IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CASE NO.5 OF 2020

WELLWORTH HOTELS &LODGES LTD.....PLAINTIFF
VERSUS
EAST AFRICA CANVANS CO. LTD.....1st DEFENDANT
STIRLING ARVING HORSELY.....2nd DEFENDANT
ROBERT JAMES FLOWERS.....3rd DEFENDANT
GARY MCINTYRE.....4th DEFENDANT
ECO-STEEL AFRICA LTD.....5th DEFENDANT

Last Order, 21/07/2020.
Ruling, 22/09/2020.

RULING

NANGELA, J.:

The Plaintiff, a company registered in accordance with the laws of the United Republic of Tanzania, operates its businesses in the hotel industry under the tourism sector. The 1st Defendant is a company duly registered under the Laws of the Republic of Kenya, while the 2nd, 3rd, 4th and 5th defendants are shareholders of the 1st Defendant. The Plaintiff is suing the Defendants, jointly and severally, for breach of contract dated 26th January 2016, which was entered between the Plaintiff and the 1st Defendant.

Under the said contract, the Defendants were to design, manufacture, supply, and install five mobile tented camps in various national parks in Tanzania. The tents were to be delivered by 30th June 2016 but the same were never delivered, hence the present suit.

In view of the filing of this suit against the Defendants, the Plaintiff seeks the following prayers from this Court against all Defendants, jointly and severally:

(a) a Declaratory Order that the Defendants have breached the contract entered between the 1st Defendant and the Plaintiff;
(b) A full reimbursement of **US$ 443,508.60**;
(c) Special damages for losses incurred, an amount of **US$ 1,357,045.18**;
(d) Interest at commercial rate of 22% from the date of filing the suit until the date of judgement;
(e) Interest at Court's rate of 12% from the date of judgement until the full satisfaction of the decree;
(f) Legal fees of the US$ 20,000 (twenty thousand USD).
(g) General damages;
(h) Any other relief that the Honourable Court deems fit and just to grant.

On the 3rd of April, 2020 the 1st, 2nd, and 3rd Defendants filed a Written Statement of Defence, (WSD). In their WSD, the 1st Defendant raised counter claim to the claims contained in the Plaint. Moreover, the 1st, 2nd, and 3rd Defendants raised four

preliminary points of law (**POs**) in objection to the suit. The particular POs are as hereunder, that:

1. The Plaint does not disclose any cause of action against the 2nd and 3rd Defendants.
2. The Plaint contravenes the provisions of Order VII Rule 1 (e) of the Civil Procedure Code, Cap.33 [R.E.2019];
3. This Honourable Court lacks the requisite jurisdiction to entertain the suit in accordance with section 18 (a), (b) and (c) of the Civil Procedure Code, Cap.33 [R.E.2019];
4. At the time of filing this Plaint in January 2020, Mr. Yassin Maka, the Advocate for the Plaintiff, had no valid Practicing Certificate for the year 2020 contrary to sections 39(1) (b) and 41(1) of the Advocates Act, Cap.341 R.E. [2019].

On the 3rd of April 2020, the 4th and 5th Defendants did as well file a joint Written Statement of Defence (WSD) in response to the Plaint. In their WSD, the learned counsel for the 4th and 5th Defendants raised two Preliminary Objections as well. The 4th and 5th Defendants' points of law were as follows, that:

1. The suit has been filed contrary to section 39(1) (b) and section 41(1) of the Advocates Act, Cap.341.
2. The Suit is incompetent for misjoinder of the parties.

On the 23rd April 2020, the learned counsel for the Plaintiff filed a reply to the WSD filed by the 1st, 2nd, and 3rd Defendants and a Reply to the Counterclaim. In its reply to the counterclaim, the Plaintiff (defendant to the counter claim) raised a preliminary

objection against the counter-claim. The respective objection was to the effect that:

> The entire counterclaim has been misconceived as it contravenes the provisions of Order VI Rule 14 of the Civil Procedure Code, Cap.33 [R.E.2019].

On the 21st July 2020, when the parties appeared before me, it was agreed that, since there is a multiplicity of POs, the parties be allowed to argue them by way of filing written submissions. With that agreement, this Court made the following orders with regard to the filing of the written submissions:

1. That the 1st, 2nd and 3rd Defendants shall have their written submission filed on or before 3rd of August 2020.
2. The 4th and 5th Defendants shall file their written submission on or before 3rd of August 2020.
3. The Plaintiff shall file its written submission on or before 17th August 2020.
4. That, rejoinder submissions (if any) be filed on or before 22nd September 2020.
5. Ruling on 22nd September 2020.

