

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CVIL CASE NO 5099 OF 2024

ALEXANDER MASSAY TLAKA.....PLAINTIFF

VERSUS

- | | | |
|---|---|-------------------|
| 1. DONGOBESH VIZIWI PRIMARY SCHOOL..... | } | DEFENDANTS |
| 2. THE REGISTERED TRUSTEES OF EVANGELICAL
LUTHERAN CHURCH OF TANZANIA (KKKT) DIOCESE
OF MBULU..... | | |
| 3. HALMASHAURI YA WILAYA MBULU (DC)..... | | |
| 4. THE ATTORNEY GENERAL..... | | |

RULING

3rd and 20th June, 2024

MIRINDO, J.:

The third and fourth defendants, the Halmashauri ya Wilaya ya Mbulu (DC) and the Attorney General, respectively, have filed a familiar objection on point of law against the suit filed by the plaintiff, Alexander Massay Tlaka, to the effect that the plaintiff has no cause of action against the third defendant.

Mr Chrispin Kaijage, learned State Attorney, representing the third and fourth defendants, argued that this suit, based on the breach of the tender agreement between the plaintiff and the second and third defendants, does not implead the third defendant. The learned State Attorney pointed out different paragraphs from the plaint and concluded that they do not contain a cause of action against the third defendant. He emphasized that those paragraphs contain mere narration of events against the third defendant and have nothing to do with the tender agreement. Mr Kaijage concluded that this is contrary to Order 7 Rule (1) (e) of the Civil Procedure Code [Cap 33 RE 2019] and called upon this Court to strike out the suit.

In opposition, the plaintiff's counsel, Mr John Lairumbe, contended that determination of a cause of action is not a question of law because it requires evidence. In the present circumstances, the learned counsel, Mr Lairumbe pointed out that the determination whether the plaint contain a cause of action entails examination of the tender agreement. In any case, the learned counsel, concluded that paragraphs eight and fourteen of the plaint clearly indicate that the plaintiff disclose a cause of action against the third defendant.

Undoubtedly, Order 7 Rule 11 (a) of the Civil Procedure Code directs the trial court to reject a plaint that does not contain a cause of action. It states that:

The plaint shall be rejected in the following cases-

(a) where it does not disclose a cause of action;

The import of this sub-rule has been commented on in Sarkar, S and Manohar, VR, **Sarkar: Code of Civil Procedure**, 11th edn, Vol 1, 11th edn, Haryana: Lexis Nexis, 2006, at 1161-1162 as follows:

The phrase "does not disclose the cause of action" has to be very narrowly construed. The rejection of the plaint at the threshold entails very serious consequences. This power therefore has to be used in exceptional circumstances, ought to be used only when the Court is absolutely sure that the plaintiff does not have an arguable case...The exercise of this power is not justified merely because the story told in the pleadings is highly improbable or which may be difficult to believe...While considering the application of Order 7, Rule 11, CPC, the Court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether the plaint discloses any cause of action is to be decided by looking at the averments contained in the plaint itself and not the defence set up in the written statement. What is to be seen is whether or not a meaningful reading of the plaint discloses a cause of action. While considering the application the strength or weakness of the case of the plaintiff is not to be seen.... The Court should look at the plaint and documents accompanying the plaint, and not the defence of the defendants or documents relied upon by the defendant...

This commentary contains various principles about the existence of a cause of action in a plaint. One of those principles is that the strength or weakness of the

plaintiff's case should not be considered in determining the existence of a cause of action. Rejection of a plaint is an exceptional measure confined to cases of undisclosed cause of action. This measure is inapplicable to cases of absence of the cause of action or defective cause of action. It is important to contrast cases of undisclosed cause of action with those of absence of cause of action and defective cause of action so as not to prejudice the merits of the plaintiff's case. This distinction is set forth in **Sarkar: Code of Civil Procedure**, cited above. At page 1162, where it is stated that:

A plea that there was no cause of action is different from saying that the plaint itself did not disclose the cause of action. In the latter case it is the duty to reject... There is no cause of action for the suit is not the same as to say the plaint does not disclose any cause of action, which is a ground for rejection of the plaint. If the plaint discloses a cause of action, the correctness or otherwise of the allegations constituting the cause of action is beyond the purview of Or 7, r 11...Plaint cannot be rejected merely because the plaintiff has defaulted in furnishing information as to the existence of cause of action...

