

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 291 OF 2023

BEST WESTERN PROPERTY HOLDING COMPANY LIMITED.....PLAINTIFF

VERSUS

ZAMBIA CARGO AND LOGISTICS LIMITED.....1ST DEFENDANT

Date of last order: 19/10/2023

Date of ruling: 27/10/2023

RULING

A. MSAFIRI, J.

This is a ruling on preliminary objections raised by the defendant in this suit. In the suit, the plaintiff claims against the defendant for a declaration order that the acceptance letter for sale of the property on Plot No. 316, Toure Drive, Oysterbay, Maski, Dar es Salaam (herein suit property) is valid, and the revocation of the same by the defendant is illegal null and void, the defendant to pay general damages arising out of breach of contract to be assessed by this Court as well as costs of the suit.

On lodging her respective written statement of defence, on 22/9/2023, the defendant raised two preliminary objections to the effect that; *Alls.*

- 1. The plaintiff has no cause of action against the defendant as at the time of offer, acceptance and revocation of offer plaintiff was a non-existent legal person as per section 15(2) of the Companies Act and Section 6(f) of the Law of Limitation Act, Cap 89.*
- 2. The Court has no jurisdiction to entertain the matter in terms of section 167 of (i) (sic) of the Land Act Cap 113 R.E 2019 read together with section 3 of the Land disputes Courts Act Cap 216 R.E 2019 and Rule 5E of High Court Registries Rules, 2005 as amended by G.N. No. 638 of 2021.*

On 25/9/2023, this Court ordered the said preliminary objections to be disposed of by written submissions, the order was duly complied with by learned advocates for both parties. Ms. Romana Gervas, learned advocate appeared for the defendant, while the plaintiff had the legal services of Mr. Mrindoko Rajabu and Mr. Alais Rundya Mwasha, learned advocates.

Submitting on the first limb of objection, Ms. Gervas, counsel for the defendant said that it is trite established principle that on determining the point of preliminary objection, the Court should look into the Plaintiff and its annexures. And by doing that, it cannot anyway be considered as a mixture of law and fact. They pointed that this was observed in the case of **Babito Limited vs. Freight Africa NV-Belgium & 2 others**, Civil Appeal No. 355 *Adls*.

of 2020 where the Court of Appeal found that the trial court correctly relied on the plaint and its annexures in determining a preliminary objection raised.

The counsel referred this Court to the contents of the plaint where the plaintiff claims that on 16th August 2023, the plaintiff issued an offer to purchase the property on the suit property. However, in Annexure HK-5 attached to the plaint, the plaintiff admits that the plaintiff was registered on 3rd September 2023 and was given incorporation No. 168239866. That, the question which is obvious is how a company which was incorporated on 3rd September 2023 can write an offer letter on 16th August 2023?

The counsel for the defendant cited Section 15(2) of the Companies Act, No.12 of 2002 which provides that from the date of incorporation, a company shall become a body corporate and capable of exercising all the functions of an incorporated company. She argued that from that provision, the plaintiff had a mandate to write an offer letter to the defendant from the date of her incorporation which is 3rd September 2023 and not before. That anything done before the date of incorporation is illegal and invalid because at that time the company was not existing legally. *Adls.*

She added that, Annexure HK-4 is a letter of revocation which was issued by the defendant on 1st September 2023. But on that date, the plaintiff was not yet incorporated and hence it was a non-existing entity. That Section 6(f) of the Law of Limitation Act, Cap 89 R.E.2019 states that the cause of action in the case of a suit for damages for the breach of contract shall accrue from the date of the breach. In this matter the cause of action started to run on 1st September 2023, and by that time the plaintiff was not existing.

She prayed for the Court to sustain the first objection as the plaintiff has no cause of action against the defendant.

On the second objection, the counsel for the defendant argued that the plaintiff has instituted this case before the High Court Land Registry which is vested with specific jurisdiction to determine land disputes. That under Section 167 of (i) of the Land Act and Section 3 of the Land Dispute Courts Act and the High Court Registries Rules, 2005, the High Court Land Division is vested with exclusive jurisdiction to determine land matters.

The counsel submitted further that ways to determine the jurisdiction of the Court was observed in the case of **Godlove Raphael Dembe vs.**

Allo

Philipo Paul Ndunguru and 2 others, Civil Case No. 130 of 2022 where it was remarked thus;

"Two matters have to be looked upon before deciding whether the court is closed with jurisdiction. One, you look at the pleaded facts that may constitute cause of action. Two, you look at reliefs claimed and see as to whether they correlate with the cause of action".

