

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

CIVIL REFERENCE NO. 29 OF 2022

(Arising from Taxation Cause No. 146 of 2020, Hon. Hamza DR dated 29th November 2022 Originating from Land Case No. 370 of 2017 Hon. Makani. J dated 30.10.2020)

EFC TANZANIA MICROFINANCE BANK LTD..... APPLICANT

VERSUS

SAAD SADICK 1ST RESPONDENT

MAJEMBE AUCTION MART LTD 2ND RESPONDENT

MAULID NGAIWA JUMA 3RD RESPONDENT

RULING

Date of last Order: 21.03.2023

Date of Ruling: 23.03.2023

A.Z.MGEYEKWA, J

This is a reference that emerged from the Ruling of a Taxing Master, Hon. W. Hamza dated 29th November 2022. The application is made under Order 7 (1) of the Advocates Remuneration Order GN. 264 of 2015. The application is supported by an affidavit deponed by Adam Kessy, the Principal Officer of the applicant.

deducted them from their salaries every month. They claim that during the course of terminations by retrenchment there was an outstanding amount which is not been paid to date.

On 4th January, 2023, the Plaintiffs herein, instituted this suit against the Defendant seeking the following five reliefs:-

- a) *Specific performance that the staff housing loans contract should be Honoured by the Defendant instead of threatening to sell the Plaintiffs houses without their consent.*
- b) *A declaration that the discharge of contract should be exercised until the finality of the appeal at the Court of Appeal.*
- c) *Costs of this suit.*
- d) *General damages as to mental pain at the tune of Tshs. 200,000,000/=*
- e) *Any other relief(s) that the Honourable Court deems fit to grant.*

The suit has encountered an impediment, coming by way of preliminary objections, raised by the counsel for the 3rd Defendant. The objections are to the effect that: -

The Plaint is defective for not containing a verification clause to the requirements under Order VI Rule 15 (1) of the Civil Procedure Code Cap. 33 [R.E 2019].

When the matter was called for hearing objections on 9th March 2023, the Plaintiffs enjoyed the legal service of Mr. Robert Mageni, learned counsel whereas the Defendant had the legal service of Ms. Catherine Tibasana, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit.

Ms. Catherine, counsel for the Defendant was the first one to kick the ball rolling. She contended that the Plaint is defective for containing a verification clause that contravenes Order VI Rule 15 (1) of the Civil Procedure Code Cap.33 [2019]. She went on to state the word shall is couched on the mandatory term. To buttress her submission, she referred this Court section 53 (2) of the Interpretation of Laws Act, Cap. 1, and cited the case of **Conrod Thadei Gervas v Andwillile Nyalle Mwakibete & Another**, Land Appeal No. 97 of 2022. She valiantly argued that the Plaintiff was required to comply with the provision of the law, failure to verify the Plaint means they went contrary to the provision of the law. In the case of **Bashasha Merchandise Dealers Ltd & another, v Equity Bank Tanzania Ltd & another**, Civil Case No. 215 of 2019. She insisted that a Plaint must to verified.

To add up, in support of the objection, Ms. Catherine contended that since the Plaintiff has contravened the mandatory requirement of the law, thus, the remedy for a defective verification clause is to strike out the Plaintiff. To fortify his submission, she cited the case of **Charles Semwenda (Administrator of the Estate of Makame Mohamed Sungura (deceased) v Azania Bank Ltd & 7 others**, Land Case No. 151 of 2021.

In conclusion, the learned counsel for Defendant beckoned upon this Court to strike out the Plaintiff with costs.

In response, the counsel for the Plaintiff admitted that the verification clause is missing. He submitted that it is a typographical error and the same is curable. Mr. Mageni urged this Court to apply the overriding principle as stipulated under section 3A and B of the Civil Procedure Code Cap.33 and proceed with hearing the instant case.. to bolster his submission he referred this Court to the case of **Target Borewells Ltd v Shaban Cosla & 2 others**, Civil Case No. 1 of 2021. He urged this Court to allow them to file an amended Plaintiff and costs to follow the event.

In her rejoinder, the learned counsel for the Defendant reiterated her submission in chief. She contended that the overriding principle cannot be applied blindly against a mandatory provision. She stressed that the overriding principle is not applicable to the matter at hand. To support her

submission, she cited the cases of **Mondorosi Village Council & 2 others v Tanzania Breweries Ltd & 4 others**, Civil Appeal No. 66 of 2017, **ZTE Corporation v Benson Informatics Ltd T/A Smart**, Commercial Case No. 188 of 2017 and **Ernest Nduta Nyororo v NBC & Another**, Civil Case No.1 of 2015. Ms. Catherine stressed that this court is not required to promote compliance nor reduce the contravention of the law.

Having gone through submissions by both parties and the record at hand the issue for determination is whether or not the preliminary objection raised by learned Counsel for the respondent is of merit. I have perused the Plaintiff's Complaint and noted that the verification clause is missing. As rightly pointed out by the learned counsel for the Defendant that the Complaint contravenes Order VI Rule 15 (1) of the Civil Procedure Code Cap. 33 [R.E 2019]. For ease of reference, I find it apposite to reproduce Order VI Rule 15 of Cap.33 [R.E 2019] as hereunder:-

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 the satisfaction of the court to be acquainted with the facts of the case.

Applying the above excerpt, it is crystal clear that the Plaintiffs were legally bound to verify the Complaint in order to prove that the Plaintiff or other party is

acquainted with the facts of the case. By the principle of stare decisis, this Court is bound by the decision of the Court of Appeal of Tanzania in the cited case of **Econofinance Company Ltd (EFC) v Anchor - Clearing and Forwarders and Another**, Civil Application No 54 of 2013, CAT at Dar Es Salaam, (unreported) Oriyo, J.A.; whereas lack of proper verification clause was held amongst defects which render the suit incompetent.

The learned Counsel for the Plaintiffs contended that the omission can be cured by applying the overriding principle. That contention is hereby rejected by this Court as it does not bear any justifiable legal truth.

I am on all fours with the learned counsel for the Defendant that the overriding objective principle cannot be applied blindly in disregard of the mandatory rules of procedure. In the case of **Njake Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017 (unreported), the Court of Appeal of Tanzania was asked to invoke the overriding objective principle. In refusing to apply that principle, the Court directed its mind to the objects and reasons for introducing the said principle in the Appellate Jurisdiction Act, Cap.141 [R.E. 2019]. The Court referred to the relevant Bill which stated that:

"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms...."

See also **The Registered Trustees of St. Anita's Greenland School & 6 Others vs Azania Bank Ltd**, Civil Application No.168/16 of 2020 delivered on 9th June 2022.

This Court finds the suit is defective as submitted by learned Counsel for the Defendant, and the preliminary objection, therefore, is upheld.

In the upshot, I proceed to strike out Land Case No. 3 of 2023 without costs.

Order accordingly.

DATED at Dar es Salaam this 9th March 2023.


A.Z.MGEYEKWA
JUDGE
09.03.2023

Ruling delivered on 9th March 2023 in the presence of Mr. Robert Mageni, counsel for the Plaintiff, and Ms. Catherine Tibasana, counsel for the Plaintiff.


A.Z.MGEYEKWA
JUDGE
09.03.2023