

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

COMMERCIAL CASE NO.53 OF 2009

**MICCO'S INTERNATIONAL (T) LIMITED..... PLAINTIFF
VERSUS
RELI ASSETS HOLDING COMPANY.....DEFENDANT**

Date of last order: 15.09.2009 & 08/04/2011
Date of final submissions: 30.09.2009
Date of ruling: 10.06.2011

RULING

MAKARAMBA, J.:

This is a ruling on the preliminary objection raised by the Defendant that the suit filed by the Plaintiff in this Court against the Defendant does not automatically lie against the defendant concerning liabilities of the defunct Tanzania Railways Corporation due to absence of Minister's order under section 9(1) of the Railways Act, 2002.

The background to the matter giving rise to the preliminary objection briefly is that on the 1st day of July 2009, the Plaintiff filed a suit in this Court against the Defendant for the payment of an outstanding sum of TZS 232,786,768/-, interest, general damages and cots. The Plaintiff is a limited liability company incorporated in Tanzania carrying among others the

business of fumigation. The Defendant is a company established by Act of Parliament, the Railways Act, 2002 (Act No.4 of 2002) and is successor of all liabilities of the defunct Tanzania Railways Corporation (TRC).

On the 24th day of July 2009, the Defendant filed its written statement of defence and raised a preliminary objection on points of law that:

- (a) That by virtue of section 9(1) of the Railways Act, 2002, the suit by the Plaintiff does not automatically lie against the defendant concerning liabilities of the defunct Tanzania Railways Corporation.*
- (b) That the suit is time barred for being instituted beyond the statutory time provided for under section 87(b) of the erstwhile Tanzania Railway Corporation Act of 1977 [Cap.170 R.E. 2002].*

The preliminary objection on points of law by consent was disposed of by way of written submissions whereupon Werema, J. of this Court (as he then) accordingly on the 15/09/2009 entered orders accordingly, which orders the Counsel for the parties duly complied with. However, due to being re-assigned other duties having been appointed Attorney General, the case had to be re-assigned to me and accordingly on the 08/04/2011 I entered an order for ruling.

In the course of making his submissions in support of the preliminary objection, the learned Counsel for the Defendant elected to abandon the second point of preliminary objection that the suit was time barred and proceeded to make submissions on the first preliminary point of objection concerning lack of Minister's order under section 9(1) of the Railways Act, 2002.

The preliminary objection that the suit filed by the Plaintiff in this Court against the Defendant does not automatically lie against the defendant concerning liabilities of the defunct Tanzania Railways Corporation due to absence of Minister's order under section 9(1) of the Railways Act, 2002, has two limbs. The first limb is that the Plaintiff has not pleaded the material condition to entitle him to sue the Defendant. The second limb is that the plaint does not disclose cause of action. These two limbs form part of the same preliminary objection and are interrelated. However, I propose, more than anything else for purposes of convenience that I shall canvass the first limb relating to **accrual of right to use** first before I deal with the second limb concerning **cause of action**.

Making his submissions on the first limb of the preliminary objection on accrual of right to sue, the Defendant's Counsel argued that the provisions of section 9(1) of the Railways Act, 2002, requires the Minister, who under the Act, is the minister responsible for railway transport, to issue an order of transfer of rights and liabilities of the corporation, which under the Act it is defined as the defunct Tanzania railways Corporation, to the defendant Company, Reli Assets Holding Company Ltd. The Defendant's Counsel submitted further that it is only after the order of transfer of rights and liabilities when the same can be sued on, recovered or enforced by or against the defendant company. The **accrual of the right to sue** the defendant company is therefore dependent upon the order by the Minister of transfer of assets and liability and hence in order for someone to sue the defendant company he has the duty, not only to establish this fact, but also to plead and indicate in the plaint the

ministerial order of transfer, which is a condition precedent required to be pleaded under Order VI Rule 6 of the Civil Procedure Code, the Defendant's Counsel surmised. Such performance or occurrence of the condition precedent that entitles the plaintiff to sue the defendant company has not been pleaded, subject to which such performance or occurrence could be implied in the plaint, and thus amounting to non disclosure of a cause of action, thus rendering the plaint incompetent and thereby liable to be mandatorily rejected, the Defendant's Counsel surmised and prayed.

The Plaintiff's Counsel conceded that section 9(1) of the Railways Act give power to the Minister responsible for railway transport to make an order transferring to the Defendant such rights and liabilities or classes of rights and liabilities of Tanzania Railways Corporation or its subsidiaries by virtue of any contract entered into by it or them.

The provision however does not prescribe or provide for the mode or manner or format under which the order may, or should be made, whether be it in writing or otherwise but in any event the subsection does not make it mandatory that such order be published in the Government Gazette or even in local newspaper or other mass media or communicating it to any creditors or debtors of the defunct Tanzania Railways Corporation.

It was the further submission of the Defendant's Counsel that the order demanded by the Defendant at this stage can only be proved or disproved upon adduction of evidence during trial of the matter on merit.

