

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**DAR ES SALAAM**

**COMMERCIAL CASE NO. 30 OF 2021**

**YUKO ENTERPRISES (E.A) LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**MAGOMA MAGIRA MASEGESA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**M/S. MAXINSURE TANZANIA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**M/S CRDB INSURANCE BROKERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**Date of Last Order:27/04/2021**

**Date of Ruling:24/05/2021**

**RULING**

**MAGOIGA, J.**

This ruling is in respect of the preliminary objections raised by the 1<sup>st</sup> defendant on points of law to the effect that:

1. This court lacks subject-matter of jurisdiction to entertain this suit;
2. The verification clause in the plaint is incurably defective for lack of verification by the 2<sup>nd</sup> defendant;
3. That the verification clause in the plaint is incurably defective for being undated
4. That the plaint is incurably defective for want of signature of the advocate who drafted the plaint.



Equally, this ruling is on concern raised by the advocate for the 1<sup>st</sup> defendant that, the advocate who drew and eventually signed the plaint has not renewed his practicing certificate by the date he drew the plaint and signed it.

The facts of this suit in nutshell are imperative to be stated. The plaintiffs by way of plaint filed in this court 3<sup>rd</sup> March, 2021 instituted the instant suit jointly and severally against the defendants praying several reliefs as contained in the plaint for failure to indemnify the plaintiffs and for breach of insurance broker's professional duty as result of fire accident to the plaintiffs' printing house or factory.

Upon being served with the plaint, the 1<sup>st</sup> defendant filed a written statement of defence in which he raised four preliminary objections on points of law. But when the suit was called on for hearing of the preliminary objections, Mr. Ganja dropped grounds 1 and 3 and argued only grounds 2 and 4 of the objections raised, hence, this ruling praying the instant suit be struck out with costs. The 2<sup>nd</sup> defendant did not raise preliminary objection on a point of law but theirs was a concern that, the advocate who drew and signed the documents pertaining to this suit has not renewed his practicing certificate and invited the court to strike out the

plaint signed on 27<sup>th</sup> February, 2021 and filed in this court on 3<sup>rd</sup> March, 2021.

When this suit was called on for hearing of the preliminary objections and the so called concern, the plaintiffs were represented by Messrs. Geoffrey Lugomo and Franco Mahemba, learned advocates. On the other hand, the 1<sup>st</sup> defendant was represented by Messrs. Ngasa Ganja and Haji Sama, learned advocates and whereas the 2<sup>nd</sup> defendant was represented by Messrs. Nduruma Majembe and Deusdedit Luteja, learned advocates.

Mr. Ganja when invited to argue points of objections on point of law, told the court that upon going through the plaint on a second note, they prayed to drop and abandoned grounds 1 and 3 of the objections and will argue grounds 2 and 4 of the objections.

Arguing ground number 2, Mr. Ganja pointed out that, verification clause of the 2<sup>nd</sup> plaintiff is wanting in the plaint. According to Mr. Ganja, the plaint shows verification done by Germain Magira Magoma was done at the capacity of his directorship of the 1<sup>st</sup> plaintiff and is not among the plaintiff in the suit. The learned advocate for the 1<sup>st</sup> defendant, therefore, argued that, Order VI Rule 15(1) requires verification to be done by a party to the suit or any other person with consent of the plaintiff and to his own


interpretation, the purpose is to be acquainted with facts. To bolt up his point, the learned advocate cited the case of ZTE CORPORATION vs. BENSON INFORMATION SYSTEM t/a SMART, COMMERCIAL CASE NO. 188 OF 2017 in which it was held that the purpose of verification is to fix responsibility to parties.

On that note, Mr. Ganja argued that since the verification is defective as to the 2<sup>nd</sup> plaintiff, the remedy is to strike out the name of the 2<sup>nd</sup> plaintiff from this suit with costs.

On the 4<sup>th</sup> limb of objection, Mr. Ganja told the court that, their complaint is the absence of the signature of the person who drew the plaint. The fact that the plaint shows that it was drawn by Mr. Kitwana Said Makwega as an advocate, then under section 41(1) (2) of the Advocates Act, [Cap 341 R.E.2019] it was mandatory for the advocate to sign and by failure to sign, renders the plaint defective. On that reason the learned advocate for the 1<sup>st</sup> defendant implored this court to struck out the suit with costs.

