

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

COMMERCIAL CASE NO. 96 OF 2010

AHMED MOHAMED SIWJI PLAINTIFF

VERSUS

NBC LIMITED.....1ST DEFENDANT

AMIN AHMED SIWJI.....2ND DEFENDANT

Date of last order: 10/06/2011

Date of final submissions: 22/06/2011

Date of Ruling: 05/08/2011

RULING

MAKARAMBA, J.:

On the 13th day of December 2010, the Plaintiff, a natural person residing in Zanzibar and a sole proprietor of the business known as Ahmed Mohamedali Siwji, dealing with importation of rice, suing through his duly appointed attorney, Murtaza Ahmed Mohamedali Siwiji, lodged a suit in this Court against the 1st Defendant, a limited Financial Institution carrying on its business in Tanzania Mainland and Zanzibar and the 2nd Defendant, a natural person conducting his business in Tanzania, and an alternative signatory in the account name of the Plaintiff, for damages for breach of

contract and refund of money withdrawn from the Plaintiff's accounts maintained at NBC Limited Zanzibar Branch.

On the 21st day of March, 2011, the 2nd Defendant lodged in this Court his written statement of defence wherein he raised seven points of preliminary objection seeking this Court to dismiss this suit on the following grounds that:

- (a) The suit is bad in law for being time barred*
- (b) That the Court lacks territorial jurisdiction on the cause of action of the suit.*
- (c) That the Plaintiff has no cause of action*
- (d) That the Plaintiff is bad for improper verification*
- (e) That the purported Power of Attorney jurat is defective*
- (f) That the attestation officer of the power of attorney jurat is defective*
- (g) That the attestation officer of the power of attorney was not a notary public and commissioner for oaths in law*
- (h) That the Plaintiff is bad in form for not complying with the requirements of Order VI and VII of Cap 33 R.E 2002.*

The preliminary objection on points of law by consent was disposed of by way of written submissions, Mr. Massaba, learned Counsel assisted by M/s Grace Meta from the firm of Henry Sato Massaba, Advocates for the Plaintiff and Mr. Salim Mnkonje, learned Counsel from the firm of lawyers of Zanzibar M.M. Law Chambers for the 2nd Defendant.

The nature of the points of law in the preliminary objection is such that it calls for grouping for the sole purpose of easiness in addressing them. In my opinion, the preliminary objection that **(a) *The suit is bad in law for being time barred; (b) That the Court lacks territorial jurisdiction on the cause of action of the suit***, and that **(c) *That the Plaintiff has no cause of action touch on jurisdiction and I propose to address them first.***

The other group of preliminary objection namely, **(d) *that the Plaintiff is bad for improper verification; (h) that the Plaintiff is bad in form for not complying with the requirements of Order VI and VII of Cap 33 R.E 2002*** are dealt with together.

The last grouping of preliminary objection concerns the instrument of power of attorney, namely, **(e) *that the purported Power of Attorney jurat is defective; (f) that the attestation officer of the power of attorney jurat is defective***; and ***that the attestation officer of the power of attorney was not a Notary Public and Commissioner for Oaths in law.***

In dealing with the first grouping of preliminary objection, I propose to address first the point of objection **(b) *that the Court lacks territorial jurisdiction on the cause of action of the suit.*** Mr. Mkonje, learned Counsel for the 2nd Defendant submits that according to the plaint and the documents attached to it and the relief claimed, the bank account

services/operation contract, the refusal to accept the "power of attorney" and the residences of the parties are in Zanzibar. Mr. Mkonje submits further that the Commercial Division of the High Court of Tanzania has no territorial jurisdiction for contracts and causes of action arising in Zanzibar and cites section 18(a)(b)(c) of the Civil Procedure Code Act, [Cap.33 R.E 2002] which provides as follows:

"Provided that every suit shall be instituted in a Court within the local limits of whose jurisdiction where the Defendants resides, or where the cause of action arose or in case of a corporation at any place where it has subordinate office."

Mr. Mkonje submits further that the 2nd Defendant resides and works for gain in Zanzibar and the cause of action arose in Zanzibar at the NBC Limited Branch, thus the Court vested with territorial jurisdiction are Zanzibar Courts.

In reply, Mr. Massaba learned Counsel for the Plaintiff submits that the 1st Defendant, is a body corporate duly registered under the law of the United Republic of Tanzania with its registered office in Dar es Salaam, Mainland Tanzania and its branch in Zanzibar. The suit which is against the 1st Defendant has its basis on the contract the Plaintiff entered into with the 1st Defendant through its branch in Zanzibar. Mr. Massaba submits further that this suit has been filed in line with section 17 of the Civil Procedure Code which provides as follows:

"Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the

jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts”.