Basing on that, Ms. Gervas submitted that reading the contents of paragraphs 5,5,6,9,10, and 11 of the plaint along with prayers sought by the plaintiff, it is clearly that this not a land case and there is no land dispute to be determined by this Court. To bolster her points, the counsel referred the case of **Godlove Raphael Dembe vs Philipo Paul Ndunguru and 2 others,(supra)**, where the High Court, Dar es Salaam Registry found that it has no jurisdiction to entertain a land matter.

She prayed for the Court to dismiss the case as it has no jurisdiction to entertain the same.

In response, Mr. Mrindoko and Mr. Mwashu, counsels for the plaintiff, submitted on the first limb of objection by referring the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A** at page 700 where the principles of preliminary objections were set that;

Adls

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer a dispute to the arbitrator"

Basing on that the counsels for the plaintiff argued that this first limb of objection has been misplaced as it does not qualify to be a point of law as per the rule set in the case of **Mukisa Biscuit (supra)**. They stated that the question on whether the plaintiff was capable of entering into contract for purchase of landed property in dispute before being incorporated which was raised by counsel for the defendant, is prematurely raised as it is based on facts which needs to be ascertained by way of evidence.

They submitted further that annexure HK-5 in the plaint which the defendant has relied upon is not evidence because the plaintiff is at liberty to use it as evidence or not during the trial. To bolster this point, they cited the case of **Sabry Hafidh Khalfan vs. Zanzibar Telecom Ltd (TANTEL Zanzibar)**, Civil Appeal No.47 of 2009 (Unreported) where the Court of Appeal ruled that the annexures attached with the plaint or written *Ally.*

statement of defence are not evidence. They prayed for the Court to disregard the first point of objection and dismiss it with costs.

On the second limb of objection, the counsels argued that the same is misconceived and has no merits. That this Court has jurisdiction to hear and determine the matter for three reasons; first, by looking into the cause of action and pleadings filed by plaintiff and the reliefs sought, this is a land matter. That the plaintiff have claimed to have offered for purchase of suit property. That the defendant accepted the plaintiff's offer but later the defendant breached the contract by revoking the letter of acceptance. That the reliefs sought is for declaration that the acceptance letter for sale of the suit property is still valid, a declaration order that the revocation of the acceptance letter by the defendant is illegal null and void and order for damages.

The counsels argued that the cause of action raised from the breach of purchase under Sub Part 3 of the Land Act and Section 33(1)(a) of the Land Disputes Courts Act. They pointed that this Court has jurisdiction to hear the matter being a land dispute arising from the Land Act. They cited the case of **Olam Tanzania Ltd and 3 others vs. Seleman. Seleman** *Allo.*

and others, Consolidated Civil Revisions No. 2,3,4,5 &6 of 2010, CAT at Mtwara.

They submitted further that even if it is found that this is not land matter still this Court has mandate to hear and determine the matter as the High Court and its mandate are creature of the Constitution of the United Republic of Tanzania of 1977 and it is established under Article 108 of the said Constitution. That, the High Court has unlimited jurisdiction and the judges of the High Court are mandated to exercise all any part of the powers conferred on the High Court. They prayed for this objection also to be dismissed with costs.

In rejoinder, Ms. Gervas reiterated her submissions in chief. She said the as per the case of **Mukisa Biscuit (supra)**, the points of objections raised are on points of law. She added that the cited cases by the plaintiff are distinguishable with the present case. She reiterated her prayers that the suit be dismissed with costs.

Having heard the submissions of the parties rival to this matter, the issue is whether the preliminary objections raised are on merit. *Allg.*

The first limb of objection is on whether the plaintiff have cause of action against the defendant. In defending this point, the defendant has based her argument on the claim that the plaintiff's claims that on 16th August 2023 she issued an offer to the defendant to purchase the suit property cannot stand before this Court as during that time, the plaintiff was not yet registered and incorporated hence it was not existing.

In this I agree with the counsels for the plaintiff that the raised objection need ascertainment as to when the plaintiff company was registered and whether it has a mandate in law to offer the purchase of property while it was not in existence. It a principle of law that a preliminary objection should be on pure point of law. I find the first point of objection to contain a mixture of law and facts, the facts which attracts proof by evidence. I agree that the Court, at this stage cannot dig into the annexures attached in the pleadings, determine and decide upon them as they are not evidence. For that reason I find that the first limb of objection was prematurely brought and is hereby overruled.