All Defendants filed their written and rejoinder submissions as directed. The Plaintiff also filed its reply submission timely. I will start by summarizing the written submissions filed the 1st, 2nd and 3rd Defendants.

In their joint written submission, the 1st, 2nd and 3rd Defendants consolidated their 1st and 2nd grounds. The first ground was to the effect that: ***the Plaint disclosed no cause of action against the 2nd and 3rd Defendants***. They argued that,

under Order VII Rule 1 (e) of the CPC Cap.33 [R.E 2019], the Plaintiff is mandatorily required to plead all material facts constituting the cause of action.

Moreover, the 1st, 2nd and 3rd Defendants referred to the case of **John M. Byombalirwa v Agency Maritime Internationale (T) Ltd [1983] TLR 1,** as regards to what constitute a cause of action and submitted that, it is the duty of the Plaintiff to disclose in his pleadings, the cause of action against the defendants. They further submitted that, if the plaint fails to disclose any cause of action against a defendant or defendants, then the suit ought to be struck out for non-disclosure of cause of action. This Court was referred to the case of **Motohov v Auto Garage, (1971) HCD No.81**. In that case the Court held as follows, that:

> "It is trite to observe that a plaint must set out with sufficient particularity the plaintiff's cause of action ... this fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another fact that was pleaded could not be true."

It was a further submission by the 1st, 2nd and 3rd Defendants that, in considering whether a plaint discloses a cause of action or not, it is only the plaint that should be looked at and not the reply to the WSD. **(See John M. Byombalirwa v Agency Maritime Internationale (T) Ltd (supra))**. They argued that, since the plaint does not disclose any cause of action against the 2nd and 3rd

Defendants, this Court should uphold the objection and struck it out.

As regards their 2nd point of objection, i.e., *that this Court lacks the requisite jurisdiction to entertain this suit in accordance with section 18 (a), (b) and (c) of the Civil Procedure Code, Cap. 33 [R.E.2019]*, it was the 1st, 2nd and 3rd Defendants' submission that, it is trite law that every court that tries a suit should have the requisite jurisdiction vested to it by the statute and not by will of the parties.

To support their submission, the 1st, 2nd and 3rd Defendants referred this Court to the case of **Shyam Thanki and Others v New Palace Hotel Ltd [1972] HCD No.92.** According to the 1st, 2nd and 3rd Defendants, a place of instituting a suit is governed by law, more specifically, section 18 (a) (b) and (c) of the CPC, Cap.33 [R.E.2019]. They argued that, section 18 is couched in mandatory terms.

Referring to paragraphs 2, 3, (i), (ii) and (iii) of the Plaint filed in this Court, the 1st, 2nd and 3rd Defendants rightly submitted that, according to what the Plaintiff has stated clearly in the Plaint, the 1st Defendant is a company duly registered under the laws of the Republic of Kenya and the 2nd and 3rd Defendants are the Directors and Shareholders of the 1st Defendant, and, further that, their address for the purposes of service of this suit is in the care

of East Africa Canvans Co. Ltd (EACC), P. O. Box 1483-000502, Nairobi, Kenya.

However, it was argued that, nowhere is it pleaded in the Plaint, *firstly*, that, at the time of institution this suit on 20th January 2020, any of these Defendants actually and voluntarily resided in Dar-es-Salaam or any other place in Tanzania. *Secondly*, it is contended that, the Plaintiff does not plead whether or not at the time of commencement of this suit on 20th January 2020 any of the 1st, 2nd and 3rd Defendants actually and voluntarily carried business or worked for gain at Dar-es-Salaam or any other place in Tanzania.

Thirdly, the 1st, 2nd and 3rd Defendants submitted that, the Plaintiff does not plead in the plaint whether or not before the commencement of this suit it sought leave to institute and prosecute this suit within the jurisdiction of this honourable court. *Fourthly*, the 1st, 2nd and 3rd Defendants submitted that, the Plaintiff does not plead in the plaint whether or not the cause of action arose in Dar-es-Salaam or at any place in Tanzania.