Mr. Massaba submits further that the act of refusal to honour the Power of Attorney was done in the branch of the 1st Defendant in Zanzibar and the final say was made here at their registered office in Dar es Salaam, which means that the decision at the branch was not final but that at the registered office, and that is where the cause of action arose.

Mr. Mkonje in rejoinder submits that the 1st Defendant is working in Zanzibar after complying with the Company Decree [Cap.153 of the Laws of Zanzibar], which makes the 1st Defendant for all purposes to have all rights of a local company. Mr. Mkonje submits further that the contract was made in Zanzibar when the Plaintiff applied and filled in forms to open accounts in Zanzibar Branch and was accepted and all the correspondences in the plaint were made in Zanzibar. The residence of the Plaintiff and that of the 2nd Defendant and the 1st Defendant Branch is in Zanzibar, Mr. Mkonje further submits and surmised that therefore the Commercial Division of the High Court of Tanzania does not have jurisdiction under section 18(a)(b)(c) of the Civil Procedure Code. The gist of the argument by Mr. Mkonje is that the Commercial Division of the High Court of Tanzania lacks jurisdiction under section 18(a)(b)(c) of the Civil Procedure Code Act, [Cap.33 R.E 2002] to entertain the present suit. Section 18(a)(b)(c) of the Civil Procedure Code Act, [Cap.33 R.E 2002] provides as follows:

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, **actually and voluntarily resides, or carries on business, or personally works for gain;***
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, **provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution;** or*
- (c) the cause of action, wholly or part, arises." (the emphasis is of this Court)*

The general principle enshrined under section 18 of the Civil Procedure Code is that, subject to the limitations stipulated in the law, it is mandatory for a suit to be instituted in a "***court within the local limits.***"

In my considered opinion the question whether the Commercial Division of the High Court of Tanzania where the suit has been instituted is a "***court within the local limits***" as envisaged under section 18 of the Civil Procedure Code needs to be resolved. In doing so I find it useful to revisit section 3 of the Civil Procedure Code [Cap. 33 R.E. 2002] which defines a "court", except in the expression "foreign court", to mean the ***High Court of the United Republic***, a court of a resident magistrate or a district court presided over by a civil magistrate and references to a district court are references to a district court presided over by a civil magistrate. The same section defines the "High Court" to mean the ***High***

Court of the United Republic. However, in my opinion there exists no such court by the name of the High Court of the United Republic anywhere in Tanzania. Article 151.-(1) of the Constitution of the United Republic of Tanzania adds to the confusion by defining the "High Court" to mean the ***High Court of the United Republic*** or the ***High Court of Zanzibar*** and similarly Article 108.-(1) of the Constitution of the United Republic of Tanzania maintains consistency in the confusion by stipulating that:

*"There shall be a **High Court of the United Republic** (to be referred to in short as "**the High Court**") the jurisdiction of which shall be as specified in this Constitution or in any other law."*

Article 114 of the Constitution on the other hand provides that:

*"For the purposes of construing the provisions of this Chapter of this Constitution, it is hereby declared that the provisions contained in this Chapter do not prevent the continuance or establishment, in accordance with the law applicable in Zanzibar of the **High Court of Zanzibar** or courts subordinate to it."*

Article 115.-(1) of the Constitution provides that:

*"Subject to Articles 83 and 116 of this Constitution, the jurisdiction of the **High Court of Zanzibar** shall be as specified in the laws applicable in Zanzibar."*

Clearly the constitutional dispensation throughout maintains some consistency in so far as the High Court of Zanzibar is concerned. We can

therefore safely conclude that in terms of Article 4 of the Constitution the two organs vested with judicial powers are the Judiciary of the United Republic which is comprised of the High Court of Tanzania and all courts subordinate to it and the Judiciary of the Revolutionary government of Zanzibar comprised of the High Court of Zanzibar and all courts subordinate to it. The apex body in the administration of justice in so far as the United Republic of Tanzania is concerned is the Court of Appeal which hears appeals from both Tanzania Mainland and Tanzania Zanzibar except on Islamic matters originating from Tanzania Zanzibar which terminate at the High Court of Zanzibar. The High Court of Zanzibar within the "Judiciary of Zanzibar" which is headed by the Chief Justice of Zanzibar includes all the courts within the Revolutionary Government of Zanzibar. Clearly the law recognizes the existence of an independent and distinct judiciary for Tanzania Zanzibar and a High Court of Zanzibar whose local limits of jurisdiction is the whole of Tanzania Zanzibar comprised of the Island on Unguja and Pemba.

