

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. 165 OF 2019

BISMARCK HOTEL MINING COMPANY LIMITED PLAINTIFF

VERSUS

PANGEA MINERALS LIMITED 1ST DEFENDANT

ACACIA MINING PLC 2ND DEFENDANT

BARRICK GOLD CORPORATION 3RD DEFENDANT

BRAD GORDON 4TH DEFENDANT

PETER SPORA 5TH DEFENDANT

PETER GELETE 6TH DEFENDANT

RULING

24th November, 2022 & 19th January, 2023

KISANYA, J.:

The plaintiff is a limited liability company licenced to carry out prospecting and mining of minerals and to undertake related in activities. It has sued the above named defendants, jointly and severally, claiming for judgment and decree in the following terms:

- (a) *As against the First Defendant, an order lifting confidentiality over the Confidential Contract generally, alternatively limited to matters that are related to pollution to the environment.*
- (b) *As against the 2nd, 3^d, 4th and 6th defendants jointly and severally, a declaration that they are wholly, jointly and severally*

responsible for all pollution caused to the environment in the Contract Area.

- (c) *An order directed to the 2nd, 3^d, 4th, 5th and 6th defendants jointly and severally for payment of USD 47,200,000 to the Plaintiff as pleaded in paragraph 15(f) and (g).*
- (d) *An order for interest on the decial amount at the rate of 7% (seven per centum) from the date of judgment to the date of full satisfaction of payment.*
- (e) *Punitive damages against the 2nd, 3^d, 4th 5th and 6th Defendants, wholly, jointly and severally, for causing or failing to prevent pollution to the environment in the Contract Area.*
- (f) *The grant of any other relief or reliefs to the Plaintiff as this Hnourable Court may deem fit, just or fair to grant; and*
- (g) *The costs of this suit be provided*

The 1st, 2nd and 3rd defendants filed a joint written statement of defence in which they raised on a notice of preliminary of objection on the points of law that:

- 1. In terms of paragraph 1 of the Schedule to the Law of Limitation Act, Cap. 89, R.E. 2002, the Plaintiff's claim for compensation are timed barred.*
- 2. The suit is res-subjudice owing to the pending adjudication proceedings between the Plaintiff and the 2nd Defendant.*
- 3. Based on the Plaintiff's own admission in paragraph 22 of the plaint, the Plaintiff has no any cause of action against the 2nd and 3^d defendants.*

At the hearing of the preliminary objection, Mr. Seni Malimi, learned counsel appeared for the plaintiff, whereas Ms. Flora Mukasa, also learned advocate appeared for the 1st, 2nd and 3rd defendants. The matter is proceeding ex-parte against the remaining defendants.

Submitting in support of the first limb of objection, Ms. Mukasa contended that the plaintiff is claiming for compensation arising from pollution. She went on to submit that the suit was filed after one year set forth under item 1, Part I of the Schedule to the Law of Limitation Act [Cap. 89, R.E. 2019] (the LLA). In that regard, she urged the Court to dismiss the suit under section 3 of the LLA. To support her argument, the learned counsel cited the case of **Ali Shaban and 48 Others vs Tanzania National Roads Agency**, Civil Appeal No. 261 of 2020 (unreported).

On the second limb of objection, Ms. Mukasa contended that the 1st defendant had from 25th December, 2016, submitted a request for adjudication against the plaintiff under the Confidential Contract entered between them. In view of section 8 of the CPC, the learned counsel submitted that the Court is barred from entertaining the matter. She contended that the conditions for *res-subjudice* had been met as follows. *One*, the issue in this suit is directly and substantially an issue in the adjudication proceedings on the account that both suits originate from the Confidential Contract which dealt with the contract area where the alleged pollution took

place. *Two*, the parties in this suit and the adjudication proceedings are the same. *Three*, in terms of the Confidential Contract, the decision of the adjudication proceedings is final and binding to the parties and thus, before the competent court or tribunal. *Four*, following the plaintiff's appeal to High Court of Tanzania to seek temporary injunction of the adjudication proceedings, the former matter is pending in the Court of Appeal.

With regard to the third limb of objection, Ms. Mukasa started by pointing out that the plaintiff admits in paragraph 22 of the plaint that the 2nd and 3rd defendants are not a party to the Confidential Contract or subject to claim in the separate confidential process between the plaintiff and 1st defendant. She further submitted that the plaint does not disclose the cause of action against the 2nd and 3rd defendants because they are not a party to the Confidential Contract. Referring the Court to the case of **John Byombarirwa vs Agency Maritime International** (1983) TLR 1 and Order VII, Rule 1(e) of the CPC, the learned counsel argued that the plaint was required to disclose all facts showing cause of action against the 2nd and 3rd defendants. She submitted that it was not sufficient for the plaintiff to state that certain event occurred and that each element of cause of action ought to have been disclosed.

On the foregoing, the learned counsel asked the Court to dismiss the suit with costs.