On the part of the 1<sup>st</sup> defendant, Mr. Majembe told the court that, on 15/04/2021, they discovered through TAMS, that the advocate named in the pleadings whose Roll Number is 8902, practicing under the umbrella of Juta Attorneys was at the time of drafting, signing and filing of the plaint

and certificate of urgency not a qualified person under section 41(1) and (2) of the Advocates Act, [Cap 341 R.E.2019]. According to Mr. Majembe, the purpose of the letter was to put the court into attention that this particular advocate is not qualified person, so to speak. And Mr. Majembe was clear to the point that, they were not raising a preliminary objection on point of law because it requires evidence and in the light of famous MUKISA BISCUITS LTD vs. WEST END DISTRIBUTORS LIMITED [1969] EA 696. However, the learned advocate for the 2<sup>nd</sup> defendant submitted that, their concern was tantamount to what happened in the case of STANDARD CHARTERED BANK TANZANIA LIMITED vs. BEST TRAVEL SOLUTION LIMITED AND 3 OTHERS, COMMERCIAL CASE NO. 16 OF 2020 and implored the court to struck out the plaint which was filed by an unqualified person. Another cases cited were PANGEA MINERALS LIMITED vs. PETROFUL TANZANIA LIMITED AND 2 OTHERS, MISC. COMMERCIAL APPLICATION NO. 51 OF 2020 AND EDSON OSWARD MBOGORO vs. DR. EMMANUEL NCHAMBI AND AG, CIVIL APPEAL NO. 140 OF 2006 of which the court held that, it is illegal to practice without practicing certificate and a court cannot condone illegality.




On the totality of the above, the learned advocate for the 2<sup>nd</sup> defendant implored this court to strike out the plaint with costs.

In rebuttal to the preliminary objections raised, Mr. Lugomo, learned advocate for the plaintiffs submitted starting with the second preliminary objection that it is unmerited because verification in the plaint is at home with the provisions of Rule 15 of Order VI of the Civil Procedure Code, [Cap 33 R.E.2019]. According to Mr. Lugomo, under Rule 15(1) verification can be done by a party to suit, or by one of the parties, or by any other person proved to the satisfaction of the court to be acquainted with the facts of the case. Jermain Magira Magoma who verified the pleading/plaint is the director of the first plaintiff and is aware of the facts of the case, insisted Mr. Lugomo. Mr Lugomo went on to submit in rebuttal that, the law allows three categories of people who can verify pleadings and still be proper and the law do not say that in order to sign one must get permission as submitted by the learned advocate for the 1<sup>st</sup> defendant.

However, Mr. Lugomo went on to argue that, even if it can be found that it was not properly verified, still is not fatal to the extent of making the plaint to be struck out but the court can allow amendment of the same for the interest of justice.

On the 4<sup>th</sup> ground of preliminary objection, it was the argument of Mr. Lugomo in rebuttal that, same was not argued at all because the preliminary objection that was raised in written statement of defence is defective for want of signature but what was argued on is something else without leave of the court and worse enough, the learned advocate for the 1<sup>st</sup> defendant has utterly failed to cite any provision of the law that is said to be abrogated. This, according to Mr. Lugomo needs to be ascertained, hence, not preliminary objection in the eyes of law.


In the alternative, Mr. Lugomo went on to argue that, even if it can be found to be defective but he was quick to point out that, it is not fatal but it can be cured by any other advocate of the firm to sign because by not signing of the advocate from the law firm do not tetter the firm's powers and no way the defendant is affected and prejudiced.

On that note, the learned advocate prayed that this court be inspired by the overriding objective which is provided for under rules 3 and 4 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by  G.N. 107 of 2019.

On the above reasons, Mr.Lugomo invited this court to find no merits in the raised and argued preliminary objections and dismiss the same with costs to the plaintiffs.

In reply to the concern raised by the learned advocates for the 1<sup>st</sup> defendant, it was the submissions of Mr. Lugomo in rebuttal that, so long as Mr. Majembe admits that it is not a preliminary objection and do not qualify to be preliminary objection, it cannot be used to defeat the plaintiffs' suit.

