

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT ARUSHA

CIVIL CASE NO. 37 OF 2019

MWANANCHI INSURANCE COMPANY LIMITED.....PLAINTIFF

Vs

CRDB BANK PLC.....1ST DEFENDANT

EPHRAEM CHIRSTOPHER MANASE MREMA.....2ND DEFENDANT

RULING

Date of last order: 14-12-2021

Date of Ruling: 28-1-2022

B.K.PHILLIP,J

This ruling is in respect of points of preliminary objections raised by the defendants' Advocates. The learned advocate Wilbard John Massawe of Mawalla Advocates who represents the 1st defendant raised the following points of preliminary objections;

- i) That the plaintiff's claims are hopelessly time barred.*
- ii) That the plaintiff has no locus stand to claim damages suffered by Mwananchi Micro Credit Limited.*

On the other hand, the learned advocate Richard Valeriani Massawe of Dexter Attorneys who represents the 2nd defendant, raised the following points of preliminary objections;

- i) That this Honourable Court lacks requisite Jurisdiction to entertain and determine this matter for plaintiff's failure to obtain leave to prosecute this matter, which is contrary to mandatory requirement under section 234 (1) and (2) of the Companies Act , No.12 of 2002.*
- ii) That the suit is pre-mature and thus un-maintainable for want to resolve an internal management conflict and resolution as to the directors' rights to represent the Company.*
- iii) That the suit and plaint is bad and contradictory in law for containing personal cause of action by two purported shareholders (Elias Masija Nyang'oro and Edna Mrema Nyang'oro) in the name of the Company.*

The plaintiff enjoys legal services from the learned Advocate Kipanga Kimaay of Ms Royal Attorneys.

I ordered the points of preliminary objections to be disposed of by way of written submission. All advocates filed their submission as ordered by the Court.

Before embarking on the analyses of the submissions made by the learned advocates, let me give the background to this matter, albeit briefly. On the 23rd of October , 2019 the plaintiff lodged this case against the 1st defendant alleging that the plaintiff through its directors and shareholders namely Elias Masija Nyang'oro and Edna Elias Nyang'oro opened a fixed deposit account with the 1st defendant bank for a period

of one year, commencing on 7th January , 2013 to 7th January , 2014 for a sum of fixed deposit to a tune of Tshs 250,000,000/= with agreed interests rate of 12% thereon per annum. The plaintiff and the 1st defendant agreed that after the lapse of one year from the date of opening the aforesaid fixed deposit account a total sum of Tshs 277,000,000/= was supposed to be available in the plaintiff's bank account in order to be used for the plaintiff's businesses . After the expiry of the agreed period, that is one year , the 1st defendant did not deposit into the plaintiff's bank account the agreed sum of Tshs 277,000,000/=.

Mr Elias Masija Nyang'oro and Edna Elias Nyang'oro made several attempts to demand for the payment of the aforesaid agreed sum and directed the 1st defendant's officer to transfer the agreed sum of money into the bank account of Mwananchi Microcredit Ltd , the plaintiff's sister Company, but the 1st defendant did no heed to their demands. On 22nd November 2017 the plaintiff's Director Ms Edna Elias Nyang'oro informed the 1st defendant about the plaintiff's plan of purchasing Government Bond using the said sum of money of Tshs 277,000,000/= which was not yet paid, hoping that the 1st defendant would pay of the money as soon as possible. To the contrary, in response the 1st defendant informed them that he was waiting for a response from the Tanzania Insurance Regulatory Authority (TIRA) before releasing the

fund. The plaintiff reveals that the agreed amount of money was not released and the plaintiff failed to fulfill its plans. Thus, in this case the plaintiff alleged that the 1st defendant committed breach of contract and was negligent. He mishandled the plaintiff's fixed deposit bank account and occasioned loss to the plaintiff for failure to buy the Government Bond through plaintiff's sister Company, Mwananchi Microcredit Ltd. The plaintiff prays for the following reliefs;

- i) Payment of Tshs 435,864,862/= for fundamental breach of banker and customer relationship.
- ii) Payment of Tshs 26,152,534,878/= being loss incurred by the plaintiff for failure to invest the money (the agreed amount of Tshs 277,000,000/= in the Government Bonds due to the defendant's refusal to release the money to the plaintiff.
- iii) Payment of commercial interests at a default rate of 21.5% per year from the date of default and interest at the rate of 12% from the date of judgment till full payment of the decretal
- iv) General damages .
- v) Punitive damages as may be assessed by the Court.
- vi) Costs of the suit.

vii) Any other reliefs as this Court may deem fit and appropriate to grant.

