IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 146 OF 2010

MIC (T) LTD.....PLAINTIFF

VERSUS

THE EDITOR, MTANZANIA.....1ST DEFENDANT

NEW HABARI (2006) LTD.....2ND DEFENDANT

MWANANCHI COMMUNICATIONS LTD.....3RD DEFENDANT

RULING

Mwarija, J.

In its written statement of defence, the 3rd defendant raised a preliminary objection which consists of four grounds:

"*(i) That the plaint does not disclose a cause of action against the third defendant in view of the fact that (a) the alleged defamatory words are not quoted in verbatim in the plaint and (b) nothing is pleaded in the plaint against the third defendant.*

(ii) The plaint does not disclose a cause of action against the third defendant in view of the fact that the third defendant is sued as the printer.

(iii) *The plaint is incurably defective in that it is incurably verified in contravention of rule 15 of order VI and (sic) of the Civil Procedure Code, chapter 33 R.E. 2002.*

(iv) *That the suit is bad in law as it is instituted without authority of the Board of Directors of the plaintiff.*

On its part, in its reply to the written statement of defence, the plaintiff also raised a preliminary objection against the 1st and 2nd defendants' defence to the effect that:

> *"The written statement filed by the 1st and 2nd defendants is time barred and contravenes Order VIII 1. (2) of the Civil Procedure Code, cap. 33 R.E. 2002."*

With leave of the court, the parties argued the preliminary objections by way of written submissions. They were ordered to file their submissions for each of the preliminary objections simultaneously. Since the effect of success in any of the grounds of the preliminary objection raised by the 3rd defendant is to render the plaint incompetent hence rendering superfluous the preliminary objection raised by the plaintiff, I will start to consider the 3rd defendant's preliminary objection.

In his written submission, the learned counsel for the 3rd defendant abandoned grounds (ii), (iii) and (iv) of the preliminary objection and argued only ground (i) which has two parts, (a) and (b). As to part (a) of that ground, the learned counsel argued that the plaintiff did not state in

the plaint, the particular words which are alleged to be defamatory of the defendants. According to the learned counsel, the alleged defamatory words complained of by the plaintiff constitute the basis of the claim which ought to be proved hence the requirement that they must have been specifically stated. He cited to that effect passages from the books **Bullen & Leakes and Jacob's Precedents of Pleading,** 12th Ed. at page 626 and **Winfield & Jolowics,** 11th Ed. Sweet & Maxwell, 1979 at page 283. He also cited the case of **Nkalubo v. Kibirige** (1973) E.A. 102 and **Fatma Salmin v. Dr. Maua Daftari,** Civ. Case No. 34 of 2008 (HC-DSM) (unreported). As to part (b), it was the argument by the learned counsel that the plaint does not disclose a cause of action against the 3rd defendant because there is no specific allegation made against it in any of the paragraphs of the plaint.

In response, the learned counsel for the plaintiff started by expressing his doubt as to whether the point raised by the learned counsel for the 3rd defendant is a pure point of law or not. He contended that the nature of the point raised may tend to require ascertainment of facts. He however proceeded to make his submission in reply to the arguments made by the counsel for the 3rd defendant. On part (a) of ground (i) of the preliminary objection, the learned counsel argued that the counsel for the 3rd defendant is wrong in contending that in a case based on defamation, the alleged defamatory words must be set out verbatim in the plaint. He argued that the plaint discloses a cause of action without specifying the defamatory words complained of because it complies with the requirements stated in O.VII of the Civil Procedure Code, Cap. 33 [R.E.

2002] (the CPC) He cite to that effect the case of **G. P. Jani Properties Ltd. (In Voluntary Liquidation) v. Dar es Salaam City Council** (1966) E.A. 281 to substantiate his argument that a plaint is competent, when it complies with that provision of the CPC.

The learned counsel went on to submit that since cuttings of the relevant newspapers, have been attached to the plaint, the need for quoting in the body of the plaint, the entire contents of the words complained of did not arise. He stressed that to do so would "breach the guidelines requiring the need to observe brevity and precision in the presentation of facts in the pleading." He cited **Mogha's Law of Pleadings in India,** 15th Ed. 1998 at page 47 where the learned author reiterates the position that the material facts should be stated in a concise form, but with precision and certainty. Relying on that requirement, the learned counsel argued that it was sufficient for the plaintiff to annex the relevant portions of the newspapers, (MIC 1 and MIC 3) as they constitute a bundle of essential facts.