Mr. Lugomo argued that, Mr. Makwega stopped practicing after being employed by the Judiciary of Tanzania as Resident Magistrate. Another point argued was that under section 36(1) of the Advocates Act [Cap 341 R.E. 2019], the last day of renewal is 31<sup>st</sup> June, every year and not 28<sup>th</sup> February every year. The learned advocate for the plaintiffs cited the case of ALLIANCE INSURANCE CORPORATION LIMITED vs. ARUSHA ART LIMITED, CIVIL APPEAL NO.297 OF 2017 (ARUSHA) CAT (UNREPORTED) in which the Court of Appeal of Tanzania held that the issue whether or not the person who signed ...is an unqualified person or not is matter which requires evidence to ascertain and as such does not qualify as pure point of law.





On that note, Mr. Lugomo invited this court to disregard the point raised by Mr. Majembe.

On further reply Mr. Lugomo argued in the alternative that even if there is such a mistake done by advocates, it cannot be used to punish parties and in support of that argument, he cited the case of *FATUMA M. RAMADHANI vs. ALLY M. JUMA*, CIVIL REVISION NO. 4 OF 2019.

Furthermore, it was the argument of the learned advocate for the plaintiffs that, even if it can be said there was negligence but that should not be used to punish parties to the proceedings because some of the matters like renewal or not are domestic affairs of the advocate and not client. In support of that Mr. Lugomo cited the case of *GHANIA J. KIMAMBI vs. SHEDRACK RUBEN NG'AMBI*, MISC. APPLICATION NO. 692 OF 2018 (DSM) HC (UNREPORTED).


Lastly and not least, Mr. Lugomo urged this court to be guided by the overriding objective principal as stated in Rules 3 and 4 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by G.N. 107 of 2019 to do justice to parties and not be tight up with technicalities. On the same parity, he pointed out that no injustice was caused by the plaint because parties have filed their defence and are going to be heard. He

cited the case of CHARLES BODE vs. THE REPUBLIC, CRIMINAL APPEAL NO.46 OF 2016 to substantiate his point.

Lastly Mr. Lugomo invited this court to dismiss all preliminary objections and the concern raised and argued with costs.

In rejoinder, Mr. Ngassa reiterated his earlier submissions and prayed that this court find that the suit for 2<sup>nd</sup> plaintiff was not verified. Mr. Ngassa went to rejoin that the overriding objective principal cannot cure what they have pointed out.

On the 4<sup>th</sup> point of preliminary objection, the learned advocate for the 1<sup>st</sup> defendant had nothing material to add but reiterated what he had earlier submitted and prayed that the instant suit be dismissed with costs.

On the part of the learned advocates for the 2<sup>nd</sup> defendant, their letter subject of their submission was to draw to the attention to the court that, there is something wrong as in the period the advocate who drew and consequently signed the plaint had no practicing certificate. According to Mr. Majembe, the overriding objective principal cannot apply to nullity because the whole plaint originates from a nullity and prayed that the court deal with the concern accordingly. 

This marked the end of hearing of the preliminary objections on point of laws and concern by learned advocates for the defendants. The noble task of the court now is to determine the merits and demerits of the same. I will start with the first limb argued on the competence of the plaint in dispute which was that verification clause in the plaint is incurably defective for lack of verification by the 1<sup>st</sup> defendant.

Having carefully heard and considered both parties' rival submissions and having gone through the provisions of Rule 15(1) of Order VI of the Civil Procedure Code [Cap 33 R.E.2019], which for easy of reference provides as follows:

Order VI

Rule 15(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot **by the party or by one of the parties pleading, or by some other person proved to satisfaction of the court to be acquainted with the facts of the case.**(Emphasis mine)

(2) N/A

(3)NA



From the literal wording of the above cited provision it is clear that, the parliament intended that verification in any suit can be done by three categories of the people as correctly argued by Mr. Lugomo, and rightly so in my respective view that, these are; one, **a party to a case**; two, **one of the parties where there are more than one in a suit**; and three, **by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.**

In the instant suit, no doubt that verification was done by one, Jermain Magira Magoma who introduced himself as the Managing Director of the plaintiff and is conversant with the facts of the case. The purpose of verification in my view is that person who verifies must have a personal knowledge of what he verifies and in case the knowledge is outside his knowledge must state the source of knowledge.

Therefore, it can certainly be said that, determination whether the person who verified the plaint had knowledge of all matters will involve the requirement of evidence which, in law, obliterate the elements of being preliminary objection on pure point of law as held in the famous MUKISA BISCUITS (supra).



