

LEGAL DOCUMENTS

1. [A]

IN THE UNITED REPUBLIC OF TANZANIA

CIVIL CASE NO: 7 OF 2011

VERSUS

H.I Co. LTD..... DEFENDANT

WRITTEN STATEMENT OF DEFENCE

TAKE NOTICE that on the date fixed for hearing of this suit a preliminary objection on the point of law shall be raised on behalf of the defendant basing on the following **GROUND**S:-

1. That the Plaintiff Contravened the Rules of Pleading.
2. That the Suit is Unmaintainable for want of purpose.

WHEREFORE: The defendant prays that this honorable court dismiss the suit with costs.

IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE ABOVE STATEMENT the defendant states the following hereunder:-

1. THAT the content of paragraph 1 of the plaint is noted.
2. THAT the content of paragraph 2 of the plaint is noted
3. THAT the content of paragraph 3 of the plaint is disputed and the plaintiff is put to strict proof thereof.
4. THAT the content of paragraph 4 of the plaint is noted.
5. THAT the content of paragraph 5 of the plaint is disputed and the plaintiff is put to strict proof thereof.

6. THAT the content of paragraph 6 of the plaint is disputed and the plaintiff is put to strict proof thereof.

7. THAT the content of paragraph 7 of the plaint is disputed and the plaintiff is put to strict proof thereof.

WHEREFORE: The Defendant prays for the following:-

1. THAT this Honorable Court dismisses the suit entirely with costs.
2. THAT any other remedy this court may deem fit to grant.

Dated in Mwanza on this 13TH Day of December 2011

.....

Advocate for the Defendant

VERIFICATION: The defendant Verifies that all what is stated above in paragraph 7 are true to the best of his Knowledge.

VERIFIED in Mwanza on this 13TH Day of December 2011

.....

Defendant/Advocate for Defendant

PRESENTED for filing on this 14TH Day of December 2011

.....

Court Clerk/Registry Officer

DRAWN AND FILED BY:-

CHELEBA AND CO. ADVOCATES

P.O.BOX 805
MWANZA

1. [B] IN THE HIGH COURT OF TANZANIA AT MWANZA

CIVIL CASE NO: 7 OF 2011

DERECHO HUMANOS..... PLAINTIFF

VERSUS

H.I Co. LTD..... DEFENDANT

DEFENDANT WRITTEN SUBMISSION

May it please your Lordship

Before you is a Written Submission of the defendant, it is Pursuant to the Court Order issued during the hearing of this suit, that parties in this suit should present their arguments by way of Written Submission.

Brief Material Facts of the Submission

A flotilla organized by *Derecho Humanos* (an Ngo with Legal Capacity in Tanzania) collided with recklessly operated *Mashauzi* (a Marine Vehicle owned by H.I Co. (T) Ltd and captained by *Jay Bomba*). The collision, which

occurred within territorial waters of Tanzania Mainland, occasioned the loss of hundreds of millions in Tshs being damage of aid packages for the victims of *Al Shaabab* in Somalia.

For the Purpose of this Suit the Plaintiff is Derecho Humanos and the Defendant is H.I Co. (T) Ltd.

Your Lordship, during the hearing of this Suit the Defendant raised a Preliminary Objection on the point of Law based on the following GROUNDS:-

1. THAT the plaint contravenes the Rules of Pleadings.
2. THAT the suit is Unmaintainable for want of purpose.

Your Lordship for the purpose of this submission the defendant will argue on the **First ground** of the Preliminary Objection By basing on the Arguments hereunder:-

The First Argument is on **Absence of Signature**, the law provides that every plaint must be verified by signature. The plaintiff did not adhere to this law. This is provided for under **Order VI Rule 15 (3)** of the Civil Procedure Code CAP 33 R.E 2002, we humbly reproduce the Order as follows;

The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

In the case of **Kiganga and Associates Gold Mining Co. Ltd vs. Universal Gold**

The holding of above case was that the Plaintiff was defective because the Verification does not specify the person who verifies it.

The Second Argument is on **Absence of Date**, the plaintiff did not state the date of which the plaintiff was signed. This is provided for under **Order VI Rule 15 (3)** of the Civil Procedure Code CAP 33 R.E 2002, we humbly reproduce the Order as follows;

15(3) *The verification shall be signed by the person making it and shall state the date...*

The Third Argument is on **Numbering of Paragraph of the Plaintiff**, The paragraphs of the plaintiff must be numbered consecutively so as to distinguish one paragraph from the other, for this matter the plaintiff's the plaintiff **was not** numbered. This is provided for under **Order VI Rule 15 (2)** of the Civil Procedure Code CAP 33 R.E 2002, we humbly reproduce the Order as follows;

15(2) *the person verifying shall specify, by reference to the numbered paragraphs of the pleading...*

The Fourth Argument is on the **Knowledge of the Information**; the plaintiff seems to have no knowledge as to the damage(s), whether it is specific or general damage and also the plaintiff does not state the damage(s) BUT the plaintiff has just Claim for compensation of the damages. The defendant fails to know as to what kind of damages is entitled to pay to the plaintiff.