A conclusion that a cause of action is absent in a plaint or is defective rests on the strength of the plaintiff's case. These are questions that can be meaningfully dealt with after evidence has been adduced.

Unfortunately in many objections pleas of absence of cause of action or defective causes of action are often masqueraded as pleas of undisclosed cause

of action. This complication has not prevented courts from seeing the differences between the merit-based attack on the cause of action and the undisclosed cause of action. One of the cases cited by Mr Kaijage, learned State Attorney, in support of his preliminary objection is the widely known case of **John M Byombalirwa v Agency Maritime International (T) Ltd** [1983] TLR 1. In this case, a plaint alleging breach of contract for sale of goods did not envisage the defendant's statutory defence under section 6 of the Sales of Goods Ordinance. The High Court upheld the objection that it did not disclose a cause of action. On appeal to the Court of Appeal, it was held that the question was inopportune decided. The Court of Appeal held that the cause of action existed independent of the defendant's statutory defence but the determination of the defendant's defence was a matter to be determined after hearing the evidence.

Another complication between undisclosed cause of action and the merits of the cause of action came for consideration before the Court of Appeal in **Mukesh Gaurshanker Joshi v Gintex Suppliers and Two Others**, Civil Appeal 15 of 2001. The plaint averred trespass committed by the first defendant and involvement of the second and third defendants in facilitating trespass. The defendants objected to the plaint that it did not disclose a cause of action against them. In disposing the objection, the High Court examined the circumstances constituting the trespass including the earlier charge involving the

first defendant and allegations of *mala fide* against the third respondent. At the end the High Court held that the plaint did not disclose the cause of action. When the matter landed to the Court of Appeal, it was held that the detailed examination of the cause of action was a question of evidence that was prematurely decided by the High Court:

...All those matters and more, which it is unnecessary to list down here, related to the merits of the case of the appellant [plaintiff]. They entailed adducing evidence to enable the court to draw the necessary inferences and conclusion. But that stage had not yet been reached. By raising the preliminary objections the respondents wanted to forestall such an eventuality....

This principle was reaffirmed in **Anthony Leonard Msanze and Another v Juliana Elias Msanze and Two Others**, Civil Appeal 76 of 2012, another case relied on by the learned State Attorney. The Court of Appeal concluded in this case that once the plaint manifested a cause of action, detailed examination of the cause of action at the preliminary stage was inappropriate without further evidence.

The impact of this principle came to light in **Sharifa Twahib Massala v Thomas Mollel and Three Others**, Civil Appeal 67 of 2011. The plaintiff challenged the sale of a house to the first defendant at the instance of the second defendant, a decree holder, as a result of the suit between the second

respondent and the plaintiff's late husband. The High Court dismissed the suit on the basis of the preliminary objection that the plaintiff had no *locus standi* and that there was no cause of action against the defendants. In dismissing the plaintiff for not disclosing the cause of action, the High Court took the view that since the plaintiff had no *locus standi* and had not obtained letters of administration of her husband's estate, the apparent owner of the house in question, there could be no cause of action against the defendants. Dealing with this question, on appeal, the Court of Appeal held that these were questions of fact to be proved by evidence and rejection of a plaintiff not disclosing a cause of action lies at the discretion of the court under the proviso to Order 7 Rule 11. In a judgment delivered by Massati JA, the Court of Appeal held that:

On the second preliminary objection, whether the plaintiff disclosed a cause of action; the reasoning of the learned trial judge can be found at page 129 of the record. First, he connected it with the plaintiff's lack of *locus standi*, and secondly because she had not yet obtained letters of administration of the estate of the apparent owner. The issue is, does it qualify to be a pure point of law, whose disposal would necessarily dispose of the suit? We do not think so. Why? ...First, it still subjects that decision to the question of the plaintiff's (appellant's) to produce 'evidence' of her having applied for letters of administration; and institute [ion of] objection proceedings. As we held above, these are questions of facts. Secondly, Under Order VII rule 11, the court has

power to reject a plaint which does not disclose a cause of action. But there is a proviso to that provision which states as follows:

