

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 85 OF 2006

FRANCIS R. KIMARO..... PLAINTIFF
VERSUS
CARLING BEVERAGES LIMITED..... DEFENDANT

R U L I N G

Date of final submissions May 3, 2007.

Date of Ruling 21.5.2007.

MJASIRI J

The Plaintiff has filed a suit against the Defendant for TShs 47,000,000 being the amount advanced to the Defendant by the Plaintiff as a loan.

The Defendant denied owing the Plaintiff any sum of money.

The Defendant has filed a notice of preliminary objections on points of law. Hearing of the preliminary objections proceeded by way of written submissions.

The following preliminary points were raised by the Defendant:

- 1. Essential elements for creating legal contracts has not been provided in both Loan agreements which are alleged to be the basic foundation of the Plaintiff's suit hence renders the same null and void.*
- 2. The plaint discloses no cause of action against the Defendant.*

The Defendant therefore prayed that the suit be dismissed with costs.

The Plaintiff is represented by Temba Advocate and Mr. Mbowe the Managing Director of the Defendant appeared for the Defendant.

The Defendant in support of the preliminary objections made the following submissions. The basic foundation of the Plaintiff's claim against the Defendants are copies of the agreement marked Annex K1 and K3. The said annexures lack essential elements for creating legal contracts which are

enforceable in the court of law. This element is consideration. The Defendant cited section 10 and section 25 of the Law of Contract Act Cap 345 [R.E. 2002] in support of his arguments. According to the Defendant no security was provided for the loan, hence there was no consideration. The transaction was between the Plaintiff and the Managing Director of the Company and did not involve the company.

Mr. Temba Counsel for the Plaintiff submitted as follows:

1. The preliminary objections were not properly brought before the court as provided under Order VIII r2. It is mandatory procedure that the preliminary objection should be included in the Written Statement of Defence.
2. With regards to the first preliminary objection, the objection raised requires an examination of evidence and proof thereof. The preliminary point of law was therefore not based on a point of law. Mukisa Biscuit Co. V West End Distributors [1969] EA 696 was cited:

Counsel for the Defendant also argued that there are sufficient elements for creating legal contracts.

3. With regards to the preliminary objection that the plaint does not disclose any cause of action. Counsel for the Plaintiff submitted that paragraphs 3 and 9 of the plaint clearly provide for the nature of the claim against the Defendant and failure by the Defendant to repay the loan. Copies of the loan agreements are annexed to the plaint. Therefore the cause of action has been disclosed.

In view of the fact that sufficient notice was served to the other party on the Defendant's desire to raise preliminary points of law, the element of surprise to the other party has been addressed. I would therefore not take a strict interpretation of Order VIII rule 2 of the Civil Procedure Act.

With regards to the second preliminary objection, that the plaint does not disclose any cause of action, the Defendant has failed to demonstrate that Order VII rule (1) of the Civil Procedure Act Cap.33 has not been complied with.

With regards to the first preliminary objection I am inclined to agree with the submissions made by Counsel for the Plaintiff that the objections raised by the Defendant require going into

the evidence and cannot therefore stand as a preliminary objection.

The legal position is that preliminary objections are supposed to be raised on points of law.

In order to ascertain whether the essential elements for creating legal contracts have not been provided in both Loan Agreements the said Loan Agreements have to be examined. This therefore is a question of evidence. *In Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited* 1969 EA 696 it was held as under:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The *Mukisa Biscuit Manufacturing* decision has been followed by the Court of Appeal of Tanzania in various decisions one of them being *Shahida Abdul Hassanali Kassam V*

Mahedi Mohamedi Gulamali Kanji (Application No.42 of 1999)
unreported.

In view of what has been stated hereinabove the preliminary objections raised by the Defendant are hereby dismissed with costs.

Sauda Mjasiri

Judge

May 16, 2007

Date 21.5.2007

Coram: Hon. S.Mjasiri, Judge

For the Plaintiff – Mr. Mbwambo, Advocate

For the Defendant – absent.

CC: R.Mtey.

Order:

Ruling delivered in chambers this 21st day of May 2007 in the presence of Mr. Mbwambo Advocate and in the absence of the Defendant

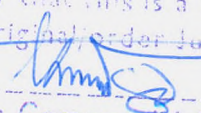
Sgd

Sauda Mjasiri

Judge

May 21, 2007

1046 words

I Certify that this is a true and correct
of the original order judgement Ruling
Sign 
Registrar Commercial Court DSM.
Date 21 May 2007