This is provided for under **Order VI Rule 15 (2)** of the Civil Procedure Code CAP 33 R.E 2002, we humbly reproduce the Order as follows;

...What he verifies of his own knowledge and what he verified upon information received and believed to be true.

The Fifth Argument is on **Title of the Plaintiff**, The title of the Plaintiff shows that this suit is a miscellaneous civil application no: 7 of 2011. The title of this plaintiff contravenes the rules governing plaintiff that the plaintiff is not used for miscellaneous civil application but rather is used for civil cases. This is an Error and for that reason the defendant does not understand the intention of the plaintiff in this suit.

Your Lordship the defendant for the purpose of this submission argues on the **Second ground** of the Preliminary Objection that the Suit is Unmaintainable for want of purpose.

The defendant support the second ground for the **reason** that the plaintiff does not sufficiently disclose the cause of action against the defendant and henceforth the plaintiff has no *locus standi* in this honorable court, And to that effect the defendant prays that the plaintiff to be struck out of the court records and award costs of the suit to the defendant.

However in drafting a plaintiff the Cause of Action is the most authoritative thing to be noted, where the plaintiff does not disclose the cause of action the suit will be rejected, this is because the plaintiff cannot succeed upon a cause of action.

In the case of **Motohov vs. Auto Garage (1971) H.C.D NO 81** the holding of this case was that, a plaintiff must render sufficient particularity the plaintiff's cause of action, from this case the fundamental rule of pleading will be declared invalid if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true.

The Defendant Humbly Submits.

DATED in Mwanza on this 13TH Day of December 2011

.....

Applicant's Advocate.

PRESENTED for filing this on this 14TH Day of December 2011

.....

Registry Officer

DRAWN AND FILED BY

CHELEBA AND CO. ADVOCATES

P.O.BOX 805

MWANZA

COPY TO BE SERVED UPON:

DEFENDANT

2. [A] [I]

IN THE UNITED REPUBLIC OF TANZANIA AT MWANZA

MISC. CIVIL APPLICATION NO: __ OF 2011

BEPARI MJUNI.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

AFFIDAVIT

(Made in Pursuant to the Court Order Dated on 13TH Day of December 2011 and Section 2 of the JALA, Section 95 of the Civil Procedure Code Part VII of Fatal Accidents, Law reforms Miscellaneous provision Act).

I Fina Figo, a female Adult Christian of sound mind, of P.O. BOX 805 MWANZA do hereby swear and states as follows:-

1.THAT, I am an Advocate of the High Court of Tanzania and the courts subordinate thereto except the primary courts and that I represent the applicant herein hence conversant with the facts I am about to depone.

2. THAT, the applicant's property was detained by the Regional Commissioner without any Justifiable cause.

3. THAT, the order of the Regional Commissioner was Bias and Unreasonable.

4. THAT, the applicant requested the Regional Commissioner to deliver the property to him but the regional commissioner denied.

5.THAT, since the Regional Commissioner denied the applicant right to be heard and that there was no any other alternative means of recovering the said property from the Regional Commissioner the applicant has applied for the orders of *Certiorari* and *Mandamus* in this honorable court.

6. THAT, I believe if the said order will be allowed, Justice will be done and the applicant will acquire his property.

DATED in Mwanza on this 13TH Day of December 2011

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Advocate for the Applicant

VERIFICATION: I advocate for the applicant do hereby certify that all what is stated above in paragraphs 1 to 5 are true according to the information presented to me by the applicant, and that for paragraph 6 is true to the best of my sincere belief.

VERIFIED in Mwanza on this 13TH Day of December 2011

.....

Advocate for the Applicant

SWORN in Mwanza by the said Fina Figo who is known to me personally identified to me by, the later known to me personally in my absence this 13TH Day of December 2011.

.....

Deponent

BEFORE ME

.....

COMMISSIONER FOR OATH

PRESENTED for filing on this 14TH Day of December 2011

.....

