

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
[COMMERCIAL DIVISION]
COMMERCIAL CASE NO. 77 OF 2007

JCR ENTERPRISE LIMITED.....PLAINTIFF

Versus

ISLAM BALHABOU.....1ST DEFENDANT

TANGANYIKA INVESTMENT

OIL COMPANY CO. LTD.....2ND DEFENDANT

ENOC SUPPLY & TRADING [TLC].....3RD DEFENDANT

Date of last Order 23rd April 2008

Date of Judgment 22nd July 2008.

RULING

Werema, J

The plaintiff instituted a suit against the three defendants herein. In the plaint the 1st defendant is categorized as a natural person, businessman and resident of the City of Dar es Salaam. A haven of peace, by its literal interpretation. The claim against the defendants is jointly and severally for payment of USD two million four hundred seventy eight thousand two hundred and seven only (US \$ 2,478,207) being money

withdrawn from the plaintiff's bank account by the defendants. This was meant to guarantee supplies of petroleum products to Kijemba Transport Ltd.

The transactions above arose from a Contract for the Supply of Petroleum Products dated 30th September, 2005 between the 1st defendant who was acting for and on behalf of the 2nd defendant. Under the Agreement, the 2nd defendant was to supply two million litres of petroleum products to Kijemba Transport for the sum of USD one million three thousand only within 45 days from the date of the Agreement. It was agreed, under Article 5 of the Agreement, that these transactions were to be guaranteed by a bank guarantee issued by the plaintiff in favour of the third defendant.

The plaint discloses that 2nd defendant started to supply the products to Kijemba Transport Ltd. after the issuance of the guarantee. Then, at paragraph 10 of the plaint, the plaintiff complaint is couched as follows:

"That despite the 2nd defendant being paid his money, without the knowledge of the plaintiff, wilful and with intent to defraud, drawn the entire sum of US \$ 1,200,000 from the bank, the money which was intended to be a guarantee for supply of petroleum products to Kijemba Transport Ltd before the due date of the guarantee."

This is the essence of the complaint and the foundation of the suit against the defendants.

The defendants were served with summons to file Written Statement of Defence. The 1st and 2nd defendants at the instance of Law offices of Chipeta & Associates filed a joint Written Statement of Defence. The 3rd defendant did not file a defence. I did not see proof of service to him.

In the Written Statement of Defence, Counsel has taken a preliminary point of objection to effect that the plaintiff does not have a cause of action against the 1st Defendant or that the plaint does not disclose the cause of action against the 1st defendant. He prays that the suit against the 1st defendant be dismissed in its entirety with costs. By way of a counter claim, the 2nd defendant alone is counter claiming against the Plaintiff and Kijemba Transport Limited is sued as a 2nd defendant.

When the matter came before me, I granted permission for the parties to argue the preliminary objection by way of written submissions. The order and schedule which was agreed to were complied with. I commend Mr Walter Chipeta and Mr Madega Omari, the learned advocates for their industry and lucid presentations. They have enriched my mind a great deal.

The substantive argument raised on behalf of the 1st defendant is that reading the plaint alone, which is the document containing the pleadings by the plaintiff, there

is no disclosure of a cause of action against the 1st defendant. According to Mr. Chipeta, the Court should reject the plaint under the authority of JOHN BYOMBALIRWA V AGENCE MARITIME INTERNATIONALE (TZ) LTD [1983] TLR 1 and struck it out with costs.

On the legal personality, Mr. Chipeta has asked the Court to regard the 1st defendant and the 2nd Defendant which has a corporate entity, as a distinct and separate personality under the principle established in SOLOMON V SOLOMON CO LTD [1897] AC 22.

Mr. Madega, the learned advocate for the plaintiff attacked the preliminary objection as superfluous, devoid of merits, confusing because it was wrongly framed to the extent that counsel could hardly understand its scope; and, as such ought to be dismissed with costs.

The above juxtaposition summarises briefly the case for both sides.

