

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CIVIL CASE NO. 3 OF 2022

JOHN RAPHAEL BOCCO.....PLAINTIFF

VERSUS

PRINCESS LEISURE (T) LTD.....DEFENDANT

RULING

6th & 8th April, 2022

DYANSOBERA, J:.

The plaintiff herein has instituted the suit against the defendant claiming, among others, declaratory orders, payment of damages arising from unauthorised use of his images in marketing and promoting the Defendant's services and products and payment of royalties arising out of the benefits gained as a result of publishing his images.

Before the hearing this suit commenced, Counsel for the defendant Mr. Nabiry Juma Jumanne, took a preliminary objection thereto in the defendant's Written Statement of Defence. The preliminary objection is based on three grounds.

The first ground of objection is predicated on the provisions of Order VII rule 1 (a) and 11 (e) of the Civil Procedure Code [Cap. 33 R.E.2019] (hereinafter referred to as the Code) in which the plaint is being challenged for failure to disclose a cause of action against the defendant. Counsel for defendant submitted that it is a mandatory requirement under Order VII rule 1 (a) the said Code that a plaint must contain facts constituting the cause of action and when it arose. According to learned Counsel, these facts are not reflected in the plaint and the consequences are fatal. Reliance was placed on the case laws of **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania) Limited** [1983] TLR 1, **J.B. Shirima and Others Express Bus Service v. Humphrey Meena t/a Comfort Bus Service** [1992] TLR 32 and **Auto Garage v. Motokov** [1971] EA at p. 514 on when the cause of action is said to be disclosed.

On the second point of preliminary objection, the jurisdiction of this court is being challenged on the premises that this suit has been filed contrary to Section 18 (a) of the Code. Counsel for the defendant argued, and I think correctly so, that question of jurisdiction is paramount in any court proceedings and the court is duty bound to determine if it is properly vested with the jurisdiction to adjudicate the matter before it. It was in the

contention of Mr. Nabir Juma Jumanne this suit had to be instituted in the local limits of the court where the defendant resides or a place where he carries business or works for gain inasmuch as the plaintiff admits under paragraph 2 of the plaint that the defendant is a company duly registered and operates its daily business in Dar es Salaam. That the suit had to be instituted not in Mwanza as is in this case but in Dar es Salaam where the defendant resides and carries his business.

With regard to section 17 of the Code, it was argued on part of the defendant that it would not apply because the plaint does not disclose a cause of action so as to gauge where it arose and the defendant carries on business in Dar es Salaam and the cause of action could not have arisen outside her place of business. It was further argued that the fact that one of the purported advertised football matches had been played in Mwanza does not mean that the cause of action arose in Mwanza because the football match by itself is not labelled as the wrong against the plaintiff but the act of the purported commercial advertisement of the defendant which was carried out in Dar es Salaam and not in Mwanza. As to legal implication, Counsel for the defendant relied on the case of **Werandumi Benjamin**

Ulomi v. Zainab Rashid Mkwama and another, Misc. Civil Application No. 10 of 2020 [2020] TZH 4234 at p. 5

The third point of objection is on the plaintiff lacking *locus standi*. Expounding on this objection, Counsel for the defendant contended that the plaintiff is not the author of the work and also the photographs are protected by copyright at the moment of creation and the owner of the work is generally the photographer as stipulated under section 11 (b) of the Copyright and Neighbouring Rights Act. This court was referred to the case of **Classic Artworks Ltd v. Mr. Vicent Lukenge and Children of Grace**, Civil Suit No. 206 of 2010 at p. 11 on the authority that it only the owner who can pursue the cause of action. The other cited cases are **King v. South African Weather Services** (716/07) [2008] ZASCA 143 at p. 5, and **Telephonic Communications International Pty Ltd v. Motors Solutions Australia Pty Ltd** [2004] FCA 942 (21 July, 2004).

Responding to the first point of objection, Counsel for the plaintiff Mr. Innocent Michael, concurring with a legal observation made in **Auto Garage v. Motokov** (supra) that disclosing cause of action rests in three factors, he argued that the plaint contains cause of action and explicit entails when the same arose under paragraphs 5 and 6, respectively and

maintained that the principles developed in the cases of **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania) Limited** and **J.B. Shirima and Others Express Bus Service v. Humphrey Meena t/a Comfort Bus Service** (supra), have not been offended. This court was urged to dismiss this first point of preliminary objection.

