

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO. 23 OF 2023**

NOVA ESPERANCA SERVICES PLAINTIFF

VERSUS

PTL ROADWAYS LIMITED DEFENDANT

Last Order: 13/06/2023

Ruling Date: 03/08/2023

RULING

NANGELA, J.,.

The Plaintiff in this case claims from the Defendant
as follows:

1. Payment of US\$ 251,971.20 and 9,950,000/= being the amount emanating from the Defendant's breach of the transportation agreement.
2. Payment of US\$ 50,000 as general damages arising from the Defendant's acts of breach.
3. Costs for this suit.
4. Any other relief that the Honorable Court deems fit to grant.

The filing and service of the Plaintiff to the Defendant was met with a written statement of defence from the Defendant who, apart from strongly denying the claims made by the Plaintiff, also raised two preliminary objections to wit, that:

1. the Plaintiff has no cause of action against the Defendant herein; and
2. the Plaintiff lacks locus standi to sue for being a third party (not privy to the agreement of transportation).

On the 23rd of June 2023, this court ordered the parties to dispose of the preliminary objections by way of written submissions and a schedule of filing their respective submissions was issued for compliance. Both parties filed their respective submissions.

Submitting in support of the preliminary objections, Mr. Abdulaziz S. Baisi, the learned counsel appearing for Defendant urged this court to uphold the two objections and dismiss the suit. To justify his conclusions, Mr. Baisi contended that, the first objection emanates from the brief

facts to this suit. He contended that, the Plaintiff filed this suit based on breach of a transport agreement of which the Plaintiff was never a party.

He submitted that, the Defendant inked the agreement attached to the Plaintiff not with the Plaintiff but with a Company in the name of Wakawaka Logistics Company Ltd, not a party to this suit. In view of that fact, Mr. Baisi submitted that, the Plaintiff does not have a cause of action against the Defendant.

Mr. Baisi relied on **Black's Law Dictionary**, 8th Edn. at pg.664 regarding what a cause of action is all about. According to **Black's Law Dictionary**, a cause of action refers to:

"a group of operative facts giving rise to one or more basis of suing; a factual situation that entitles one person to obtain a remedy in court from another person."

Mr. Baisi submitted that, a scrutiny of the facts as per the Plaintiff's Complaint and the annexures thereto, will make

one to come conclusion that, the allegations are unfounded. He submitted that, the annexures clearly indicate that the agreement which is the subject matter of the suit was between the Defendant and Africa Wakawaka Logistics Co.Ltd and not the Plaintiff.

As regards the second objection, Mr. Baisi submitted that, the Plaintiff lacks *locus standi* to gain audience before this court to enforce any remedy against the Defendant. Mr. Baisi referred this court to the case of **Ali Shabani and 48 others vs. TANROADS and AG.** Civil Appeal No.261 of 2020 (unreported). He contended that, the Plaintiff's nexus was only limited to an invoice issued by the Defendant under the instruction of the said Africa Wakawaka Logistics Co. Ltd.

In that regard, the Defendant's counsel submitted that, the Plaintiff being not a party to the agreement alleged to be breached by the Defendant, was a stranger who could not sue under the said contract. He relied on the case of **BIMEL Enterprises Co. Ltd vs. Tanzania National Road Agency and Others,** Civil Case. No.23 of 2014 (unreported). In that case, the court reiterated a principle

once expressed in the famous case of **Tweedle vs. Atkison** [1861] EWHC Q.B J 57 to the effect that, "*only parties to the contract can sue or be sued.*"

Mr. Baisi contended that, an issue of *locus standi* raises a jurisdictional challenge which needs to be determined at the earliest stage of the suit as it was held in the case of **Peter Mpalanzi vs. Christina Mbaruka**, Civil Appeal No.153 of 2019 (CAT), (unreported). In view of such submissions, he urged this court to dismiss the entire suit with costs.

Challenging the tenability of the objections raised by the Defendant, Mr. Frank Kifunda, the learned counsel appearing for the Plaintiff contended that, the purported objections raised by the Defendant are untenable because preliminary objections are not raised when certain facts are to be ascertained or what is sought is exercise of judicial discretion.

To support his submission, reliance was placed on the cases of **Mukisa Biscuits Manufacturing Company vs. West End Distributors Ltd** [1969] E.A 696, **Skyes Travel Agent Ltd vs. National Identification Authority**

and Another, Civil Case No.27 of 2019 [2019]TZHC 163;
Total Tanzania Ltd vs. Seet Peng Swee, Misc. Appl.
No.323 of 2019)[2020] TZHCLD 152 and **Harel Mallac**
Tanzania Ltd vs. Falcon Chemicals Co. Ltd and
Another, Commercial Case No.133 of 2019,
[2020]TZHCCOMD 31.

