of Commerce Ltd, the defendants' counsel argues, has no capacity to sue or be sued. To buttress this argument, the learned counsel has referred to me the cases of ***Reg Vs Registrar of Joint Stock Companies*** (1847), 1 QB 839 at 839; an English case cited in **The Law of Names: Public, Private and Corporate** by Anthony Linell, Butterworths & Co. (Publishers) Ltd London at pp74 - 75 and ***South Freight & Co. Ltd Vs the Branch Manager, CRDB Tanga***, Civil Case No. 5 of 2002 (unreported); the decision of this court. The learned counsel for the defendants thus argues that the suit should be struck out with costs

On the other hand, the plaintiff's counsel, luckily, concedes that the second defendant has no legal personality and therefore cannot sue or be sued as done in the present case. However, the learned counsel for the plaintiffs disputes the learned counsel for the defendants' prayer to the effect the suit against both defendants should be struck out. He argues that the defendants' counsel does not dispute that the first defendant has rightly been sued. In the premises there is no reason why a suit against her should be struck out as well. The plaintiffs' counsel, as a true officer of the court, finally submits that the PO should partially be sustained by striking out the name of the second defendant and in that process dismissing the prayer to have the suit against the first defendant struck out. The plaintiffs' counsel adds a prayer to the effect that costs should be in the main suit.

In a short rejoinder, the defendants' counsel has objected with some force the prayer to have costs in the main suit. he has relied on the provisions of section 30 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC") to state that costs must follow the event and subsection (2) of the same section to the effect that where the court directs that any costs shall not follow the event, it is mandatorily required that reasons in writing should be advanced. Agreeing that matters of costs are within the discretion of the court, the learned counsel argues that the exercise of that jurisdiction should be judiciously exercised. He cites ***John Gimunta Vs Joseph Obeto***, Civil Application No. 173 of 2007 (unreported) and **Mulla: the Code of Civil Procedure** (18th Edition) at p. 540 to reinforce this proposition. He thus reiterates the prayer in the main submission to the effect that the plaintiffs' suit should be struck out with costs.

I have elegantly read the learned submissions by both learned counsel for the parties. Happily, there is no dispute that the second defendant has no legal status to sue or be sued. The learned counsel for the plaintiffs concedes so and thus the issues will not detain me. As rightly pointed out by the learned counsel for the defendants, and conceded by the learned counsel for the plaintiffs, the second defendant, being a branch of the first defendant, cannot sue or be sued in its own capacity. As was held in the ***South Freight*** case (supra), a case cited to me by the learned counsel for the defendants, branches to a bank do not have a legal capacity to sue or be sued. In that case, the plaintiff sued The Branch Manager CRDB Tanga Branch. Sustaining a preliminary objection that the defendant had no legal capacity to sue or be sued, my brother at the Bench Mkwawa, J. at p 3 of the cyclostyled ruling observed:

> "... the suit is against a wrong defendant. It cannot seriously be disputed that THE BRANCH MANAGER, CRDB, TANGA BRANCH is not a legal entity."

In the case at hand, it is without dispute that the first defendant has several branch offices throughout Tanzania. None of those branches has independent legal existence or personality. That is to say; those branches, including the second defendant, do not have a legal entity of their own separate from the first defendant's. None of them can therefore sue or be sued in its own name. On this premise, the second defendant; a branch of the first defendant, does not have any legal capacity to sue or be sued in its own name. It was therefore inappropriate to implead the second defendant in this case. The proper party is the first defendant.

Having so found and held, what then should the way forward? The defendants' counsel has beckoned the court to have the whole suit struck out. The plaintiffs' counsel thinks the proper course to take is to strike the suit against the second defendant only. I think the plaintiffs' counsel is right. As the defendants' counsel concedes that the first defendant is a proper party to be sued and was therefore properly so sued, I do not think it will be legally appropriate strike out the whole suit. Without much ado, I proceed to strike out the suit against the second defendant for being improperly impleaded. The suit against the first defendant remains.

Next for determination is the question of costs. While the defendants' counsel prays for costs in this objection, the plaintiffs' counsel thinks the same should be in the cause. As rightly pointed out by the learned counsel for the defendants the basic principle is that costs must always follow the

event and where the court thinks they should not, it must give reasons in writing. This is the tenor and import of section 30 (2) of the CPC and the discussion is evident in a number of cases in this jurisdiction. In ***Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd*** [1967] 1 EA 287, this court (Biron, J), I quote from the headnote, held:

> "The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause".

