

**THE UNITED REPUBLIC OF TANZANIA**

**IN THE HIGH COURT OF TANZANIA**

**DODOMA DISTRICT REGISTRY**

**AT DODOMA**

**LAND CASE NO. 9 OF 2021**

**BALVINDER SINGH VIRDI T/a THAKER SINGH.....PLAINTIFF**

**VERSUS**

**PREMALT LIMITED.....1<sup>ST</sup> DEFENDANT**

**BARODA BANK (T) LIMITED.....2<sup>ND</sup> DEFENDANT**

**AHQ CONSULTANCY.....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of Ruling: 12/07/2023*

**A. J. Mambi, J.**

This ruling emanates from the preliminary objections raised by the first and second defendants against the amended plaint filed by the plaintiff. Earlier the plaintiff filed the Land Case No. 9 Of 2021 suing the defendants for recovery of outstanding rent from lease agreement. Before the matter proceeded, the first defendant raised the preliminary objections basing on the following limbs that: -

- 1. 'The plaintiff has no cause of action against the 1<sup>st</sup> defendant.*
- 2. The suit is bad for mis-joinder of a party."*

In its preliminary objections, the second defendant based on the on ground that;

*'The amended plaint is bad at law for amending matters beyond the order of this Honorable Court'*

Parties argued the matter by way of written submissions. In its written submissions the 1<sup>st</sup> defendant through the learned counsel Mr. Laurent Leonard dropped the 1<sup>st</sup> limb of the preliminary objection and went ahead in submitting second limb on mis-joinder of a party. Mr. Laurent in his submissions contended that the 1<sup>st</sup> defendant was subjected under receivership since 22/01/2018 following the appointment of a receiver/manager as per the provision of the debenture deed between the 1<sup>st</sup> and 2<sup>nd</sup> defendant. It was Mr. Laurent's contention that since the under the plaint the plaintiff alleges that cause of action against the 1<sup>st</sup> defendant arose in 2020 when the 1<sup>st</sup> defendant was under receivership therefore all claims against the 1<sup>st</sup> defendant were to be channeled to the appointed receiver/manager. Mr. Laurent's further submitted that once a receiver is appointed the powers of the directors of the company ceases and that the receiver becomes the sole person with power to run the affairs of the company. The learned counsel referred this Court to sections 416(1) and 253(1) of the Companies Act, Cap 212 R: E 2002. Mr. Laurent went on submitting that following the appointment of the receiver of the 1<sup>st</sup> defendant, the management and control of the company were vested to the appointed receiver who had all powers to perform the stated activities in terms of s. 416(1) and 253. Reference was further made to the decision of the Kenyan court in **Queensway Trustees Ltd vs Official Receiver and Liquidator of Tenneries of Kenya Ltd** [1983] eKLR at page 4. The learned Counsel also referred this court to the decision of the court in **Calico Textile Industries Ltd vs Zenon Investment Ltd and Others** [1999] TLR 100, **Omondi vs National Bank of Kenya Ltd and Others** [2001] 1 EA 177 at page 183. Mr.

Laurent asserted that it was the obligation of the 2<sup>nd</sup> and the 3<sup>rd</sup> defendant to defend the case since the assets of the 1<sup>st</sup> defendant are in the hands of the 2<sup>nd</sup> defendant and its appointed receiver. The learned counsel prayed this Court to relieve the 1<sup>st</sup> defendant from the conduct of this case under Order 1 Rule 13 of the Civil Procedure Code, Cap 33 as it was wrongly joined in the suit.

With respect to the preliminary objection raised by the 2<sup>nd</sup> defendant, that the amended plaint offended the order of this court, the learned counsel for the 2<sup>nd</sup> defendant Mr. Charles Mathias contended that on 20<sup>th</sup> July, 2022 the counsel for the plaintiff prayed this Court to amend the plaint to include a 3<sup>rd</sup> party who was a receiver manager of the 1<sup>st</sup> defendant. Mr. Charles added that this Court granted the plaintiff's prayer to the extent of what he prayed for. Mr. Charles was of the view that the amended plaint filed before this Court was contrary to the order of this Court of 20<sup>th</sup> July, 2022 since the plaintiff made additional claims of rent from USD 364,000/= that raised to USD 406,000/=. The counsel for the 2<sup>nd</sup> defendant contended that the amended plaint is bad in law for amending matters beyond the order of this Court and the plaint should be struck out with costs. He referred the decision of the court in **Mohamed Rajuu Hassan vs Salim Ally Al Saad and Another**, Land Case No. 34 of 2013.

