

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND CASE NO. 6 OF 2020**

**PETROLUX SERVICE STATIONS LIMITED ..... PLAINTIFF**

***VERSUS***

**1. NMB BANK PLC ..... 1<sup>ST</sup> DEFENDANT**

**2. ADILI AUCTION MART LIMITED..... 2<sup>ND</sup> DEFENDANT**

**RULING**

19<sup>th</sup> March 2021

**KISANYA, J.:**

The Plaintiff carries out the business of trading in, distribution and transportation of petroleum products. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> defendants deal with commercial business and business of court brokers and auctioneers respectively. On 11<sup>th</sup> day of May 2018, the plaintiff accepted the 1<sup>st</sup> defendant's financial facilities in terms of Term Loan and Overdraft and Bank Guarantee Declaratory order. The following landed properties (some of which are in his name while other in guarantors) were pledged by the plaintiff as security:

- (i) *Landed property with C.T No. 36896, L.O No. 419943 Located on Plot No. 357 & 358 Block 'K' High Density Kitaji Area, Musoma Municipality – Mara registered in the name of Sylvanus Maganya Chacha.*

- (ii) *Landed property with C.T No. 11034 LR Mwanza L.O No. 159107 Located on Plot No.96, Block 'C' High Density Kawawa Street, Musoma Municipality, registered in the name of Magori Sylvanus Chacha.*
- (iii) *Landed property (hotel building) with C.T. No. 11301, Located on Plot No. 67, Block 'C' Karume Street, Musoma Municipality, registered in the name of Silvanus Maganya Chacha;*
- (iv) *Landed property with C.T. No. 11925, located on plot No. 69 Block 'C' Karume Street, Musoma Municipality, registered in the name of Celestine Sylvanus Magori;*
- (v) *Landed property with C.T. No. 49973 LR Mwanza, L.O. No. 425389 Located on Plot No. 480 and 481 Block 'S' Nyasurura D, Bunda Urban Area registered in the name of Petrolux Service Stations Limited;*
- (vi) *Landed property with C.T. No. 51566 LR Mwanza, L.O. No 423108 Located on plot No. 22 Block 'C' Ilungu Magu Urban Area registered in the name of Petrolux Service Stations Limited.*
- (vii) *Landed property with C.T. 55850 LR Mwanza, L.O. No. 462411 Located on Plot No.1 Block 'B' Kakindo Area Muleba District registered in the name of Petrolux Service Stations Limited;*
- (viii) *Landed Property with C.T. No. 51565 LR Mwanza, L.O. No. 423106 Located on plot No. 69 'A' Kisesa. Mwanza City Council registered in the name of Petrolux Service Stations Limited;*
- (ix) *Landed property with C.T. No. 48802 LR Mwanza, L.O. No. 420518 Located on Plot No. 677 & 678 Bweri Musoma Municipal, registered in the name of Magori Sylvanus Chacha.*

It is alleged that the plaintiff discharged her obligation under the facility agreement. However, on 30<sup>th</sup> day of August, 2020, she was surprised to learn that 2<sup>nd</sup> defendant had been engaged to call for tender for the sale of the above named landed properties. The plaintiff claims that the 1<sup>st</sup> defendant breached the facility agreement as follows: **One**, merging the overdraft facility with the bank guarantee and without informing her. **Two**,

making payment of bank guarantee offered to the plaintiff suppliers without notifying the plaintiff. **Three**, issuing public adverts of intention to sell the plaintiff's securities without issuing default notice whatsoever to the plaintiff.