The learned counsel for the 1st, 2nd and 3rd Defendants further contended that, the place of suing is a statutory requirement which cannot be ignored and must be complied with. Citing the case of **CR. F. Lwanyatika Masha v Attorney General, Civil Cause No.136 of 2001, (unreported)**, it was

submitted that the Court in that case underscored the importance of instituting a suit where the defendant actually or voluntarily carries on business or resides for gain and transferred the case to the relevant court in Mwanza.

The learned counsel for the 1st, 2nd and 3rd Defendants was emphatic that, when the Court makes a finding that it has no jurisdiction over the defendant for the reason that the defendant resides or carries out his business outside the local jurisdiction of the Court, then the Court can either transfer the case to the relevant court which has the requisite jurisdiction or strike out the suit for it to be filed in the proper forum. Citing the case of **Kagenyi v Musramo [1968] 1 EA 43**, the 1st, 2nd and 3rd Defendants submitted that, if the court does not have jurisdiction to entertain the suit in the first place, it cannot transfer it. On the basis of the foregoing submission, the 1st, 2nd and 3rd Defendants implored this Court to sustain their point of objection and struck out the suit.

The third final point of objection argued by the 1st, 2nd and 3rd Defendants was to the effect that, *at the time of filing this Plaint in January 2020, Mr. Yassin Maka, the Advocate for the Plaintiff, had no valid Practicing Certificate for the year 2020 contrary to sections 39(1) (b) and 41(1) of the Advocates Act, Cap.341 R.E. [2019].* This point was also raised by the 4th and 5th Defendants as a

preliminary objection and, for that matter; I will consider the two objections together.

The 1st, 2nd and 3rd Defendants' submitted that, sections 39 (1) (b) and 41(1) of the Advocates Act, Cap 341 [R.E 2019] disqualifies a person who purports to practice as an advocate if such person does not possess a valid practicing certificate for the relevant year of practice. They referred to this Court the decision of the Court of Appeal in the case of **Edson Osward Mbogoro v Dr. Emmanuel John Nchimbi, Misc. Civil Cause No.1 of 2005 (unreported)**. In that decision, the Court of Appeal was of the view that:

> "..if an advocate in this country practices as an advocate without having a current practicing certificate, not only does he act illegally, but also whatever he does in that capacity as an unqualified person has no legal validity."

In view of the above holding of the Court of Appeal, the 1st, 2nd and 3rd Defendants submitted that, Mr. Yassin Maka, the advocate who drafted and filed the Plaint in this Court on 20th January 2020 had not renewed his practicing certificate. It was submitted that he renewed it on the 3rd of February 2020, which means that, from 1st January 2020 to 2nd February 2020 Mr. Maka was an unqualified person pursuant to the provisions of Cap.341. The 1st, 2nd and 3rd Defendants concluded, therefore, that, his acts of drafting and filing the Plaint on the 20th January 2020 were of no legal validity.

The learned counsel for the 4th and 5th Defendants made a further reference to section 38 (1) of Cap. 341[R.E.2019]. The proviso to that provision states that:

> "Provided that every practicing certificate issued between the first day of January and the First day of February in any year to an advocate who held a valid certificate on the first day of December of the preceding year shall have effect for all purposes from the first day of January in the year.

The learned counsel for the 4th and 5th Defendants argued that, because the practising certificate of every advocate expires on the 31st of December of each year as per section 38(2) of the Cap.341 [R.E 2019], the law gives a grace period of renewal up to the 1st February with retrospective renewal validity effectively from the 1st day of January. It was contended, therefore, that, had Mr. Maka renewed and got issued with a certificate of practice on the 1st day of February he could have benefitted from the grace period. However, his certificate was renewed on the 3rd day of February, it was so argued.

The learned counsel for the 4th and 5th Defendants submitted further, that, section 35(1) of the Advocates Act, Cap.341 [R.E.2019] clearly provides for the mode of application which include paying to the registrar the prescribed fees for the practicing certificate. He referred to this Court the cases of **Kilimani Dotto Richard v Geita Gold Mine Ltd, Labour Rev. No.112 of 2019** and that of **Baraka Owawa v Tanzania**

Teachers Union, Misc. Labour Appl. No.6 of 2020, (HC) (Musoma) (unreported). In the latter case, this Court, (Galeba, J.) when considering the applicability of section 35 of Cap.341 [R.E.2019] observed that:

> "Breach of the above provision legally mutates an advocate from being an advocate and assumes the title of an unqualified person as defined under section 39 (1) of the Advocates Act, and the behaviour is punishable with a fine and imprisonment under section 6(1) of the NPCO Act (the Notaries Public and Commissioners for Oaths Act [Cap 12 RE 2002]). Secondly, whatever documents prepared endorsed or work done by an unqualified person does not have legal value in courts. The reasons are not far to find, first, such work is a result of criminality and deceit, second the work or document lack legality."

