

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

COMMERCIAL CASE NO. 29 OF 2006

NECOR DATA LIMITED.....PLAINTIFF

VERSUS

TANZANIA REVENUE AUTHORITY...1ST DEFENDANT
NECOR (ZAMBIA) LIMITED.....2ND DEFENDANT
ALFRED ADAM MARTIN LYIMO.....3RD DEFENDANT
NECOR ZAMBIA LIMITED.....4TH DEFENDANT

R U L I N G

MJASIRI, J.

The Applicant Plaintiff Necor Data Limited has filed a suit against the following parties: the Tanzania Revenue Authority; Necor (Zambia) Limited; Alfred Adam Martin Lyimo and Necor Zambia Limited. The Plaintiff claims against the first, second, third and fourth Defendants jointly and severally the sum of Tshs 500,000,000 being payments for implementation of a Lumpsum Remuneration Contract for the operation and management of computerized direct input for customs operations.

The Defendants denied the Plaintiff's claim and raised preliminary points of law in their Written Statement of Defence.

Following the order of Dr. Bwana J dated August 2, 2006 that all preliminary objections raised by the Defendants be consolidated and argued together including the application filed by the Plaintiff under Order 37 Rule 10, Sections 68 (e) and 95 of the Civil Procedure Act, Counsels filed their written submissions in court.

The Preliminary Objections raised by the parties in their defence are as under.

1. First Defendant

- i. *The Plaintiff has no locus standi to sue the first defendant for not being a party to the contract forming the subject matter of the suit.*
- ii. *Application filed by Plaintiff for orders under Order 37 is not an interlocutory application. It is a prayer in the main*

suit. The applicant is asking the court to make a final decision.

2. Second and 4th Defendants

- (i) *The Plaint is defective due to a misjoinder of causes of action.*
- (ii) *The Plaintiff has no cause of action against the second Defendant on the Lumpsum Agreement.*

3. Third Defendant

- (i) *Application filed by Plaintiff for orders under Order 37 is not an interlocutory application. The applicant plaintiff is asking the court to give a final decision.*
- (ii) *Misjoinder of parties. The second and fourth Defendants are same.*

With regards to the objections raised by the first Defendant that it is not a party to a contract; the legal

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

In order to determine whether the first Defendant is a party to the contract or not, the said contract has 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 the 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.”

This 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).

With regards to the issue of the misjoinder of causes of action the legal position is set out in Order I Rule 3 of the Civil Procedure Act 2002 which provides as under:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

In the **Bank of India Limited V Ambalal Shah & Others** 1965 EA 18 it was held as under:

- i. *Although the plaintiff had separate remedies against each guarantor, the same transaction namely, the company's overdraft raised some common questions of law.*
- ii. *There was no misjoinder of the Defendants or causes of action.*

In order to determine whether the present suit has been constituted in conformity with Order I Rule 3, the following determinant factors have to be considered. In **Ramendra Nath Roy V Broyendra Nath Dass** (1918) 45 Col 135 it was stated as follows:

- i. *Could the right to relief against the Defendants be said to be in respect of or arising out of the same transaction.*
- ii. *Would any common question of law or fact arise if separate suits were brought.*

In **Pioneer Investment Trust Limited V Amarchand and Others** 1964 EA 703; which was an action for specific performance against first defendant and for redemption of mortgages and possession of land against second Defendants. It was held that:

- (1) *The right to possession was a common question of law affecting both respondents and arose out of the same transaction.*

(ii) Both the first and second respondents were properly joined under Order 1 Rule 3.

According to Mulla (12th Edition) Vol.1 page 543:

“Two or more defendants may be joined as parties in one suit, though there are two or more causes of action provided that the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact, and this is so although they may not all be jointly interested in the same causes of action. But if the right to the relief claimed does not arise from the same act or transaction, or if there be no common question of law or fact the defendants cannot all be joined in one suit unless they are jointly interested in the cause of action as provided by the rule.”

In this case the Plaintiff's case against the Defendants arises from the Lumpsum Agreement. A common question of law and fact would arise in the claims against each Defendant. The court has to decide on the plaintiff's right under the Agreement.

With regards to the arguments raised by the third and first defendants on the Plaintiff's application under Order 37 rule 10, I entirely agree with the Counsels that the orders applied for are not appropriate. The remedies sought are not interim and the Plaintiff is asking for orders which can only be made after the final determination of the suit.

In view of what has been stated hereinabove the Application filed by the Plaintiff's under Order 37 rule 10 is found to be devoid of any merit and is hereby dismissed with costs.

The preliminary objections raised by the Defendants are also hereby dismissed. Costs to be costs in the cause.

Sauda Mjasiri

Judge

January 26, 2007.

Delivered in Chambers this 26th day of January 2007 in the presence of Ms Upendo Msuya Advocate for the Applicant/Plaintiff, Mr. Shigella Advocate for 1st Respondent/Defendant and Mr. Martin Advocate, for

Luguwa Advocate for the third Respondent/Defendant and in the absence of Dr. Ringo Advocate for the second and fourth Respondents/Defendants.

Sauda Mjasiri

Judge

January 26, 2007.

1850 words

Jd.

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign Enbuse
Registrar Commercial Court Dsm.
Date 8/2/2007