

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LAND CASE NO. 21 OF 2021

ROYO COMMUNICATION LIMITED PLAINTIFF

VERSUS

KITWIMA INDUSTRIES COMPANY LIMITED..... DEFENDANT

RULING

Date of last Order: 10/11/2021

Date of Ruling: 15/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection held out by the Defendant to the hearing of this suit on one point of law that the case has been filed prematurely.

In this suit the Plaintiff, Royo Communication Limited, is suing the Defendant, Kitwima Industries Company Limited, for a claim of Tshs. 2,112,240,000/= arising out of lease agreement entered in 2010



between them in respect of a hotel house at Plot No. 103 Block "A" Kilumba Area, Opposite Furahisha Grounds, Mwanza City.

The Defendant who is the owner of the premises, took a loan of Tshs. 1,080,000,000/= from the defunct Twiga Bankcorp. In order to service the loan, the Defendant leased the premises to the Plaintiff on agreed that the Plaintiff would repay the loan. The lease agreement life span agreed was fifteen years from 2010 to 2025. A dispute arose when the Defendant demanded back the leased premises threatening to terminate the lease agreement while the Plaintiff contends that 83% of the loan has been repaid already and that the remaining period of the lease agreement (from 2021 to 2015), the Plaintiff expects to earn Tshs. 2,112,240,000/= which is the amount she claims. The Defendant therefore came up with the objection to the hearing of the suit as explained above.

At the oral hearing of the objection, the Respondent was represented by Mr. Chirare, learned Advocate, and the Plaintiff enjoyed the services of Mr. Aaron Kabunga, learned Advocate.

Mr. Chirare submitted in support of the preliminary objection arguing that the suit has been filed prematurely because the Defendant has

never served the Plaintiff with neither notice of terminate of the lease agreement nor notice of eviction, what was done was only to ask about the status of loan repayment. The Counsel observed that the procedure for terminating the lease agreement as provided in the agreement requires a one-month notice prior to be served to the lessee. Since there is no such notice served, then the suit is prematurely filed as there is dispute so far.

Moreover, the Counsel unjustifiably attempted to raise another point of objection in the course of his submissions that the Counsel for the Plaintiff has conflict of interest in the suit, this Court overruled that objection on ground that it did not conform with the law on preliminary objections in suits which under **Order VII Rule 2 of the Civil Procedure Code**, [Cap. 33 R. E. 2019] require such an objection to be raised in the Written Statement of Defence.

Mr. Kabunga replied that the preliminary objection is misconceived because the Counsel for the Respondent did not mention any law alleged to have been contravened by the Plaintiff for filing the suit. The Counsel observed that a letter by the Defendant was not a mere request for status of the loan repayment but it was a demand letter for loan repayment and notice for eviction.

The Counsel argued further that a person is entitled to come to the court whenever feels his rights are about to be infringed. Moreover, the Counsel argued that the purported objection fails the tests for a preliminary objection because it requires ascertainment from facts needing proof by evidence. He cited the case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Company Limited** [1969] EA 696 which was referred to in the case of **Shose Sinare vs. Stanbic Bank (T) Ltd**, Civil Case No. 89 of 2020 (unreported). He prayed the objection to be overruled.

Those are the submissions by the counsel for both parties. I am thankful to the Bar. Both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

In this objection, I must state outright from this stage of the ruling that the preliminary objection stands to fail. I say so because the law on preliminary objection is very clear that the same must consist of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. This was the holding in the famous case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd**



[1969] EA 696 where the then East Africa Court of Appeal considered what constitutes a preliminary objection, it said, at page 700

*"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. **Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.**"* (Emphasis added).

And further down at page 701 **Sir Charles Newbold**, President, said as follows: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises as a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In our jurisdiction the tests for a preliminary objection were well spelt in the case of **Musanga Ng'andwa vs. Chief Japhet Wanzagi and Eight Others**, [2006] TLR 351. In that case the plaintiff presented a claim based on tort, alleging that the defendants had arranged a



meeting at which he was defamed as a witch. Apart from denying liability in their defences, the defendants raised preliminary objections to the effect that the plaint disclosed no cause of action, that the notice to sue the government was defective and lack of *locus standi*.

The Court defined the term "preliminary objection" by stating as follows:

"The expression has been used in our jurisdiction to refer to objection to the jurisdiction of the Court, a plea of limitation and the like; it contains a point of law which, if argued as a preliminary point, may dispose of the suit; a preliminary objection cannot be raised if any fact has to be ascertained, that is, it cannot be based on unascertained factual matters."

Further to that, the Court elaborated what constitutes a cause of action that is, every fact which would be necessary for the plaintiff to prove in order to support his title to a decree; in other words, a cause of action is the sum total of those allegations upon which the right to relief claimed is founded, then it held that: -

"whether the allegations are sufficient to prove the claim or not is not the issue now and can only be known at the trial and whether the Notice under the provisions of the

Government Proceedings Act was defective or not was an arguable issue; and so it was not one to be disposed of by way of preliminary objection."

In that case, as the preliminary objections were based on unascertained factual matters, they were held as unsustainable.

In the case at hand the objection is centered on a letter alleged to have been written by the Defendant to the Plaintiff. The said letter is attached to the plaint without label. The Counsel for the Plaintiff interpretation of the letter is that it is neither notice to terminate the lease agreement nor notice of eviction, but it was all about to ask the status of loan repayment. The Counsel was of the views that termination of the lease agreement would have been preceded with a notice of termination.

The Counsel for Respondent argument is that the said letter is a demand note intended to evict the Plaintiff from the premises thereby terminate the lease contract.

When perusing the unlabeled attachments to the plaint I came across a letter from Atrox Attorneys dated 19/07/2021 with no reference number which is headed "YAH: MALIPO YA MKOPO". The last two paragraphs complained of by the Plaintiff intimate that it is a demand letter urging



the addressee to pay a debt within seven days short of which the author of the letter would take up the premises. It reads as follows:

"Hivyo kwa muktadha huu, Mteja wetu ametuamulu kukuandikia barua hii kukutaka ulipe lote au kuhama kwenye eneo la biashara, tunapenda kukupa muda wa siku saba kuweza kufanya mawasiliano na mteja wetu. Ifahamike kwama usipo tekeleza agizo hili la kuwasiliana na mteja wetu basi mteja wetu hana budi kuchukua majengo yake na kufanya nayo kazi zingine kwa [kuwa] utakuwa umevunja makubaliano yenu mlioingia."

Literally means that given the circumstances, the advocates were instructed by their client to write to him informing him to either pay the loan or vacate from the building and they gave seven days for implementation or else their client would take possession of the premises due breach of the lease agreement.

As it can be seen the letter is a corner stone fact contested by the parties to be decided from the evidence.

In such a situation can it be said that the preliminary objection concerns a point of law. The answer to this question is in negative. I say so because in order for one to determine whether or not the letter was a notice of termination of the lease agreement or mere demand of loan re-payment has to hear the evidence. Therefore, it is an issue to be

ascertained from the evidence, which fails the test for a preliminary objection as expounded in the authorities cited above.

From the above premise, I find the preliminary objection as non-meritorious. Consequently, I do hereby overrule the same. Costs in the course. It is so ordered.




F. K. MANYANDA

JUDGE

15/03/2022