In view of the above, the 4th and 5th Defendants implored this Court to strike out the entire suit with costs as being incompetent for being drawn by an unqualified person. As regards the second point raised by these Defendants, they clung to Order 1 rule 3 of the CPC, Cap.33 [R.E.2019] arguing that, it clearly provides who may be joined as defendants. It was argued that there is no clear nexus between the 1st and 5th Defendants and the proximity of this Defendant with the rest of Defendants. They have referred to this Court the case of **Abdullatiff Mohamed Hamis v Mehboob Yusufu Osman & Fatna Mohamed, Civil Revision No.6 of 2017, CAT, (DSM) (unreported)**. In that case, the Court of Appeal held that:

> "The CPC does not specifically define what constitute a mis-joinder or a non-joinder but we should suppose, if two or more person are joined as plaintiff or defendant in one suit in contravention of Order 1 rule 3 respectively, and they are neither necessary nor proper parties it is a case of mis-joinder of parties."

The learned counsel for the 4th and 5th Defendants further submitted that, these Defendants are either shareholders or directors of the 1st Defendant. Even so, they argued that they are not privy to the contract alleged to be breached. The learned counsel for these Defendants buttressed his submission by referring this Court to the case of **Tweedle v Atkinson 1861** which gave roots to the doctrine of privity of contract. Reference was also made to the cases of **Mwangi v Braeburn Ltd (2004) 2EA 196 CAK** and **PUMA Energy (T) Ltd v Spec-check Enterprises Ltd, Comm. Case No.19 of 2014 (HC) (unreported).**

Apart from seeking refuge under the doctrine of privity of contract, the 4th and 5th Defendants have also invoked the doctrine of corporate personality arguing that the Plaintiff failed to draw a line between the 1st Defendant and 4th and 5th Defendants. They referred to this Court the famous case of **Solomon v Solomon [1987]AC 22, Macaura v Northern Assurance Co. [1925] AC 619** and **Lee v Lee's Air Framing Ltd [1961]AC 12.**

The 4th and 5th Defendants have discouraged any resort to the doctrine of lifting of the veil of incorporation arguing that that doctrine should be resorted to only on very exceptional circumstances. They relied upon the cases of **Harel Mallac Tanzania Ltd v JUNACO (T) Ltd & Another, Misc. Comm. Appl.No.144 of 2016 (unreported); Multichoice Kenya Ltd v MAINKAM Ltd & Another, Civil Case No.492 of 2012,** and **Yusuf Manji v Edward Masanja & Another, Civil Appeal No.78 of 2002, CAT (DSM) (unreported).**

The 4th and 5th Defendants have argued further, that, the Plaintiff has no proof or exceptional grounds regarding why he chose to join the 4th and 5th Defendants to the suit while they were separate from the 1st Defendant. He argued that, the only course which needs to be taken is to strike out the plaint under *Order I rule 10(2) of the CPC, Cap.33 [R.E.2019].* Similarly, the 4th and 5th Defendants urged this Court to reject the Plaint under *Order VII rule 11 (a) of the CPC Cap.33 [R.E.2019]* for lacking a cause of action.

In opposition to the objections, Mr. Maka, the learned counsel for the Plaintiff submitted, in response to the submissions by the 1st, 2nd and 3rd Defendants, that, what was raised by the Defendants, are mere factual issues that call for evidence. He

submitted that, the manner in which the 2nd and 3rd Defendants have argued the first PO regarding lack of cause of action is tantamount to arguing the substantive suit which is not a proper approach.

He referred to this Court the case of **Jeraj Shariff & Sons v Chotai Fancy Stores [1960] EA 375** where the Court stated that:

> "The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true."