Emanating from the above therefore we can safely conclude that the Civil Procedure Code [Cap.33 R.E. 2002] governs civil proceedings in the High Court of Tanzania and the subordinate courts of District and Resident Magistrates' Courts. As such the provision of section 18(a) of the Civil Procedure Code which are to the effect that "at the time of the commencement of the suit, it can be established that **any of the defendant** or **each defendant** either **actually and voluntarily resides**, or **carries on business**, or **personally works for gain within** **would apply in respect of** the local limits of the Commercial Division of

the High Court of Tanzania, which in this respect will mean Tanzania Mainland only and not Tanzania Zanzibar.

Similarly, the provisions of section 18(b) of the Civil Procedure Code which concern the question whether “any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, **provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution**, will apply only in respect of the local limits of the Commercial Division of the High Court of Tanzania.

The same also applies in respect of the provisions of section 18(c) of the Civil Procedure Code which address the issue whether the cause of action, wholly or part, arose within the local limits of the Commercial Division of the High Court of Tanzania.

In my humble view any or all of the three conditions stipulated under section 18 of the Civil Procedure Code, which as I have indicated above is applicable only in civil proceedings in courts on Tanzania Mainland, may be shown to be present for purposes of establishing whether the court where the suit has been instituted is a “***court within the local limits***” for purposes of establishing its jurisdiction over the subject matter of the dispute.

The present suit has been instituted in the Commercial Division of the High Court of Tanzania. The Commercial Division is among the three divisions of the High Court of Tanzania, albeit which is without exclusive

jurisdiction in commercial matters as is the case with the other two divisions of the High Court of Tanzania, namely, the Land and Labour Courts respectively, which have exclusive jurisdiction in land and labour matters. The High Court of Tanzania, which the Commercial Division is its constituent division, was established by virtue of section 2(1) & (2) of the ***Judicature and Application of Laws Act***, [Cap.358 R.E 2002]. As I indicated above the High Court is recognized under Article 108(1) of the Constitution of the United Republic of Tanzania of 1977 as amended, (the Constitution), which stipulates that its "*jurisdiction shall be specified in the Constitution and any other law.*" Furthermore, Article 108(2) of the Constitution stipulates that the High Court "*shall have power over any matter not expressly provided by the Constitution or any other law.*" The High Court of Tanzania as is the case for its constituent Commercial Division has territorial jurisdiction over the whole of Tanzania Mainland, except of course Tanzania Zanzibar, where as I have indicated above, the High Court of Zanzibar also exercises "territorial" jurisdiction over the whole of Tanzania Zanzibar, which include the Islands of Unguja and Pemba. The territorial nature of the jurisdiction of the High Court of Tanzania comes out clearly under Rule 7(1) of the **High Court Registries Rules, 2005 (G.N. 96/2005)** which stipulates that:-

*"(1) Original proceedings in the Court may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for **the area in which the cause of action arose or where the Defendant resides...**" (the emphasis is of this Court)*

However, whereas in the case of Tanzania Mainland there is no specific law conferring powers on and concerning the administration of the High Court of Tanzania, in Tanzania Zanzibar, apart from the existence of the High Court of Zanzibar as is the case for the High Court of Tanzania being recognized under the Constitution of the United Republic of Tanzania, there is a law specifically providing for the jurisdiction of the High Court of Zanzibar over matters which it has jurisdiction in Tanzania Zanzibar and for its administration, the High of Zanzibar Act of 1985. As I indicated above, the High Court of Zanzibar is headed by a Chief Justice of Zanzibar. On the basis of the foregoing discussion the Commercial Division of the High Court of Tanzania cannot by any stretch of imagination be said to be a "***court within the local limits***" whose jurisdiction is exercisable over commercial disputes arising in Tanzania Zanzibar.

Let us now turn to consider whether the Commercial Division of the High Court of Tanzania is a "*court within the local limits*" as envisaged under section 18(a), (b) and (c) of the Civil Procedure Code for purposes of instituting suits whose cause of action arose in Tanzania Zanzibar. The first issue to be determined is whether "**any of the defendant**" or "**each defendant**" in this suit either "**actually and voluntarily resides,**" or "**carries on business**", or "**personally works for gain**" within the local limits of the Commercial Division of the High Court of Tanzania.