As to the authorities cited by the learned counsel for the 3rd defendant, the learned counsel for the plaintiff attempted to distinguish them. He argued that the decision in **Nkalubo** case (supra) related to a letter written in Luganda and that therefore, it was required to be transalted in English so that as to be understood by the members of the court who did not understand language. In this case, the learned counsel argued, Kiswahili is understood by both members of the bench and the bar. As to the **Byombalirwa** case (supra), the learned counsel submitted that unlike in the present case which is founded on defamation, that case

concerned a disclosure of cause of action in a suit which arose from a contract under the provisions of the Sale of Goods Ordinance.

On the **Dr. Maua Daftari** case (supra), he pegged his distinction on the existing relationship between the parties involved in the case. He stated that while the relationship between the parties in that case was private, in the present case, the dispute is between competeting mobile phone business firms. The learned counsel made another argument that the 3rd defendant will not, in any case, be prejudiced by the defect of the pleading because rules of procedure being a hand maidens of justice, should not be used to hinder dispensation of substantive justice. He cited the cases of **Philip Anania Masasi v. Returning Officer, Njombe North, Attorney General & Jackson Makweta,** Civil Case No. 7 of 1995, (HC) (unreported) and **Covell Mathews Partnership Ltd. v. Gutam J. Chavda** Civil Case No. 33 of 2002 (HC-DSM) (unreported) to bolster his argument.

On whether or not the case discloses a cause of action, the learned counsel for the 3rd defendant relied on the cases of **Dr. Salim Ahmed Salim v. The Editor, the East African & Anr.,** Civil Case No. 332 of 2002 , **Jani Properties Ltd. (In Voluntary Liquidation) v. Dar es Salaam City Council** (1966) E.A. 281 and **Jeraj Shariff & Co. v. Chotai Fancy Store** (1960) E.A. 373. The decisions in the two cases restated the meaning of the phrase cause of action and the position that in considering the issue whether a plaint discloses a cause of action or not, the court has to look at the plaint alone and its annextures.

Responding the contention that the plaint does not raise any claim against the 3rd defendant the learned counsel for the plaintiff referred to paragraph 4 of the plaint and submitted that according to that paragraph, the 3rd defendant has been joined in the suit because it printed the newspaper which published the alleged defamatory article and that it was therefore jointly liable with the other defendants for publishing the defamatory material.

Regarding **Dr. Maua Daftari** case, the learned counsel for the plaintiff urged me not to follow that decision. He submitted as follows:

> *"With regard to the first and main aspect of the objection i.e. on the alleged failure of cause of action, I have attempted to show that, contrary to the submissions of the 3rd defendant, the plaint contains a sufficient collection of facts – otherwise called a bundle of essential facts which it is well prepared to prove during the trial. Now having referred to the preceding authorities, I find myself in a most unenviable position to ask you to vacate the precedent established under* ***Maua's*** *case."*

In rejoinder, the counsel for the 3rd defendant argued that although it is true that in finding whether a plaint discloses a cause of action or not, the plaint together with its annextures have to be looked at, that does not exempt the plaintiff from quoting verbatim the words alleged to be defamatory. He stressed that the court cannot be left to venture into the

exercise of picking out from the plaint and its annextures, words which are complained of as being defamatory. On the argument that it is impracticable to quote the defamatory words because of bulkiness of the article, the learned counsel for the 3rd defendant submitted that the plaintiff is not required to quote the whole article but particular words which are alleged to be offensive. Furthermore, as to the argument that according to the law, facts of the case must be precise hence the reason why it was not necessary to state in the plaint, the particular words alleged to be defamatory of the plaintiff, the learned counsel argued that this legal position does not exempt a plaintiff from complying with the requirement of specifying the words which are alleged to be defamatory.