On the argument by the Defendant's Counsel that the Minister's order is a condition precedent to the right to sue as per Rule 6 of Order VI of the Civil Procedure Code, the Plaintiff's Counsel submitted that the none

pleading of such condition precedent does not defeat the suit altogether or at the outset but the provision requires a party who seeks to contest non-performance to raise such point by his pleading or else it shall be deemed that he has waived it.

Neither section 9 of the Railways Act, 2002 nor the Civil Procedure Code require a party to succinctly plead beyond room of leading evince that Minister has made such order transferring rights and liabilities.

I have carefully followed the submissions of Counsel for the parties on the preliminary objection raised by the Defendant. The main issue for determination is whether the Minister's order under subsection (1) of section 9 of the Railways Act, 2002 is a condition precedent to the right to sue and as such its non-pleading amounts to non-disclosure of cause of action thus rendering the suit incompetent.

The provisions of subsection (1) of section 9 of the Railways Act, 2002, stipulates as follows:

"The minister may by order transfer to the company such rights and liabilities or classes of rights or liabilities of the corporation or of a subsidiary or subsidiaries of the corporation by virtue of any contract or commitment entered into by it or them."

The gist of the argument by the Defendant's Counsel is that the Plaintiff ought to have specifically pleaded in the Plaint the fact of the order of the Minister transferring the rights and liabilities of the defunct railways corporation as envisaged under subsection (1) of section 9 of the Railways Act, 2002. In other words the fact of such order is a condition precedent to the right to sue. The counter argument by the Plaintiff's Counsel is that the

fact of the order is a fact requiring evidence to establish or disestablish at the hearing of the suit and as such its non disclosure in the pleading does not render the suit incompetent and in any event it is an error curable by amendment of the Plaint to reflect it.

It is not disputed that the Railways Act, 2002 establishes the Defendant Company and makes it the only successor of the rights and liabilities of Tanzania Railways Corporation. It is also without dispute that section 9(1) of the Act empowers the Minister responsible for railway transport to make an order transferring to the Defendant such rights and liabilities or classes of rights and liabilities of Tanzania Railways Corporation or its subsidiaries by virtue of any contract entered into by it or them.

The gist of the controversy that the Plaintiff ought to have disclosed in the Plaint the fact of the order of the Minister transferring to the Reli Assets the rights and liabilities of the defunct Tanzania Railways Corporation by virtue of contract or commitment entered into by the defunct corporation. The question which comes immediately to my mind is whether in the absence of an order by the Minister transferring the rights and liabilities, then that disentitles a person from suing on, recovering or enforcing by or against the company.

On the issue of non-disclosure of cause of action, it was the argument of the Defendant's Counsel that the Plaintiff has failed to plead the fact of the order by the Minister, which is a condition precedent, and therefore the Plaint is incompetent under Rule 11 Order VII of the Civil Procedure Code for non disclosure of cause of action and thus should be mandatorily rejected. The Defendant's Counsel relying on the case of

SULIVAN VS ALI MOHAMED OSMAN (1959) EA 239 by Forbes VP, Gould and Windam JJA, submitted that a plaint which fails to make an allegation of fact which was necessary to be so stated, must fail for non disclosure of cause of action upon which Order 7 Rule 11 of the CPC it was mandatorily to reject the plaint.

The Defendant's Counsel submitted further that subsection 3 of section 9 of the Railways Act does not confer discretion in whether to comply or not but confers discretion on whether to sue or not, citing the case of **TAMBUENI ABDALLAH & 89 OTHERS VS NSSF Civil Appeal No.33 of 2000** (unreported) where the Court of Appeal construing section 14(1) of the Act determined that the section does not confer discretion as to which court to go to but whether or not to litigate. It was the Defendant's case further that section 9(1) of the Railways Act does not give discretion as to whether the transfer order has to be made or not, but it is necessary that the order must be made in order to enable/entitle someone to sue the defendant on certain liabilities and further that the word "may" in subsection 3 gives the discretion to a person on whether to sue or to abandon suing.

With due respect to the submissions by the Defendant's Counsel, my reading of subsection (1) of section 9 of the Railways Act, 2002 seems to be contrary to what the Defendant's Counsel is trying to impute in that sub-section. It is a canon of statutory interpretation which has withstood the test of the times and which now finds expression in our Interpretation Act [Cap.1 R.E. 2002], that whenever the word "*may*" appears in a statutory provision it implies permissiveness as opposed to requiring

mandatory action on the part of the person upon whom the statutory duty or obligation is imposed. Contrary to what the Defendant's Counsel wishes this Court to believe, the provisions of subsection (1) of section 9 of the Railways Act in so far as the ministerial order of transfer of rights and liabilities is concerned is couched in permissive terms. It means that the obligation imposed by statute on the Minister to make such order is not mandatory. The Minister may or may not make such order. As rightly submitted by the Plaintiff's Counsel, the provision does not prescribe or provide for the mode or manner or format under which the order may, or should be made, whether be in writing or otherwise, and in any event it does not make it mandatory that such order be published in the Government Gazette.