In view of the above, the plaintiff sued the defendants and prayed for the following reliefs:

- 1. Declaratory order to the effect, the 1<sup>st</sup> Defendant, through her actions of breach of both the loan agreement and overdraft and bank guarantee agreement be performed in accordance with the law.*
- 2. A permanent order restraining the Defendants jointly and severally from disposing the Plaintiff's securities or change of ownership thereof.*
- 3. General damages against all Defendants jointly and severally at the court's discretion.*
- 4. Costs of the suit be provided for.*

Upon being served, the defendants lodged a joint written statement of defence in which they raised a counter claim against the defendant. In addition, they filed a preliminary objection on the following points of law:

- (i) That the plaintiff has no locus standi to sue over properties listed under paragraph 4(iii) of the plaint as properties (a), (b), (c), (d), and (i) as the said properties do not belong to the plaintiff.*
- (ii) That as long as the suit is over immovable properties, the honourable court has no jurisdiction to entertain matter over properties listed in paragraphs 4(iii) of the plaint as property number (f), (g) and (h) as the said properties are located beyond the territorial jurisdiction of the High Court Musoma Registry.*
- (iii) That the plaintiff's plaint does not disclose a cause action against the defendants.*

Thus, the counsel for the defendants moved the Court to strike out this appeal on the above point of law.

The plaintiff filed a reply to joint written statement of defence in which, she also raised the following points of preliminary objection on points of law:

*(i) That the Defendants joint written statement of defence is bad in law for contravening the provisions of rule 14 of Order VI of the Civil Procedure Code [Cap. 33 R.E. 2019].*

*(ii) The Defendants joint written statement of defence is bad in law for contravening the provisions of rule 15 sub-rule 1, 2 and 3 of order VI of the Civil Procedure Code [Cap. 33 R.E. 2019].*

From the foregoing, the plaintiff asked the Court to strike out the written statement of defence and the counter claimed raised therein. The Court ordered the preliminary objection be heard by way of written submissions. The same were filed in due compliance with the Court's order. While Mr. Heri Emmanuel, learned advocate filed submissions for the plaintiff, the defendants' submissions were filed by Mr. George Mwaisondola, learned advocate. I will consider the learned counsel's submissions in the course of addressing the above points of preliminary objection.

At the very outset, it is pertinent to state that, in disposing of the preliminary objections, the guidance will be the principle stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs Westy End Distributors Ltd** (1969) EA 698 that, objection should be raised on pure point of law. It cannot be raised if any fact has to be ascertained. Also, a preliminary

objection has to be argued on the assumption that all facts deposed by the adverse party in the pleading are correct and that, if argued at the preliminary stage may dispose of the suit. This principle was also stated by the learned counsel for the plaintiff.

I prefer to start with the preliminary objection raised the defendants against the suit filed by the plaintiff. The limb of objection is to effect that, the applicant has no *locus standi* to sue over properties listed under paragraph 4(iii) (a), (b), (c), (d), and (i) of the plaint because they do not belong to the plaintiff. Mr. Mwaisondola argued that a person instituting a suit must have a *locus standi* and that, the Court must have jurisdiction. He cited the case of **Lujuna Shubi Balonzi vs Registered Trustees of Chama cha Mapindunzi** (1996) TLR 208 to support his argument. The learned counsel went on to submit that, the plaintiff has no locus to sue over the landed properties which are in the names of guarantors. Therefore, Mr. Mwaisondola urged the Court to dismiss the plaintiff's claim in respect of the said properties.

In his reply submission to the first point of objection, Mr Emmanuel submitted that, the plaintiff's cause of action is breach of contract namely, facilities agreements between the plaintiff and the 1<sup>st</sup> defendant and the plaintiff's suit is not centred on claiming rights over the said properties. He went on to state that the said properties were pledged as security by the

guarantors who are strangers to the facilities agreement. It was submitted further that, the case of **Lujuna Shubi Ballonzi** is distinguishable from the circumstances of this case because the facts thereto revolved around suing on behalf of other persons, which is not the case in the matter at hand. Mr. Emmanuel argued further that, the defendants' assertion that some of the properties belongs to the plaintiff's directors does not qualify as preliminary objection because it calls for evidence. He therefore asked the Court to dismiss the same.