In response to the second point of objection, Counsel for the plaintiff, while appreciating on the presentation made by learned Counsel for the defendant on this point with a limit to geographical jurisdiction, argued that this point would, however, been very prudent and of logical sense had it been on the subordinate courts other than the High Court whose jurisdiction is not limited to the geographical location in the country. To buttress this point, Counsel for the plaintiff placed reliance on the provisions of Article 108 (1) of the Constitution and the case of the **National Bank of Commerce Limited v. National Chicks Corporation Limited and Others**, Civil Appeal No. 129 of 2015 which was also cited in **East Africa Development Bank v. Naura Spings Hotel Limited and 2 others** , Commercial Case No. 70 of 2021, HCT Commercial Division at Dar es Salaam (unreported) in which the position stated was that it is apparent

that there is one High Court of Tanzania with unlimited geographical jurisdiction within the country and the High Court enjoys territorial jurisdiction of the entire Tanzania. Clarifying on where the cause of action arose and where the defendant resides, Counsel for the plaintiff stated that the place where harms were sustained by the plaintiff as indicated in the plaint is Mwanza and that the place where the post was posted is a matter of evidence as the defendant's business is not limited to Dar es Salaam it being an online betting service which can be subscribed anywhere not necessarily in Dar es Salaam. Counsel insisted that it is now a law that any point of preliminary objection must be a point of law and not facts as detailed in the **Mukisa Biscuit Manufacturing Company Ltd** case.

On the application of section 17 of the Code, it was submitted on part of the plaintiff that the section provides an option to the plaintiff to institute the matter either where the cause of action occurred or where the defendant resides and that in this matter, the plaintiff opted to institute the matter in the Registry of Mwanza where the cause of action occurred. With regard to sections 14 and 18 of the same Code, Counsel for the plaintiff maintained that two provisions of the same statute cannot be in conflict but must be complementary of one another.

As far as the third point of objection is concerned, Counsel for the plaintiff argued that the plaintiff's locus standi is not associated with copyrights; rather it is associated with image rights/individual's property proprietary rights. In short, this court was told that the plaintiff's locus standi is derived from his image rights/individual proprietary rights, his right to prevent unauthorized third parties from making use of his image and his image having been used for commercial gain without his consent. After citing some authorities, learned Advocate concluded that copyrights laws are limited use in protecting image rights since there is no intrinsic copyright in a human face. He was emphatic that that there is nowhere in the plaint the plaintiff has claimed copyright of the photograph posted in the Instagram rather he claimed unauthorized use of his image for commercial use.

In rebuttal, Counsel for the defendant essentially reiterated almost what he had submitted in chief.

I have considered the preliminary objection and the rival submissions of both Counsel for the defendant and the plaintiff in this matter. It cannot be gainsaid that the question of jurisdiction is so fundamental that courts must as a matter of practice, be certain and assured of their jurisdictional

position at the commencement of the trial otherwise, the whole trial will be a nullity.

Since the second preliminary objection questions jurisdictional competence of this court, I have to determine it first before embarking on the first and third preliminary points, if need to do so arises.

The 2nd point of preliminary objection runs as follows:-

2. That this Honourable Court has no jurisdiction to hear and determine this matter or grant the reliefs prayed by the plaintiff as per section 18 (a) and (b) as well as Order VII rule 1 (f) and (i) of the Civil Procedure Code [Cap 33 R.E.2019].

As to how I am to satisfy myself whether or not I am seized with the requisite jurisdiction to hear and determine this suit, I undertake to be guided by the principle laid down by the Court of Appeal of Tanzania in the case of **Meneja Mkuu, Shirika la Umeme Zanzibar v. Juma Simai Mkumbini and Others**, Civil Appeals No. 41,42,43,44 and 45 of 2011 (unreported) where at p. 3 the Court, *inter alia*, observed that:

“Secondly, in determining the jurisdiction of a civil court the averments made in a plaint are material. In effect, this means that the jurisdiction of a court should normally be determined on the basis of the case put forward by the plaintiff in the plaint and not by the defendant in the written statement of

defence. It is the law, therefore, that the averments made in a plaint usually decide the forum."

As the laws stands, the provisions governing the jurisdiction of courts in civil cases fall under Part I under which there is a title, '**Place of Suing**'. Section 18 (a), (b) and (c) of the Code, in particular, provides as hereunder:

"18.

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or part, arises.

In the defendant's view, since she resides and carries business in Dar es Salaam, the suit against her had to be instituted in Dar es Salaam and not in Mwanza, particularly where the plaintiff himself admits under

paragraph 2 of the plaint that the defendant is a company, duly registered in accordance with the laws of Tanzania and operates daily business activities in Dar es Salaam. It is contended on part of the defendant that since she carries business in Dar es Salaam there is no way that the cause of action could arise outside the place of business.

The plaintiff, on his part, would not buy that argument. According to his learned Counsel, the High Court of the United Republic of Tanzania is a creature of the Constitution of the United Republic of Tanzania, 1977 as amended and is established under Article 108 (1) of the said Constitution. It is the argument of the plaintiff's Counsel that there is only one High Court of Tanzania with unlimited geographical jurisdiction within the country and enjoys the territorial jurisdiction of the entire Tanzania. He refuted the argument that the High Court registries would mean to be different courts demarcation. With regard to the defendant's head office being in Dar es Salaam, Counsel for the plaintiff argued that the defendant's business is not limited in Dar es Salaam as it is an on line betting service which can be subscribed anywhere with the internet access and the post Instagram posts in dispute can also be posted anywhere not necessarily in Dar es Salaam.