Registry Officer

DRAWN AND FILED BY

CHELEBA AND CO. ADVOCATES

P.O. BOX 805

MWANZA

COPY TO BE SERVED UPON

RESPONDENT

2. [A] [I]

IN THE HIGH COURT OF TANZANIA AT MWANZA

MISC. CIVIL APPLICATION NO: __ OF 2011

BEPARI MJUNI.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CHAMBER SUMMONS

(Made under Section 2 (1) of the JALA, Section 95 of the Civil Procedure Code and Part VII of Fatal Accidents, Law Reforms Miscellaneous civil Provision Act)

LET ALL PARTIES CONCERNED appear before honorable Justice Shio in the Chambers of the High Court of Tanzania at Mwanza at 10:00 am before noon or soon thereafter for the applicant to be heard on the following orders:-

1. THAT, this honorable court granted the applicant the orders of *Certiorari* and *Mandamus* against the Respondent.
2. THAT, costs of the suit shall be awarded to the applicant.
3. THAT, any other remedy that this honorable court may deem fit to grant.

This chamber Summons is given out at the instance of the grounds and reasons set out in the applicant's affidavit attached herewith and any other grounds and reasons may be adduced during the hearing of this application.

GIVEN under my hand and seal of this court on this 15TH Day of December 2011

.....

Judge/District Registry

PRESENTED for filing on this 14th Day of December 2011

.....

Registry Officer

DRAWN AND FILED BY

CHELEBA AND CO. ADVOCATES

P.O.BOX 805

MWANZA

COPY TO BE SERVED UPON

RESPONDENT

2. [A] [III]

IN TH E UNITED REPUBLIC OF TANZANIA AT
MWANZA

MISCILANEOUS CIVIL APPLICATION NO: __OF 2011

BEPARI MJUNI.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RESPONDENT COUNTER-AFFIDAVIT

I Baraka Shio, an adult male Christian of sound mind of P.O.BOX 10 Mwanza, do hereby swear and state as follows:-

1. THAT, I am a state Attorney of Mwanza Region representing the Attorney General in all suits against the Government and that in this suit am representing the Regional Commissioner of Mwanza region.

2. THAT the contents of paragraph 1 of the affidavit are noted.

3. THAT the contents of paragraph 2 of the affidavit are disputed and therefore the applicant is put to strict proof thereof.

4. THAT the contents of paragraph 3 of the affidavit are disputed and the applicant is therefore put to strict proof thereof.

5. THAT the contents of paragraph 4 of the affidavit are noted.

6. THAT the contents of paragraph 5 of the affidavit are disputed and therefore the applicant is put to strict proof thereof.

7. THAT the contents of paragraph 6 of the affidavit are noted.

DATED at Mwanza on this 13TH Day of December 2011

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Respondent's Advocate

VERIFICATION: The Advocate for the respondent verifies that all what is stated in paragraph 1 to 6 of the affidavit are true to the best of his information from the regional commissioner of Mwanza.

VERIFIED at Mwanza on this 13TH Day of December 2011

.....

Respondent's Advocate

PRESENTED for filing on this 14TH Day of December 2011

.....

Registry Officer

DRAWN AND FILED BY

CHELEBA AND CO.ADVOCATES,

P.O.BOX 805

MWANZA

COPY TO BE SERVED UPON

RESPONDENT

2. [B]

IN THE HIGH COURT OF TANZANIA AT MWANZA

MISC. CIVIL APPLICATION NO: _OF 2011.

BEPARI MJUNI.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RESPONDENT WRITTEN SUBMISSION

May it please your Lordship

Hereunder is a Written Submission of the Respondent who is herein represented by Baraka Shio who is a State Attorney of Mwanza Region representing the Attorney General in all suits against the Government and for that in this suit is representing the Regional Commissioner of Mwanza region.

Brief Material Facts of the Submission

Your Lordship, on the material day acting in his official capacity the Regional Commissioner of Mwanza detains the property of one Mr. Bepari Mjuni without any Justifiable cause. Despite persistent request by Mr.Mjuni that his property be released, the Regional Commissioner had denied to release the same.

However since he failed to produce documents to prove the title of his ownership the Regional Commissioner refused to deliver the said property to the applicant, hence the applicant decided to apply for the court orders of *Certiorari* and *Mandamus*.

Your Lordship the applicant in his affidavit raised **four** grounds to support his application of which they are

- I. Regional Commissioner Decision to detain his property was unjustifiable.
- II. That he was denied the right to be heard.
- III. That he pursued the recovery of his property but he was denied and that there was no other means of recovering the said property except for the orders of certiorari and mandamus.