As regards, the jurisdiction of this Court, Mr. Maka argued that, paragraphs 20 and 21 of the Plaint clearly establish the Court's jurisdiction by showing the law which was agreed as an applicable law. He argued that the contract was concluded in Tanzania and the applicable law is the Tanzanian law.

As regards the practicing certificate of Advocate Yassin Maka, the learned counsel submitted that, the issue whether a person who signed the document is disqualified person or not is a matter which requires evidence to ascertain its truthfulness.

He referred to this Court the case of **Alliance Insurance Corporation Ltd v Arusha Art Ltd, Civil Appeal No.297 of 2017, CAT (Arusha) (Unreported)**. In view of the above, it was the learned counsel for the Plaintiff's submission, that, the

POs raised by the 1st, 2nd and 3rd Defendants are unqualified as preliminary objections.

The learned counsel for the Plaintiff further referred to the decision of this Court in the case of **Fatuma M. Ramadhani v Ally M. Juma, Civil Rev.No.4 of 2019 (HC) (Dodoma) (unreported)** where His Lordship Masaju, J., held as follows regarding section 41(1) of the Advocate Act, Cap.341 [R.E.2019]:

> "Section 41 (1) of the Advocates Act, [Cap 341] provides for the restriction of unqualified person not to act as advocates in any Court of law. Section 41 (2) of the Advocates Act, [Cap 341] provides for the sanctions thereto. However, the provision does not state that the unqualified person's act of representation shall affect the proceedings of the case tried under representation of unqualified person, but rather the provision deals with the unqualified person thereto."

In view of the above, Mr. Maka submitted that the point raised by the Defendants do not qualify as pure point of law. He referred this Court to the famous case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd [1969] EA 696** regarding what a preliminary objection is all about.

The learned counsel for the 1st, 2nd and 3rd Defendants filed rejoinder submission. In their rejoinder, these Defendants rejoined that disclosing a cause of action is paramount to enable the Court to ascertain, at the offset when the pleadings are filed, whether the Defendant sued is the appropriate party to be sued.

He argued that the Plaintiff has not disclosed how the 2nd and 3rd Defendants are concerned. He submitted that, in describing the cause of action, a pleader is required to be precise in disclosing its cause of action against all of the Defendants as pleaded in a plaint.

As regards the issue of Advocate Maka's practicing certificate, the learned counsel for the 1st, 2nd and 3rd Defendants referred this Court to Rule 124 (a) of the Advocates (Professional Conduct and Etiquette) Regulations of 2018. He rejoined that, it is undisputed that Mr. Maka drafted and filed the Plaint before this Court on 20th January 2020 and further that, according to the www.tams.judiciary.go.tz website, he only renewed his practicing certificate on the 3rd February 2020. The learned counsel for the 1st, 2nd and 3rd Defendants further rejoined that, section 39 (1) of Cap.341 [R.E.2019] clearly provides that, "*no person shall be qualified to act as an Advocate unless he has in force a practicing certificate*".

As regards the issue of jurisdiction, the learned counsel for the 1st, 2nd and 3rd Defendants rejoined stating that the Plaintiff failed to establish that this Court has the requisite jurisdiction. Reference was made to the case of **St. Bernards Hospital Company Ltd v Dr. Linus Mlula Maemba Chuwa Commercial Case No. 57 of 2004 (unreported).** In that case, the Court (Nyangarika, J (as he then was) stated as follows:

> "It must be noted that it is not enough simply to allege in the Plaint that the court has jurisdiction. The provisions of the rule require that you must state the facts showing that the court has jurisdiction. A mere assertion by the Plaintiff that the court has jurisdiction is not enough. The rule requires facts showing that the Court has jurisdiction to be stated."

I have considered the submissions made by the rival parties in this case. As earlier noted, there have been a number of preliminary objections raised by the Defendants. I will first consider the PO on jurisdiction of this Court since if it will be found that this Court lacks jurisdiction, then the matter will end up there. Principally, the question of jurisdiction of a court is of paramount importance. See **Fanuel Mantiri Ng'unda v Herman M Nguda, Civil Appeal No.8 of 1995 (CAT) (unreported)**. The issue, which I am called upon to address in regard to the objection raised, therefore, is: **whether this Court lacks jurisdiction to entertain the suit as argued by the learned counsel for the 1st, 2nd and 3rd Defendants.**

Essentially, this Court has general jurisdiction over civil matters. According to section 7 of the CPC, Cap.33 [R.E.2019], courts in Tanzania have jurisdiction to hear all suits of a civil nature unless otherwise expressly or impliedly barred from doing so. Besides, section 2 of the *Judicature and Application of Laws*, Cap.358 [R.E.2019] provides that, the High Court has full jurisdiction over all civil matter.

