IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 170 OF 2014

CHINA PESTICIDE (T) LIMITED ..... PLAINTIFF

VERSUS

SAFARI RADIO LIMITED ..... DEFENDANT

11th August & 10th September, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a preliminary objection raised by the defendant Safari Radio Limited against the amended plaint filed by the plaintiff China Pesticide (T) Limited. The preliminary objection (henceforth "the PO") is to the effect that the amended plaint is incurably defective for failure to comply with the mandatory provisions of Order VII rule 1 (f) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC)" in that the jurisdiction clause is defective, and that the suit is an abuse of the court process. This is not the first time a preliminary objection is being raised in this case. The first was of somewhat similar nature whereby the defect was deemed to be in the verification clause and contravention of Order VI rule 14 of the CPC. The defendant had sought

for the suit to be dismissed, but contrary to his counsel's wish, and on the basis of the authorities, the said defects were deemed not fatal but curable. The plaintiff was ordered by the court to amend the plaint accordingly. This PO emanates from the said amended plaint.

A brief background to the suit as gleaned from the plaint is apposite at this juncture. The plaintiff is a private company registered under the laws of Tanzania, carrying on the business of trading, processing and exporting agricultural produces. It has its registered office in Dar es Salaam. The defendant is equally a body corporate having its registered office in Mtwara. The plaintiff's claim against the defendant company is for payment of the sum of Tanzania Shillings Eighty Six Million Seven Thousand One Hundred (Tshs. 86,007,100/) being money advanced to it by the former for the supply of sesame produce during the year 2013. Further statements in the plaint show that an agreement for the supply of sesame seeds was executed between the parties whereby, as per the terms of the agreement, some monies were advanced to the defendant before the supply. The dispute, as can yet be gathered from the plaint, arose after the defendant had failed to honour part of the bargain by supplying the seeds not commensurate with the monies disbursed. A suit was filed by way of plaint which plaint was later amended by order of this court. As already alluded to, the amended plaint is under challenge by way of this PO.

The PO was argued before me on 11.08.2015 during which Mr. Beatus Malima and James Bwana, learned advocates, appeared for the plaintiff

and defendant respectively. Both learned counsel, in compliance with rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, filed their respective skeleton written submissions before I heard them *viva voce*. I commend the learned counsel for their endeavour to represent their clients. They both made ground-breaking submissions supported by relevant authorities in respect of their respective positions which have made my task of composing this ruling simple. A brief summary of their arguments will be apposite at this juncture.

The defendant's counsel arguments are that the plaint is defective for want of facts showing that the case is a commercial case. He contends that since this is a commercial case, the amended plaint should have stated clearly that this is a commercial case and further that it is not upon the court to presume that this is a commercial case. He puts that since coming to this court is not mandatory then a person seeking recourse to this court must state that this is a commercial dispute. He maintains that failure to comply with Order VII rule 1 (f) is failure to comply with the mandatory provision of the law. He is of the view that pleading the jurisdiction at paragraph 16 of the amended plaint is not sufficient because that paragraph has not stated that the case is commercial.

On the second point, the learned counsel maintains, basically, that since the amendment followed an order for amendment following the preliminary objection, the plaintiff is in contempt of the court and abuse of court process by filing an amended plaint which does not comply with the

law. It is his contention that coming back and forth for possible further amendments is nothing but abuse of court process.

To reinforce his arguments, the learned counsel cited the following cases: ***Assanand and sons Vs East Africa Records [1959] 1 EA 360***, ***Wanzami & Anor Vs Salisu & ors*** (2014) LPELR - 22337; the decision of the Court of Appeal of Nigeria at Kaduna, ***Ace distributors Vs Khalid Said Kingabo*** Commercial Case No. 46 of 2012 (unreported), ***Ahmed Chilambo Vs Murray and Roberts (T) Ltd*** Civil Case No. 44 of 2005 (unreported), ***Lujuna Balonzi Vs Registered Trustees of CCM*** [1996] TLR 203, 208 and a ruling in this very case [***China Pesticide (T) Limited Vs Safari Radio Limited*** Commercial Case No. 170 of 2014 (unreported)] I handed down on 18.06.2015.

On the other hand, Mr. Malima, learned counsel for the plaintiff, fervently charges that the first point of objection is misguided because the jurisdiction of the court is determined by reading the whole plaint. He stresses that if the amended plaint is read as whole, it shows that the case arose out of a commercial transaction and therefore it is commercial in nature as it shows that there is a commercial debt.

Regarding the second point, the learned counsel contends that it is the defendant's counsel who is abusing the court process because, abuse of court process means taking advantage of the court process and therefore all cases cited by the counsel for the plaintiff in that respect are not applicable in the instant case. He contends further that abuse of court

process is not a matter of law but of fact and therefore the second point does not qualify to be a preliminary objection. He argues that the complainant must show the facts or evidence that the respondent has done certain overreaching acts intended to take advantage of the legal system. On this point, the learned counsel cited the oft-cited ***Mukisa Biscuits Co. Ltd Vs West End Distributors*** [1969] EA 696 in support.

In his brief rejoinder, Mr. Bwana, learned counsel for the defendant, maintains that it was imperative upon the plaint to state that the matter is commercial because leaving the court to read the entire plaint is shifting the burden on the court. He states that though there are situations where abuse of court process does not amount to a preliminary objection, in the present case, it does because it does not need factual proof and therefore it is a preliminary objection. He asked me to sustain the preliminary objection and dismiss the suit.