On my part, I agree with the learned counsel for the defendants that, determination of *locus standi* is essential in any civil case. Hence, a party bringing a matter to court should be able to show how his right or interest has been breached or interfered with as held in **Lujuna Shubi Balonzi** (supra). I am live to the principle set out in **John Byombalirwa vs Agency Maritime Internationale (Tanzania)** (1983) TLR 1 that, in determining whether or not a plaint discloses a cause of action, it is the plaint which should be considered.

Upon going through the plaint, I am in agreement with Mr. Emmanuel that the plaintiff's case is premised on breach of contract. The properties subject to the preliminary objection were pledged as security of the loan facilities advanced to the plaintiff and listed in the facilities agreement. Since the plaintiff claims that, the 1<sup>st</sup> defendant has breached the said agreement and

engaged the 2<sup>nd</sup> defendant to sale the said properties without prior notice, she has a cause of action against the defendants and is entitled to bring the case in this Court. Thus, I dismiss the first limb of objection.

The second limb of objection by the defendants' counsel relates to jurisdiction of this Court over properties listed in paragraph 4 (iii), (f), (g) and (h) of the plaint. The said properties are stated to be located in Magu, Muleba and Kisesa Mwanza respectively. Mr. Mwaiondola was of the view that this Court has no jurisdiction over properties which are beyond local limit of Musoma Registry. He therefore moved the Court to dismiss the claim over the properties listed in paragraph 4 (iii), (f), (g) and (h) of the plaint.

In his reply, Mr. Emmanuel submitted that the second limb of objection does not mention the law that the plaintiff has contravened. The learned counsel reiterated his submission that, the epicentre of the suit is not on properties rather breach of facilities agreements between the plaintiff and the 1<sup>st</sup> defendant. He went on to submit that the said agreements were cordially made at Musoma, which is within the territorial jurisdiction of this Court. It was also submitted that, even if the plaintiff was suing over the said landed properties, section 15 of the CPC provides that if immovable property situates in different court's jurisdiction, a suit can be filed in any of the courts having territorial jurisdiction. He was of the view that there was



no need of instituting the suits in the registries where the land properties are located as that would amount to *res subjudice* and abuse of court process. Mr. Emanuel further submitted that the High Court of Tanzania has unlimited jurisdiction under section 2 of JALA. Therefore, this Court was asked to overrule the second objection raised by the defendants.

I have carefully considered the submission by the learned counsel for both parties. The issue is whether this Court has jurisdiction over the properties listed in paragraph 4 (iii), (f), (g) and (h) of the plaint. As stated herein, the plaint shows that the plaintiff's cause of action is based on breach of contract and not over the landed properties identified by the defendants. It was stated in paragraph 5 of the plaint that, the cause of action arose in Musoma. In that regard, this Court has jurisdiction to try the matter under section 18 of the CPC. See also the case of **Abdallah Ally Selemani T/A Ottawa Enterprises (1987) Vs Tabata Petrol Station Co. Ltd and 2 Others**, Civil Appeal No. 89 of 2017, CAT at Iringa (unreported) where it was held that:

*"We firmly think that only suits for immovable property were meant to be filed within the local limits in which such properties are situated. Any other suits as provided under section 18 of the CPC are to be filed where the cause of action arose or where the defendant resides or works for gain. The suit alleging conversion falls under this provision."*

The issue whether or not the facilities agreements were not signed in Musoma is a matter of fact which calls for evidence to substantiate the



same. That reason is sufficient to dismiss the second limb of preliminary objection.

Now, even if it is taken that the cause of action is also based on the land properties whereby some of them are outside the local limits of High Court of Tanzania, Musoma Registry, I am of the view that, this Court will still have jurisdiction to try the claims over properties which are outside Musoma Registry. This is because the territorial jurisdiction of the High Court of Tanzania is within Mainland Tanzania. Further, since there are two cause of action in this case, the same cannot be detached or separated. The Court is mandated to determine the matter basing on any of the cause of action. This stance gets support from the **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998 (unreported) which was cited with approval in **Abdallah Ally Selemani** (supra) as follows:

*"There is no room for separating the claims based on the same cause of action. To sever or separate the claims as the courts below did in this case was not, in our view, the intention of the legislature in its wisdom. It was the intention of the legislature to allow certain claims based on the same cause of action to be entertained by the civil courts, it would have stated so in the law."*

In view of the above, I overrule the second limb of objection for want of merit.