Your Lordship, the applicant in his **first ground** argued that the order of Regional Commissioner was unjustifiable. BUT this invalid due to the reason that is a settled law, that is order an administrative body is NOT justifiable if it is issued when the government officer acts *ultra vires*.

But from the material facts of the case reveals that the regional commissioner gave the orders to detain the property of the applicant while acting in his official capacity and that he gave the said order because the property was in an inappropriate area. And also the owner of the said property was not identified.

Later on the applicant appeared and claimed to be the owner of the said property but all the same he failed to produce the document of Title of Ownership, and for that matter the argument of the applicant cannot endure.

In the case of **John Mwombeki Byombalirwa Vs The Regional Commissioner and Regional Police Commissioner, BUKOBA, Misc Civil Cause 22 of 1986.**

In this case the applicant was one of the suspected economic saboteurs. He was arrested and a substantial part of his property valued at **Tshs.11, 675,680** was seized. He was charged with hording property but the special tribunal acquitted him and ordered that the seized property be

restored to the applicant. The government officials involved did not comply with the order hence the application for an order of mandamus to issue.

Held: It was stated that the five conditions must be proved for an order of mandamus to issue.

- a) The applicant must have demanded performance and the respondents must have refused to perform.
- b) The respondent as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty owed solely to the state but should be a duty owed as well to the individual citizen.
- c) His public duty imposed should be of an imperative nature and not a discretionary one.
- d) The applicant must have a locus standi that is he must have sufficient interest in the matter he is applying for.
- e) There should be no other appropriate remedy available to the applicant. In this application all the five conditions have been proved the applicant deserves an immediate order for redress because the injustice already done to him is substantial and unwarranted.

In the case of **Juma Yusuph vs. Minister For Home Affairs (1990) TLR 80.**

It was held that an Administrative authority acts within the Jurisdiction or if *intra vires* and no appeals provided for by the statutes then it is immune from the control by the court of law to issue orders of *certiorari* or *mandamus*.

Therefore this honourable court is impeded from issuing the orders of *mandamus* and *certiorari*, since the Regional Commissioner acted *intra vires* (within legal power) for ordering the detaining of Mr. Mjuni properties.

Your Lordship, the applicant in his second ground argued that he was denied the right to be heard, the applicant was asked to produce the documents for title of ownership. It was the same as being given the chance to be heard and the failure to produce documents of title of ownership should not be taken as exclusion of the right to be heard as the applicant contended.

In the case of **Abadia Salehe vs. Dodoma Wine Co. Ltd (1990) TLR 113**, it was held that as a general rule the court will refuse to issue the order of *mandamus* if there is another favourable and practible within the reach of the applicant. It is therefore NOT the right of the applicant to claim or to be granted the order of *certiorari* or *mandamus*. *Certiorari* being a discretionary for courts to issue

Your Lordship the applicant in his **third ground**, that the Regional Commissioner had detained his property and for that reason it violated his constitutional rights to own property as provided under **Article 24 of the Constitution of the United Republic of Tanzania**

We humbly reproduce the article as follows

Every person is entitled and has a right to the protection of his property held in accordance with the law, in so doing it shall be unlawful for any person to be deprived of property for the purpose of nationalization or any other purpose without the authority of law.

However the remedy as to the claim of violation of his right to own property under **Section 6 of the Basic Rights and Duties Enforcement Cap 4 of 1994**

In the case of **Morice Onyango vs. Senior Investigating Officer Custom Department Mbeya Criminal Appeal No: 25 of 1981**. Where Sammatta J. Stated that it is entirely correct preposition to say that an order of mandamus is a discretionally remedy, the order is not the right and it is not issued as a matter of cause. The purpose of the order is to supply defects of justice, the court will therefore issue where there is no specific legal remedy for enforcing a specific legal right claimed or where although there is an alternative legal remedy such modes of redress is considered by the court to be less Convenient, Beneficial and effectual.

Also in the case of **Lakaru vs. Town Director Arusha (1986) TLR 326**

The court held that *certiorari* being a discretionary remedy for courts to issue cannot be issued in a case where there is already a contractual relationship. The recourse to the court of law is to adjudicate on the breach of contract would be better procedure.

Your Lordship in the aforementioned reasons the respondent prays that this honourable court dismiss this application with costs.

DATED at Mwanza on this 13TH Day of December 2011

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Advocate for the Respondent

PRESENTED for filing on this 14th Day of December 2011

.....

Registry Officer

DRAWN AND FILED BY

CHELEBA AND CO. AVDOCATES

P.O.BOX 805

MWANZA

COPY TO BE SERVED UPON

APPLICANT