Attempts have been made to define a term "cause of action". Many of the definitions are descriptive in nature. Reading many of decided cases in this jurisdiction and recognizing that the provisions regarding causes of action within this jurisdiction are in materia with the Civil Procedure Code of India, I would therefore give high regards and prominence to those commentaries by Indian jurists and academicians. If I may paraphrase in summary form my own thinking, I will define a cause of action to mean a fact or facts committed or attributed to

one person which give rise to a claim by another. It follows therefore, that such other person must state those facts and attribute them to the defendant in order to disclose a cause action against the defendant. That is sheer simplicity which is a summary of the quotation from **Mulla's Code of Civil Procedure (13th Edn)** which is cited by Mr. Chipeta, the learned advocate. To be further simpler, it is an answer to the question:

"What is the wrong which is complained of in these pleadings?"

This is the question asked by Mushi, J in J.B. SHIRIMA & OTHERS EXPRESS BUS SERVICE V HUMPHREY t/a COMFORT BUS SERVICE [1992] TLR 290. I am again grateful to Mr. Chipeta, Advocate for locating my brother's noble and helpful guidance.

Judges, apart from making judgments, are also teachers. This is the role I should assume before pronouncing my ruling on the issue before me. The first point is just to note that every legal practitioner knows that there are principles of pleading. There are also credible text books on this subject. What are these principles? A summary by Megarry V.C in the case of RE BRICKMAN'S SETTLEMENT [1982] 1All ER 336 may provide a clue. He said *brevity, clarity and simplicity are the hallmarks of the skilled pleader*. This tells us simply that the basic purpose of pleading is to summarise a case and define the issues in it. Good pleadings assists the party drafting the

pleading to clarify his or her own case and will help a judge to see immediately what the case is about; and it is common knowledge that good pleadings make a good impression on a judge. One must therefore decide what to include in the pleadings. The most fundamental principles of pleading come from the Civil Procedure Act, [CAP 33 R.E 2002]. Order IV Rule 1 (2) specifically provides that "*Every plaint shall comply with the rules contained in Order VI and VIII, so far as they are applicable*". The need to disclose material facts, for instance, is the hallmark of O.VI and VII. The requirement can be summarized as follows:

- (a) Only material facts should be pleaded as such pleading must be a brief statement of the material facts. A claim must be as clearly and concisely as possible. This is under O.VI r.3;
- (b) All material facts should be pleaded. These material facts could involve identification of dates, places and exact actions or people involved, as far as they are known and as far as they are relevant to the action. This is under O.VII; I must add, that these details will be needed when are relevant to factual or legal issues in a particular case. Sloppiness in pleading should be avoided. It is a sign of bad pleading. A lawyer drafting the pleadings is the master of pleadings. He should decide rightly

what material facts to include and which to omit from the pleadings; if you do not put a material fact in a pleading you will not be able to give evidence on it at trial unless a judge gives leave. Do not rely on the judge's sense of justice; it may not work for you on the day you want it. It may be rejected on a ground that you have taken the other party by surprise!

- (c) Do not plead the law, plead facts. I think this principle seem to have sunk into many practioner. No pleadings will normally need to contain any legal argument or to draw any legal conclusion. I think there are exceptions to this rule. For instance where one is asking the Court to act or not to act under a specific statute and not for any other reason, the statute may be pleaded. Be ware! Even here, do not mention the statute because it is relevant but only if it is an exclusive authority for the court to act. The two English cases are illustrative of this point. These are RE GONIN [1979] 1 Ch 16 and ASCHERBERG, HOPWOOD & CREW V CASA MUSICALE SNC [1971] 1 WLR 173. In some situations, pleading law may dispose of the whole case. That may be a ground to plead the law. There is guidance on this assertion in INDEPENDENT AUTOMATIC

SALES V KNOWLES & FORSTER [1962] 3 All ER
27.

- (d) There are many other principles to consider including the following: Plead facts not evidence; Plead facts not arguments; Plead clearly and logically; and, Plead briefly. I could go on and on. The Civil Procedure Act is well written only if one reads it as a source text.

I think recourse should be made to precedents and writings of jurists. The principle, with all that can be summarised by words of Judge Hammerton that Get the facts and the law will look for itself, quoted in a book How Judges Decide Cases: Reading, Writing and Analysing Judgments by Andrew Goodman (XPL publishing), 1975.

Having travelled this far, is the preliminary objection meritorious? The act or conduct complained of by the plaintiff and which is fundamental cornerstone of the suit is that stated in paragraph 10. It refers to the second defendant. It is alleged that without the knowledge of the plaintiff, wilful and with intent to defraud the plaintiff he withdrew the entire sum of USD 1,200,000 which sum was deposited as a guarantee for the supply of petroleum products. According to this paragraph, the material facts are clear. The person involved here is the 2nd Defendant. The material involved is money in the sum mentioned.

