

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 95 OF 2018

TIMOTHY J. FLAVELL.....PLAINTIFF

VERSUS

PUMZIKO SAFARI LODGE LIMITED.....DEFENDANT

RULING

B.K. PHILLIP, J

This ruling is in respect of points of preliminary objections raised by the defendant's advocate Moses Mahuna, to wit;

- (i) That this honourable court is not seized with jurisdiction to entertain this suit.
- (ii) That the suit has been filed contrary to Order II Rule 1 of the Civil Procedure Code Act No.49 of 1966, Cap 33 R.E 2002.
- (iii) That the suit is incompetent for improper verification which contravenes Order VI Rule 15 (3) of the Civil Procedure Code Act No. 49 of 1966, Cap 33 R.E 2002.

The respondent was represented by the learned Advocate Andrew Akyoo. I ordered the points of preliminary objections to be disposed of by written submissions.

Submitting on the first point of preliminary objection, the learned Advocate Moses Mahuna submitted that, the case in hand is not a commercial case as it does not fall under the ambit of the provisions of Rule 5(1) of the High court (Commercial Division) Procedure Rules,2012 (henceforth " the Rules") which provides as follows;

"there shall be a Commercial Division of the High Court of Tanzania vested with both original and appellate jurisdiction over Commercial cases"

(Emphasis is added)

Mr. Mahuna referred this court to the provisions of section 3 of the Rules which defines a "commercial case" as follows;

"a Civil case involving a matter considered by the court to be of commercial significance, including any claim or application arising out of a transaction of trade or commerce but not limited to:-

- (a) The formation of a business or commercial organization*
- (b) The management of a business or commercial organization*
- (c) The contractual relationship of a business or commercial organization with other bodies or person outside the business or commercial organization*
- (d) The liability of a business or commercial organization or official of the business or commercial organization arising out of its commercial or business activities*

- (e) *The liability of a business or commercial person arising out of that person's business or commercial activities*
- (f) *banking and financial services*
- (g) *The restructuring or payment of commercial debts by or to business or commercial organization or person*
- (h) *The enforcement of arbitral award....."*

Mr. Mahuna proceeded to submitted that it appears that this case can fall under item (d) herein above and was of the view that the share purchase agreement which is the base of this case, cannot qualify for a liability arising out of commercial or business activities to merit as a matter of commercial significances. To cement his arguments, he referred this court to the case of **Malima Bundara and two others vrs Patric Nyoni and six others, Commercial Case No. 44 of 2006**, High of Tanzania Commercial Division (Unreported) in which this court said that ;

"...so from the above, I think, it can safely be concluded that a case or a matter of a commercial significance is one that arises from ordinary transactions of merchants or trades, or the construction of mercantile documents...."

Expounding on the findings of the court in the above cited case of **Malima Bundara** (supra) and applying the same to the facts of the instant case, Mr. Mahuna was of the view that the transaction between the plaintiff and the defendant in buying shares from the defendant's

Company was not resulting from mercantile or trade arrangement since the defendant was not in a business of buying and selling shares as a merchant or trader. In his analysis Mahuna concluded that the transaction between the plaintiff and the defendant's company was not of commercial significance, since it was not ordinary transaction between merchants or traders. Mr. Mahuna submitted further that the liability of the defendant if any, cannot be said to have arisen out of the defendant's commercial business activities as the plaint does not contain particulars to indicate that or suggest that the defendant company is in a business of buying and selling shares for profit either on its own account or as a member of the stock exchange, so as to warrant the whole transaction to fall squarely under the ambit of the provisions of Rule 3(d) of the Rules and the suit to qualify as a commercial case.

On the second point of preliminary objection, Mr. Mahuna submitted that, this suit contravenes the provisions of Order II Rule 1 of the Civil Procedure Code, Cap 33, R.E 2002, (henceforth " the CPC") which provides as follows;

"Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them"

Mr. Mahuna contended that the plaint filed in court does not disclose any allegation for breach of the share purchase agreement or declaration that the share purchase agreement has been breached , so as to pave a way

for the court to grant the reliefs sought in paragraph 18 clauses (i) to (viii) inclusive. Mr. Mahuna was of the view that the plaint is drafted in such a way that it will not lead to final decision upon the subjects and prevent further ligation as provided in Order II rule 1 of the CPC. Mr. Mahuna insisted that the said defect in the plaint cannot be cured by amendment or by the application of the principle of overriding objectives as provided in the written laws (Miscellaneous Amendments)(No.3) Act. No.8 of 2018 which under section 3 of the Civil Procedure Code introduced Section 3A. To cement his arguments he referred this court to the case of **Njake Enterprises Limited Vrs Blue Rock Limited and another, Civil appeal No.69 of 2017**, CA at Arusha(unreported) in which the court said;

"...the proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms....."

Mr. Mahuna prayed the plaint to be struck out for offending the provisions of Order II rule 1 of the CPC.