On the 27th of October 2021, this Court order the 2nd defendant to be joined in this case pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Code, (The "CPC). On 8th November 2021, the plaintiff's advocate filed the amended plaint as ordered by the Court. Both defendants filed their written statement of defence to the amended plaint and also raised the points of preliminary objections, the subject of this ruling. The amended plaint had the same contents of claims as the original plaint save that the 2nd defendant was joined in the case as was ordered by the Court.

Now, back to the points of preliminary objections, Mr. Wilbard's submission for the 1st point of preliminary objection was to the effect that this suit is time barred because the pleadings show that the cause of action arose on 7th January 2014, when the claimed amount fell due for payment. Citing the provision of section 5 of the Law of Limitation Act and item 7 of part one of the schedule to the Law of Limitation Act, R.E 2019, Mr. Wilbard submitted that the limitation period for claims arising out of contract is six years. He contended that since the amended plaint was filed in Court on 8th November 2021, after expiry of seven

years and eight months from the date the cause of action arose, then this suit is time barred.

Mr. Wilbard went on submitting that he is alive that the original plaint was filed in Court on 23rd December 2019. However, relying on the case of **Sarbjit Singh Bharya and Sharya Engineering & Contracting Co. Ltd Vs NIC Bank Tanzania Ltd and Strainght –Line Auction Mart, Civil Appeal No. 94 of 2017, (CAT) (unreported)** , he contended that , once the pleadings are amended , the original pleadings are no longer material before the Court. Thus, the correct reference date in computing the time limit in institution of this suit is the date when the amended plaint was presented in Court in 2021. He strongly argued that the original plaint does not form part of the Court's records, therefore it should not be relied upon in computing the time limit for filing this case.

In rebuttal, Mr. Kimaay was of a view that this case is not time barred since it was filed in Court on the 23rd of December 2021, before the expiry of six years from the date the cause of action arose. He went on submitting that the fact that after amendment of the plaint, the case remained with the same case number, it means that the date of filing the case also remains to be 23rd of December 2021. He distinguished the case of **Sarbjit Singh Bharya (supra)** from this case on the ground

that , in **Sarbjit Singh Bharya's** case the amended plaint introduced new claims / causes of action which were not pleaded in the original plaint whereas in the instant case the amended plaint did not introduce any new claims/cause of action.

In addition, Mr. Kimaay , contended that there has been continues breach of the contract by the 1st defendant. Therefore, fresh period of limitation begins to run at every moment of the time during which the breach continues as the plaintiff has been continuously demanding to be paid his money, but in vain. To cement his arguments, he referred this Court to the provision of section 7 of the Law of Limitation Act, Cap 89 R.E 2019.

In rejoinder, Mr. Wilbard reiterated his submission in chief. He insisted that as per decision of the Court of Appeal in the case of **Sarbjit Singh Bharya** (Supra), upon amendment of the plaint the original plaint no longer forms part of the court's records for the purpose of reckoning the date when the suit was filed in Court. He went on submitting that the doctrine of continues breach provided under section 7 of the Law of Limitation Act, cannot be applicable in this case since it was not pleaded. He cited that case of **National Bank of Commerce LimitedVs NM Worldwide Trading Company Limited and two others,**

Commercial Case No.166 of 2014 (unreported), to cement his arguments.

Having perused the law as well as read the authority cited by both learned advocates, I entirely agree with Mr. Kimaay, that the correct date to be referred to in computing the time limit for filing this case is 23rd October 2021, the date when the original plaint was filed in Court. My above stance is based on the fact that the amended plaint did not introduce a new cause of action or claim. As correctly submitted by Mr. Kimaay , I find the case of **Sarbjit Singh Bharya** (supra) , distinguishable from the case in hand, since in that case the amended plaint introduced new causes of action. Thus ,it was imperative to count the time limit for filing the newly introduced cause of action from the date the amended plaint was filed in Court. Since there is no dispute that counting from the date the original plaint was filed in court, this case was filed within the prescribed period for filing cases arising from contracts, it is the finding of this Court that this point of preliminary objection has no merit.

I will deal with the second point of preliminary raised by the 1st defendant 's advocate conjointly with the 3rd point of preliminary

objection raised by 2nd defendant 's advocate since the same seem to be similar.