I now move on to consider the third limb of preliminary objection that, the plaintiff does not disclose the cause of action against the defendants. Mr. Mwaisondola submitted that, the requirement for cause of action is provided for under Order VII, Rule 1(e) of the CPC. He also cited the case of **John Byombalirwa** (supra) and the book titled Magistrate's Manual by B.D Chipeta where the term cause of action defined. The learned counsel further referred the Court to the case of **Musanga Ng'andwa vs Chief Japhet Wanzagi and Eight Others** (2006) TLR 351 where it was held that plaintiff should be looked at together with anything attached to it in determining a cause of action.

He went on to contend that, although the plaintiff claims to have discharged her obligation under the facilities agreement, annexure A to the plaintiff suggests that she had defaulted. His contention was based on the claim that, Annexure A to the plaintiff shows the outstanding balance debt as Tshs. 3, 060, 126, 357.22. Therefore, he argued that the plaintiff does not disclose the cause of action against the defendants because the plaintiff took the loan, mortgaged the suit premises but defaulted to repay the loan. He fortified his argument by citing the cases of **Yusuf Mwita Marwa vs NMB Bank Plc and Another**, HCT at Mwanza (unreported), Land Case No. 9 of 2017 (unreported) and **Emmy Ngowi vs Bank of Africa Tanzania Ltd and 3 Others**, HCT at Mwanza, Land Case No. 22 of 2017

(unreported). The learned counsel concluded by asking me to dismiss the plaintiff's case for want of cause of action.

Responding, Mr. Emmanuel submitted that the argument by the defence was based on evidence which cannot be analysed at this stage. Thus, he requested the Court to dismiss the third limb of objection for want of merit.

I have carefully weighed the submissions of both counsel on the preliminary objection that the plaint does not disclose of cause of action. In view of Order VII, Rule 11 of the CPC, the cause of action should be clear from the pleading without qualification. It is settled law that, a cause of action constitutes facts which or allegation which if proved, entitle the plaintiff to judgement.

I agree with Mr. Emmanuel that, the submission by the learned counsel submissions for the defendants is based on evidence to be proved during trial. As earlier stated, the following facts deposed in plaint disclose the cause of action against the defendant: First, the plaintiff entered into facilities agreements with the 1<sup>st</sup> defendant and pledged the landed properties which are in her names and guarantors' names. Second, discharged her obligation by paying the advanced loan in accordance with the payment schedule. Third, the 1<sup>st</sup> defendant breached the agreements by merging the overdraft facility with the bank guarantee without informing

her. Fourth, the 1<sup>st</sup> defendant issued public advert of intention to sale the securities without issuing any default notice to her as mandated by the law.

It follows that the arguments by the counsel for the defendants that the plaintiff defaulted to pay calls for evidence. It cannot be determined at this stage. This is so when it is considered that Exhibit P1 to the plaint relied upon by Mr. Mwaisondola does not indicate whether the current balance appearing in the outstanding debt. It is a fact to be proved during trial. For that matter, the authorities referred by the learned counsel for the defendants are distinguishable from the circumstances of this case. Therefore, the third limb of objection is unmerited and overruled.

In the event, I accordingly dismiss all objections that the plaintiff has no cause action against the defendants and that, the Court has no jurisdiction to entertain the claim over some of the landed properties.

