

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

LAND CASE NO. 20 OF 2019

SOUD MOHAMED BARAKAT (suing as legal representative of the late Mohamed Islam Barakat)..... PLAINTIFF

VERSUS

SAID BARAGASH.....1st DEFENDANT

LULUA INVESTMENT LTD.....2nd DEFENDANT

RULING

8th July 2021 & 8th March, 2022.

S.M. KULITA, J.

On 11th April, 2019 the plaintiff herein instituted this case against the defendants claiming for declaration that the defendants have breached a contract. On that claim, the plaintiff prayed for multiple prayers including compensations.

In reply thereto, the Respondents filed a Preliminary Objection on point of law to the effect that, the plaintiff's suit has no cause of action against the 1st defendant. For that matter, the defendants prayed for the entire suit be dismissed with costs.

As the law requires preliminary objections be argued first, on 30th March, 2021 the preliminary objection was ordered to be argued by way of written submissions. Mr. Boniphace Byamungu Advocate, represented the Defendants, whereas Mr. Msafiri Maberera represented the Plaintiff.

Submitting in support of the preliminary objection Mr. Byamungu stated that, going through the entire plaint the claims are against the 2nd defendant. He went on stating that, the 1st defendant is not connected with the claims. He stated that his argument is supported by the cases of **Al Hajji Nasser Ntege Sebagalar v. Attorney General and Another, Constitutional Petition No. 1 of 1999, Constitutional Court of Uganda** and that of High Court of Tanzania Commercial Division at Dar es Salaam namely **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia and Chara Malavasi [2002] TLR 217** which gave the meaning of the term cause of action.

In insisting his argument Mr. Byamungu added that, the plaintiff has to distinguish the occurrence of liability between an individual versus a company. He went on stating that, the second defendant is a legal entity capable of suing and being sued separate from its shareholders and people associated with it. He supported his argument with the cases

of **Solomon v. Solomon and Company Limited (1897) AC 22** and **Macaura v. Northern Assurance Co. Ltd (1925) AC 619**.

With that stance, he formed an opinion that, as the plaintiff has alleged to have entered an agreement with the 2nd defendant, he was thus duty bound to institute proceedings against that 2nd defendant and not otherwise. On that note, he was of considered opinion that, it was improper for the plaintiff to sue the 1st defendant since he was not a party to the agreement and the 2nd defendant is a legal person capable of suing and being sued.

In response Mr. Mabera was of opinion that, the preliminary objection is misplaced and baseless. He went on stating that, the plaintiff does not dispute the definition of the term cause of actions as stated in the cited cases of **Al Hajji Nasser Sebgalar** (supra) and **Stanbic Finance Tanzania Limited** (supra). He observed further that, the same cases, particularly the **Stanbic** one, do not support the defendants' argument.

Mr. Mabera made a further reference on **Wharton's Concise Law Dictionary at page 167** that defined the term cause of action, that, it is a bundle of pleaded facts necessary for the plaintiff to prove in order to support the judgment. With that definition Mr. Mabera stated

that, what has been pleaded in paragraphs 4 and 5 of the plaintiff's complaint, conforms to it. He thus had the stand that, the complaint discloses cause of action against the 1st defendant too.

Disputing on the argument that the 1st defendant should not be sued together with the 2nd defendant, Mr. Maberwa was of the view that, the same is not correct, he then cited the case of **Zebedayo Mkondya v. Best Microfinance Solution Limited and 4 Others, Commercial Case No. 95 of 2016, HC Commercial Division at DSM** (unreported) to bolster his assertion.

Again, on the other hand, Mr. Maberwa contended that, the facts that the plaintiff has averred in paragraphs 4 and 5 of the complaint, require proof from the plaintiff in connecting the 1st defendant to the cause of action claimed. With that stand, Mr. Maberwa was of the considered opinion that, to that end the preliminary objection falls short as per the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) 1 EA 696 (CAN)**.

