IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 123 OF 2022

JUMANNE M. MBARUCK T/A J.M. MBARUCK ARCHITECTS ..... PLAINTIFF

VERSUS

VIVO ENERGIES TANZANIA LIMITED ..... DEFENDANT

RULING

27th October and 22nd November, 2022

KISANYA, J.:

In this suit, the plaintiffs' claim against the defendant is for payment of Tshs. 516,910,728.70 being consultancy fees. Other claims are payment of interest on the principal amount at the compound interest rate of 20% per month from 2019 to the date of judgment, payment of general damages, payment of interest of decretal sum at the Court's rate of 12 % per annum from the date of judgment to the date of payment, costs and any other relief as this Court may deem fit and just to grant.

Responding to the claim, the defendant filed a written of statement of defence. Apart from disputing the plaintiff's claim, the defendant raised a notice of preliminary objection on the following points of law:

1. That the plaint is bad in law for misjoinder of parties.

2. The plaint does not disclose a cause of action against the defendant.

When the matter came up for mention for orders on 30th September, 2022, the plaintiff was represented by Mr. Jamhuri Johnson, learned advocate, whereas Ms. Angelista Nashon, learned advocate appeared for the defendant. The learned counsel prayed that the preliminary objection be disposed of by way of written submissions. The prayer was granted and the parties were given the schedule within which to file their respective submissions. The learned counsel for the parties filed their respective submissions in accordance with the Court's order.

On the first limb of objection, the defendant's counsel argued that the plaint is bad in law for misjoinder of parties. This argument was premised on the contention that the plaintiff did not state to have entered into a consultancy agreement with the defendant and that the said agreement, if any, was not appended to the plaint. That being the case, the learned counsel submitted that the plaintiff has preferred a suit against a non- existent and wrong party. On that basis, this Court was invited to dismiss the plaint with costs. The learned counsel relied on the provisions of Order 1, Rule 13 of the CPC and the case of **Abudullatif Mohamed**

Hamis vs Mehboob Yusuf Osman and Another, Civil Revision No. 6 of 2017 (unreported).

It was further submitted that there is misjoinder of parties as the plaintiff stated to have entered into consultancy agreement with Engen Tanzania without attaching the said contract or making the said Engen Petroleum (Tanzania) a necessary party to the suit. That being the position, the learned counsel contended that the plaint is defective due to absence of the main party to the agreement and explanation as to why the claim is against the third party and not the main party.

Arguing the second limb of objection, the learned counsel submitted that that Order VII Rule 1(e) of the CPC requires that a plaint should disclose facts constituting the cause of action and when it arose. It was further argued that a plaint which does not disclose a cause of action should be rejected as provided for under Order VII Rule 11(a) of the CPC. As it was on the first limb of objection, this argument was based on the contention that the consultancy agreement which is the epicentre of this suit was between the plaintiff and Engen Petroleum (Tanzania). It was also argued that the fact that the defendant bought the assets from Engen Petroleum (Tanzania) Limited is not enough to establish a cause of action

against the defendant. This Court was the asked to reject the plaint as required by the law.

Responding to the first limb of objection, Mr. Jamhuri submitted that there was no formal agreement signed between the parties. However, he urged this Court to note that the offer was sent to Engen Petroleum was accepted by the defendant who also made all request for performance of the contract and not Engen Petroleum. It was also argued that the defendant admitted in her written statement of defence that she was the predecessor of Engen Petroleum. Making reference to section 123 of the Evidence Act, he argued that the defendant is stopped from denying to have taken all liabilities arising from the contract commenced by the latter.

In alternative, Mr. Johnson submitted that the defendant is enjoined to join Engen Petroleum under the Third Part Procedure set out under Order 1 Rule 14(1) of the CPC. It was his further argument that a suit cannot be defeated by reason of misjoinder or non-joiner of parties as provided for under Order I Rule 13 of the CPC.

The learned counsel argued further that the plaintiff has discretion of which party should be sued as the defendant under Order I, Rule 6 of the CPC. Therefore, he submitted that the defendant was required to apply to the court to exercise its discretionary powers to join her and not to raise a

preliminary objection. He contended that the case of **Abudulatif Mohamed Hamis** (supra) is distinguishable from the circumstances of this case because the defendant herein issued instruction to the plaintiff in her personal capacity and not as the representative of Engen Petroleum.