Referring to some of the paragraphs in the plaint which states that the plaintiff's directors and shareholders namely Elias Masija Nyang'oro and Edna Mrema Nyang'oro opened the fixed deposit account in which the plaintiff's claims in this case is hinged on, and that they are the actual owners of the fixed deposit fund Mr. Wilbard, submitted that the plaintiff has no *locus standi* to institute this case. He contended that the plaint reveals the following; That Edna Mrema Nyang'oro and Elias Masija Nyang'oro are Directors and shareholder of the plaintiff. The fixed deposit account in which the funds were kept was personally opened by Edna Mrema Nyang'oro and Elias Masija Nyang'oro, with full power to deal with or use the fund as they wished , and that the damages claimed arose from the plaintiff's failure to purchase Government bonds for its sister Company known as Mwananchi Micro Credit Co. Ltd. Expounding on this point, Mr .Wilbard was of the view that from the above set of facts extracted from the plaint, the plaintiff being a legal entity cannot bring action arising from business transaction undertaken by its Directors or shareholders personally, namely by Edna Mrema Nyang'oro and Elias Masija Nyang'oro. Likewise, the plaintiff has no *locus standi* to claim

for losses alleged to have been incurred by its sister Company, Mwananchi Microcredit Ltd for failure to invest in the Government Bond. Citing the case of **Salomon Vs Salomon and Co Ltd , (1897) A.C.22** which was cited by the Court appeal in the Case of **Yusufu Manji Vs Edward Masanja and Abdallah Juma , Civil Appeal No. 78 of 2002,** (unreported) , Mr. Massawe submitted that a Company is legal entity distinct from its members and shareholders. Since the pleadings reveal that fixed deposit account was owned personally by Edna Mrema Nyang'oro and Elias Masija Nyang'oro , then they were supposed to file the case in their personal capacity not under the umbrella of the plaintiff's Company. Likewise Mwananchi Microcredit Ltd , was supposed to file the claims for damages in its capacity as a legal entity , contended Mr. Wilbard.

Furthermore, submitting on what is "*locus standi*," Mr. Wilbard, cited the case of **Lujuna Shubi Ballonzi, Senior Vs Registered Trustees of Chama cha Mapinduzi, TLR 1996, 203** in which the court held that

" a person bringing a matter to Court should be able to show his rights or interests has been breached or interfered with.. " He also referred this Court to the case of **Chama Cha Wafanyakazi**

Mahoteli na Mikahawa Zanzibar (Horau) Vs Kaimu Mrajiis wa Vyama Vya wafanyakazi na Waajiri Zanzibar, Civil Appeal No. 300 of 2019 (CAT-ZNZ (unreported) in which the Court of Appeal held that;

" ... a person whose right or interests has been interfered by another is able to come to the Court personally or through an authorized agent or board depending on the circumstances of each case..."

Mr .Wilbard went on submitting that plaintiff has no interests or basis to claim for the losses suffered by Mwananchi Micro-Credit Ltd. Similarly, the plaintiff has no interests or any basis for claiming for moneys owned personally by Edna Mrema Nyang'oro and Elias Masija Nyang'oro as disclosed in the plaint. He invited this Court to dismiss and or strike out this case.

In rebuttal , Mr Kimaay, started his submission by referring this Court to the contents of the 1st defendant's written statement of defence , in which he disputes the allegations that the funds deposited in the fixed deposit account belongs to the Edna Mrema Nyang'oro and Elias Masija Nyang'oro, and alleges that Edna and Elias were mere signatories , and that in 2013 there were serious and irreconcilable conflicts among the Directors of the Plaintiff's Company which moved the 2nd defendant to

file a case in this Court in this Court vide Commercial Case No. 20 of 2013.

Furthermore, Mr Kimaayi was of the view that the case of **Lujuna Shubi Ballonzi** (supra) and **Chama cha Wafanyakazi wa Mahotel na Migahawa Zanzibar (Horau)** (supra) are irrelevant and inapplicable in this case because the plaintiff has clear interests in the claimed fund deposited in the fixed deposit account. Also, he contended that the case of **Salomon** (Supra) and **Yusufu Manji** (supra) cited by Mr. Wilbard are distinguishable from this case.

In addition, relying on the case of **Antony Leonard Msanze and another Vs Juliana Elias Msanze and two others, Civil Appeal No.76 of 2012**, (unreported) , Mr Kimaay argued that even if this court finds that the plaintiff has no *Locus standi* to claim the fund deposited in the fixed deposit account, this Court is not supposed to dismiss or strike the case but to reject the plaint.

