

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL CASE NO. 12 OF 2020

BANNY MAIJO t/a BANNY

TECHNICAL AND GENERAL SUPPLY PLAINTIFF

VERSUS

MEDICAL OFFICER IN CHARGE

GEITA REFERRAL HOSPITAL 1ST DEFENDANT

PERMANENT SECRETARY (HEALTH) MINISTRY

OF HEALTH COMMUNITY DEVELOPMENT

GENDER, ELDERLY AND CHILDREN 2ND DEFENDANT

HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

RULING

23rd, June & 14th July, 2021

ISMAIL, J.

The Court is called upon to determine the competence of the pending suit, instituted by the plaintiff against the defendants, principally for payment of the sum of TZS. 9,615,000/-. The sum owing allegedly constitute the

contract sum for civil works allegedly performed by the plaintiff. The contention by the plaintiff is that she was contracted by the Office of the Regional Commissioner, on behalf of the 1st defendant, to perform some assorted civil works at the Geita Referral Hospital. The allegation is that, despite completion of the said works and subsequent request for payment of the contract sum, the same has remained unpaid to-date.

In the joint written statement of defence, the defendants have raised two points of preliminary objection, questioning the competence of the suit. These are:

- (i) *That, the suit is misconceived for suing the 1st defendant without a prior statutory notice as stipulated under the Government Proceedings Act, Cap. 5 R.E. 2019; and*
- (ii) *That, as the suit is based on contract the plaintiff has no cause of action against the 1st and 2nd defendant.*

These points of objection were argued by way of written submissions, duly filed by the counsel for the parties. Submitting in support of the objections was Ms. Subira Mwandambo, learned State Attorney, while Mr. Stephen Kaijage, learned counsel, stood in for the plaintiffs.

With respect to the first objection, Ms. Mwandambo's contention is that section 6 (2) of Cap. 5 was flouted as no notice was served on either the 1st

defendant or the 3rd defendant, thereby making the suit incompetent, liable to striking out.

With regards to the second limb of objection, the counsel's argument is that there is no privity of contract between the plaintiff and the defendants. Absence of such privity means that the plaintiffs have no cause of action against the defendants, and therefore offending the requirements of Order VII Rule 1 (e) of the Civil Procedure Code, Cap. 33 R.E. 2019. Ms. Mwandambo argued that what is evident from Annexure OPA-1 is a letter from the Regional Commissioner's office to the Regional Administrative Secretary in respect of which neither the 1st defendant nor the 2nd defendant were the addressees or bound by it. The counsel relied on the decisions of the Court in ***Puma Energy Tanzania Ltd v. Spec-Chec Enterprises Ltd***, HC-Civil Case No. 19 of 2014 (unreported); and John ***Mwombeki Byombalilwa v. Agency Martine International (T) Ltd*** [1983] TLR 1. In the latter it was held that where the plaint discloses no cause of action, the court is to reject and dismiss it. The defendants prayed that the suit be dismissed with costs.

Submitting in rebuttal, Kaijage was of the view that the objections are misconceived. With respect to the first objection, the contention was that the objection had been raised without taking a due diligence of the

documents that accompany the plaint. The counsel argued that the said notice, as acknowledged in paragraph 13 of the plaint, was issued and a copy thereof was part of annexure OPA 1. He took the view that the provisions of section 6 (2) of Cap. 5 were duly complied with.

With respect to the second limb of objections, the counsel's argument is that section 2 (1) (e) of the Law of Contract, Cap. 345 R.E. 2019, which provides that every promise and every set of promises forming the consideration for each other is an agreement, factors in all forms of contract, including the contract that bred these proceedings. It was the counsel's contention that, the fact that the contract between the parties herein was orally made does not make it a lesser contract, as oral contracts are also binding and with the same enforceable force. This includes contracts inferred from the parties' conducts. Mr. Kaijage buttressed his arguments by citing the case of ***Merali Hirji & Sons v. General Tyre (EA) Ltd*** [1983] TLR 175, in which the parties' conduct over the years was deemed to constitute a valid contract by the parties.

On the cause of action, the counsel's argument is that paragraph 6 of the plaint states that the dispute arises from an oral agreement entered by the parties in November, 2015; the nature of the work performed; and circumstances under which the dispute arose. Mr. Kaijage contended that

ascertainment of a cause of action has to be done by reviewing the plaint and all its attachments. To fortify his contention, the learned counsel cited the decisions in ***Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Another*** [2002] TLR 217; and ***John Byombalilwa v. Agency Martine International (T) Ltd*** (supra).

The plaintiff's counsel invited the Court to consider his submission and the cited authorities, and dismiss the preliminary objections.

Submitting in rejoinder, Ms. Mwandambo argued in respect of the 1st ground of objection that service of the notice is not evidenced in the dispatch books and that the letter constituting the notice was not stamped with an official stamp. This means that it is not clear if the mode of transmission was through dispatch or by post. In view of this uncertainty, the counsel's view is that the said notice was not issued.

With regards to the second limb of objection, the contention by the counsel is that there was neither oral nor written contract on which the plaintiff's claims would be based. Ms. Mwandambo argued that, what is disclosed in paragraph 6 is the verbal engagement between the plaintiff and Hon. Fatma Mwasu who is neither of the defendants. She contended that the defendants cannot be held liable for the breach of the oral agreement by people other than the defendants. The counsel took the view that the

decisions cited by the plaintiff's counsel are distinguishable. She maintained that the plaint does not disclose any cause of action. She urged the Court to dismiss the plaint with costs.