Responding to the submissions above, Mr. Deus Nyabiri the learned counsel for the plaintiff, in respect of the preliminary objection with regard to mis-joinder of a 1<sup>st</sup> defendant, contended that, the objection does not meet the test of pure point of law for it to be regarded as a preliminary objection. It was Mr. Nyabiri's view that if a party is mis-joined the remedy is not to dismiss the suit but rather to strike out the names of such persons as have not been properly joined as defendants and the suit is supposed to proceed with the remained defendants. Mr. Nyabiri was of the view

that an objection on the grounds of mis-joinder of defendants is not fatal to the suit and does not dispose of the suit. The learned counsel referred this Court on Order 1 Rule 9 and 10(2) of the CPC, the decision of the court in **Mukisa Biscuits Manufacturing Co. Ltd vs Western Distributors Ltd** (1969) EA 696 at page 700, **Musangang'andwa vs Chief Japhet Wanzagi and 8 Others** 2006 TRC 351, **COTWO (T) OTTU UNION and Another vs Honorable Iddi Simba Minister of Industries and Trade and Others**, 2002 TLR 88 and Mulla, the Code of Civil Procedure 16<sup>th</sup> Ed Vol 2 at page 1500.

Mr. Nyabiri went ahead in submitting that even if the 1<sup>st</sup> defendant was under receivership still that did not exonerate it from being impleaded because issues of management to him do not take away the legal existence of the company. The learned counsel asserted that the 1<sup>st</sup> defendant was a proper party to be impleaded.

With regard to the preliminary objection raised by the second defendant that the amended plaintiff contravened the order of this Court. Mr. Nyabiri submitted that the point of preliminary objection did not meet the criteria stated in **Mukisa Biscuits** *supra* as it is not a pure point of law and cannot dispose the suit. The learned counsel submitted that in the present matter in order for this Court to determine the objection at hand it will have to go into the proceedings to see what was decided by this Court regarding the amendment of the original plaintiff *viz a vis* the amended plaintiff which was filed. Mr. Nyabiri was of the view that doing so this Court will not be dealing with a point of law but facts in the proceedings. The learned counsel further submitted that what can be gleaned from the submissions of the advocate of the 2<sup>nd</sup> defendant is the sum claimed in the amended plaintiff *viz a vis* that which was in the original plaintiff. To him those are points based on facts and not law as it is required in law. It was

Mr. Nyabiri's submission that it was a fact that as the time was going the amount of unpaid rent continued to pile up and that was what was pleaded in the amended plaint which would be proved in the trial. The learned counsel referred further this Court to the decision of the court in **Leo Didas and 171 Others vs Ardhi University, The University of Dar es Salaam and the Ag**, Misc. Civil Cause No. 34 of 2008 (unreported).

Rejoining, Mr. Leonard for the 1<sup>st</sup> defendant reiterated his submission in and added that the 1<sup>st</sup> defendant being in receivership the proper party to be sued was the receiver manager as upon the appointment of the receiver manager the company directors are exonerated from running the company and the appointed receiver manager steps into their shoes in running of the company. He again referred section 418 (1) (a), 253(1)(e) and 416(1) of the Companies Act and the decision of the Court of Appeal of Tanzania in **Hassan Marua vs Tanzania Cigarette Company Ltd**, Civil Appeal No. 338/01 of 2019 (unreported) at page 14.

Having considerably gone through the preliminary objections, the submissions by the parties and the records, the central issue for determination is whether the preliminary objections raised are tenable in law or not.

Starting with the preliminary objection of whether or not the 1<sup>st</sup> defendant is a mis-joinder to the suit. To answer this question, I must first determine whether this is a point of a law or of fact. The underlying principle on the components of preliminary objection was laid down in the celebrated case **Mukisa Buscuits** *supra* where the court held;

*".....so far as we are aware, a preliminary objection consists of a clear point of law which has been raised*

*or which arise clear implication out of pleadings and when 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”*

The position as illustrated by the court in the above phrase means that for a point of preliminary objection to stand the same must be on law and not on facts.

There is no dispute that the 1<sup>st</sup> defendant is under receivership. That being the case the question is; can the 1<sup>st</sup> defendant still continue to enjoy its legal personality (like to sue or be sued on its own corporate name) as it was before its placement under receivership? The answer in my view is **NO**. My reason is based on the fact that where a company is placed under receivership its legal powers ceases and the directors managerial and control powers of running the company ceases in favor of the receiver. Reference can be made on Section 416 (1) read together with section 253 of the Companies Act, Cap 212 R: E 2002 provides;

*“ The powers conferred on the administrative receiver of a company by the debentures by virtue of which he was appointed are deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in section 253. ”*

Section 253 of the same law provides as follows;

*253.-(1) The administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company, and in particular shall have the following powers: -*



*(a) to take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as may seem to him expedient;*

*(b) to sell or otherwise dispose of the property of the company by public auction or private contract;*