I think this matter will not strain my mental faculties much. The bone of contention is in relation to the violation or otherwise of Order VII rule 1 (f) of the CPC. The rule is couched thus:

> "The Plaint shall contain the following particulars-
> (a)-(e) ... N/A
> (f) the facts showing that the court has jurisdiction"

Mr. Bwana, learned advocate has endeavoured to show that the amended plaint falls short of that requirement. He has cited to me the ***Assanand*** case (supra) whose *ratio decidendi* is to the effect that mere statement that the court has jurisdiction is not enough and therefore the facts showing that the court has jurisdiction must be stated. He has also relied on another decision of this court by my sister at the Bench; Justice Bukuku of ***Ace Distributors*** (supra) in which it was held that a case has to be commercial in nature and that that fact must be pleaded in the plaint, and other decisions to the effect that it is the duty of the counsel to show that the court has jurisdiction and not the court as the court presumes to know nothing unless it is told save for facts for which it takes judicial notice of.

In my considered opinion, Mr. Bwana, learned counsel for the defendant, is right. The rest of this ruling demonstrates why I am at one with the learned counsel for the defendant.

Both learned counsel are at one that the provisions of Order VII rule 1 (f) of the CPC must be complied with in the plaint. This provision mandatorily requires that the plaint must contain facts showing that the court has jurisdiction. However, more often, parties fail to comply with this mandatory prescription of the law. As stated by S.N. Dhingra and G. C. Mogha in **Mogha's Law of Pleading in India** (18th Edition) at page 271:

> "It is also not unusual to find in plaints a vague statement to the following effect: 'That the court has jurisdiction to try the case.' What is really

> required is a statement, not of the fact that the court has jurisdiction, but of *the facts showing that the court has jurisdiction*. A plea in the plaint that the court has jurisdiction to entertain the suit is technically defective where it does not allege how and where the cause of action arose..."

The learned authors, at the same page, go on:

> "... the petition/suit must specify the nature of claim, the subject matter and the territorial jurisdiction of the Tribunal/court. Certain suits can be filed only before specific judges. For example copyright and trademark can be filed only to the District Judge of the area and **this must be specified in the paragraph for jurisdiction**."
> [bold added].

I am aware that the learned authors refer to the cases to be filed before specific judges and examples of trademark and copyright cases are given. However, I have not scintilla of doubt that that commentary extends to specific courts like the commercial court in this jurisdiction and an example of commercial cases as well. Thus, borrowing the wording of the learned authors, I may say, for a suit to be filed in the commercial division of the

High Court of Tanzania, it (the suit) must, *inter alia*, specify the nature of the claim, the subject matter and the territorial jurisdiction as well as facts showing that the suit is of commercial significance. Certain suits can be filed only in specific courts. The commercial division of the High Court is vested with jurisdiction to try only cases with commercial significance and this must be specified in the paragraph for jurisdiction in the plaint. Failure to do so amounts to a fatal ailment.

In the case at hand, the last paragraph of the amended plaint relates to jurisdiction. It reads:

> "That the amount claimed from the defendant is well above Tanzanian Shillings Seventy Million, and that the cause of action arose in Dar es Salaam thus the court is vested with geographical and pecuniary jurisdiction to adjudicate the same."

With due respect, the paragraph falls short of ingredients to the effect that the suit arises out of a commercial transaction and that, therefore the case is commercial in nature. This ailment is, in my well considered view, fatal.

I must confess to my inability to find sense in the pick-seed-out-of-chaff proposition brought to the fore by the learned counsel for the plaintiff. I find it very difficult to comprehend. I ask myself a question why in the first place did he put para 16? If his proposition to the effect that to know

that the court has jurisdiction the whole of the plaint (or amended plaint) must be looked at was the law, he should have left the court to find out for itself pecuniary and geographical jurisdiction by reading the whole of the amended plaint to find out that it (the court) had such jurisdiction. My understanding of the law has it that the court will not wander about in the plaint or amended plaint to look for facts showing that it has pecuniary or geographical jurisdiction. Neither will the court wander about in the plaint or amended plaint to look for facts showing that the dispute between the parties is commercial in nature. These facts must be specifically pleaded in a paragraph respecting jurisdiction.

I find fortification in the above stance in the decision of this court [Massati, J. (as he then was)] when confronted with an akin situation in ***Lucas Mallya Vs Mukwano Industries***, Commercial Case No 60 of 2004 (unreported), a case relied on and supplied by Mr. Bwana, the learned counsel for the defendant. His Lordship stated:

> "This is a Commercial Court. It is pertinent that the facts show that the transaction between the parties was of a commercial nature within the jurisdiction of this Court. ... the rule is vital and goes to the root of the Court's jurisdiction and it cannot be broken. The omission is therefore fatal and renders the plaint incurably defective."

In the light of the foregoing discussion, I find merit in the first point of the PO raised by Mr. Bwana, learned counsel for the defendant and proceed to sustain it. This being the stance I take, I do not find it necessary to go into the merits of the second point of the PO in that whichever verdict to be arrived at will not change the final result of the present matter.

In the upshot therefore, having found that the ailment is fatal, I consequently find the amended plaint to be incurably defective and proceed to strike it out with costs.

Order accordingly.

DATED at DAR ES SALAAM this 10th day of September, 2015.

J. C. M. MWAMBEGELE

JUDGE