As it might be noted in this case, however, the 2nd and 3rd Defendants' focal point is section 18 (a),(b) and (c) of the Civil Procedure Code, Cap. 33 [R.E.2019], which they have examined it in light of paragraphs 2, 3, (i), (ii) and (iii) of the Plaint filed in this Court. These paragraphs disclose that the 2nd, 3rd and 4th Defendants reside outside the territorial boundary of Tanzania.

From the classical doctrine of sovereignty, it is trite to note, that, a courts' power to subject persons to legal process is a sovereign's 'right and might' confined within its boundaries. (See ***Buck v AG* [1965] Ch. 745)**. Similarly, even under the legal 'doctrine of territoriality', it a well established rule that, national courts can only exercise their powers competently over everything situated in, and over every person present within their territorial borders.

It means, therefore, that, foreign individuals will at once fall under jurisdiction of this Court when they cross our territorial frontiers. It also means that, for this Court to be able to exercise Jurisdiction *in personam* over a foreign defendant, such defendant must be within the territorial jurisdiction of the Court. In other words, there must be a connecting factor between the court and the Defendants.

In this ruling, however, the argument which has been brought to the front by the learned counsel for the 1st, 2nd and 3rd

Defendants is that, at no point has it been pleaded in the Plaint that, at the time of institution this suit on 20th January 2020, any of these Defendants actually and voluntarily resided, carried business or worked for gain at Dar-es-Salaam, or any other place in Tanzania.

Likewise, it is argued that, the Plaintiff does not plead in the plaint whether or not before the commencement of this suit it sought leave to institute and prosecute this suit within the jurisdiction of this honourable court or whether or not the cause of action arose in Dar-es-Salaam or at any place in Tanzania. In that regard, it has been argued that the requirements of section 18 (a), (b) and (c) of the CPC, Cap.33 [R.E 2019], have not been fulfilled to warrant this Court to exercise its jurisdiction over the 2nd, 3rd and 4th Defendants.

Section 18 of the CPC, Cap.33 [R.E 2019] provides as follows:

> 18. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carryon business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or partly, arises.

As it might be seen from section 18 of the CPC, Cap.33 [R.E 2019], the section provides three connecting factors which are necessary for this Court to be able to exercise jurisdiction *in personam*. Those factors are founded on (i) residence of the defendant, or (ii) submission to the court's jurisdiction or (iii) the place where the cause of action wholly or partly, arose.

In the instant case at hand, the issue regarding where the cause of action had arisen is relevant for our consideration. In particular, section 18(c) is concerned with where the cause of action had arisen. The Plaintiff's learned counsel has argued that this Court has jurisdiction over the defendants because the cause of action arose wholly in Tanzania. This is indeed a correct position given what section 18(c) of the CPC, Cap.33 [R.E.2019] provides.

Let me add, that, the competency of a court to hear cases is, as well, closely connected to the procedural requirement that the defendant must be properly served. This is indispensable, primarily because, the purpose of service of the court process to the defendants, who are either within the jurisdiction of the court or foreign defendants, is to give them notice of pending suits so that they are not taken by surprise, a requirement likened to the principle of fair hearing.

In ***Craig vs Kanssen* (1943) 1 All E. R 108, 113**, the court stated that '*failure to serve process where service of process is required, is a failure which goes to the root of our conception of the proper procedure in litigation.*' This means that, where a defendant has not been served with the summons to appear and has no knowledge, actual or constructive, that he has been sued by a plaintiff, cannot be said to be aware of the existence of a suit against him.

According to Order V rule 24 of the CPC, Cap.33 [R.E.2019] the law states that:

> "Where the defendant is believed to reside in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept service, the summons may be served– (a) where the plaintiff has furnished the postal address of the defendant, by post; (b) in any other case, through the courts of the country in which the defendant is believed to reside; or (c) by leave of the court, by the plaintiff or his agent."

Likewise, according to Order III rule, 2 and 6(1) and (2) of the CPC Cap.33 [R.E.2019], service on a foreign defendant may also be made to his recognised agent if any.