Furthermore, Kimaayi argued that this point of preliminary objection is not a pure point of law. Some of the contentions made by Mr. Wilbard in support of his stance the plaintiff has no *locus standi* cannot be ascertained without calling evidence. To cement his arguments, he cited the case of **Soitsambu Village Council Vs Tanzania Breweries Ltd**

and another, Civil Appeal No. 105 of 2011, (unreported), in which the Court held as follows;

"A preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law...."

Mr Wilbard prayed for the dismissal of the point of preliminary objections.

With regard to the 3rd point of preliminary objection, the learned Advocate Richard submitted that this suit is bad and contradictory in law for containing personal course of action by two purported shareholders (Elias Masija Nyang'oro and Edna Mrema Nyang'oro) in the name of the Company. He contended that paragraph 8 and 9 of the plaint mentions the people who claim to be the actual owners of the fund deposited in the fixed deposit account ,but surprisingly the suit is in the name of the Company. Since paragraph 11 of the plaint states that the amount at issue was supposed to be deposited to Mwananchi Micro Credit Ltd bank account, not the plaintiff's bank account, then it is obvious that Elias Masija Nyang'oro and Edna Mrema Nyang'oro want to use the Plaintiff's Company for their own benefits. Contended Mr Richard. Also, he pointed out that even the reliefs sought in this case do not indicate that the claimed amount should be deposited in the plaintiff's bank account or

Mwananchi Micro Credit Ltd who is not a party in this matter or to the so called owners of the money. His conclusive views were to the effect that the plaintiff in this case is suing for the money belonging to Elias Masija Nyang'oro , Edna Mrema Nyang'oro, Rodrick Elias Nyang'oro which is not acceptable under the law.

Mr. Kimaay's response to Mr Richard's submission was to the effect that the 3rd point of preliminary objection raised by Mr Richard is not a pure point of Law. Evidence is required ascertain the allegations made by the 2nd defendant in his defence to wit; that the fund in question, the subject of this suit does not belong to Elias Masija Nyang'oro and Edna Mrema Nyang'oro. To cement his argument he cited the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 and Soitsambu Village Council (supra)**.Mr. Kimaay invited this Court to dismiss this point of Preliminary objection.

In rejoinder, Mr Richard reiterated his submission in chief and insisted that the individual Directors are separate from the Company. How come the plaintiff's Company sues for the money owned by Mr Elias Masija Nyang'oro and Edna Mrema Nyang'oro who claim to be the Directors of the Plaintiff's Company. In addition, he pointed out that one Rodrick

Nyang'oro is mentioned as one of the actual owners of the money claimed in this case, but he is not among the Directors of the Plaintiff's Company.

With regard to Mr Kimaay's argument that the points of preliminary objections in question are not pure points of law, both Mr. Wilbard and Richard argued that, in the case of **Mukisa Biscuits** (supra) the Court held that in determination of any point of preliminary objection there is an assumption that all facts pleaded in the plaint are true. Therefore, the contents of the defendants' written statement of defence are irrelevant for the purpose of determining the point of preliminary objections.

Having dispassionately analyzed the rival arguments made by the learned advocates as well as perused the pleadings carefully, I wish to start by point out that the correct position of the law is that in determining whether or not the plaintiff has an cause of action or *locus standi* the Court has to look into the plaint, not the written statement of defence or the reply to the written statement of defence. (see the case of **Antony Leonard Msanze and another** (supra) and **Lujuna Shubi Ballonzi, senior** (supra). In short the Court looks at the plaintiff's case only. In this case the plaint indicates clearly that the amount which was deposited in the fixed deposit account which forms the basis of this case belongs to by

Edna Mrema Nyang'oro , Elias Masija Nyang'oro and Rodrick Elias Nyang'oro and are the ones who opened that fixed deposit account. For clarity let me reproduce the relevant paragraphs in the plaint hereunder;

Paragraph 7;

"That the plaintiff through its Directors and shareholders Elias Masija Nyang'oro and Edna Elias Nyang'oro had opened a fixed Deposit Account with the defendant Bank for a period of one year, commencing from 7th January , 2013, to 7th January , 2014 for the total fixed deposit being Tanzanian Shillings Two Hundred and fifty Million only(Tshs 250,000,000/=) with an agreed interest rate of 12% thereon per annum"

