

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 15 OF 2011

THE ADVENTISTS DEVELOPMENT RELIEF AGENCY.....PLAINTIFF

VERSUS

DARSWED EXPORT TRADING SERVICES CO LTD.....1<sup>ST</sup> DEFEDANT

JEREMIAH M. SHANGE.....2<sup>ND</sup> DEFENDANT

RULING.

Mruma J.

The plaintiff has instituted a suit against the defendants jointly and severally for prompt payment of T.shs 60,200,000/= being outstanding payments for school desks and chairs supplied by it to the defendants and interests under various heads.

In their joint written statement of defence the defendants have given a notice of preliminary objection on the point of law seeking to extinguish the suit as against them jointly and severally. The objections are based on the grounds that;-

- a) The plaintiff lacks mandate to institute the current suit and;
- b) The suit has erroneously been preferred against the defendant

Parties through their counsels preferred to argue the preliminary point by way of written submissions. A schedule was set for counsels to file their respective submissions. The duly complied with the filing schedule. I commend the counsels for that.

Submitting in support of the first limb of the objection, counsel for defendant contended that the resolution upon which the plaintiff purports to draw mandate to sue was a move to pre-empt the objection raised by the defendant. This, he says, is due to the variations on the dates of signing the said resolution, that whereas it was purportedly held on 31<sup>st</sup> May, 2010, it was signed by the Chairman on the 6<sup>th</sup> October 2010 and the Secretary signed it on 27<sup>th</sup> September, 2010. He forcefully submits that this was an after-thought which was calculated to pre-empt the preliminary objection and therefore pray that the suit be dismissed for plaintiff's want of mandate to institute the proceedings.

On the second limb, it is the counsel's view that the suit has been erroneously instituted against the second defendant on the ground that the crux of the matter being the contract between the first defendant and the plaintiff to which the second defendant was not a party, the second defendant cannot be sued on the same cause of action as that of the 1<sup>st</sup> defendant. The learned counsel referred me to decision in the case of John Byombalilwa versus Agency Maritime Internationale (T) Ltd (1983) 1 (CA) and on that strength invited this court to strike out the suit on the reason that no cause of action has been established against the second defendant.

In reply thereto, counsel for the plaintiff has vehemently attacked the preliminary points raised saying that it is a misconception of what constitute a preliminary objection on the points of law. He drew this Court's attention to the celebrated decision in the case of Mukisa Biscuits Manufacturing Co. Ltd Versus West End Distributors Ltd [1969] EA 696 at page 700 and particularly the words of Law, J.A. at page 701.

The learned counsel proceeded to fault the defendant's preliminary objection basing on the enunciation of the principle from the said authority that, firstly, the issue of mandate to institute a case is a matter of evidence that cannot be disposed of by way of written submission and secondly that preliminary points of law should be based on pure points of law on assumption that all facts pleaded by the other side are correct.



Amplifying his arguments, the learned counsel submitted that the document annexed to the plaint and marked annex 3 shows that there was mandate to sue and therefore the variations in the dating as raised by the counsel for the defendant would call for evidence as to why the document is differently dated, a fact which in his view cannot be disposed of by way of preliminary objection.

As regards to erroneously suing the second defendant, the learned counsel has submitted along the same line that it was still a fact which has to be ascertained by calling evidence so as to prove whether the defendant did not act fraudulently as alleged in the plaint. Summing up his submissions the counsel referred me to the same authority of **Mukisa Biscuit Case (Supra)**, and submitted that a court when deciding whether there is a cause of action, it should ask itself whether there are any facts which it is necessary for the plaintiff to prove before he can succeed in the case and added that referring to the plaint, there are allegation which exposes that the second defendant conducted himself fraudulently which may compel the court to lift the corporate veil. He finally invited this court to dismiss the preliminary objection.

Counsel for the defendant in his rejoinder reiterated his submissions in chief to the effect that the plaintiff has no mandate to institute a case by reasons of defects on the board resolution and that the plaint does not disclose a cause of action as against the second defendant.

On a careful consideration of the respective submissions for the parties, on whether or not the plaintiff has mandate to sue and whether or not the second defendant has erroneously being sued, and basing on the correctly cited authority on the subjects of preliminary objection and cause of actions I am satisfied that these are questions that cannot be answered at this infant stage of the suit by way of preliminary objection. I will briefly show why I am of that view.

Firstly the mandate to sue: Counsel for the defendant contends that the resolution purporting to issue the mandate to the plaintiff to sue is differently dated. I have gone through the said document, and indeed the counsel's contention is true in that respect. But, as rightly submitted by the counsel for the defendant, if that is the only qualm against the mandate, it cannot be resolved at

this stage, as evidence need to be adduce to explain the difference. This is an exercise which can only be undertaken on the course of the trial, and not preliminarily at this stage as the defendant's counsel would love to be.

As regards to the lack of cause of action against the second defendant, I should state that; looking at the plaint and the said contract as between the first defendant and the plaintiff, it is very vivid that the objection in that respect is quite misplaced and uncalled for. It is incomprehensible as to how the learned counsel would come to the conclusion that there is no cause of action against the second defendant. The following paragraphs of the plaint would prove him wrong;

*"4. That the plaintiff's claim against the defendants jointly and severally is for prompt payment of ....."*

*5..... [not relevant]*

*6. That on the 6<sup>th</sup> March, 2008 the plaintiff and the 1<sup>st</sup> Defendant who was represented by the 2<sup>nd</sup> Defendant entered into an agreement under which the plaintiff were to supply the school desks and chairs to the plaintiff.*

*8. That to date, the first defendant has not paid the amount due as agreed.....*

*9. that the 2<sup>nd</sup> Defendant's conduct in this transaction makes the plaintiff believe that the 2<sup>nd</sup> defendant has used the first defendant to defraud the organization"*

These parts of the plaint present a set of circumstance which requires to be proved before the plaintiff can be granted his prayers or put in another way; it requires disproving of such allegations against the defendant so as to exonerate him from liability. That, in line of **John Byombalilwa (supra)** there is a cause of action sufficient to join the second plaintiff in this case, and therefore basing in **Mukisa Biscuit's (Supra)** case the point raised cannot be preliminary point of law properly so called.

In fine therefore, I find the nature, and the import of the sets of preliminary points raised by the counsel for the defendants to be that which compel calling evidence so as to be established with exactness. I am in all fours with the counsel for the plaintiff that the veracity of the document purporting to authorize the plaintiff to sue need to be called into question and further that allegation of misconduct raised in the plaint as against the second defendant need also to be either proved or disproved so as to establish whether or not it was right to sue the second defendant.

I therefore find both grounds of preliminary objections to be wanting of merits and I hereby overrule them with costs. The suit should proceed to hearing (third party notice) on a date to be fixed.

It is accordingly ordered.



A.R MRUMA

JUDGE.

Date: 3/6/2011

1,411 Words