Conduct pleaded is fraud. That it was intentional. The 1st defendant or any other person mentioned to have been involved is a material fact which is, by the provisions of the Code should or ought to be pleaded.

I am aware that the cause of action as defined above must be found in the plaint and in the plaint alone. I cannot attempt to go to the written statement of defence or wait for prove by evidence to find a cause of action and associate it with the plaint. This is the essence of the decision of the Court of Appeal (Nyalali, CJ; Makame and Kisanga JJA) in JOHN BYOMBALIRWA V AMI cited by Mr. Chipeta at page 2 of his maiden submissions. Clearly, the 1st defendant is not mentioned anywhere in the plaint to have been involved in the fraudulent conduct complained about by the plaintiff.

Mr. Madega, the learned advocate for the plaintiff attacked the preliminary objection for being superfluous. I hope I read the script correctly. If so, then my understanding of that English word is that it was unnecessary for the defendants to have raised the preliminary objection. I do not agree. This is a matter of law which must be raised at the very earliest stage of the pleadings under O.VIII r.2 of the Civil Procedure Act.

My understanding of the requirement of O VII r. 1(e) of the Civil Procedure Act is that the fact connecting the defendant with the act which is the subject of the suit

is mandatory. The fact that the 1st defendant's conduct or transgression is not pleaded is fatal. His objection cannot be superfluous because no one has disentangled him from the shackles of this suit.

It may be of assistance if the decision of Biron J in FAKURUDIN EBRAHIM VS THE BANK OF TANZANIA [1978] LRT (PART III &IV) NO.45 could be read into this case. It was of immense assistance to and was cited approvingly by Kyando J, in HANS NAGORSEN VS BP TANZANIA LTD [1987] TLR 175. The late judge said about a cause of action:

"...in my view, all that is necessary to set out in a plaint is the averment which if not traversed would entitle the plaintiff to judgment. And in a case of this nature all that is necessary to set out to, that the vehicle caused the damage to the plaintiff, that vehicle belonged to the defendant, that at the material time it was being driven by the defendant's servant or agent in the course of his employment, and that the accident ...was caused by the negligence of the driver..."

Kyando J, in approving Justice Biron's decision reasoned that the driver being in the course of employment was the foundation of his employer's vicarious liability and ought to have been pleaded to disclose a cause of action. The analogy may be imported here. If the 1st defendant was a person who wilfully and

with the intent to defraud the plaintiff, had withdrawn the sum of monies referred in paragraph 10, he is not mentioned in the paragraph or elsewhere on that fraud. That fact being a foundation on which his liability is based ought to have been pleaded to disclose a cause of action against him. The plaint is silent on this point. The principles of pleading that I have indicated in this ruling were not adhered to.

What is the remedy in cases of this nature? O.VII r.11 (a) seems to provide a remedy. The Plaint may be struck out as it refers to the name of the first defendant because it does disclose a cause of action against him; or I may order amendment of the plaint to disclose a cause of action intended by the plaintiff subject to other conditions including order for costs.

I agree with Mr. Chipeta, learned advocate that on the basis of corporate personality, the 2nd defendant has a separate legal identity and personality with powers to sue and being sued; it can owe money quite independently of its directors and shareholders. It is doubtful, so it seems to me, that the plaintiff will suffer irreparably if the name of the 1st defendant is struck out. If this was so, then, the plaintiff should have stated material facts involving his fraudulent role, if any.

I am concluding by holding that the plaint does not disclose a cause of action against the 1st defendant. I am

not satisfied that the remedy lies in allowing amendment of the plaint to correct any perceived defect but rejecting it by striking out the name of the 1st defendant from the plaint on the ground of non disclosure of a cause of action by the plaintiff against him.

In compliance of O.VII r.12, this order of rejecting the plaint and striking out the name of the First defendant from the plaint is made on the reasons stated herein.

The preliminary objection is upheld. The 1st defendant will have his costs. The conduct of this case should continue as between parties remaining.


F.M. Werema,
JUDGE

Delivered on 22nd July, 2008.

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