*(c) to raise or borrow money and grant security therefore over the property of the company;*

*(d) to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;*

***(e) to bring or defend any action or other legal proceedings in the name and on behalf of the company;***

*(f) to bring or defend any arbitration on any question affecting the company;*

*(g) to effect and maintain insurances in respect of the business and property of the company;*

*(h) to use the company's seal;*

*(i) to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document;*

*(j) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;*

*(k) to make any payment which is necessary or incidental to the performance of his functions;*

*(l) to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to*

take a lease or tenancy of any property required or  
convenient for the business of the company;

Reference can also be made on section 418(1)(a) of the Companies Act, it provides;

*"The administrative receiver of a company –  
(a) is deemed to be the company's agent, unless and  
until the company goes into liquidation;"*

The above provisions of the law are clear that when the company is undergoing receivership and the receiver has been appointed the powers of suing or defending a case in the courts of law automatically shift to the receiver or an administrator of that particular company.

The said provisions expressly forfeit the powers of directors of a company which is being under receivership from running the affairs of a company. The directors' powers are vested to the receiver or an administrator.

In a persuasive decision of the court of Kenya in **Queensway Trustees** *supra* cited by the counsel for the 1<sup>st</sup> defendant the court held;

*"Where a receiver is appointed out of court, as Mr. Birnie was by the Debenture Stockholders on July 5, 1978, the management and control of the Company's assets are taken out of the hands of the directors and the secretary of the company"*

That being a requirement of the law and since the objection raised was based on the provision of the law (the Companies Act) and the fact that the 1<sup>st</sup> defendant is in receivership the same cannot be said that the preliminary objection raised was a factual and not on legal basis.

Having found that the preliminary objection was raised on point of law, the remaining question is, was there any misjoinder and non-joinder of



the parties? In my view there was both misjoinder and non-joinder of the parties. This means that it was necessary to join receiver as necessary party and failure to do so can be graded as non-joinder. Likewise, it was wrong to include the first defendant since there was receiver who could step on the shoes of the first defendant and failure to do so makes the suit misjoinder.

In this regard it was necessary for the receiver to be joined as necessary party. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. The term necessary party is defined in the **Black's Law Dictionary**, 8<sup>th</sup> Edition to mean;

*"a party who, being closely connected to a law suit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings"*

In other words, in absence of a necessary party no decree can be passed. His presence, however enables the court or Tribunal to adjudicate more "effectually and completely". See also ***Shahasa Mard vs Sadahiv ILR (1918) 43 Bom 575 at p 581*** and ***Kasturi v Iyyamperumal (2005) AIR 2005*** at P.738. Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding:

- (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and
- (ii) It should not be possible to pass an effective decree in absence of such a party. (See also ***C.K.Takwani on Civil Procedure at page 162-163***).

It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. The Court of Appeal in **Tang Gas Distributors Limited vs Mohamed Salim said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported), when considering circumstances upon which a necessary party ought to be added in a suit stated that: -

- (i) *".....an intervener, otherwise commonly referred to as a **NECESSARY PARTY**, would be added in a suit under this rule.....even though there is no distinct cause of action against him, where:-*
- (ii) *(a).....*
- (iii) *(b) **his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.***

Again, in **Abdullatiff Mohamed Hamis vs. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017(unreported), the Court of Appeal when faced with an akin situation, it stated that: -

*'The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the **particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.**'*

Similarly, the Court of Appeal in **Juliana Francis Mkwabi Vs Lawrent Chimwaga**, Civil Appeal No. 531 of 2020(unreported), when confronted with the issue of whether the Dodoma Municipal Council was a necessary party in the circumstances of the case, it found that the Council was not a necessary party who ought to have been joined in the proceedings, because;

*'in the circumstances of the case subject of this appeal, Dodoma Municipal Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed.'*

In this regard, the absence of the receiver in the suit meant that it should not be possible to pass an effective decree as the first defendant company was under receivership. That being the case, it was necessary the issue of misjoinder or non-joinder to be raised at the earlier stage as done by the defendants in this case. Indeed, the law requires that matters of non-joinder or mis-joinder of parties to be raised at earliest possible opportunity. Reference can be on Order 1 Rule 13, it provides;

*'All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived'*

It is my considered view that the law intends to avoid unnecessary inconveniences to a party who is not legally responsible in the suit to be exonerated at earliest possible moment. It would be injustice to drag a

person all the way from the beginning of a suit to finality only to find at the end that he was wrongly joined.

That said, it is the finding of this Court that the question of mis-joinder of the 1<sup>st</sup> defendant was rightly raised. Furthermore, since the 1<sup>st</sup> defendant was under receivership, it is the finding of this Court that the 1<sup>st</sup> defendant was wrongly joined in the suit and the receiver of the 1<sup>st</sup> defendant company being a necessary person was wrongly non-joined.