Paragraph 8

*"That the Plaintiff was issued with a fixed deposit receipt No. C. 063071. **The signatory to the said fixed deposit account were Elias Masija Nyang'oro , Edna Masija Nyang'oro and Rodrick Elias Nyang'oro who are actual owners of the deposited amount .***

The receipts along with other documents was sadly lost a result of theft which occurred at Mwananchi Insurance Company Limited offices in Arusha. Copy of the loss report is annexed hereto and marked as "MIC-1"

(Emphasis is added)

I have noted in the paragraphs of the plaint herein above. Edna's full name reads as Edna Masija Nyang'oro not Edna Mrema Nyang'oro as indicated in the rest of the paragraphs in the plaint and to the reply to the written statement of defence filed by the defendants. Be as it is, looking at the pleadings generally, to my understanding Edna Masija Nyang'oro and Edna Mrema Nyang'oro refers to one and the same person.

From the foregoing, I find myself in agreement with Mr Wilbard that the plaintiff, being a legal entity distinct from its Directors and shareholders has no *locus standi* to claim for the funds belonging to its Directors and deposited in a fixed deposit account opened by those Directors in their personal capacity as alleged in the plaint. The principle laid down in the case of **Salomon** (supra) is very relevant here. In fact, Mr. Kimaay, has completely failed to demonstrate how the plaintiff can claim to have interests in the fund alleged to belong to its Directors in their individual capacity.

In addition, as correctly submitted by Mr Wilbard, the plaintiff has no *locus standi* to claim for the losses suffered by its sister Company (Mwananchi Micro Credit Ltd.) for a simple and straight forward reason that these are two different legal entities.

In fact it leaves a lot to be desired as to why Edna Elias Nyang'oro, Elias Mrema Nyang'oro did not file the case in their personal capacities since it is alleged in the plaint that the fund that was deposited in the fixed deposit account belongs to them and they are the ones who opened the said fixed deposit account.

Also, I wish to point out that I have noted that Mr Wilbard's submission has gone beyond his point of preliminary objection because the point of preliminary objection was couched in such a way that the same was challenging the plaintiff's *locus standi* to claim damages suffered by Mwananchi Micro Credit Limited, but in his submission he also challenged the plaintiff's *locus standi* to claim for money belonging to its Directors, (Edna Masija Nyang'oro not Edna Mrema Nyang'oro) and one Rodrick Masija Nyang'oro who is not the Director of the Plaintiff's Company. However, there is no any prejudice occasioned to the plaintiff as Mr. Kimaay responded to all arguments raised by Mr. Wilbard.

Coming to the second limb of Mr. Kimaayi's submission, with due respect to him, I am not inclined to agree with his contention that the second point of preliminary objection raised by Mr. Wilbard and the 3rd Point of Preliminary objection raised by Mr. Richard are not pure points of law. My stance is based on the fact that none of the contentions made by Mr.

Wilbard and Mr. Richard in support of the aforesaid points of preliminary objections needs to be ascertained by calling evidence. Mr. Kimaayi in his submission failed to point out which allegations or contentions raised by Mr. Wilbard and Mr. Richard need evidence to be established. The contention that the claimed fund belongs to the plaintiff's directors and one Rodrick Elias Nyang'oro does not need to be proved since the same is clearly pleaded in the plaint without any ambiguity. The case of **Soitsambu Village Council** (supra) cited by Mr. Kimaayi is irrelevant and not applicable in this matter as it has different set of facts from this case.

In the upshot, I hereby uphold the 2nd point of preliminary objection raised by Mr. Wilbard, that is the plaintiff has no *locus standi* to institute this case. Also, I uphold the 3rd point of preliminary objection raised by Mr. Richard that this suit is bad in law and un-maintainable for containing personal cause of action by Mr. Elias Masija Nyang'oro and Edna Mrema Nyang'oro, but the suit is filed in the name of the Company instead of being filed in the name of the alleged owners of the fund at issue. Lack of *locus standi* on part of the plaintiff leads to the suit being struck out [see the case of **Lujuna Shubi Ballonzi, Senior** , (supra)] .

From the foregoing, it is obvious that the 2nd and the 3rd points of objections raised by the advocate for 1st and the 2nd defendants respectively suffice to dispose of this suit. Therefore, with the findings I have made herein above, I do not see any plausible reasons to continue with the determination of the remaining points of preliminary objections as there will be no any different findings from the one I have made herein above. Thus, this suit is hereby struck out with costs.

Dated this 28th day of January 2022


B.K.PHILLIP

JUDGE