And His Lordship went on to quote from **Mulla: the Code of Civil Procedure**, 12th Edition, at Page 150 where it is stated:

> "The general rule is that costs shall follow the event unless the court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation."

The above paragraph in the 12th Edition has been improved in the 18th Edition (2011) of the same legal work by Sir Dinshah Fardunji Mulla, at page 540 as follows:

> "The general rule is that costs shall follow the event unless the court, for good reason, otherwise orders. Such reasons must be in writing. This

> means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him; and this rule applies even to proceedings in writ jurisdiction."

The general rule that costs shall follow the event has also been discussed by this court in at some length in ***Nkaile Tozo Vs Philimon Mussa Mwashilanga*** [2002] TLR 276 and ***In The Matter of Independent Power Tanzania Ltd and In The Matter of a Petition by A Creditor For An Administration Order By Standard Chartered Bank (Hong Kong) Ltd*** Misc. Civil Cause No. 112 of 2009 (unreported). In these two decisions, this court referred to a plethora of authorities on the point. Such authorities include ***Hussein Janmohamed*** (supra), ***Karimune and others Vs the Commissioner General for Income Tax*** [1973] LRT n. 40, ***N. S Mangat Vs Abdul Jafer Ladak*** [1979] LRT n. 37, ***M/S Umoja Garage Limited Vs National Bank of Commerce***, High Court Civil Case No. 83 of 1993 (unreported), ***Njoro Furniture Mart Ltd Vs Tanzania Electric Supply Co Ltd*** [1995] TLR 205 and ***Kenedy Kamwela Vs Sophia Mwangulangu & another*** HC Miscellaneous Civil Application No. 31 of 2004 (unreported). I agree with the reasoning in the ***Nkaile Tozo*** and ***Standard Chartered*** cases (supra) and propose to follow them in determining this matter.

In the matter at hand, the defendants filed a PO along with the written statement of defence to which the plaintiffs' counsel has partially conceded. It is obvious that the counsel for the defendants' counsel must have spent time and resources in preparation for the PO. These are costs involved in that endeavour which the applicant must shoulder following the event. I find

no sufficient reason why the defendants should wait for final determination of the suit to enjoy them. After all, no one is sure at this stage in whose favour will the case end. Costs soothe litigants and, unless there are cogent reasons to the contrary, must follow the event rather than wait until finalization of the suit as counsel for the plaintiffs would want this court to do.

On this point, I find it irresistible to quote the statement of Bowen, L.J. in ***Cropper Vs Smith*** (1884), 26 Ch. D. 700, at p. 711, quoted by the High Court of Uganda in ***Note Waljee's (Uganda) Ltd Vs Ramji Punjabhai Bugerere Tea Estates Ltd*** [1971] 1 EA 188:

> "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a party ... cannot be cured by the application of that healing medicine".

In a somewhat similar tone, this court [Othman, J. (as he then was – now Chief Justice of Tanzania)] echoed the foregoing excerpt in ***Kenedy Kamwela*** (supra) when confronted with an identical situation. His Lordship simply but conclusively remarked:

> "Costs are one panacea that no doubt heals such sore in litigations".

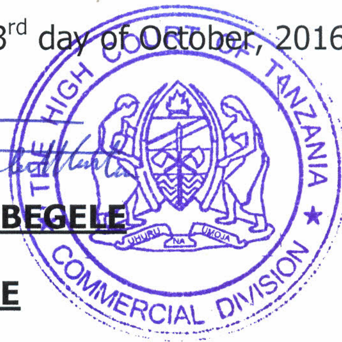
I share the sentiments of Their Lordships in the foregoing quotes respecting costs as a panacea in litigation. To borrow Their Lordships' words, I feel comfortable to recapitulate that costs are one panacea that soothe the souls of litigants that, in the absence of sound reasons, as is the case in the matter

at hand, this court is not prepared to delay the defendants' counsel to reap them at the earliest possible moment.

The foregoing said and done, I decline the invitation by Mr. Lyimo; the plaintiffs' counsel that costs should be in the cause. The suit against the second defendant is struck out with costs. I order that the plaintiffs' counsel should file a fair copy of the Amended Plaint within seven days from the date hereof. The same timeframe is accorded to the defendants' counsel within which to file a fair copy of the Amended Written Statement of Defence. The PO is therefore sustained to the extent stated above. The case against the first defendant will proceed on a date to be fixed today.

Order accordingly.

DATED at DAR ES SALAAM this 3rd day of October, 2016.



J. C. M. MWAMBEGELE

JUDGE