

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 129 OF 2018

ALEX MWITA MSAMA PLAINTIFF

VERSUS

ROSE MHANDO.....1ST DEFENDANT

THE EDITOR MWANANCHI NEWSPAPER..... 2ND DEFENDANT

MWANANCHI COMMUNICATION LTD 3RD DEFENDANT

Date of last Order: 05/11/2019

Date of Judgment: 28/02/2020

R U L I N G

MGONYA, J.

When the matter was called for hearing Ms. Wilson learned Advocate for the 2nd and 3rd Defendants averred before this Honorable Court that, on 23/08/2018 raised a preliminary objection in court claiming that the Plaint does not disclose the cause of action against the 2nd Defendant. The learned Counsel submitted that, looking at the Plaint, the 2nd Defendant appears and reads as THE EDITOR of MWANANCHI NEWSPAPER while under paragraph 3 of the Plaint on the description of the 2nd Defendant was referred as the Editor of the Tabloid called "MWANASPOTI". The Counsel's emphasis is

basically on the 3rd paragraph of the Plaint; which deserves to be quoted:

"That the 2nd Defendant is the Editor of the Tabloid called Mwanasport which has been registered under the laws of Tanzania and her address of service is through the 3rd Defendant"

Ms. Wilson learned Advocate further stated that under paragraph 5 of the Plaint, the Plaintiff is claiming against the Defendants joint and severally for the payment of **Tshs. 1 Billion Shillings** arising from the claim of DEFEMATION, also looking at Annexure A of the Plaint, is a piece of Newspaper and the same is for MWANASPOTI Newspaper and not "MWANANCHI".

However it is the Counsel's submission that, MWANANCHI Newspaper is different from MWANASPOTI NEWSPAPER and also the Editor for MWANASPOTI Newspaper is different from the one of MWANANCHI Newspaper. The Plaintiff instead of suing the Editor for MWANASPOTI Newspaper, he sued the Editor of MWANANCHI NEWSPAPER while he is not responsible for editing MWANASPOTI Newspaper.

Ms. Wilson further contended that, looking at Annexure B of the Plaint which is a Demand Letter and on the same, there is nowhere that shows that the 2nd Defendant is the Editor of

MWANANCHI Newspaper, rather appear as Editor of MWANASPOTI Newspaper. The learned Counsel submitted that, generally looking at the Complaint and Annexures A and B, there is nowhere that the Complaint discloses the cause of action against the 2nd Defendant.

Counsel for the 2nd defendant averred that, Courts have stated in several occasions what amounts to cause of action. Among those decisions is the including the decision in the case of ***STANBIC FINANCE TANZANIA LIMITED VS. GIUSEPPE TRUPYA and CHIARA MALAVAS, 2002 TLR at pg. 221*** where the cause of action have defined as **“the facts exists which give rise or occasion to a party to make a demand or seek redress. ”**

It is the Counsel’s further submission that, in connection with the case at hand, there are nowhere the Plaintiff shows that they have a cause of action against the 2nd Defendant. Also under **Order VII Rule II (a) of CPC [Cap 33 R.E. 2002]** it provides for the circumstances where the complaint should be rejected. From the cited above, it is the learned Counsel’s humble submission that, since the complaint does not expose any cause of action to the 2nd Defendant, the complaint be rejected with costs.

In reply Counsel for the Plaintiff Mr. Magusu, learned Counsel admitted that it is true that on the 3rd paragraph of the Plaintiff, the 2nd Defendant is referred to as the Editor of the Tabloid called MWANASPOTI instead of the EDITOR MWANANCHI NEWSPAPER as intended to be.

It is the submission of the learned Advocate for the Plaintiff that the same is just a typing error that can be amended/ rectified through an amendment than rejecting the entire Plaintiff for not disclosing the Cause of Action against the 2nd Defendant.

Mr. Mugusu Learned Advocate continued stating that going through the other paragraphs of the Plaintiff referring to the contents of paragraphs (5), (7), (8), (9) and (10) and the facts therein, discloses the cause of action against the 2nd and 3rd Defendant.

The learned Counsel for the Plaintiff further argued that in order to determine the question whether the Plaintiff discloses a cause of action, there must be determined upon perusal of the Plaintiff alone, but further with everything attached to it and the assumption that any express or implied allegation of facts are true.

Further Mr. Magusu learned Advocate stated that a preliminary objection cannot be raised if any fact has to be

ascertained or if what sought is exercise of judicial discretion. He referred the court to the case of **SULTAN MOHAMED ZAHRON (1997) TLR 295**, where it was held that:

"Where a fact at issue needs to be proved in one way or the other, cannot be relied upon to dispose off the suit and the preliminary Objection".

The learned Advocate for Plaintiff further referred the court to the case of **MIC TANZANIA LTD VS TANZANIA TELECOMUNICATION COMPANY LTS COMMERCIAL CASE NO. 146/2002**, where Justice Bwana held that:

"No suit ought to be dismissed summarily unless it appears so helpless that it plainly and obviously discloses no reasonable causes of cause of action and is so weak as to beyond redemption and in able by amendment".

Mr. Magusu, learned Advocate further invited the court to take inspiration from the above extract in determining the matter before the court; and take into consideration that the error is a typing error where they can be correct the Plaintiff through amendment, if allowed.

In the rejoinder Ms. Wilson learned Advocate submitted that, looking at the Plaintiff the Defendants and Honorable

Courts was not in a position to guess if it was really a typing error. Additional to that, the said error appeared 3 times in the entire Plaintiff hence the same deserves to be rejected instead of being amended.