Disposal of the preliminary objections will follow the sequence in which the same preferred. With respect to the 1st objection, the question is whether institution of the proceedings was preceded by the issuance of the notice of intention to sue the Government. This stems from the fact that the established position, as provided by section 6 (2) of Cap. 5, is that suits against the Government should, as a condition precedent, be preceded by issuance of the notice of intention to sue the Government. The said notice is to be issued to a respective government department against whom the action is contemplated. For ease of reference the said provision states as hereunder:

"No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General."

Glancing through the plaint and its attachments, it comes out clearly that, by a letter dated 25th July, 2019, the 2nd and 3rd defendants were put on notice that the plaintiff was intending to institute the proceedings against both of them and the 1st defendant, the latter of whom was given a copy of the said notice. This notice was sent to the defendants by registered mail, handled by Tanzania Posts Corporation, as evidenced by electronic receipts which form part of the annexure OPA 1. This revelation convinces me that the requirements of section 6 (2) of Cap. 5 were complied with and, as such, these proceedings were in conformity with the law. Accordingly, I find nothing blemished in the plaintiff's conduct, as far as this ground of objection is concerned. I overrule this objection.

The second ground of objection questions the nexus that exists between the plaintiff and the defendants. The contention is that there is no privity of contract between the plaintiff and the defendants. Absence thereof renders the suit unmaintainable as no cause of action has been established. The plaintiff is convinced that the oral agreement between the then Regional Commissioner and the plaintiff suffices to rope in the defendants and hold them responsible for what is alleged to be a breach.

While oral agreement qualifies to be a contract just like any other, and this need not detain us, what is critical is whether the defendants are the

culpable parties against whom the cause of action may be inferred or established. As both counsel agree, a plaintiff who initiates action is duty bound to ensure that there exists a link between himself and the person he intends to implead as a defendant. This is the import of Order VII rule 1 (e) of the CPC. Mulla on Civil Procedure, 13th Edn., gives a definition of what a cause of action is, in the following words:

"A suit is always based on a cause of action. There can be no suit without a cause of action and such cause of action having accrued to the plaintiff.

"A cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court (w). In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue (x). It is not limited to the actual infringement of the right sued on but includes all of the right sued on but includes all material facts on which it is founded (y). It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain decree (z). Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action (a). it is, in other words, a bundle of facts which it is necessary for the

plaintiff to prove in order to succeed in the suit (b). But it has no relation whatsoever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayer for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour (c)."

Thus, as summed up in ***Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Another*** (supra), cause of action is a set of facts which give a person (plaintiff) a right to a judicial redress, or a relief against another (defendant).

To be able establish if the statement of claim establishes the cause of action, resort has to be had to the contents of the statement of the claim together with their accompanying attachments (See: ***Anthony Leonard Msanze & Another v. Juliana Elias Msanze & 2 Others***, CAT-Civil Appeal No. 76 of 2012; and ***Zebedayo Mkodya v. Best Microfinances Solution Limited & 4 Others***, HC-Commercial Case No. 95 of 2016 (both unreported). The position in the cited decisions was propounded by the defunct East African Court of Appeal in ***Jeraj Shariff & Sons v. Chotai Fancy Stores*** [1960] E.A. 375, wherein it was guided as hereunder:

"The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it and

upon the assumption that any express or implied allegations of fact in it are true.”

My scrupulous review of the plaint and its annexures reveals, as the counsel argued, that the plaintiff had an oral conversation with the then Regional Commissioner with whom it agreed that the plaintiff should undertake some civil works that would face lift the district hospital and its environs. When this was done, none of the defendants was involved, save for a certain Dr. Adam Sijaona, who is widely described as the then Medical Officer in charge of Geita District Hospital. In his latest communication (part of Annexure OPA 1) Dr. Sijaona was designated as Medical Officer II, Geita Referral Hospital, but did not show that the ultimate responsibility on the matter lied with the 1st defendant or any of the defendants. He simply urged the Regional Commissioner's office to intervene and do the needful. Nowhere, in the plaint and the attached documents, has it been clearly demonstrated that the contractual obligation whose contract price is at stake was conferred on the plaintiff by the defendants. Missing, as well, is an indication that the Regional Commissioner was acting on behalf of any of the defendants, or that it was intended that such obligation would pass on to the defendants.


In the absence of all this, I am not convinced that instructions given by the Regional Commissioner, *per se*, constitute a bundle of facts which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendants. The said facts simply do not crystalize into some acts which would be said to have been done by the defendants as to accrue an act on which a cause of action can possibly accrue. It is my conviction that a cause of action against the defendants is glaringly missing in this case, rendering the suit unmaintainable. In consequence thereof, this objection succeeds.

Accordingly, this suit is struck out with costs.

It is so ordered.

DATED at **MWANZA** this 14th day of July, 2021.




M.K. ISMAIL
JUDGE

Date: 14/07/2021

Coram: Hon. C. Tengwa, DR

Plaintiff: Mr. Steven Kayaga, Advocate

Defendants: Sambuna Yombo, State Attorney

B/C: J. Mhina

Court:

Ruling delivered today in the presence of the applicants and Respondents Counsels.

C. Tengwa

DR

At Mwanza

14th July, 2021