Mr. Malimi vehemently contested all points of objection. As for the objection on time limitation, he contended that the counsel for the defendants has misconstrued the provisions of item 1, Part I of the Schedule to the LLA. It was his argument the said provision refers to a determined compensation under the written law. Making reference to paragraph 12 of the plaint, he submitted that the present suit is based tort. The learned counsel went on to submit that, the suit was instituted within three years specified by item 6, Part I of the Schedule to the LLA on the suit. To cement his argument, the learned cited the case of **Elias Mwita Mlimi (Suing as Administrator of Estate of the late Suzana Mubusi Masyora) vs North Mara Gold Mine Ltd**, Civil Case No. 8 of 2020, HCT at Musoma (unreported).

It was his alternative submission that, the suit is founded on breach of contract between the plaintiff and 1st defendant, whereby other defendants were involved during execution of the contract. For that reason, the learned counsel submitted that the suit was filed within six years from the date when the plaintiff discovered the alleged breach, and thus within the time set forth under the LLA.

Countering the second limb of objection, Mr. Malimi submitted that the Court has not been furnished with facts or pleadings on the pending adjudication proceedings in order to decide whether the matter is *res-subjudice*. He also contended that the plaintiff's claim in this suit is not

pending before the adjudicator and that the adjudication proceedings under the Confidential Contract cannot be predicated on environment issues. It was further submitted that the adjudication proceedings is pending in London. Therefore, he argued that section 8 of the CPC does not bar the Court from entertaining a matter in which adjudication is pending in a foreign court. To support his argument, the learned counsel cited the case of **Independent Power Tanzania Limited and Another vs Standard Chartered Hong Kong and 3 Others** [2015] TLR 344.

Replying to the third limb of objection on cause of action, Mr. Malimi conceded that the 2nd and 3rd defendants are not a party to the Confidential Contract. However, he submitted that the preceding paragraphs indicate how the said defendants executed the contract and thus, liable for pollution under section 201 of the Environment Management Act. The learned counsel further submitted that paragraphs 3, 4, 5 and 5 of the plaint display the relationship between the 2nd and 3rd defendants.

In the light of the foregoing submission, Mr. Malimi asked the Court to overrule all limbs of preliminary objection with costs.

Rejoining, Ms. Mukasa submitted that the plaint does not state anything about breach of contract or tortious liability. On the issue of *res-subjudice*, she reiterated that the suit is based on confidential contract which breach is pending in the adjudication proceedings.

I have examined the rival submissions by the parties in light of the preliminary objections with the weight they deserve. In my view, the crucial issue for determination is whether the preliminary objections are meritorious.

At the outset, I am satisfied that, all limbs of preliminary objection are on pure point law as required by case law, including the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd**, [1969] EA 696 and **Karata Ernest & Others vs. Attorney General**, Civil Revision No.10 of 2010, CAT (unreported). However, as underlined in both cases, a preliminary objection must be determined basing on the facts deposed in the pleadings.

In the first limb of objection, the Court is called upon to determine whether the suit is time barred. From the contending submissions, it is vivid that this objection is predicated under item of 1, Part I of the Schedule to the LLA. Pursuant to the said provision, the period of limitation on the suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any written law is one year from the date on which the time accrued. See also the cases of **Ali Shaban and 48 Others** (supra) and **Elias Mwita Mlimi** (supra).

Reading from paragraphs 8, 9 of the plaint, I agree with Mr. Malimi that this suit is founded on tort of pollution. For instance, paragraph 8 of the plaint provides as follows:

"The plaintiff claims as against the 2nd, 3rd, 4th, 5th and 6th Defendants, wholly and severally, that they were involved in the management and control of the 1st Defendant which caused pollution to the environment in breach of the law. The reliefs sought of this transgression is stated herein."

I have also considered paragraphs 13 and 14 of the plaint which were referred to this Court by Ms. Mukasa. It is my humble view that the said paragraphs do not suggest that this is a suit for claim of compensation as contended by Ms. Mukasa. To the contrary, paragraph 13 of the plaint shows that, on 14th September, 2016, the plaintiff became aware that the 1st Defendant had "polluted the environment or alternatively permitted others to do so", when former (1st defendant) returned the mining licences to her. As for paragraph 14 of the plaint, the plaintiff pleads that the defendants' action has exposed her to penalties that may be imposed on her, orders for compensation and remediation costs for removing pollutants and effects of the claimed pollution. Further to this, the relief for payment of USD 47,200,000 is pleaded as costs of remediating and rehabilitating the affected environment and people to rid of the pollution.

All the above considered, I hold the view that this suit is founded on tort of pollution. Since the objection on time limitation was premised on argument that the suit is for claim for compensation, it lacks legs to stand on. I agree with Mr. Malimi that, in terms of item 6, Part I of the Schedule to the

LLA, the period of limitation on the suit founded on tort is three years from the date on which the time accrued. The plaintiff pleaded that he became aware of the pollution on 14th September, 2016, when the 1st defendant returned the mining licence. Given the fact that the suit was instituted on 13th September, 2019, I am satisfied that it is timeous. Thus, the first limb of objection is devoid of merit.

