

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB- REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 190 OF 2023

SARAM COMPANY LIMITED.....PLAINTIFF

VERSUS

**VICE CHANCELOR,
SAINT AUGUSTINE UNIVERSITY OF TANZANIA (SAUT).....DEFENDANT**

RULING

6th March & 14th May, 2024

DYANSOBERA, J.:

The plaintiff has filed the present suit against the defendant claiming for an assortment of reliefs as follows: orders for payment of Tshs. 1,077,696,700/= as a principal sum arising from the defendant's failure to effect payments for construction done, payment of Tshs. 200,000,000/= being costs of security guards, payment of interest at commercial rate of 30% on the principal sum from the date of filing the suit, payment of interest at court's rate of 7% from the date of judgment to the date of full settlement of decree, costs of the suit and any other relief (s) this court deem just to grant.

The defendant filed its written statement of defence disputing the plaintiff's claims. The written statement of defence was accompanied by a three-limb of notice of preliminary objection on the following grounds: -

1. That the court has no jurisdiction to entertain the matter.
2. That the plaintiff has sued the wrong and incompetent party.
3. That the Plaintiff has no cause of action against the Defendant.

The above points of preliminary objection were disposed of by way of written submissions. Mr. Edmund Rweyemamu Ngemela, learned advocate, represented the plaintiff while Mr. Anthony Nasmire, learned counsel, stood for the defendant.

For the reasons that will be apparent soon, I undertake to discuss and determine only the first limb of preliminary objection.

In his submission in support of the first limb of preliminary objection, Mr. Anthony Nasimire contended that Section 18 of the Civil Procedure Code (Cap 33 R.E 2019), (hereinafter referred to as the CPC), illustrates the legislature's goal of attaining finality in proceedings under the CPC, and in providing *quietus* to a dispute instead of allowing a jurisdictional obstacle from becoming a permanent roadblock to a party seeking justice. He further contended that where multiple courts can exercise jurisdiction over a civil suit which often is the case for suits involving money recovery, partition, etc., the choice of institution of the suit is left to the Plaintiff, who is the *dominus litis*. Referring this court to the case **Abdallah Ally Selema t/s Ottawa Enterprises (1987) Vs Tabata Petrol Station Co. Ltd and Another**, Civil Appeal No 89 of 2017 at pages 15 and 16 on the place of suing which is governed by Section 18 of CPC, Counsel for the defendant contended that the place of suing is where the defendant resides or carries on his business as indicated under paragraph 5 of the plaint. He further contended that that Rule 7(1) of the High Court Rules, GN No. 09 of 2005 provides that proceedings may be instituted where the cause action arose or where the defendant resides. He concluded that this suit ought to have been instituted in Songea where the subject matter of the suit lies and that filling this suit in the Dar es Salaam Sub- Registry was misguided.

The defendant's preliminary objection was opposed by the plaintiff's learned counsel on two fronts. In the first place, Mr. Mr. Ngemela questioned the manner in which the preliminary objections were raised by the defendant. He argued that the purported preliminary objections were improperly raised before this court for having contravened Order VIII, Rule 2 of the Civil Procedure Code. He explained that the said provision required the preliminary objection on point of law to be pleaded in the written statement of defence. He pointed out that the preliminary objections raised by the defendant are not

pleaded in the written statement of defence but they were brought in a separate paper, a move which is improper. To support his argument, he cited the case of **CRDB Bank Limited Vs Noorrilly KJ Dhanani and Shrazi H.K Dhanani** (Unreported) which held that a *NOTICE of preliminary objection to a suit contravenes O.VIII rule 2 of the Civil procedure Code Act, 1966 and should be discarded.*”

He thus prayed that the defendant's preliminary objection to be struck out with costs.

Second, in response to the first limb of preliminary objection that this Court is not vested with jurisdiction on the basic ground that the case was not instituted where the defendant resides or where the cause of action arose, Counsel for the plaintiff pointed out that the case was instituted in Dar es Salaam where the contract between the parties was executed and where the defendant has permanent business.

Replying, learned advocate for the defendant, relying on the case of **Gibinius Sinagano vs St. Thomothy Pre and Primary School**, (Labour Revision No. 08 of 2019) [2020] TZHC 4221, submitted that it is trite law that a preliminary objection may not lawfully be raised over another preliminary objection. He contended that as plaintiff was given time to prepare and respond to the objection raised by the respondent through a notice, he should have first addressed the already raised preliminary objection and then he could raise his objection thereafter.

In his brief rejoinder on the first limb of preliminary objection, Mr. Nasimire argued that the agreement shows that the construction of the library and lecture halls was to be at Songea. He added that the payments for the works were to be made at Songea. He pointed out that in terms of sections 17 and 18(a) of the CPC the matter should have been filed either at Songea where the breach of contract occurred or at Mwanza where the defendant resides as supported by paragraphs 2 and 5 of the plaint.

Starting with the argument by counsel for the plaintiff that the preliminary objections are improper before this court as they were not pleaded in the written statement of defence, I must state that it has been the position of our courts that it is an intolerable practice for an advocate trying to pre-empt a preliminary objection either by raising another preliminary objection or rectifying the error complained of. Either, in the case of **Gibinius Sinagano vs St. Thomothy Pre and Primary School**, Labour Revision No. 08 of 2019 [2020] TZHC 4221 at p. 5 this court had this to say: -

'It was improper for the applicant to raise an objection at the time he was supposed to respond to the preliminary objection that had been raised by the respondent.'

