IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 94 OF 2019

BEVCO LIMITED.....1st PLAINTIFF

MARK TECHNO LIMITED .....2nd PLAINTIFF

VERSUS

ANNA INVESTMENT COMPANY LIMITED.....DEFENDANT

Last Order: 17th Oct, 2019

Date of Ruling: 13th Feb, 2020

RULING

FIKIRINI, J.

This is a ruling in respect of two preliminary points of objection raised by the defendant namely:

1. That, this Honourable Court has no territorial jurisdiction to try the matter as the cause of action arose in the city of Arusha and thus the defendant's natural forum is in the City of Arusha.
2. That, the suit is an abuse of court process, since the plaintiffs herein are pursuing two legal avenues (criminal and civil) in two different courts in the same time in respect of the same matter.

Pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012, counsels filed skeleton arguments. At the oral hearing conducted on 17th October, 2019, Ms. Dorothea Rutta assisted by Mr. Mudhihir Magea, appeared

for the defendant while Mr. Denis Mwesiga appeared for the plaintiffs. Their respective submissions albeit briefly was, according to the defendant, the cause of action arose in Arusha, the fact which is as well reflected in paragraph 12 of the plaint. In compliance to section 18 (a) (b) and (c) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC), which requires all cases to be filed where the cause of action arose. This case was therefore supposed to be filed in Arusha. In support of the argument the following cases were cited: **Ahmed Mohamed Siwji v NBC Ltd, Commercial Case No. 96 of 2010; Joyce Mwangonda v Zanzibar Insurance Tanzania Limited, Civil Case No. 51 of 2016; Frabboni Giorgio v Simon Meigaro, Civil Case No. 128 of 2015; Transcargo Ltd v M. G. Hollevas & MS. M.G. Hollevas, Civil Case No. 292 of 1998.**

The defendant also argued that by opening the case elsewhere other than in Arusha rendered this Court to have no jurisdiction and the only remedy is to strike out the matter. A number of cases were cited in support namely: **The Courtyard DSM v The Managing Director, Tanzania Postal Bank, Commercial Case No. 35 of 2003; Gat Metusellah v Matiko w/o Marwa Warioba, Civil Application No. 6 of 2006; The Attorney General v Hermanus Phillippinus Steyn, Miscellaneous Civil Cause No. 11 of 2010; Thomas Kirumbuyo & Another v TTCL, Civil Application No. 1 of 2005- Court of Appeal of Tanzania; Rajab A. Rajab v Hamidi M. Tuli &**

Another, PC Civil Appeal No. 33 of 2005 and **Shahida Abdul Hassanali Kassam v Mahed Mohamed Gulamali Kanji, Civil Application No. 42 of 1999 – Court of Appeal of Tanzania.**

Submitting on the 2nd point of objection, it was Ms. Rutta's submission that the plaintiffs are pursuing two legal avenues on the same subject matter. A criminal case against the defendant's director Anna Jeremiah, owner of the business, that she stole hard drinks, and a civil case, in which the plaintiffs are alleging breach of contract. On the two cases, Ms. Rutta argued that the subject matters were identical and hence falling under section 8 of the CPC.

And owing to that the defendant prayed for the suit to be struck out.

Mr. Mwesiga submitting on behalf of the plaintiffs controverting the objection argued that the two cases were different. The Criminal case No. 543 of 2019 at DSM, Kivukoni Resident Magistrate's Court, is governed by the Penal Code and Criminal Procedure Code. In this case the plaintiffs are not a party to, and have not instituted any criminal case against the defendant. Moreover, the case is R v Anna Jeremiah, and not R v Anna Investment, which is a separate entity from the owner, with personality of suing and being sued. The two cases are thus totally different, submitted Mr. Mwesiga.

Extending his submission, Mr. Mwesiga submitted that on the other hand the objection raised contravened the principle propounded in the **Mukisa Biscuit**

Manufacturing Co. Ltd v End Distributors Ltd [1969] 1 E.A. 696 case, that a preliminary point of objection should be on pure point of law, which has been pleaded or arises by clear implication out of the pleadings and which if argued may dispose the suit, unlike in this objection.

He further submitted that the defendant has read the plaint in isolation as paragraph 2 and 12 insinuate existence of two kinds of jurisdiction as provided under Order 8 Rule 1 (f) of the CPC. Therefore the word "Arusha" should be interpreted as a slip of a pen, as the cause of action arose in Dar Es Salaam. In that regard he urged the Court to invoke the Written Laws Miscellaneous Amendment, No. 8 of 2018. Fortifying the position he referred this Court to the case of **Yakobo Gabriel Mushi v Greenfield Limited & Another, Miscellaneous Civil Application No. 4 of 2019** and **Maheshkumar Raojibhai Patel v Karim Shamshuddin Sulema, Commercial Case No. 80 of 2015.**

Briefly rejoining the submission, Ms. Rutta argued that since the plaint stated the cause of action arose was in Arusha citing of **Mukisa Biscuit's** case was irrelevant. And as for the application of section 3A of the Amendment of the CPC, the provision can cure other things but not jurisdiction.