On the position stated in the **Nkalubo** case (supra) the learned counsel responded by arguing that the stated position is supportive of his argument because, contrary to the argument made by the counsel for the plaintiff that the requirement arose because the alleged defamatory words were in Luganda language, the court re-iterated the principle that in a suit based on defamation, the particular words complained of must be specifically stated so as to enable the defendant prepare his defence. Responding further to the argument by the counsel for the plaintiff that the decision in **Dr.Maua Daftari** case is distinguishable, the counsel for the 3rd defendant contended that the fact relied on by the plaintiff's counsel in distinguishing the case is not of relevance because it is based on the personality of the parties. He argued that in that case the distinction was based on the fact that in **Dr. Maua Daftari** case, the suit was between

natural persons, while in this case it is between juristic persons is of insignificant material difference as regards the principle in question.

Having considered the submissions made by the learned counsel for the respective parties, I wish to answer first, the issue whether or not ground (i) of the 3rd defendant's preliminary objection raises a pure point of law. The counsel for the plaintiff expressed that he was doubtful as to whether that ground would not require evidence thus not a pure point of law. I need not be detained much in answering this issue. It is a legal requirement that a plaint must disclose a cause of action. This is in accordance to O. VII of the Civil Procedure Code, Cap. 33 [R.E. 2002].

In his submission, the learned counsel for the plaintiff stated correctly that in finding out whether a plaint discloses a cause of action or not, it is the plaint alone and its annextues which is to be looked at. This being the position therefore, the issue whether the words alleged to be offensive of the plaintiff should have been specified in the plaint or not does not require evidence to be answered. Under the circumstances therefore, ground (i) of the preliminary objection raises a pure point of law because, as stated above, it does not require evidence to be ascertained.

I will now consider the issue whether or not the plaint discloses a cause of action against the 3rd defendant. The description of the said defendant is given in paragraph 4 of the plaint. Referring to that paragraph, the counsel for the plaintiff argued that the 3rd defendant has been joined in the suit by virtue of its role in printing the **Mtanzania** Newspaper which published the alleged defamatory article. In paragraph 7

of the plaint the allegation is that the defendants jointly and together caused the publication of the alleged defamatory articles against the plaintiff. Considering the contents of the two paragraph it is clear that the 3rd defendant has been sued on the ground that it did, jointly with the other defendants, cause publication of the alleged defamatory article. The contention that nothing has been pleaded against the 3rd defendant is therefore devoid of merit.

Coming now to the issue whether or not the alleged defamatory words must be specified in the plaint, I held in **Dr. Maua Daftri** case that it is a legal requirement that in a defamation case, the words complained of must be quoted verbatim in the plaint. I cited a passage in **Bullen & Leake & Jacobs precedents of pleadings,** 13th Ed. S & M (Lon.) 1990. The learned authors state as follows at page 623:

> " *The words must be set out verbatim in the statement of claim. It is not enough to set out their substance or effect (**Harris v. Warre** (1979) 4 CPD 125 at 127; **Collins v. Jones** (1955) 1 QB 564). Where the defamatory words form only part of longer article or programme, the plaintiff must set out in his statement of claim only the particular pages of which he complains as being defamatory of him (DDSA Pharmaceuticals Ltd. v. Times Newspapers Ltd. (1973) 1 QB 21, CA). Question and answer must be set out if the libel is contained in*

both together ***Bromage v. Prosser*** *(1825) 4 B & C. 247)."*

The persuasive decisions in the cases of **Collins v. Jones** and **DDSA Pharmaceutical Ltd. v. Times Newspapers Ltd.** (supra) clearly lay down the position which I adopted. In his submission, the learned counsel for the plaintiff attempted to distinguish the case of **Dr. Maua Daftari** ~~case~~ with the present case. In my considered view, the reason given that; whereas this case involves juristic persons, the former case involved natural or private persons is, as argued by the counsel for the 3rd defendant, not insignificant. The requirement of setting out verbatim the words complained of in a defamation case does not have different standards of application between natural and legal persons. I do not also find merit in the submission by the learned counsel for the plaintiff that the case of **Nkalubo** is distinguishable. In attempting to distinguish that case, the learned counsel looked only at one aspect of the holding which is to the effect that when the alleged libel is in a language other than English, the statement complained of must be translated into English. Had the learned counsel thoroughly read the judgment, he would have noted that this aspect was based on the principal that the alleged defamatory words must be set out in the plaint. In that case, it was clearly stated by the Court of Appeal of Kenya that when the alleged defamatory material is not in English, the actual words complained of must be set out in the plaint, firstly, in the language used and secondly, their literal translation in English. The court stated as follows at page 103 of the judgment.