In this case at hand, there is no doubt that the defendants were served and have filed their written statement of defence to contest the allegations raised in the Plaint. This was confirmed to this Court on 20th March 2020 when the learned counsel for the parties appeared in this Court. The defendants have also went ahead and appointed their advocates to represent them in this

Court. In view of all these, I find that the issue of whether this Court has jurisdiction or not is a non-starter. The jurisdiction of this Court, therefore, cannot be questioned. That objection is unmerited and I hereby dismiss it.

The next issue which I am invited to address is: **whether Mr. Maka was a qualified advocate when he prepared and filed the Plaint in this Court.** It is a legal requirement, as stated in section 39(1) of Cap.341 [R.E.2019], that, "no person shall be qualified to act as an Advocate unless he has in force a practicing certificate". Besides, it is also clear, under section 41(1) of the Advocate Act, Cap.341 [R.E.2019] that, the law provides for the restriction of unqualified person not to act as advocates in any Court of law.

A number of decisions have addressed situations where acts of unqualified persons acting as advocates were disapproved by the Court. The relevant cases as such as the case of **Dr. Salim Ahmed Salim v The Editor, The East African Newspaper & Another, Civil Case No.332 of 2002 (HC) (DSM) (Unreported)**; **Ahmed Jamal v Yeslam Said Bin Kulaib, Civil Appeal No.312 of 2004, (HC) (DSM) (unreported)**; and **Islam Ally Saleh v Akbar Hameer & Another, Civil Case No.156 of 2016, (HC) (DSM) (unreported)**. In all

these decisions, the Court expunged from its records, the pleadings filed by the unqualified Advocates.

It is clear, in my view, that, Mr. Yassin Maka, the advocate who drafted and filed the Plaint in this Court on 20th January 2020 had not renewed his practicing certificate. I do not think that this is an issue that needs one to call for evidence. No one needs to prove that which is obvious. That is a fact which is clear according to the www.tams.judiciary.go.tz website. He renewed his practicing certificate on the 3rd February 2020, which means that, from 1st January 2020 to 2nd February 2020 Mr. Maka was an unqualified person pursuant to the provisions of Cap.341.

And, as correctly argued by the learned counsel for the 4th and 5th Defendants, although section 38 (1) and (2) of Cap. 341[R.E.2019] gives a grace period of renewal of one's certificate of practice up to the 1st February of each year, with retrospective renewal validity effectively from the 1st day of January, unfortunately Mr. Maka cannot benefit from it because, his certificate was renewed on the 3rd day of February.

That being said, as this Court stated in the case of **Baraka Owawa v Tanzania Teachers Union, (supra)**, my learned colleague Mr. Justice Galeba, J., observed that:

> "whatever documents prepared endorsed or work done by an unqualified person does not have legal value in courts. The reasons are not far to find, first, such work is

> a result of criminality and deceit, second the work or document lack legality."

A more authoritative decision which cements the above position is that the Court of Appeal in the case of **Edson Osward Mbogoro v Dr. Emmanuel Nchimbi & Another, Civil. Appeal No.140 of 2006, CAT (DSM), (Unreported)**. In that case, having been established that the Advocate who prepared and filed a Memorandum of Appeal filed in that Court was unqualified, the Court held that:

> "if an advocate practices as an advocate without having a current practicing certificate, not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We also take the liberty to say that, to hold otherwise would be tantamount to condoning illegality. It follows; the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court ... were of no legal effect."

In view of the above, the second issue, regarding *whether Mr. Maka was a qualified advocate when he prepared and filed the Plaint in this Court* is answered in the negative. Mr. Maka was unqualified to act as an advocate at the time and, for that matter, the pleadings he prepared and filed in this Court were of no legal effect.

Having made such a finding, I see no reason why I should address the rest of grounds of objection raised by the Defendants. In the upshot, this Court settles for the following orders:

1. That, the Plaint filed in this Court is hereby struck out for having been filed by unqualified person.
2. Costs to follow the event.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)
22 / 09 /2020

Ruling delivered on this 22nd day of September 2020, in the presence of Mr. Yassini Maka and Ms Thabita Maina, Advocates for the Plaintiff, and Mr. Said Nassoro and Mr. Steven Urassa, Advocates for the Defendants.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)
22/ 09 /2020