In questioning the propriety of the defendant's preliminary objection, counsel for the plaintiff relied on Order VIII Rule 2 of the CPC which provides that: -

'The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.'

Going by above provision, it is clear that defendant is required to state in his written statement of defence all matters showing that the suit is not maintainable. The purpose behind such provision is to prevent taking the other party by surprise or to raise issue of fact not pleaded. However, raising the preliminary objections by way of a separate notice not in the written statement of defence on issue of law, cannot be safely said the plaintiff was taken by surprise. This is because there was a notice on the other side and the issue raised was not of fact, rather, it was of law and the plaintiff had opportunity of going through the preliminary objections first before they argued them. This

means that the issue of the plaintiff being taken by surprise in this case does not arise here.

Settled law is that a preliminary objection especially that goes to the jurisdiction of the court can be raised at any stage even on appeal. For instance, in the case of **R. S. A. Limited v Hanspaul Automechs Limited Govinderajan Senthil Kumal** Civil Appeal No. 179 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported) preliminary objections were raised in the final submissions after closure of the case. The Court of Appeal observed on page 12 thus;

"...In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the close of the hearing."

Obviously, the argument of the learned advocate for the plaintiff that the preliminary objections must be raised only in the written statement of defence, would, in my view, defeat the settled principle that preliminary objection may be raised at any stage. To me, what is important is that the raising of a preliminary objection should not take the other party by surprise and must be on issue of law particularly touching the jurisdiction of the court as was the case in the instant matter. In that regard, it is not insignificant, therefore, to state that a party that wishes to raise preliminary objections must give notice to that effect which notice must contain grounds for objection and prayers to the court. The notice of preliminary objection can be featured in a written statement of defence or filed separately as was done in this case.

That said, I decline to accept the argument by the plaintiff's counsel that purported preliminary point of law is improper before the court.

Now, on the merit or otherwise of the first limb of preliminary objection. Having considered the rival submissions in respect of the first limb of preliminary objection, the issue for consideration and determination is whether this court is proper and competent to try and decide this suit. While counsel for the

defendant argues that the suit had to be filed either at Mwanza where the defendant carries on her business or at Songea where the construction of the library and lecture halls was to be made, Counsel for the plaintiff maintains that the suit is competently before this court because the contract in question was executed in Dar es Salaam where also the defendant resides.

With unfeigned respect, counsel for the plaintiff is off tangent and has misconceived the law. The reasons for this are not far to find. The cause of action in this suit is the breach of contract and not execution of the contract. In so far as it is the cause of action which gives occasion for and forms the foundation of the suit, the court which has jurisdiction to entertain this suit is the court in the local limits of jurisdiction where either the breach occurred or where the performance of the contract was to be made or where the performance of thereof was completed.

Since there is no dispute that the building construction was done at Songea, the building materials lie at Songea site and are being guarded by the plaintiff's security guards, then under the provisions of clause (c) of Section 18 of the Civil Procedure Code, the suit had to be instituted at Songea which is the place where the cause of action wholly or part, arose. Moreover, the institution of the suit at Songea will also afford convenience of the parties and witnesses who may be required to testify and undergo examination. Clause (c) of Section 18 of the CPC provides as hereunder: -

'18. Subject to limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a).....(not relevant)

(b).....(not relevant)

(c) the cause of action wholly or in part arises.

Interpreting the provisions of Section 20 of the Indian Code of Civil Procedure, 1908 which is *pari materia* with Section 18 of our Civil Procedure Code (supra), the Honourable Supreme Court of India in the case of **A.B.C. Laminart v. A.P. Agencies**, AIR [1989] SC 1239 observed, *inter alia*, that: -

'The performance of a contract is part of a cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract has to be filed there and nowhere else.'

According to paragraphs 5 and 6 of the plaint,

'the defendant is a University of which its headquarters are situated at Mwanza and the construction was done at Songea but the agreement was executed at Dar es Salaam....the agreement was for construction of buildings to increase the number of students at eh Songea Campus'.

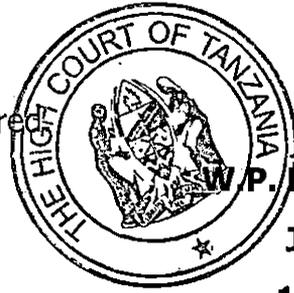
This means that Songea is not only where the cause of action wholly arose but also the place where the contract should have (been) performed or its performance completed.

It bears stressing that jurisdiction is everything. It is what gives a court the power, authority and legitimacy to entertain a matter before it. Likewise, jurisdiction is the gateway to the temple of justice, and without it there is no basis for continuing with the proceedings, for a decision made by a court of law without jurisdiction is null and void.

For the foregoing reasons, I uphold the defendant's first limb of preliminary objection and strike out this suit with costs to the defendant.

Since this finding alone suffices to dispose of the whole suit, I need not embark on the rest limbs of preliminary objection.

It is so ordered



Handwritten signature of W. P. Dyansobera.

W. P. Dyansobera

JUDGE

14.5.2024

This ruling is delivered under my hand and the seal of this Court on this 14th day of May, 2024 in the presence of Mr. Gabriel Rwahira, learned Counsel holding brief for Mr. Edmund Ngemela, learned for the plaintiff and in the presence of Ms. Agnes Nduyepo, learned Advocate holding brief for Mr. Antony Nasimire, learned Advocate for the defendant.

Handwritten signature of W. P. Dyansobera.

W. P. Dyansobera

JUDGE