Countering the second limb of objection, Mr. Johnson submitted that the cause of action is founded on the contract, performance of which depended on the invitation by the defendant to perform several accession under the instruction of the latter. He relied on the case of **Musanga Ng'abdwa vs Chief Japhet Wanzagi and 8 Others** [2006] TLR in which the word cause of action was defined as follows:

> *"A cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to the decree, in other words, a cause of action is the, sum total of those allegations upon which the right to relief claimed is founded"*

He went on arguing that the plaintiff has several documents to prove that the defendant invited the plaintiff to perform architectural works and that the plaintiff was billing the defendant. Referring to the case of **Mukisa Biscuit Manufacturing Co. vs West End Distributors Ltd** [1969] E.A. 696, the learned counsel argued that the objection lacks legs to stand on.

On the foresaid grounds, Mr. Johnson implored the Court to overrule the second limb of preliminary objection for being misconceived.

In their rejoinder submission, the defendant's counsel submitted that a party does not become necessary to a suit by the mere fact of being pleaded in a plaint. She went on to submit that Engen Petroleum is a necessary party to these proceedings because the plaintiff admits to have entered into contract with her (Engen) who was also served with invoices for payment. It was further submitted that that the defendant is a successor and not a predecessor company to Engen Petroleum.

On the issue of cause of action, the learned counsel submitted that the plaintiff had failed to append to the plaint or mention the contract which is the basis of the cause of action. To bolster her argument, the learned counsel cited the provisions of Order VIII Rule 14(1), Order VII Rule 15 and Order VI Rule 9 of the CPC.

The learned counsel further argued that the necessary facts of this case is the breach of contract and that the plaintiff has however failed to show the alleged contract. Referring further to the case of **Mukisa Biscuits** (supra), she argued that the preliminary objection has merit as the plaintiff pleaded breach of contract or implied that a contract has been breached and that disclosed a cause of action. It was her firm argument

that by failing to provide the alleged contract in support of the cause of action, the cause of action is unfounded. Therefore, the learned counsel reiterated her prayer that the suit be dismissed with costs.

Having gone through the pleadings and submissions by the counsel for the parties, it is clear that the issue for determination is whether the preliminary objections are meritorious.

As rightly argued by the learned counsel for both parties, a preliminary objection is governed by the principles stated in the case of **Mukisa Biscuit** (supra) in which the term preliminary objection was defined as follows:-

> *"So far I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by a clear implication out of the pleadings and which if argued as a preliminary point dispose of the suit. Examples are an objection to the jurisdiction of the Court, 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.*

In the same case, Sir Newbold, went on stating as follows:-

> *A preliminary objection is in the nature of what used to be a demurrer. It raises 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop."

The above position of law has been adopted by this Court and the Court of Appeal in a number of cases. This include the case of **Karata Ernest & Others vs. Attorney General,** Civil Revision No.10 of 2010 (CAT) (unreported) in which the Court of Appeal underscored that:

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

Being guided by the foregoing position of law, a preliminary objection stands upon meeting if; it is premised on matters of law, disposed of without requiring evidence to prove the same, and based on the assumption that the facts raised by the adverse party are true.

For convenience, I prefer to start with the second limb of objection. The defendant contends that the plaintiff has no cause of action against her. At the outset, I agree with the defendant's counsel that, in terms of Order VII, Rule 1 of the CPC that, a plaint is required to disclose a cause of

action. I also agree with the learned counsel that, Order VII, Rule 11 empowers this Court to reject a plaint which does not disclose a cause of action.