On the third ground of preliminary objection Mr. Mahuna submitted that the suit is incompetent for improper verification, thus, contravenes Order VI rule 15 (3) of the CPC which provides that

"The verification shall be signed by the person making it and shall state the date on which and place at which it was signed"

Mr. Mahuna submitted further that the verification clause in the instant suit lacks date on which it was signed, thus he contended that it contravenes the provisions of Order VI Rule 15(3) of the CPC. To cement his arguments he referred this court to the case of **Roba General Merchant Vrs The Director General Tanzania Harbour authority and two to others, Civil Case No. 161, High Court of Tanzania at Dar Es Salaam** (unreported) in which the court dismissed the case for having a defective verification clause. Mr. Mahuna prayed for the dismissal of the case with costs.

In rebuttal, the plaintiff's advocate Mr. Akyoo submitting against the first preliminary objection contended that Mr. Mahuna misguidedly based his arguments on the provisions of Rule 3 of the Rules and the case of **Dr. Malima Bundara**, (supra) together with the definitions of the words 'merchant' and 'traders' as explained in the Blacks Law Dictionary, 9th edition. Mr. Akyoo proceeded to submit that the instant case is of Commercial significance for the purpose of Rule 3(c) of the Rules. He referred this court of the case of **Michael Ngaleku Shirima vrs African Banking Corporation Tanzania Limited ,Commercial case No 54 of 2016** in which this court speaking through Hon Mruma J, said that ;

"...from the definition of trade and Commerce there can be no doubt that acquisition of loans, mortgaging and securing of a loan and or selling of shares are all of trade or commerce in nature"

Mr. Akyoo submitted further that Rule 3 (c) of the Rules provides that a contractual relationship of a business or commercial organization with other bodies or person is among the list of matters considered to be of commercial significance. Mr. Akyoo contended further that, the contractual relationship between the plaintiff and defendant company as far as the share purchase agreement is concerned, whereby it involved payment of USD 326,625.00 to the defendant's company, makes this suit to be of commercial significance. Mr. Akyoo was of the view that Mr. Mahuma blatantly ignored the provisions of Rule 3 (c) purposely for his convenience.

In addition to the above Mr. Akyoo submitted that the list in Rule 3 (a) –(j) of the Rules is not exhaustive thus, this court is vested with discretionary powers to add the list. He referred this court to the following case ; **Quality Business Consultant (T) Vrs Tanzania Revenue Authority Commercial case No 162 of 2014** (unreported) and **Gosbert Mutagaywa Vrs Jamila Kassimu Ramadhani Kizenga and two other, Commercial case No. 162 of 2014**, (unreported). In both cases mentioned herein above the court made findings that the categories in Rule 3(a) – (j) are not closed. There are other categories other than those listed. Mr. Akyoo invited this court not to accept the principle stipulated in the case of **Dr. Malima Bundara** (supra) since its application will defeat the purposes of the whole of rule 3 of the Rules. Mr. Akyoo was of the view that matters arising from the ordinary transaction of merchants or traders are not the only transactions intended to be covered by rule 3 of the rules. He contended that transactions arising out of merchants or

traders must involve profit in return , but this court has held some matters to be of commercial significance regardless of the absence of the element of profit. Mr. Akyoo referred this court to the case of **Gosbert Mutagaywa**(Supra).

As regards the second point of preliminary objection, Mr. Akyoo's response was to the effect that this suit is properly framed and the plaintiff has established the cause of action against the defendant. Mr. Akyoo contended that the allegation on the breach of contract are well pleaded in the plaint. Mr. Akyoo submitted further that a plaint has to be read as whole. He referred this court to the case of **James Funke Gwagilo Vrs Attorney General (CA), Civil appeal No 67 of 2001** (unreported) in which the court said that:-

"the function of pleading is to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matters in dispute".

Mr. Akyoo contended that by applying the principles stipulated in the case **James Funke Gwagilo** (Supra) in the instant case, it is evident that the plaintiff has pleaded all material facts to enable the court to decide this case.

Furthermore Mr. Akyoo submitted that, Order II rule 1 of the CPC has to be read together with Order XIV rule 3 (b) of the CPC, since Order XIV Rule 3(b) of the CPC provides that material from which issues may be framed

are the allegations made in the pleadings. Mr. Akyoo contended that, the fact that the plaintiff has not prayed for a declaration that the share purchase agreement was breached does render the suit to be improperly framed. Mr. Akyoo submitted that by reading the plaint between the lines, it can be noticed quickly that the allegation on the breach of the purchase agreement can be drafted as one of the issue for determination by the court. Mr. Akyoo maintained that second preliminary objection has no merit.

In the alternative, Mr. Akyoo, submitted that in case this court upholds the second point of preliminary objection then, the correct remedy is to order for amendment of the pleadings. To cement his argument , he referred this the court to the case of **Investment House Limited Vrs Web Technology and two others, Commercial Case No 9 of 2015**(unreported).

As regards the last preliminary objection, Mr. Akyoo submitted that the verification clause in the instant case indicates the date on which the pleadings were verified. Mr. Akyoo submitted that the verification clause shows that the pleadings were verified on 9th July 2018. Mr. Akyoo referred this court to the case of **JV Tangerm Construction Company Ltd and another Vrs Tanzania Ports Authority** (unreported), in which the court held that when a verification clause is defective is curable by simple amendment of the pleadings. Finally Mr. Akyoo prayed for dismissal of all points of preliminary objections.