Regarding the second limb of objection, in essence, the learned counsel for the 1st, 2nd and 3rd defendants contends that the matter is pending in the adjudication proceedings. In our jurisdiction, the principle of *res-subjudice* is enshrined under section 8 of the CPC. The said provision bars Court to proceed with the trial of a suit in which the matter in issue is also directly and substantially in issue in a previous suit between the same parties, or between parties or parties litigating under the same title. However, the law is clear that the previous suit must be pending in any other court in Tanzania having jurisdiction to grant the relief claimed. It is thus, a settled position that, the pendency of a suit in a foreign court does not preclude the courts in Tanzania from trying a suit founded on the same cause of action.

The pleadings in the case at hand do not indicate whether the issue subject to this case is pending in any court in Tanzania. Ms. Mukasa's argument in support of the objection is not supported by the pleadings. Since the particulars or facts on the pending adjudication proceedings do not

feature in the pleadings, this Court is not in a position of holding whether the condition for *res-subjudice* have been met. Thus, the second limb of objection lacks basis.

Moving on to the last limb of objection, it is a legal requirement, under Order VII Rule 1 (e) of CPC that, any plaint must disclose a cause of action. The law is further settled that a cause of action is established when the plaint discloses the facts which are necessary for the Plaintiff to prove before he or she can succeed in a suit. See also the case of **John M Byombalirwa vs Agency Maritime Internationale (Tanzania) Ltd** (supra) cited by Ms. Mukasa.

I also agree with Ms. Mukasa that, it is not sufficient for the plaintiff to merely state that certain events occurred thereby entitled to reliefs. Therefore, all elements of each cause of action must be disclosed as also provided under Order VI, rule 4 of the CPC. In any case, a cause of action must be discovered by looking only at the plaint without going far into the written statement of defence or reply to written statement of defence. I am fortified by the case of **Antony Leonard Msanze and Another vs Juliana Elias Msanze and 2 Others**, Civil Appeal No. 76 of 2012 (unreported) in which the Court of Appeal:

"We hold down that for purposes of deciding whether or not a plaint disclose a cause of action, courts should not go far into the written statement of defence or replies to

the written statement of defence. But they should discover a cause of action by looking only at the plaint."

In the instant case, the argument that the plaint does not disclose a cause of action against the 2nd and 3rd defendants is based on the fact that the duo are not a party to the Confidential Agreement related to Contract Area claimed to have been polluted. Mr. Malimi is at one with Ms. Mukasa that the 2nd and 3rd defendants are not a party to the Confidential Agreement which was entered between the plaintiff and 1st defendant.

I have resolved in the course of determining the first limb of objection that this suit is founded on tort of pollution. Although the Contract Area is alleged to have been transferred to the 1st defendant vide the Confidential Agreement entered by the plaintiff and 1st defendant, it is stated in paragraph 8 of the plaint that the 2nd and 3rd defendants and other defendants "were involved in the management and control of the 1st defendant which caused pollution to the environment in breach of the law" and not in breach of contract. Furthermore, the 2nd and 3rd defendants are alleged to have participated in polluting the area subject to this case. This is pursuant to paragraph 9 of the plaint, which is reproduced as hereunder, for ease of reference:

"The Plaintiff states that the 2nd and 3rd Defendants controlled, managed and directed the affairs of the 1st Defendants during the period in which gold prospecting

and mining was carried on in the Sign Hills, Nyang'hwale District, Geita District, or alternatively, permitted such activities to be carried on in a manner which cause pollution to the environment during the period in which the 1st Defendant was responsible for area concerned. In this view, the operations of the 1st, 2nd and 3rd Defendants were intertwined in terms of their exploration or prospecting and mining operation, together with the unlawful consequences thereof and the various employees and executive comprising the 4th, 5th and 6th defendants are the individuals who the Plaintiff has so far been able to identify who responsible for these actions. The Plaintiff reserves the right to apply to join further employees and executives."

In addition, other facts implicating the 2nd and 3rd defendant are stated in paragraphs 13, 14, 16, 18 and 19 of the plaint. See for instance, paragraph 13 in which it was stated, inter alia, that:

"... the defendants are wholly, jointly and severally liable because they were involved in the management and control of the 1st defendant and or were in a position to influence and control her affairs of the 1st Defendant so as to cause or allow pollution to occur in the Contract Area while the 1st Defendant was responsible thereof.

Having considered that this suit is founded on tort of pollution, I am of the view that the facts averred in the plaint disclose the cause of action

against the 2nd and 3rd defendants. For that reason, the third limb of objection is also devoid of merits.

In the upshot of the foregoing, I hereby overrule all points of preliminary objection for want merit. Costs to follow the event.

DATED at DAR ES SALAAM this 19th day of January, 2023.



S.E. KISANYA
JUDGE