Let me now deal with the preliminary objection raised by the learned counsel for the plaintiff. It was submitted by Mr. Emmanuel that the Defendants joint written statement of defence was not signed at the foot of it thereby contravening Order VI, Rule 14 of the Civil Procedure Code [Cap. 33 R.E. 2019]. As to the second limb of objection, Mr. Emmanuel argued that, the defendants joint written statement of defence lacks the verification and hence, contravening Order VI, Rule 15 sub-rule (1), (2) and (3) of the CPC. He went on to submit that, paragraphs 7 and 8 of the

counter claim were not verified. Therefore, Mr. Emmanuel was of the view that the written statement of defence and the counter-claim were incurably defective. He asked the Court to strike the entire WSD and paragraphs 7 and 8 of the counter claim.

Mr. Mwaisondola contested the objection. He contended that there is no requirement of appending signature before raising the counter-claim. He submitted the defendants' signature at page 4 and 5 of the WSD satisfy the requirement of Order VI, Rule 14 of the CPC. In alternative, he prayed to amend the WSD in the event this Court finds it necessary to have signatures of the defendants before the beginning of the counter claim. The learned counsel conceded that paragraphs 7 and 8 of the counter-claim were not verified. However, he contended that it was a mere slip of the pen and that, the intention of the officer verifying assumed all responsibilities over the contents of all paragraph. He cited to the case of **Massawe and Company vs Jashbai P. Patel and 18 Others** [1998] TLR 445 and **Aloys Lyenga vs Inspector General of Police and Another** [1997] TLR 101 to support his argument. Furthermore, relying on the case of **Karata Ernest and Others vs AG**, Civil Revision No. 10 of 2010, CAT at DSM (unreported), Mr. Mwaisondola was of the view that, the omission to include paragraphs 7 and 8 of the counter claim in the verification clause is cured by the rule of overriding objective.

I am at one with the counsel for the defendants that, the law does not require the WSD to be signed immediately before raising the counter claim. The pleading (WSD and the counter- claim) was signed by the advocate for, and principal officers of the defendants as reflected at page 4 and 5. Therefore, it is my considered opinion the cited provision was not contravened.

As regards verification, it is not disputed that all paragraphs of the WSD and paragraphs 7 and 8 of the counter claim were not verified. In my view, such defect is not fatal to the extent of striking out the WSD. It is curable by amending the respective pleading. I subscribe to the decision of Makaramba, J. (as he then was) in **Aero Noremco Construction (Noremco) vs DAWASA**, Commercial Case No. 7 of 2009, HCT Commercial Division at DSM (unreported) that:

*"With due respect to the learned counsel for the Defendant this error is not a fatal error attracting the drastic measures proposed. It is an error which is curable by simple amendment of the pleadings. I am therefore at one with the counsel for the Plaintiff that this error is not fatal and easily curable as aptly stated by Samata, J (as he then was) in **Philip Anania Masasi vs Returning Officer Njombe North Consituency and 2 Others**, Misc Civil Cause No. 1995, High Court (unreported) that "want of or defect in verification does not make pleadings void, it is a mere irregularity which is curable by amendment."*

Similar position was taken in **Kiganga and Associates Gold Winning Company Limited vs. Universal Golf N.L**, Commercial Cause No. 24 of 2000 (Dar es Salaam Registry) (Unreported) and **Godfrey Basil Mramba v. The Managing Editor & 2 Others**, Civil Case No. 166 of 2006, (Dar es Salaam Registry), (Unreported) where this Court ordered for amendment of the plaint upon facing similar situation.

In view of the above position, the WSD and paragraphs 7 and 8 of the counter-claim cannot be struck off for want of verification as argued by the counsel for the plaintiff. The said defect does not go to the root of the matter. It can be cured by the principle of overriding objective. In the interest of justice, I order the amendment of Written Statement of Defence and the counter-claim on the verification, within seven (7) days as I dismiss the preliminary objection by the plaintiff.

In the final analysis, the preliminary objections raised by the defendants and the plaintiff are overruled for want of merit with no order as to costs.

Dated and delivered at Musoma this 19<sup>th</sup> day of March, 2021.



  
E. S. Kisanya  
JUDGE