

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 36 OF 2019

DIAMOND TRUST BANK TANZANIA LIMITED PLAINTIFF.

VERSUS

DAR COACH TANZANIA LIMITED 1ST DEFENDANT.

MANMEET SINGH LAL 2ND DEFENDANT.

SAUDAGAR SINGH LAL 3RD DEFENDANT.

JAS DEEP SINGH LAL 4TH DEFENDANT.

Date of Last Order:13/08/2019.

Date of Ruling: 20/09/2019.

RULING.

MAGOIGA, J.

This ruling is in respect of a preliminary objection on a point of law raised against the competency of the joint written statement of the defendant in that is defective and incompetent with regard to the third and fourth defendants for want of power of attorney or source of the second defendant's alleged authority to sign the joint written statement on behalf of the third and fourth defendants [Order III, Rule 2 (a) of the Civil Procedure Code, [Cap 33 R.E 2002] and for want of express certification of the alleged authority of the second defendant to sign on behalf of the third

and fourth defendants. Consequently the purported joint written statement of defence with regard to the third and fourth defendant is prayed to be expunged and struck out.

AND IN THE ALTERNATIVE

The plaintiff state that it is entitled to Summary Judgement on the whole of its claims jointly and severally against all defendants under Rule 68 (b) and (c) of the High Court (Commercial Division) Procedure Rules, 2012 as the defendants' joint written statement of defence contravenes the mandatory provisions of Order VIII, Rules 3, 4, and 5 of the Civil Procedure Code, [Cap 33 R. E 2002].

The plaintiff is enjoying the legal services of Mr. Dilip Kesaria, learned advocate from Dar es Salaam based legal clinic of Kesaria and company Advocates. On the other hand, the defendants are enjoying the legal services of Mr. Beatus Malima, learned advocate from Dar es Salaam and Arusha based legal clinics of Mawalla Advocates.

The facts pertaining to this suit as gathered from the pleadings are not complicated. On or about 8th December, 2016 the plaintiff availed a credit facility to the 1st defendant by way of a Term Loan for One Hundred

Seventy Five Million shillings(Tshs.175,000,000.00) upon the terms and subject to the conditions stipulated in the plaintiff's credit facility letter. The said facility letter was for a term of 39 months and was secured by a mortgage of the 2nd defendant's immovable property on plot no. 10 Sofu area, Kibaha Township with Certificate Title number 82923. The facts further go that the said credit facility was varied in 2017 and increased to Tshs. 500,138,888/= upon the terms and subject to the conditions of the plaintiff's credit facility letter dated 20th June, 2017 and the said facility letter was continued to be secured by the mortgage secured by the first facility, the personal guarantee of the 2nd, 3rd and 4th defendants and a mortgage of the 3rd defendant's immovable properties on 11th floor, Apartment A, Uhuru Heights plot no. 63/27 Upanga Central area Bibi Titi Mohamed road, Dar es Salaam with title deed no. 38083/7 which is not registered because of the variations of signatures of the 3rd defendant. Further, the facts are that the 1st defendant is in default of its repayment obligations under the foresaid credit facility, as varied. This has caused the outstanding amount due as of 19th February 2019 is Tshs. 589,515,014.61, hence this suit seeking orders as contained in the prayer clause in the plaint.

Upon being served with the plaint, the defendants jointly filed written statement of defence signed by the 2nd defendant for and on behalf of himself, 1st, 3rd and 4th defendants disputing every allegation in the plaint and prayed for dismissal of the suit with costs. The plaintiff counsel upon being served with the joint written statement of defence, filed a reply to the joint written statement of defence and simultaneously raised a preliminary objection on a point of law that the said joint written statement of defence is defective and incompetent, the subject of this ruling.

The learned advocates for parties by consensus were granted their prayer to argue this point of objection by written submissions. I respectively commend the learned counsel for abiding to the schedule of filing the written submission and on their insightful submission for and against the raised objection.

I have dutifully read and considered the written submissions for and against the raised preliminary objection on point of law with a very serious legal mind and eyes, with respect without repeating them here but am constrained to hold that the point raised stand to fail in this suit. The reasons I am taking this stance are not far to fetch. **One**, the raised preliminary objection was pegged on Order III, Rule 2 (a) of the CPC. This

Order is clear and in plain language, is all about the recognized agents and advocates who appear for the party to a suit or application and has nothing to do with signing the pleading as defined in the Code. For easy of reference the said Order III, Rule 2 (a) provides:

2. The recognized agents of parties by whom such appearances, application and acts may be made or done are_

(a) persons holding power of attorney, authorizing them to make appearance or application and to do such acts on behalf of such parties.