Ms. Wilson further contended that, where the word **shall** is used it refers to a mandatory requirement. Counsel for the Plaintiff states that from paragraph 7 to 10 those paragraphs disclose the cause of action against the 2nd defendant. So it is her wish that which the entire Plaintiff and its annexures thereto, which does not show that the Plaintiff has a cause of action against the 2nd Defendant, be rejected.

Moreover stating on the judicial discretion, Ms. Wilson was of the view that, the preliminary objection cannot be on judicial discretion since the law has already set an answer where there is lack of cause of action what is to be done. Defendant's counsel in the event therefore, it is prayer that the plaintiff be rejected for lack of disclosing the cause of action to the Defendant.

At this juncture after a thorough perusal of the submission upon the preliminary objection raised by Counsel for the 2nd Defendant it is of utmost importance to deal with the aspect of "**Cause of Action**" respectively. The aspect of cause of action has been elaborated in a series of cases:

In the case of **JOHN M. BYOMBALIRWA VS AGENCY MARITIME INTERNATIONAL (Tanzania) LTD [1983]** it was put as:

"Essential facts which it is necessary for the Plaintiff to prove before he can succeed in the suit".

Moreover it was also in the case of **AUTO GARAGE AND OTHERS VS MOTOKOV(3) 1971 EA AT PAGE 514 and JURAJI SHARIFF AND CO FANCY STORE (1960) EA 374,** where the Court insisted that,

"The Plaint must disclose a cause of action against the defendants, short of that, defendants must be discharged".

From the decisions above it is a conception therefore that a cause of action is a basic need to be contained in a Plaint against a Defendant/ Defendants.

Moreover, dealing with the issue of the parties from the records at hand, the Plaintiff before this Honorable Court is suing Rose Mhando as the 1st Defendant, The Editor Mwananchi Newspaper 2nd Defendant and Mwananchi Communication Limited 3rd Defendant. In contents and upon parties in the plaint the plaintiff is in confusion and not certain

as to who exactly is the person of interest to be sued. The confusion is noted at paragraph 3 of the Plaint where the Plaintiff states that:

3. That, the 2nd Defendant is the Editor of the Tabloid called Mwanasport which has been registered under the laws of Tanzania and her address of service is through the 3^d Defendant.

However after the need for the Plaintiff to initiate a civil suit against those that he had legal claims against, a Demand letter was drawn and addressed to Rose Mhando, The Editor Mwanaspoti News Paper and The Publisher Mwananchi Communication Limited.

From the records of the pleadings in this Court it is a question of fact as who is the real Defendant that was intended to be sued by the Plaintiff?, I am aware that **The Editor Mwananchi News Paper** and **The Editor of the Tabloid called Mwanaspoti** are not one and the same. These are two distinct persons thus far.

The decision of the Court of Appeal in the case of ***TOSI JATEGI V. TANZANIA HARBOURS AUTHORITY, Civil Application No. 164 of 2006 (unreported)*** where it was held that:

"The general principle of the law directs that, it is essential for the names of the parties either in a suit or an application to be clearly stated. This is because such a mistake in the names of the parties may be fatal and bring about some confusion. Hence an application bearing a non-existent Respondent as in this case, may lead to fatal consequences because if the Applicant wins, an order of the court might not be executable to such a non-existing party".

Further in the case of **CHRISTINA MRIMI V. COCA COLA KWANZA BOTTLERS LTD, Civil Appeal No. 112 of 2008 (Unreported)**, where the Appellant filed an application against **Coca Cola Kwanza Bottlers Ltd** while it had a dispute with **Coca Cola Kwanza Ltd**. In that case, the Court of Appeal of Tanzania observed at pages 4, 5 and 6 of the Ruling that:

"Companies, like human beings, have to have names. They are known and differentiate by their registered names. In the instant case, it is apparent that names "Coca Cola Kwanza Bottlers", Coca Cola Kwanza Bottlers Ltd or Coca-Cola Bolters Ltd have been used interchangeably. Although the

Appellant wants this court to hold that they mean one and the same Company, strictly, cannot be accepted without same risk can inexactitude.”

The Plaintiff's Counsel admits that the misquoting of the parties is a mere typing error of which he does not dispute but acknowledges the same and prays that the same be amended.

A plaint is legal document or also known as a pleading and has its formal form enshrined under the law, a form that a plaintiff when drafting the same is bound to adhere to and not otherwise. ***Order VII of the Civil Procedure Code [Cap. 33 R.E. 2002]***, provides for the contents of the Plaint being among others the parties and the cause of action and the same ought to be clearly stated.

Therefore it is my firm view that the laws of this country have to be adhered to and not stepped upon for any reasons known whatsoever. As a legal Counsel, the Counsel for the Plaintiff had the duty to inquire from the Plaintiff of the exact party to be sued.

Therefore with all having being stated as to the circumstances of this matter and the records before this Honorable Court, failure of the Plaintiff to disclose a cause of action against the 2nd Defendant. I find my hands tied and invoke the provisions of ***Order VII Rule 11 (a) of the Civil***

Procedure Code [Cap 33 R.E. 2002]. The Plaintiff and its annexure, thereto is hereby rejected for lack of Cause of Action against the 2nd Defendant.

Defendants to have their costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA
JUDGE
28/02/2020**

Court: Ruling delivered in the presence of the Mr. Maguysu Mgoka, Advocate for the Plaintiff and hold brief for Advocate Kanonyele for the 1st Defendant, Ms. Halima Samanda, Advocate for the 2nd and 3rd Defendant and Ms. Janet Bench Clark in my chamber today 14th February, 2020.



A handwritten signature in black ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA
JUDGE
28/02/2020**