Mr. Kifunda contended that, any preliminary objections raised by any of the parties to a suit must be based only on points of law and not fact and the objector is not supposed to rely on any documentation to support the raised preliminary objection. He submitted that, as regards the matter at hand, this court has been called upon to examine the annexures used in the Plaint to ascertain that there was no cause of action. It is on that account that Mr. Kifunda urged this court to dismiss the first objection on the ground that it contravenes the principles set out in the above cited cases.

As regards the second objection, Mr. Kufunda is also at arms against it on the same ground that, the court is being directed to invoices issued to the Defendant. He

contended that, as a matter of principle, an objection must be argued without reference to evidence.

From that perspective, he submitted that, the involvement of annexures such as agreements, invoices, and proof of payment means the Defendant wants this court to rely on documents accompanying the motion to support the objection which is contrary to the rule established in the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra). He therefore urged this court to overrule the two grounds of objection.

I have given a careful consideration of the rival submissions. Let me start by stating that, it has been a celebrated principle in the case of **Mukisa Biscuits Manufacturing Company Ltd** (supra) that, a preliminary objection must be based on a point of law. However, the argument raised by the learned counsel for the Plaintiff is that, in dealing with it, the court is precluded from examining the pleadings. I think that is not a correct position of the law.

In the case of **Ali Shabani & 48 others vs. Tanzania National Road Agency & another** Civil Appeal

No. 261/2020 (unreported), the Court of Appeal, had the following to say:

"At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."

The above case was also relied on by this court in the case of **Moto Matiko Mabanga vs. Ophir Energy PLC** Civil Appeal No. 119/2021 (both unreported).

As it may be noted from the above cited case of **Ali Sabani** (supra) when a court is faced with a preliminary objection, the court is not precluded from looking at the pleadings filed before it when determining such a preliminary objection.

The rationale for that position is that a preliminary objection is not taken from an abstract. It is from that context, I hold, therefore, that, the contention by Mr. Kifunda that this court is not required to look at the plant

and its annexures is erroneous since annexures as also part of the pleadings.

Even if Mr. Kifunda would have contended otherwise, still this court would have to examine the pleadings filed by the Plaintiff given that, the first objection is premised on the issue of cause of action. Essentially, the principles for determining whether a plaint discloses a cause of action or not, are well settled. The legal position is that, when deciding whether a plaint discloses a cause of action or not, one had to look at the plaint together with its Annexures, if any.

The cases of **John M Byombalirwa vs. Agency Maritime** [1983] TLR, 1; **Musanga Ng'anda Andwa vs. Chief Japhet Wanzagi and 8 Others** [2006] TLR 351 and **Lucy Range vs. Samwel Meshack Mollel and Others**, Land Case No.323 of 2016 (unreported) confirm that legal position.

The Defendant's contention as far as the pleadings filed by the Plaintiff are concerned (specifically the Plaint and its annexures) is, that, they reveal nothing constituting cause of action against the Defendant, simply because, the

Defendant has never had any contractual engagement with the Plaintiff related to transportation. Instead, it is contended that, the agreement was with a Company in the name of *Africa Wakawaka Logistic Co. Ltd*, a company not a party in this case.

I have indeed looked at the annexures N-1 to N-3 which constitute the so-called "transport agreements". All these bear the name of Africa Wakawaka Logistic Co. Ltd. The said company, however, is not a party to this case. Whether the Plaintiff will join the said company as a party is not for this court to direct since, in law, the Plaintiff is the "master of his complaint," and has immense flexibility in presenting his claims as he sees fit.

On the other hand, there are as well invoices which bears the name of the Plaintiff and the Defendant and attached to them is a document named "transport payment application" which bears the name of Africa Wakawaka Logistics Co. Ltd. The basis of these invoices and the document annexed thereto cannot be established without a call for further evidence. Since these documents partly involve the name of the Defendant, then, one must go a

further step by calling for evidence and establishing the requisite nexus or the lack thereof.

In view of the above, and without much ado, I hereby find that the two objections cannot stand, and I proceed to overrule them with costs. Parties are directed to proceed with the main case on the date scheduled by the court.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 03rd DAY OF
AUGUST 2023



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DEO JOHN NANGELA
JUDGE

Ruling delivered on this 3rd Day of August 2023 in the presence of Mr. David Kassanga, learned advocate for the Plaintiff and Mr. Abdulaziz Baisi, learned advocate for the Defendant.

**DATED at DAR-ES-SALAAM, THIS 03rd DAY OF
AUGUST 2023**



John Nangela

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DEO JOHN NANGELA
JUDGE

ORIGINAL