Provided where a plaint does not disclose a cause of action or where the suit appears from the statement in plaint to be barred by any law and the court is satisfied that if the plaintiff is permitted to amend the plaint, the plaint will disclose a cause of action, or, as the case may be, the suit will cease to appear from the plaint to be barred by any law, the court may allow the plaintiff to amend the plaint subject to such conditions as to costs or otherwise as the court may deem fit to impose.

So, really, it is a question of invoking the court's judicial discretion, which removes it from the realm of a preliminary objection, properly defined.

From the above authorities, a ruling that a plaint does not disclose a cause of action must be sparingly made at the preliminary stage. In any case, according to **Sharifa Twahib Massala**, the plea of undisclosed cause of action cannot ground a preliminary objection.

I will now re-examine the preliminary objection in the instant case. The third and fourth defendants' plea on cause of action is that:

1. The suit is unmaintainable in law as the Plaintiff has no cause of action against the 3rd defendant contrary to Order VII Rule (1) (e) of the Civil Procedure Code Cap 33 R.E. 2019

WHEREFORE, the 3rd and 4th Defendants shall move the court to strike out the suit in its entirety with costs.

Certainly, the third and fourth defendants sought to mask the plea of undisclosed cause of action with lack of cause of action. First, it is a plea of lack of cause of action. Secondly, the relief sought is to strike out the suit. Perhaps these defendants sought to deny the discretion of this Court to reject a plaint for not disclosing a cause of action.

Notwithstanding these complications, the third and fourth defendants' arguments are addressed to the plea of undisclosed cause of action with particular reference to the cases of **Anthony Leonard Msanze** and the leading case of **John M Byombalirwa**.

Assuming that the plea was properly framed as one of undisclosed cause of action, can it be dealt with at this preliminary stage? Paragraph 14 avers that the third defendant assists "in daily school operational expenses when the said tender agreement was executed with the Plaintiff". Annexure P-1 to the plaint is the tender agreement, which among other things, contains the third defendant's logo. It was Mr Kaijage's argument that since the third defendant was not a signatory to the tender agreement, the presence of the logo was of no consequence. As Mr Kaijage will no doubt, on reflection, agree these allegations can only be determined at the trial after evidence has been adduced.

Even if this plea of undisclosed cause of action was properly made, I am satisfied that it would not have carried the day. One set of facts that may

constitute a cause of action, as stated in Bryant, EE, **The Law of Pleading Under the Codes of Civil Procedure**, Boston: Little, Brown, and Co, 1894 at 168 is the following:

It maybe that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property...

Under these circumstances, while the plaint does not directly refer the third defendant as a signatory to the tender agreement, it does throw some doubt to the third defendant's role in the management of the affairs of the first defendant, Dongobesh Viziwi Primary School. Whether these averments establish a strong arguable case against the third defendant is not for me to decide at this stage.

Finally, I should point out that the third and fourth defendants asked for a wrong relief. A plaint which does not disclose a cause of action is liable to be rejected under Order 7 Rule 11. A decision to dismiss or strike out a suit for undisclosed cause of action has repeatedly been held to be wrong most prominently in **John M Byombalirwa v Agency Maritime International (T) Ltd** [1983] TLR 1, **Mukesh Gaurshanker Joshi v Gintex Suppliers and Two Others**, Civil Appeal 15 of 2001 and **BM Mbassa v the Attorney General and Two Others**, Civil Appeal 40 of 2003.

In the result, I dismiss the preliminary objection. Costs in the cause.

DATED at BABATI this 11th day of June, 2024



F.M. MIRINDO

JUDGE

COURT: Ruling delivered this 20th day of June, 2020 in chambers in the physical presence of the plaintiff and Advocate Reginal Noel for first and second defendants and in virtual presence of Mr Hance Mmbando, State Attorney. B/C: William Makori present.

F.M. MIRINDO

JUDGE