The Plaintiff's Counsel submitted that there is reliable information however from the Ministry that the Minister did make an order transferring all contractual rights and liabilities of the Tanzania Railways Corporation to the Defendant and that it is on that score that the representative of the Plaintiff was invited to attend a meeting of creditors under the auspices of the Ministry of Infrastructure Development and the Defendant.

The Plaintiff's Counsel submitted further that the provisions of subsection (3) of section 9 of the Railways Act does not compel the Defendant Company to give notice of transfer of rights and liabilities of the Tanzania Railways Corporation. The said subsection provides as follows:

*"Every right and liabilities **may** be sued on, recovered or enforced by or against the company and may be sued on, recovered or enforced by or against the company and **shall** not be necessary, **for the***

company to give notice to the person with respect of whose right or liability is so transferred.

I am at one with the Plaintiff's Counsel that the ministerial order which the defendant demands that the Plaintiff ought to have pleaded in the Plaintiff can only be proved or disproved upon adduction of evidence during the trial of the matter on merits and not at this stage and by way of preliminary objection. As was stated by this Court in the case of **SERAFIM ANTUNES AFONSO VS PORTAN ENTERPRISES LTD AND 7 OTHERS Commercial Case No.17 of 2000**, which the Plaintiff's Counsel cited in his submissions, at the stage of pleading where the court does not have the evidence before it to prove or disprove the material allegations made by the Plaintiff in the Plaintiff, this Court "*casts its eyes within the four corners*" of the Plaintiff, where the Plaintiff simply alleges that the Defendant has wronged him for which he believes is an actionable wrong, and therefore this Court has to assume that the factual allegations thus made, whether expressly or impliedly are true. The emphasis on court to peruse the plaintiff alone together with anything attached to it when a court is determining whether a plaintiff discloses a cause of action was emphasized by Windham, J.A. of the East African Court of Appeal in the case of **JERAJ SHARIFF & CO. V. CHOTAI FANCY STORES [1960] EA 374** at page 375 and by the Court of Appeal of Tanzania in the case of **JOHN M. BYOMBALIRWA V. AGENCY MARITIME INTERNATIONALE (TANZANIA) LTD [1983] T.L.R. 1**, which also added that the Plaintiff is under no obligation to anticipate any special defence that might be available to the Defendant.

A perusal of the "four corners" of the Plaint together with the annexures, reveals that the facts of the Plaintiff responding to and honouring a tender invitation by the Defendant for the provision of fumigation services, the fact of the Plaintiff duly having carried out and completed the tender, and the fact of the Defendant, despite several demands, not effecting payment for the entire value of the works done by the Defendant. At this stage clearly this Court does not have the evidence with which to determine whether or not the facts as alleged by the Plaintiff in the Plaint are true. This Court only assumes that the factual allegations thus made whether expressly or impliedly are true.

As correctly submitted by the Plaintiff's Counsel, in order for a preliminary objection to be a preliminary objection it has to meet the test of "***pure point of law***", which was succinctly stated in the now most often quoted famous phrases of Law, J.A and Sir Charles Newbold, P at pages 700 and 701B respectively in **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD [1969] E.A 696**. The combined effect of the statements of their Lordships in that case is that a preliminary objection is a ***pure point of law, either pleaded or arising out of pleadings, which if argued on assumption that all the facts pleaded by the other side are correct, may dispose of the suit, and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.***

In my view, and on the basis of what the Plaintiff has pleaded in the Plaint, and as correctly submitted by the Plaintiff's Counsel, the issue whether the Minister responsible for railway transport did or did not

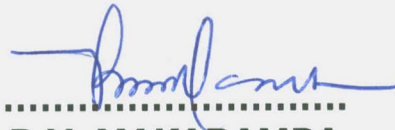
transfer the rights and liabilities in the contract in which the Plaintiff is a party, is a fact which needs to be ascertained at the trial and cannot be raised at this stage. This line of reasoning finds support in the decision of the Court of Appeal in the case of **MRS. RAFIKIHAWA MOHAMED SIDIKI VS AHMED MABROUK AND 2 OTHERS** Civil Appeal No.80 of **1998** (unreported) cited by the Plaintiff's Counsel, where it was observed that "*matters needing ascertainment by adduction of evidence cannot and ought not to be determined by way of preliminary objection.*"

In the upshot and for the foregoing reasons, the combined effect of the preliminary point of objection that the plaintiff did not plead the material condition to entitle the plaintiff to sue the defendant, and that the plaintiff has failed to disclose a cause of action, thus rendering the plaintiff incompetent and to be mandatorily struck out with costs, is the dismissal of the preliminary objection with costs, which shall be in the cause. It is accordingly ordered.



R.V. MAKARAMBA
JUDGE
10/06/2011

Ruling delivered in Chambers this 10th day of June 2011 in the presence of Mr. Msafiri, Advocate for the Plaintiff and in the presence of Mr. Kobas for Mr. Mbamba, Advocate for the Defendant.



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R.V. MAKARAMBA

JUDGE

10/06/2011

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