It should be noted that where a person like the receiver in our case is a necessary party to a suit has not been joined as party to the suit, it is a case of nonjoinder. Conversely, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1 Rule 1 and 3 respectively, it is the case of misjoinder of parties. In our case at hand, it was wrong to sue the first defendant hence misjoinder. Likewise, failure to sue the receiver as necessary party it was non-joinder. It is trite la that if the person is likely to be affected by decree is not joined as a party to the suit or appeal, the suit or appeal is liable to be dismissed or struck out on that ground only.

Coming to the preliminary objection raised by the 2<sup>nd</sup> defendant that the amended plaint was bad in law for *law for amending matters beyond the order of this Honorable Court*.

I have heard the parties on this point. There is no doubt that the plaintiff on 20<sup>th</sup> July, 2022 prayed for this Court to amend its plaint in order to replace the 1<sup>st</sup> defendant with the receiver as it was under receivership. Following the plaintiff's prayer this Court in terms of Order VII Rule 17 of the CPC allowed the plaintiff to amend the plaint in order to comply with section 416 of the Companies Act. However, coming to the amended plaint which was filed pursuant to the order of this Court of 20<sup>th</sup> July, 2022

contains additional claims which were not ordered by this Court to be added. The same are seen particularly in paragraph 7, 12 and 14 of the amended plaint which is additional claims of rent from USD 364,000/= to USD 406,000/=, additional claims of wages for security guards from Tsh 18,000,000/= to Tsh 29,250,000/=, additional Value Added Tax to Tsh 171,738,000/= and additional of documents marked as annexure P6 (a) collectively.

In the court proceedings it is a presiding court which is mandated with powers to control the said proceedings. It is trite law that orders of courts must be respected. This protects the dignity and confidence of the courts and on the other hands it promotes obedience of the rules of procedure by the parties. Reference can be made in **Africarriers Ltd vs Shirika la Usafiri Dar Es Salaam Ltd and Another**, Commercial Case No. 50 of 2019 where the court held;

*".....an advocate being an officer of the court is deemed to act diligently. There is no excuse for an officer of the court who decides not to comply with the court order without any sufficient reasons"*

The court went on stating that;

*'The duty to obey court orders is essential **not only because it protects the dignity and confidence of the courts but also promotes obedience of the rules of procedure on the world of law and justice to the parties.**'* (Emphasis Supplied)

In Shabani Amuri Sudi (the administrator of the estate of the late **Amuri Sudi vs Kazumari Hamisi Mpala**, Misc. Land Application No. 30 of 2019 (unreported) the court held;



***"Court orders must be respected, obeyed and complied with religiously. Likewise, court proceedings are controlled by the presiding judge or magistrate, parties cannot decide to do contrary to the court's order. Tolerating them will amount to a voluntary invitation to judicial chaos, disrespect, and injustice."*** (Emphasis Supplied).

In light of the above reasoning and authorities this Court finds that the act of the plaintiff adding claims and annexures in the amended plaint without leave of this Court was in contravention of the order of this Court of 20<sup>th</sup> July, 2022. The reason by the plaintiff counsel that the plaintiff was entitled to add the additional rents as they had increased at the time of filing the amended plaint do not hold water at this stage. This is due to the fact that it was a fact which was within their knowledge and therefore it was upon them to ask the court. Furthermore, this is not a question of fact but of law as the plaintiff disobeyed the court's order. Indeed, points of law do not exist in vacuum. Reference can be made in **Hassan Marua** (*supra*) where the Court of Appeal at page 14 held;

***"We are mindful, and we have no doubt that Mr. Halfani will appreciate as Ms. Kihampa does, that the points of law do not exist in a vacuum. That means that determination of a point of law cannot be divorced from the underlying facts which includes evidence on record"***. Emphasis Supplied.

I also wish to refer the decision of the court in **Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005** (unreported) where it was held that:

***"In situation where appeal or application proceeds to a hearing on merit and in such hearing the appeal or***



*application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.*

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

*"This Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."*

From my analysis and observations, I find all points of preliminary objection raised by the defendants are meritorious and are accordingly upheld and sustained. In the premises and from the foregoing reasons, the plaint filed by the plaintiff is hereby struck out. Each party to carry its own costs.

Order accordingly.



**A. J. MAMBI**

**JUDGE**

**12/07/2023**

This Ruling delivered in Chambers this 12<sup>th</sup> day of July, 2023 in presence of Mr. Constantine counsel for the plaintiff who is also holding briefs for the counsels for the defendants.



  
**A. J. MAMBI**

**JUDGE**

**12/07/2022**

Right of appeal explained.



  
**A. J. MAMBI**

**JUDGE**

**12/07/2023**