As for the argument that the plaintiffs were not party to the criminal case instituted, she dismissed the argument as irrelevant since the plaintiffs are the complainants. Moreso, the owner of Anna Investment Ltd is Anna Jeremiah,

who is the sole proprietor of the said company. Maintaining her prayer she urged the Court to strike out the plaint with costs.

The pertinent question to be answered is whether the preliminary points of objection raised by the defendant are pure points of law. What amounts to a pure point of law has been well stipulated in the **Mukisa Biscuits** and later followed in the case of **Sugar Board of Tanzania v 21st Century Food and Packaging Limited & 2 Others, Civil Application No. 49 of 2015, CAT (unreported)** where the Court held as follows:

> "*A preliminary objection is in nature of legal objection not based on the merit or facts of the case, but stated legal, procedural or technical grounds. Such objection must be argued without reference to evidence*"

While the defendant claims the cause of action arose in Arusha, where the contract was executed, the plaintiffs despite pleading so in paragraph 12 of the plaint admitting "Arusha" to be where the defendant's business is situated, claim the word "Arusha" was slip of a pen. Examining the plaint and specifically paragraph 2 the defendant's address given indicated "Dar Es Salaam". With both Arusha and Dar Es Salaam featuring in the plaint it is difficult to conclude one way over the other, with certainty. This will require adducing of evidence. And with production of evidence requirement, the objection raised fails to fall squarely under the scope of pure point of law. Hand

in hand with that is the allegation of existence of contract executed in Arusha. This can be the basis of the defendant's claim or possibly where the cause of action arose, but all these require evidence, making the objection short of being on pure point of law.

Apart from the above observation, I also undertook to examine section 18 (a) (b) and (c) of the CPC, relied on by the defendant in strengthening her submission that the law require suits to be instituted in the area of which the cause of action arose or the area where the defendant permanently resides or work for gain, is equally not supporting the defendant's position fully. It can be correct the cause of action arose in Arusha but it cannot be necessarily correct that the defendant permanently resides in Arusha or work for gain in Arusha. To clear out whether the cause of action arose in Arusha or that she had her residence permanent or temporary in Dar Es Salaam or business as stated in the plaint has to be ascertained and the only way is by providing evidence. And on assumption the information is correct, one can easily say instituting a suit in Dar es Salaam was within the Court's jurisdiction to try the matter. The two explanations given expounding on section 18 (a) (b) and (c) of the CPC, one of them have well supported my stance, with illustration that:

> *"Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause*

of action arising at the place where he has such temporary residence"

From the explanation 1 made to section 18 of the CPC, the plaintiffs are right in instituting a suit before this Court which has jurisdiction based on the above explanation.

The defendant cited a number of cases in support of her position. However, all the cases cited though relevant but not binding on this Court and also since the Court find the objection raised unsustainable, the cases were in a way of no assistance. The cases of **Shahida** (supra) and **Frasim MRA v Mashaka Abas & 2 Others, Civil Application No. 26 of 2008, CAT (unreported),** were binding upon this Court but not relevant as the objection was not on pure point of law and there was no reason of striking out the plaint.

The 1st point of objection is overruled.

The 2nd point of objection will not detain me long. Mr. Mwesiga correctly submitted that the two cases are totally different the allusion, I subscribe too. The Criminal Case No. 543 – R v Anna Jeremiah, *first and foremost* is governed by the Penal Code, Cap 16 R.E. 2002 and Criminal Procedure Act, Cap. 20 R.E. 2002. *Secondly*, the complainant is the Republic and not Bevco Ltd nor Mark Techno Ltd. *Thirdly,* the outcome in the two cases would be completely different. In a criminal case the accused person if convicted and found guilty

will be punished, including being imprisoned and if not will be set free, while in a civil case the orders given will be declaratory depending on reliefs sought. *Fourthly,* Anna Investment is a separate legal entity from the owner Anna Jeremiah which is capable of suing and being sued.

In the present situation Anna Jeremiah is accused of stealing from the plaintiffs which is a criminal offence, while in a civil case the plaintiffs are claiming from the Anna Investment Company Limited for the payment of Tzs. 294, 574, 804.31 unpaid invoices in respect of the 1st plaintiff, and Tzs. 95, 142, 514/= unpaid invoices in respect of the 2nd plaintiff. Also the plaintiffs are claiming for other reliefs in their plaint which cannot be claimed in a criminal case.

The cited case of **Exim Bank** (supra) could have applied had both matters been civil in nature and with the same identity of the whole matter. As for section 8 of the CPC, its applicability depends on more elements to be satisfied. Again, borrowing from the **Exim Bank** (supra) the four necessary ingredients which had to be met are:

(i) That, there must be two pending suits, one previously filed;

(ii) That, the parties to the suit must be the same or must claim to be suing under the same title;

(iii) That, the matter in issue must directly and substantially be the same in the two suits; and

(iv) That, the two suits must be pending in a court of competent jurisdiction.

None of the ingredients have been satisfied to pave room for application of section 8 of the CPC.

This point is also overruled.

In upshot, the Court concludes the preliminary points of objection raised devoid of merits and proceed to dismiss them with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

13th FEBRUARY, 2020