"In all suits for libel the actual words complained of must be set out in the plaint. It was said by Lord Coleridge, C.J., in Harris v. Warre (1979), 4 C.P.D. 125 at P. 128:

'In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged which is the fact on which the case depends.'

Those words have often since been cited with approval. Moreover, the letter was written in Luganda; that being so, the particular words complained of should have appeared in the plaint on that language followed by a literal translation into English."

Basing on the position as I have stated herein, the contention by the learned counsel for the plaintiff that the plaintiff could not set out verbatim in the plaint the words complained of because of the requirement of stating only the concise facts in compliance with O.VII of the CPC is, with respect, not correct. O. VII of the CPC relied on by the learned counsel is a general provision governing pleadings. The requirement of setting out the words alleged to be offensive to the plaintiff is a principle which is specific to pleadings in defamation cases.

In substantiating his argument, the learned counsel also cited **Mogha's The Law of Pleadings in India,** 15th Ed, 1998 at page 47 and stated that it was not necessary to quote in the body of the plaint, the alleged defamatory words. As stated above the rule that the material facts must be concise is a general rule of pleadings. At page 690 of the 18th Ed. of the same book, the learned author states the points which a plaint in a suit for libel must contain. He states as follows:

> *"The following points must be alleged in the plaint: The exact words which are said to be defamatory or a description of the painting or signs claimed to be defamatory with their latent significance must be alleged in the plaint."*

At page 29 it is stated as follows as regard a suit based on defamation.

> *"It is a rule of pleadings that ..... the publication of defamatory statement should be alleged and it should be stated that the words were published or spoken to some named individuals and* ***actual words should be set out*** *and the time and place, when, where and how they were published should also be specified in the plaint." (Emphasis added).*

The same position is stated in **Odger's Principles of Pleadings and Practice in Civil Actions in the High Court of Justice,** 20th Ed by Giles Francis Harwood, 3rd Indian Reprint (2010), Universal Law Publishing Co. PVT Ltd, New Delhi. The learned author states as follows:

*" ...In an action for libel or slander the precise words complained of are material, and they must be set out verbatim in the statement of claim. If the words taken by themselves are not clearly actionable, the plaintiff must also insert in his statement of claim an averment (with particulars in support) of an actionable meaning which he will contend the words conveyed to those to whom they were published. Such an averment is called innuendo (**Harris v. Ware** (1979) 4 CPD 125, 48 LTCP 310, **Collins v. Jones** (1955) 1 QB 564, **Rubber Investment Ltd. v. Daily Telegraph Ltd.** (1963) 2 WCR 1063.)"*

It was also the argument by the counsel for the plaintiff that non compliance with the requirement of quoting verbatim in the plaint the words complained of does not prejudice the defendant. To re-iterate what I stated in **Dr. Maua Daftari** case, the purpose of setting out in the plaint the alleged defamatory words is to make the defendant know the exact words complained of so as to enable him defended his case properly. This view finds support in the **Nkalubo** case. Stating the objective behind the rule that the alleged defamatory words must be set out verbatim in the plaint, the court had this to say:

"This is not a mere technicality because justice can only be done if the defendant knows exactly what

words are complained of, so that he can prepare his defence."

Where the words are not specified in the plaint therefore, it is clear that the defendant will be prejudiced as he cannot understand beforehand the nature of the statement against which he has to defend himself.

On the basis of the reasons stated herein, I uphold ground (i) (a) of the 3rd defendant's preliminary objection. Since the plaintiff did not set out verbatim in its plaint the alleged defamatory words, the omission renders the plaint incompetent for failure to disclose the cause of action. The same is therefore hereby struck out with costs.

A. G. Mwarija

JUDGE

5/9/2014