Both the Plaintiff and the 2nd Defendant reside in Zanzibar. The contract, the subject matter of the alleged breach was concluded between the parties in Zanzibar at the branch of the 1st Defendant. The alleged breach of the contract occurred at the Zanzibar Branch of the 1st

Defendant, whose headquarters are located in Tanzania Mainland. The Plaintiffs' Counsel insists that for purposes of institution of suit the 1st Defendant is said to actually and voluntarily reside or carries on business in Tanzania Mainland. The 2nd Defendant, on the other hand, who is the alternative signatory in the account of the name of the Plaintiff, personally works for gain and resides in Tanzania Zanzibar. It is without any dispute that the Plaintiff opened, maintained and operated some accounts at the NBC Limited Zanzibar Branch, where the alleged breach of contract is said to have occurred. Mr. Massaba, learned Counsel for the Plaintiff conceded in his submissions that the 1st Defendant whose headquarters are in Dar es Salaam in Tanzania Mainland in order to establish its branch in Tanzania Zanzibar complied with the law regulating companies in Tanzania Zanzibar. Simply put, this means that the NBC Zanzibar Branch got a lease of life of corporate existence with all rights and liabilities attendant to it including the right to sue and be sued in its own name.

Mr. Massaba submits that the Plaintiff instituted **Civil Suit No.7 of 2005** against the 1st Defendant in the High Court of Zanzibar, which got struck out for reasons of defects. The Plaintiff in my view thought it wise to board the jurisdictional boat, crossed over the Indian Ocean, with break at the Registry of the Commercial Division of the High Court of Tanzania located at the corner of Luthuli Street and Kivukoni Front on the way to the Ferry, hopefully wishing that this Court to be a convenient forum for the Plaintiff to overcome the procedural technicalities, which saw its premature departure from the corridors of justice in the High Court of the Spicy Island of Zanzibar. I am afraid, the attempt by the Plaintiff to reinstitute in this

Court the very suit based on the same cause of action which the High Court of Zanzibar threw out on procedural technicalities, to say the least it was not a very wise decision to take. The Plaintiff, and as Mr. Massaba seems to suggest, in my view elected to reinstitute this matter afresh in this Court presumably by virtue of section 17 of the Civil Procedure Code which provides as follows:-

*"Where a suit is for compensation for wrong done to the person or to movable property, **if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court,** the suit may be instituted at the option of the plaintiff in either of the said courts."* (the emphasis is of this Court).

In my view, and with due respect to the Plaintiff's Counsel, the forum shopping enterprise the Plaintiff has elected to engage in cannot be aided by resorting to the provisions of section 17 of the Civil Procedure Code which in my view, is a limitation on section 18 of the same Code, and as I have already held, it cannot provide the Plaintiff with the judicial cover he so earnestly yearn for. The provisions of section 17 of the Civil Procedure Code in my view envisage the existence of a "***suit is for compensation for wrong done to the person or to movable property,***" which is not the case presently. Furthermore, that provision requires such wrong to have been done "***within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction***

of another court” so as to entitle the Plaintiff to exercise the option of instituting the suit in either of the said courts. In any event, as I intimated to above, the term “*court*” in my view envisages a court in Tanzania Mainland including the Commercial Division of the High Court of Tanzania but not a court in Tanzania Zanzibar. What the law envisages in my view is the local limits of one court and the local limits of another court within Tanzania Mainland but not local limits of one court in Tanzania Mainland and local limits of another court in Tanzania Zanzibar.

It is for the foregoing reasons that I uphold the preliminary objection *that the court lacks territorial jurisdiction on the cause of action of the suit.* This essentially disposes of the matter and thus I need not have to delve into the other points of preliminary objection raised and argued. This Court having struck out the suit, there is nothing on record and thus it renders academic the other points of preliminary objection. I should however express my sincere appreciation for the passion and zeal with which the learned Counsel for the parties argued the points of preliminary objection.

In fine, the suit is incompetent and accordingly it is hereby struck out with costs. Order accordingly.

A handwritten signature in blue ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

05/08/2011

Ruling delivered on the 5th day of August in the presence of Mr. Massaba, Advocate for the Plaintiff, Mr. Shirima, Advocate for the 1st Defendant and Mr. Mnkonje, Advocate for the 2nd Defendant.

A handwritten signature in dark ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

05/08/2011.

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