Notwithstanding the above position, even if it can be said and found that, verification is defective as argued by Mr. Ganja, learned advocate for the 1<sup>st</sup> defendant, I don't think as of now that, guided by the overriding objective principle is fatal to the extent of rendering the suit fatal. This court faced with a similar situation in the case of PHILIP ANANIA MASASI vs. RETURNING OFFICER OF NJOMBE, NORTH CONSTITUENCY AND TWO OTHERS, CIVIL CAUSE NO.7 OF 1995 (UNREPORTED) in which Samatta, J.K( as he then was) cited with approval commentaries in the book titled: Principles of Pleadings in India by Sir P. Mogha, 14 edition where the author had this to say:

**"...want of signature or verification or any defect ... will not make the pleading void and a suit cannot be dismissed nor can defence be struck out for want of or defect in the signature or verification of the plaint... as these are matters of procedures only.** It has been treated to be a mere irregularity and is curable by amendment. The defect may be cured by amendment at any stage of the suit and when it is cured by amendment, the plaint must be taken to have been presented on the date it was originally presented and not the date on which it was amended." (Emphasis mine)



Further guidance on how to treat procedural provisions can be gathered from this court in the case of RESOLUTE (T) LIMITED vs. CONSTRUCTION (T) LIMITED AND 2 OTHERS, COMMERCIAL CASE NO. 39 OF 2010, in which my learned brother Mruma, Judge had this to say:

**"it is now a settled principle in our law that procedural provisions contained in the Civil Procedure Code, should not be construed in such a manner which will seriously cause injustice to a party, thus, even if we assume that the plaint was improperly verified (which is not the case) yet the improper verification would amount to irregularity which would be curable under Rule 17 of Order VI of the Civil Procedure Code which allows amendment of the pleadings for the ends of justice. Courts exists for doing justice between parties and not for punishing them"**

On the same parity, other guidance and wisdom to be embraced by the court is what was stated in the English case of COOPER vs. SMITH (1884) CH.D 700 by Bowen, L J observed that:

**" I think it is well established principle that the object of the court is to decide the rights of the parties and not to punish**

**them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights."**

With the above guidance and much as the person who verified the pleading stated that he is the Managing Director of the plaintiff and is acquainted with the facts of the case, I find the arguments for the 2<sup>nd</sup> limb of preliminary objection on the above reasons unable to convince me otherwise. The interpretation of Mr. Ganja on the provisions of Rule 15(1) of Order VI of the CPC on this point, is without much ado, devoid of any useful merit.

On the other hand, the arguments of Mr. Lugomo on this point carries the order of the day and after examining and gone through the disputed verification, I find the disputed verification is at home and dry with the law.

That said and done, the 2<sup>nd</sup> limb of objection filed and argued is devoid of any useful merit and same must be, and is hereby dismissed in its entirety.

On the 4<sup>th</sup> limb of objection which was couched that, the plaint is incurably defective for want of signature of the advocate who drafted the plaint. Having carefully considered the rival arguments by the advocates for parties on this limb, with respect to Mr. Ganja, learned advocate for the 1<sup>st</sup>



defendant, he totally missed the point and without leave of the court argued a different point not pleaded in his written statement of defence. The reason I am going to overrule this point are not far to fetch. One, as rightly argued by Mr. Lugomo what was argued was not in respect of the point raised. Mr. Ganja cited section 41 of the Advocates Act, [Cap 341 R.E 2019 to support his point but after going through that section, same says nothing about signature. Two, even if it can be found that it is true the plaintiff was not signed, still guided by overriding objective principle is not enough to defeat the instant suit. Quite correctly as argued by Mr. Lugomo, the defect, if any, can be cured by other advocate to sign because want of signature is not the gist of the legal wrangle between parties. Not only that but this court noted that, court's copy of the plaintiff is duly signed and as such rendered the whole objection devoid of any useful merit to be a point of law.

I have carefully examined the plaintiff and is clear as day light that, the plaintiff was signed by an advocate and since the other point raised was not pleaded and do not go to the root of the suit, I am constrained to find the 4<sup>th</sup> limb of the point raised and argued devoid of any useful merit in the circumstances of this suit.





In the totality of the above stated reasons, I find and hold that the two set of preliminary objections are hereby dismissed with costs to the plaintiff for want of merits.