Two, had the learned counsel for plaintiff been questioning the representation of Mr. Beatus Mālima advocate on his representation of the defendants in this suit, it could be proper and the said preliminary objection could make sense, in the circumstances. But the raised objection is misplaced and misconceived on its face value.

Three, I have observed that the learned counsel for plaintiff has amended his preliminary objection in the course of his written submissions to Order VII, Rule 14, which amendment was done without the leave of this Court. This was done either after realizing that the formerly raised objection was

misplaced and now ingeniously is finding a refuge to another Order not specifically in his pleading. This is against the rule fair hearing and the rule that parties are bound by their pleadings. See the case of JOHN M. BYOMBALIRWA v. AGENCY MARITIME INTERNATIONAL (T) LIMITED [1983] TLR 1, read together with Order 6, Rule 7. So the issue of Rule 14 of Order VII was not part of the original preliminary point of objection.

Four, even for the sake of argument, if I consider Order VI, Rule 14 still I find the joint written statement of defence duly signed by the 2nd defendant and verified accordingly on behalf of all defendants. Not only that, but also, in his verification the 2nd defendant categorically stated that he is signing on behalf of the 3rd and 4th defendant. Further the case of MASSAWE AND COMPANY v. JASHBAI P. PATEL [1998] TLR 445 is distinguishable from the circumstances of this case in that the applications was signed by the advocate alone while in this suit the advocate signed and one of the parties who is jointly sued signed on behalf of two others. It should be noted that in this suit there is no way you can expunge the joint written statement of defence where others who did not signed were sued as directors of the 1st defendant whose the signature of the 2nd defendant has cured any defect . Therefore, I reject the prayer to have the joint written statement of defence

expunged or struck out. But instead guided by the holding in the case of GEORGIA MTIKILA v. DNS & IST[1998] TLR 514 in which the Court of Appeal apart from finding the written statement of defence was not properly signed as opposed to the one in the instant suit which I find dully signed but had this to say which I find it relevant **"...however, we are satisfied that the error was harmless and it did not occasioned miscarriage of justice the error involved was really immaterial and can safely be ignored"**

In the instant suit the error, if any, am constrained guided by the above holding and the overriding objective find that the error is harmless and no cry of injustice has been raised by the plaintiff and on that same breath I hereby ignore it and give parties right to prove their case on merits to enable not only justice to be done but to be seen to have been done and bearing in mind that right to be heard is paramount that traces its origin in Eden when God heard Adam before judgement.

Five, while I appreciate the position in Kenya as cited in the case of RESEARCH INTERNATIONAL EAST AFRICA LIMITED v. ARISI AND OTHERS [2007] 1 EA 348 which am aware that not only parties but even advocates in Kenya apart from being recognized agents they must produce written

authority signed by the party giving them right to appear in Court before they are allowed to represent clients. This is not the case here in Tanzania but with due time we can go that much far. Also, this case was dealing with verifying affidavit which is evidence as opposed to this suit which is on facts to the pleadings, hence distinguishable.

On the totality of the above reasons, the first limb of objection is hereby overruled.

This trickles down to the second limb of objection argued in the alternative to the first limb of objection. With respect to the learned counsel for plaintiff, let me say straightforward that this objection is untenable in the circumstances of this suit. The reasons am taking this stance are obvious.

One, the holding of the Court above that the written statement of defence is at home and dry by being signed by the 2nd defendant means that there is a defence in the eyes of law. **Two**, I have gone through the plaint and the written statement, I hold a contrary view to that of the learned counsel for plaintiff that the said paragraphs are in contravention of paragraphs 3, 4 and 5 of Order VIII of the CPC. The defendant has specifically denied each paragraph and in particular, paragraph 2 of the WSD has called the plaintiff

to prove the amount claimed or any sum at all. These was equally done in paragraphs 4, 5 and 8.

That said and done the set of preliminary objections raised are for the above reasons devoid of any useful merits and are hereby overruled with costs.

It is so ordered.

Dated in Dar es Salaam this 20th day of September, 2019.




S. M. MAGOIGA

JUDGE

20/09/2019