It is settled position that cause of action implies allegation or facts upon which gives a person a right to sue or seek reliefs. Apart from the case of **Musanga Ng'abdwa vs Chief Japhet Wanzagi and 8 Others** (supra)], this position was stated in **Stanbic Finance Tanzania Ltd vs GiuseppeTrupia and Chiara Malavasi** [2002] TLR 221 where it was held as follows:

> *(i)A cause of action arises when facts exist which give rise or occasion to a party to make a demand or seek redress, all depending on the kind of claim; cause of action arises when facts on which liability is founded do exist and its disclosure is reflected in the claims as presented in the plaint and not as weighed against the defence statement;*
>
> *(ii) Going by the pleadings it is clear that the facts of the plaint do disclose a cause of action as required under Order VII of the Civil Procedure Act 1966.*

In the instant case, paragraph 3 shows that the plaintiff's claim against the defendant is for consultancy fees to the tune of TZS 516,728.70 (VAT Inclusive) arising from consultancy fees for the work

performed by the former at the request and instruction of the latter. She went on to aver as follows, in paragraphs 4 and 5 of the plaint:

> *"4. That in the year 2019, the defendant, through her predecessor company Engen Petroleum (Tanzania) Limited, entered into the Consultancy Agreement with the plaintiff as Local Project Management Consultants (LPMC) whereby the latter was supposed to perform consultancy works on request and instructions by the former. The performed works included, the development of Architectural Drawings, Civil and Structural Drawings, Service Drawings Bill of Quantities and supervision of project construction to the completion.*
>
> *5. That pursuant the said agreement,* ***the Plaintiff performed several activities on request and instructions from the defendant. The defendant herein was served with 49 tax invoices for the project performed by the defendant****, the said project are listed in the last two pages in the Vol. 01/04 of the Documents Titled "Unpaid Consultancy Fees Claims (as of 2019 to date) in 4 Volumes". Which is herein below referred to as Annexure JMM-1."*
> (Emphasis supplied)

Reading from the facts stated in the above paragraphs, it is clear that the plaintiff's suit is for breach of consultancy agreement. Apart from

alleging that the defendant entered the said contract through her predecessor, Engen Petroleum, the plaintiff claims to have *performed consultancy* works on request and instructions by the former. Further to this, the plaintiff alleges to have served the defendant with the tax invoices. On that account, I am of the considered view that the plaint discloses a cause of action. This is so when it is considered that, in paragraph 3 of her defence, the defendant does not dispute to be the predecessor of Engen Petroleum.

The fact that the contract was not appended to the plaint goes to the weight of evidence in support of the facts deposed in the plaint. I am alive to the settled position that a contract may be oral and or deduced from the conduct of the parties. I am of the view that failure to append the contract is not the basis of holding that the plaintiff lacks cause of action. Thus, the second limb of objection fails.

Reverting to the first limb of objection, the issue is whether Engen Petroleum (Tanzania) Limited is a necessary party. In their respective submissions, the learned counsel were at one that, the question of joining a party or otherwise to the proceedings is governed by the law. The provision of Order 1 Rule 10 (2) of the CPC provides:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, ***or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added.****" (emphasis added)*

In her effort to construe the law, the defendant's counsel was of the view that the defendant neither a necessary nor a proper party. As stated earlier, her argument was based on the contention that the contract alleged to have been breached was between the plaintiff and Engen Petroleum who is not a party to this case. For the reasons stated in the course of determining the second limb of objection, failure to append the contract is by itself not sufficient to dispose that the defendant is not a party to this this case. I have also indicated herein, that the central issue of the suit, by the plaintiff against the defendant, is evident from paragraphs 3, 4 and 5 the plaint. Thus, there is no misjoinder of the plaintiff.

However, although the plaintiff alleges that the defendant took over all the petrol stations by the Engen Petroleum Tanzania Limited as of 1st March 2019, some of the tax invoices raised after that date, including August, 2021 and

November, 2021 are in the name of the Engen Petroleum who is not a party to this case. Considering further tax invoices dated May, 2021 are in the name of the defendant herein, I am of the view that the issue whether the plaintiff is entitled to the reliefs sought cannot be completely settled in the absence of Engen Petroleum. As the plaintiff alleges to have entered into contract with the Engen Petroleum, I hold that the view that her presence in this case will enable the Court to completely adjudicate upon the issues to be raised in the suit on the contract and tax invoice.

In the event, the second limb of objection is hereby overruled. As for the first limb of objection, I agree with the defendant that the necessary party was not joined. However, for the interest of justice, I order that Engen Petroleum (Tanzania) Limited be joined in this suit. Costs to follow the event.

DATED at DAR ES SALAAM this 22nd day of November, 2022.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. KISANYA
JUDGE