This takes me to the concern raised and argued by the learned advocates for the 2<sup>nd</sup> defendant. Mr. Majembe strongly urged this court to be guided by its own ruling in the case of STANDARD CHARTED BANK (T) LIMITED AND vs. BEST TRAVEL SOLUTION LIMITED AND 3 OTHERS (supra) and have the plaint struck out from the record. Further point taken was that, under the provisions of section 41(1) of the Advocates Act, [Cap 341 R.E.2019] any pleading prepared by unqualified person is a nullity and no way a court can condone a nullity. To bolt up his pointed cited the cases of PANGEA MINERALS LIMITED vs. PETROFUL TANZANIA LIMITED AND 2 OTHERS, (supra) AND EDSON OSWARD MBOGORO vs. DR. EMMANUEL NCHAMBI AND AG, (supra)


Mr. Lugomo was of the different view that before Mr. Makwega was appointed a Resident magistrate and left the office had a practicing certificate which expired on 31<sup>st</sup> December 2020 but distinguished the case of STANDARD CHARTERED BANK (T) LIMITED in that, section 36(1) of the Advocates Act, gives a grace period of six months for a practicing advocate

to renew his certificate without any sanction. Further argument was that, the concern like other objection cannot be decided unless I get more evidence, including that of Makwega, who is now employee of the judiciary. To bolt up his point, he cited that case of ALLIANCE INSURANCE CORPORATION LIMITED vs. ARUSHA ART LIMITED (supra).

Having carefully listened to both rival arguments by the learned advocates for parties on this concern, I have noted that, learned advocates for parties' agrees and are at no issue that, this is not a point of law, equally this court joins hands with them that, this is not a point of law, so to speak. However, what is contentious is whether Mr. Kitwana Said Makwega who drew and signed the plaint is an unqualified person to warrant the striking out of the plaint as prayed by Mr. Majembe and seriously objected by Mr. Lugomo.

Before answering the above issue, I find imperative to say and observe that, the circumstances and facts in the case of STANDARD CHARTERED BANK (supra) and the instant suit are distinguishable in that, in the case of STANDARD CHARTERED BANK, the concern was raised in September, 2020 way after the grace period of renewal period has elapsed whereas in this suit an advocate is allowed to renew a practicing certificate without any

sanction from the Chief Justice. Another point that distinguishes these two cases is that, in the STANDARD CHARTERED BANK the an unqualified person came to court and was instrumental in prosecuting the case and was heard before the drastic measures were ordered against him while in this suit, I was told by both TAMS and Mr. LUGOMO that Mr. Kitwana Said Makwega suspended his practicing certificate upon being appointed Resident Magistrate and now stationed in Lindi as opposed to the case of Standard Chartered Bank.

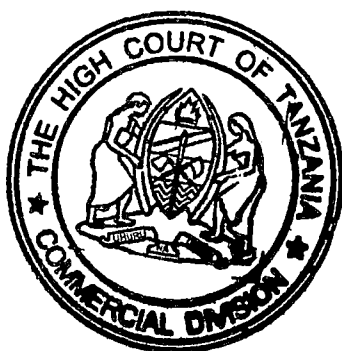
Therefore, had it been argued and substantiated that, in the previous year Mr. Kitwana Said Makwega had no valid practicing certificate in the previous year subsequent to the months of January and 31<sup>st</sup> June the following year then one would reasonably argued that Makwega was an unqualified person in the proceedings, but this was not the case here. The drafters of the law knew that renewal is a process and it can take time and not a cut and iron that once a day is gone then one becomes an unqualified person. Much as this court is vigilant in enforcing the law against the illegal practice of an authorized persons but each case must be approached to its own circumstances and interest of justice be done and seem to be done. 

Guided by the above stance, I find the instant concern not merited in the circumstances of this suit because this concern needs evidence before I can come to a conclusion of declaring Mr. Makwega an unqualified person and proceed to expunge the plaint in this suit. No evidence was advanced by either party and without which, I find the pleadings are proper and intact in the circumstances of this suit and there is no nullity as argued by Mr. Majembe, learned advocate for the 1<sup>st</sup> defendant.

Therefore, all said and done above, this court is inclined to dismiss the two set of preliminary objections with costs to the plaintiffs and equally the concern raised must be, and is hereby overruled with no order as to costs.

It is so ordered

Date at Dar es Salaam this 24<sup>th</sup> day of May, 2021.



**S. M. MAGOIGA**

**JUDGE**

**24/05/2021**