In connection with the same cited case of **Mukisa Biscuits (supra)** Mr. Maberwa submitted that, even in the situation where preliminary objection on no cause of action stands, the remedy is not to dismiss the case. He suggested that, the remedy is provided in Order 7

Rule 11(a) and (c) of the Civil Procedure Code. He cited further the case of **John Byombalirwa v. AMI (T) Limited [1983] TLR 1** and **Mulla, Code of Civil Procedure, (Abridged), Thirteen Edition, at page 629** to bolster his assertion.

On another move, Mr. Mabera submitted that, he does not dispute the principle set in the cases of **Solomon v. Solomon (supra)** and that of **Macaure v. Northern Insurance Co Ltd. (supra)**, rather his argument is that, the 1st defendant is using the 2nd defendant as a sham in fraudulent transactions so as to avoid his legal liability. On that account, Mr. Mabera urged the court not to allow that and instead to lift up the corporate veil and deal with the 1st defendant. He cited the case of **PLASCO Ltd v. EFEAM LTD and Another, Commercial Case No. 60 of 2012, HC Commercial Division at DSM** (unreported). This is the end of both parties' submissions.

I have gone through the entire pleadings. I have also taken into consideration the parties' submissions plus the authorities cited. From the parties' submissions, two issues arise; **One**, is whether it was improper for the Plaintiff to sue the 1st defendant, **two**, if it was improper to sue the 1st defendant, what remedy is available. I will start with the second issue, so that to ease this ruling writing.

Concerning the second issue, the defendants suggested the entire plaintiff's suit to be dismissed for disclosing no cause of action against the 1st defendant. The plaintiff in his reply suggested that, the remedy for not disclosing cause of action is not to dismiss the suit, but to amend the plaint.

In the case of **John Byombalirwa v. AMI (T) Limited [1983] TLR 1** it was clearly held that, the remedy for the plaint that does not disclose cause of action is not to dismiss it. With this stand, the remedy as suggested by the defendants has failed. I also went through the entire Order 7 Rule 11 of the Civil Procedure Code. I reproduce it hereunder for easy of reference.

11. The plaint shall be rejected in the following cases-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the suit appears from the statement in the plaint to be barred by any law:

Provided that, where a plaint does not disclose a cause of action or where the suit appears from the statement in plaint to be barred by any law and the court is satisfied that if the plaintiff is permitted to amend the plaint, the plaint will disclose a cause of action or, as the case may be, the suit will cease to appear from the plaint to be barred by any law, the court may allow the plaintiff to amend the plaint subject to such conditions as to costs or otherwise as the court may deem fit to impose.

With this provision of the law, I entirely agree with the submissions of the plaintiff's counsel that, the remedy for the plaint of the suit that does not disclose a cause of action, is to order amendment of it so as to cure the defect, but not to dismiss the entire suit. On that stance, I am of the settled mind that, upon discussing the first issue if the plaintiff's suit is found to disclose no cause of action against the 1st defendant, the remedy will be to order amendment of it.

Having finished determining the second issue, I now turn for the first issue, whether the plaintiff improperly sued the 1st defendant. There are situations where directors or people connected with the legal entity

can be sued together with that entity. It is when the claims and the remedies directly touch them individually or when those people use the legal entities for fraudulent transactions to avoid individual liabilities. See, **Zebedayo Mkondya** (supra) and **Prasco Limited** (supra) respectively.

However, those situations that allow directors or people connected with a legal entity to be sued, need facts to prove their liabilities. When facts are needed to prove how the 1st defendant is connected in the plaintiff's claim, then the defendants' preliminary objection falls short as preliminary objections needs purely to base on matters of law and not facts. This is as per the case of **Mukisa Biscuits** (supra).

With that stand, I find the defendants' preliminary objection lacking merit. I thus proceed to dismiss the same with costs.

Order accordingly.



S. M. KULITA
JUDGE
08/03/2022

