

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 83 OF 2021
RAPHAEL LOGISTICS (T) LIMITED PLAINTIFF
AND
PAN AFRICAN ENERGY (T) LIMITED DEFENDANT
VERSUS
ZANZIBAR MARINE & DIVING LIMITED.....1ST THIRD PARTY
AJE MARINE COMPANY LIMITED.....2ND THIRD PARTY
TANZANIA PORTS AUTHORITY3RD THIRD PARTY**

Date of Last Order: 05/10/2022

Date of Ruling: 12/12/2022

RULING

MKEHA, J.

This ruling aims at resolving three points of preliminary objection raised with regard to maintainability of the present suit. Whereas the first point of objection was preferred by Ms. Mturo learned Senior State Attorney for the 3rd third party, the other two points of objection were preferred by Mr. Bendera learned advocate for the 1st third party .

With regard to the first objection, the learned Senior State Attorney submitted that, the suit was bad in law for failure to join the Attorney General as mandatorily required under section 6 (3) and (4) of the Government Proceedings Act. According to the learned Senior State Attorney, Tanzania Ports Authority (3rd third party) is a Government entity. Therefore, in view of the learned Senior State Attorney, non-joinder of the Attorney General vitiates the proceedings relating to this suit. The learned Senior State Attorney invited the court to struck out the suit for failure to join the Attorney General.

Mr. Bendera learned advocate submitted in respect of the other two objections to the following effect. That, this court lacks jurisdiction to entertain the suit for reason that, the suit relates to sinking of a crane at Dar es Salaam Port. According to the learned advocate, in terms of GN No. 338 of 2018 as well as the decision in **Salim O. Kabora Vs TANESCO & Two (2) Others, Civil Appeal No. 55 of 2014**, the suit ought to have been referred at the Tanzania Shipping Agencies Corporation (TASAC). The learned advocate urged the court to struck out the suit. Submitting further in respect of the last point of objection, the learned advocate submitted

that, the claims are pegged to negligence which does not feature in the Written Statement of Defence and the notice for joining of the 3rd parties.

Mr. Liganga learned advocate for the plaintiff submitted in reply that, the plaintiff had no claim against any of the third parties. The learned advocate maintained that, the only claim had been filed against the defendant and not the third parties. The learned advocate submitted in respect of the jurisdictional issue that, neither the plaintiff nor the defendant was a regulated service provider; hence there was no justification of referring the matter to TASAC. According to the learned advocate, the plaintiff's claims are based on contract and not otherwise as submitted by Mr. Bendera learned advocate for the 1st third party. The learned advocate for the plaintiff made reference to paragraphs 4, 5, 6, 7, 8 and 15 of the plaint.

Mr. Mang'ena learned advocate for the defendant submitted that the preliminary point of objection on non-joinder of the Attorney General was a misconceived one. According to the learned advocate, the trio Third Parties were brought in this case by an order of the court after the defendant had successfully applied for joining of third parties. In the learned advocate's

view, it was not open at that later stage, for the court to go back to decide on the issue of joining the Attorney General. The learned advocate went on to submit that, facts constituting negligence were stated in the 3rd party notice and the annexure thereto. The learned advocate made reference to paragraph 6 of the third party notice. He otherwise supported the submission by Mr. Bendera learned advocate that, the matter ought to be referred at TASAC.

In their respective rejoinders, both, Ms. Mturo learned Senior State Attorney and Mr. Bendera learned advocate reiterated what they had submitted in chief. As such, I see no need of reproducing what they submitted in rejoinder.

To resolve the three points of objection, the following three issues have to be answered:

- (i) Whether in the circumstances of this case there is a suit against the Government.

- (ii) Whether the plaintiff and the defendant in this case are regulated service providers within the meaning of GN No 338 of 2018.
- (iii) Whether particulars regarding negligence have been pleaded by the defendant.

It is true that Tanzania Ports Authority is a Government entity. It is also true that, in all suits against Government's Agencies or Departments the Attorney General is a necessary party. In this case, Tanzania Ports Authority is one of the third parties. Does being a third party entitles Tanzania Ports Authority being treated as a defendant in this case so as to bring into use, the provisions of section 6 (3) and (4) of the Government Proceedings Act? My response to that question is in the negative. I get strength in so holding because of the pursuation I get in **Zanfra Vs Duncan and Another (1969) HCD No. 163**. It was decided by Platt, J (as he then was) that, where the plaintiff elects to sue a single though joint tortfeasor and does not sue the second, then even if the defendant joins a third party to the action in order to obtain contribution, the third party does not become a defendant in the main suit. Where third party proceedings are taken, the third party only

becomes a defendant, if the plaintiff seeks to make him so **See also: Hasnain M. Murji Vs Abdulrahim A. Salum t/a Abdulrahim Enterprises, Civil Appeal No. 6 of 2012** (Othman, CJ – as he then was). In the present case, the learned advocate for the plaintiff was insistent that, in the pliant, there were no claims levelled against any of the third parties and indeed, there were no such claims. As such, in the present case, there is no suit against the Government entity which would attract the joining of the Attorney General as a necessary party. After all, in terms of section 4 of the Government Proceedings Act, where the Government is subject to any liability by virtue of Part II of the Act, the law relating to indemnity and contribution should be enforceable by or against the Government in respect of the liability to which it is so subject as if the Government were a private person of full age and capacity.

In terms of Regulation 2 of the TASAC Regulations, GN No. 338 of 2018, the regulations apply only to regulated service providers in mainland Tanzania. Regulation 3 defines a regulated service to include any service supplied or offered for supply in maritime transport sector and

includes maritime environment, safety, security, port services, dry port services, shipping agency, clearing and forwarding, cargo consolidation and deconsolidation, gross mass verification and Miscellaneous port services. Again, Regulation 3 defines a regulated service provider to mean a company providing regulated services. Under Regulation 6 those who can lodge complaints before TASAC are listed. The list includes a person who receives or has received services from a regulated service provider, a person who is affected or likely to be affected by the act, omission or decision of a regulated service provider or a regulated service provider.

Both, the plaintiff and the defendant are body corporates registered under the Companies Act. Neither of them is a company registered for providing regulated services as defined under Regulation 3 of GN No. 338 of 2018. The plaintiff, having not received services from a regulated service provider, and being not a regulated service provider, could not rightly refer this dispute to TASAC. It is my holding that, this court has jurisdiction to determine the dispute before it. The holding in **Salim O. Kabora's case** cannot apply in the circumstances of this case.

As rightly submitted by Mr. Mang'ena learned advocate for the defendant, facts constituting negligence were stated in the 3rd party notice where it is stated thus, the Detailed Investigation Report shows that at the time of the sinking of the crane the marine vessel was owned by the Second Third party and was being operated by the First Third party. Also that, the Detailed Investigation Report further attributed the sinking of the crane to the negligence on part of the employees of the First and Third Third Party (paragraph 6 of the Third Party Notice). Therefore, the objection regarding absence of facts constituting negligence is also bound to fail. It is overruled.

For the foregoing reasoning, all the points of objection are held to be unmeritorious. They are dismissed. Costs to be in the main cause.

Dated at DAR ES SALAAM this 12th day of December, 2022.




C.P. MKEHA

JUDGE

12/12/2022

Court: Ruling is delivered in the presence of the parties' advocates.




C.P. MKEHA

JUDGE

12/12/2022