Having analyzed the submission made by the learned Advocates appearing herein, I have noted that, it is a common ground that rule 3 of the Rules is the relevant and applicable law in determining as to whether a matter is a commercial case not.

Upon perusing the rival arguments between the advocates appearing herein, I have noted that each part has decided to rely on his own item in rule 3 of the Rules. In my considered view, I think, the criteria for relying on a particular item in rule 3 of the Rules should be the relevancy of a particular item to the facts of the case. The instant case is based on the transactions arising out of a "**share purchase agreement**", having that in mind, I am inclined to agree with Mr. Akyoo that the relevant item in rule 3 of the Rules that can be applicable in the instant case is item 3(c) of the Rules, since it is the one related to contractual relationship. The share purchase agreement creates a contractual relationship between the parties herein. Also, the aforesaid contractual relationship is a business relationship, in the sense that the purchaser of the shares expects to gain financially, as it is a common knowledge that at the end of the day shareholders do get dividends in case the company performs well and, in fact that is the motive behind buying of shares. Buying of shares in a company is one way of investments. I have also noted that issue of investment is stated in paragraph 15(ii) of the plaint. I decline to agree with the submission made by Mr. Mahuna on the first point of preliminary objection, since he opted to chose item (d) of Rule 3 the rules which does not fit in the facts of this case as revealed in the plaint. Besides the above,

I am inclined to agree with the learned advocate Akyoo that the list of categories provided in Rule 3(a) – (J) is not exhaustive, so even if the facts of this case could not fit in any item in rule 3 of the Rules, this court could have determined the issue basing on the facts of case as to whether it has any commercial significance or not and I think would still hold that the instant case is of commercial significance, since buying of shares in a company is a pure issue of investment and, thus a matter of commercial significance. I am of a settled view that Mr. Mahuna's argument that the defendant is not doing a business of selling shares is misconceived. At this juncture I wish to wholly associate myself with the finding of my brother Hon. Mruma, J, that acquisition of loans, mortgaging and securing a loan and or selling of shares are all trade or commerce in nature.

As regards, the second point of preliminary objection, I have read the plaint between the lines and am inclined to agree with Mr. Akyoo that the plaint does not contravene the provisions of Order II rule 1 of the CPC. The way the plaint is framed, upon its determination it will enable the dispute between the parties herein to come to an end. I am saying this because the controversy in this case is the breach of the share purchase agreement and the same is well reflected in the plaint. For instance paragraphs 4,5 , 7 and 8 of the plaint states as follows

"4. Subsequently the plaintiff herein paid a total amount of United States Dollars Three Hundred Twenty Six Thousand Six Hundred and Twenty Five (USD 326,625.00) only being the total consideration of the purchase of the above mentioned shares from Pumziko Safari

Lodge Limited the Defendant herein. The above mentioned amount was deposited in Bank Account No. 0098951003 held at Diamond Trust Bank Tanzania Limited, Arusha Branch maintained by Pumziko Safari Lodge Limited on the 30th of May, 2017. A copy of the Transfer from HSBC Bank is hereby annexed and marked as annexure TF 2.

5. Parties herein duly executed the share purchase agreement and it was agreed between the parties that upon fulfillment of the payment of the total consideration and the execution of the above mentioned share purchase agreement, the Defendant herein shall deliver to the plaintiff an abstract copy of the share certificate for the shares purchased and paid for by the plaintiff and furthermore allotment of share forms duly executed and filed with BRELA to the plaintiff. Meaning that the plaintiff would officially be a shareholder of the company.

7. That despite the plaintiff's fulfillment of his obligation under the share purchase agreement, the defendant herein never fulfilled any of its obligations set out in the share purchase agreement.

8. That shares purchased by the Plaintiff herein have never been transferred not allotted to him despite a lapse of more than 12 calendar months since the execution of the share purchase agreement. Copies of BRELA official searches are hereby annexed and marked collectively as Annexure TF 3".


Since the among the prayer made by the plaintiff is refund of the purchase price, it means that the issue of breach of the share purchase agreement is embodied therein. By looking at what is pleaded, the court must consider the issue of breach of the share purchase agreement before making a determination as to whether the purchase price should be refunded or not. In fact the prayers in are normally derived from what is pleaded in the plaint, as I have point out herein above, in this case the particulars stated in the plaint show that the whole matter goes around the allegations on the breach of the share purchase agreement and that is what this court is called upon to decide. It is my finding that in this case the plaint has all the required information/particulars for determination of the issues in controversy.

On the third point of preliminary objection, as correctly submitted by Mr. Akyoo, the pleadings in this case were verified at Arusha on 09th day of July 2018, by Timothy James Flavell. Therefore, the third preliminary objection is baseless.

From the foregoing I hereby dismiss all the preliminary objections with costs.

Dated at Dar Es Salaam this 10th day of April 2019




B.K. PHILLIP
JUDGE