I have meticulously considered these competing arguments. There is no dispute that under section 18 (a), (b) and (c) of the Civil Procedure Code, the plaintiff, as is the case here, could institute the suit in a court within the local limits of whose jurisdiction either the defendant, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or where the cause of action, wholly or part, arises.

It is established that the defendant is a company duly registered in accordance with the laws of Tanzania and operates daily business activities in Dar es Salaam. This fact, the plaintiff has admitted under paragraph 2 of his plaint. Although there is one High Court of the United Republic of Tanzania with unlimited geographical jurisdiction within the country as the Counsel for the plaintiff seems to suggest, this suit, for purposes of 'place of suing' had to be instituted in a court within the local limits of whose jurisdiction either the defendant, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or where the cause of action, wholly or part, arises. The defendant, according to the pleadings, at the time of the commencement of this suit, actually and voluntarily resides, or carries on business, or

personally works for gain in **Dar es Salaam** and not in Mwanza. Counsel for the plaintiff admits this fact. His argument, however, is that he has opted to institute this suit in Mwanza because that is where the cause of action occurred and supported this argument by citing the case of **CR. F. Lwanyatika Masha v. the Attorney General**, Civil Case No. 136 of 2001. With unfeigned respect to learned Counsel for the plaintiff, his argument though attractive it may appear, cannot be accepted. This is because, while the defendant argues that the plaintiff has not disclosed the cause of action on where and when it arose, the defendant through his Counsel admits that 'the place where the post was posted is a matter of evidence' and referred this court to **Mukisa Biscuit Manufacturing Company Ltd** case. This means that the place where the cause of action occurred is not certainly established as it is 'a matter of evidence' to be adduced at the trial. In arguing against the preliminary objections, the plaintiff relied on paragraphs 5 and 6 of the plaint. These paragraphs run as follows:-

5. That the defendant has been using the plaintiff's images for marketing and promoting its services and products through social media platform styled as Instagram without prior consent of the plaintiff.

6. That, a day before NBC Premier League Match between Simba Sports Club and Ruvu Shooting Football club, i.e. on 18th November, 2021 that was to be played at CCM-Kirumba stadium in Mwanza, the plaintiff was in Mwanza, while preparing himself for the said match, it came across his knowledge that there was a commercial post on the Instagram platform posted via ***Instagram account*** registered as ***winprincesstz*** which he then succeeded to screen shot, saved and later printed.

With respect to paragraph 5 of the plaintiff's plaint, it does not show where and when the cause of action occurred. Likewise, under paragraph 6 of the plaint, although the date 18th November, 2021 and the place of CCM-Kirumba are shown, the plaintiff himself admitted through his Counsel that *'there is nowhere in the plaint the plaintiff has claimed copyright of the photograph posted in the Instagram, rather, he claimed use of his image for commercial use'*. The place where the cause of action arose and the time when it occurred is still unclear for the court to be certain that the cause of action arose in Mwanza and not in Dar es Salaam where the defendant, at the time of the commencement of the suit, actually and voluntarily resides, carries on business and personally works for gain.

As the Court of Appeal in **Menjeja Mkuu, Shirika la Umeme Zanzibar** case (supra) established, 'the averments in a plaint usually decides the forum'.

In the instant suit, I am satisfied that the averments of the plaintiff in his plaint established the forum to be the High Court of Tanzania, Dar es Salaam and not Mwanza.

This court, therefore, lacks jurisdiction to hear and determine this suit in view of the clear provisions of Section 18 (a) and (b) of the Civil Procedure Code [Cap 33 R.E.2019] and the available pleadings. The secondary point of preliminary objection is upheld. Accordingly, the suit is struck out with costs to the defendant.

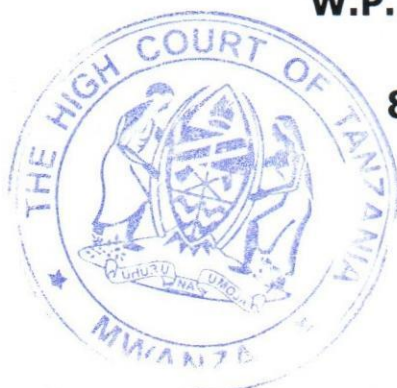
Order accordingly.




W.P. Dyansobera
Judge
8.4.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 8th day of April, 2022 in the presence of Mr. Lucas Bundala, learned Counsel for the plaintiff but in the absence of the defendant.

Rights of appeal explained.




W.P. Dyansobera
Judge
8.4.2022