The second limb of objection is on jurisdiction of this Court to entertain this matter. It was argued by the defendant that this is not land matter basing on the facts pleaded and the reliefs sought. *Adlle.*

In order for this Court to determine as to whether the matter is land matter or not, one would have to look on whether the proceedings cover protection of ownership and/or possessory rights in land, as it was stated in the case of **Charles Rick Mulaki vs. William Jackson Magero**, HC. Civil Appeal No. 69 of 2017 at page 9.

In the suit at hand, looking at the Plaintiff, the plaintiff claims against the defendant are pure contractual. He claims that on 16th August 2023, the plaintiff offered to purchase the suit property on the suit property and the proposal contained terms of acceptance. That the defendant company vide a letter accepted the plaintiff's offer on the terms set out in the letter of offer. That it was in the terms of the acceptance letter that the plaintiff will comply with the offer within 14 days from the date the plaintiff gets a verification of the title from the defendant's Bank. That, however on 1st September 2023, the defendant unilaterally revoked the acceptance letter of the plaintiff and have invited tender bids for purchase of the suit property. That the unilateral action by the defendant was illegal and in breach of a contract which already existed.

The plaintiff's claimed reliefs are; a) a declaration order that the acceptance letter for sale of the property on Plot No. 316, Toure Drive, *Atle*

Oysterbay Masaki, Dar es Salaam is still valid; b) A declaration that the revocation of the acceptance letter by the defendant is illegal null and void; c) Defendant to pay general damages arise out of breach of the contract to be assessed by this Court; d) Costs of the suit and d) any other orders that this Court deems fit and just to grant.

By the facts pleaded in the plaint and the reliefs sought, the plaintiff does not seek the possessory or proprietary rights over the suit premises nor does she claim for the disposition of the land. What the plaintiff claims is for the breach of contract and performance of the purported contract on the part of the defendant.

Therefore, the cause of action here is breach of contract and the reliefs sought purely arise from the breach of contractual obligations. Here, the sale of the suit property or the purchase of the same has not been effected to make this matter the land matter. The parties were still in the contractual process of issue of an offer, acceptance and before they completed the process as agreed i.e. by the plaintiff purchasing the property, the defendant purportedly revoked the offer. I agree with the defendant's submissions that this matter is on contractual obligations and not land matter. *Alle*

Section 167 of the Land Act and Section 3 of the Land Disputes Courts Act establishes the exclusive jurisdiction of the High Court to determine land matters. It is my view that the suit at hand is on contract and the fact that there was an offer to purchase the suit property which was accepted and later revoked, does not make the matter a land matter but it is on commercial transaction upon which there is claims of breach of contract. I hence find the matter not a land matter and the plaintiff was supposed to file her contractual claims on a normal civil court and not land division.

The counsels for the plaintiff have argued that this Court has jurisdiction to entertain this matter even if it is not a land matter. That the High Court jurisdiction is mandated by the Constitution and the Land Division is not an exception. They urge this Court to proceed with the hearing of the matter and that the purpose of establishing registries or division was to facilitate the administration and enhance the expedition of certain categories of the Court.

I agree on the submission that the High Court jurisdiction is a creature of the Constitution. I am also bound by the decision of the Court of Appeal in the cited case by the counsel for the plaintiff, the case of **The National**

Alls

Bank of Commerce Limited vs. National Chicks Corporation Limited & 4 others, Civil Appeal No. 129 of 2015, CAT at Dar es Salaam.

It is true that the Court of Appeal in the cited case observed that the purpose of establishing divisions or registries is to facilitate the administration and dispensation of judicial functions. However the Court of Appeal went on to direct that despite that the High Court has general jurisdiction created by the Constitution, the nature of the dispute should be considered when entertaining the same. The Court of Appeal observed the matter which was before it and ruled it to arise from the loan agreement which created a contractual relationship between them. The same Court found that the said claim which was based on loan agreement falls squarely in the purview of area of specialization of the High Court Commercial Division.

The Court of Appeal in the said case went further to take cognizance of the persuasive observation by Hon. Ngwala, J in the case of **Britania Biscuits Limited vs. National Bank of Commerce Limited and three others, Land Case No. 4 of 2011 HC (Unreported)** where it was stated that;

Alls.

"It must be understood that any litigation whose cause of action accrued from mortgage transaction or a commercial contract, regardless of its aftermath to the landed property/real property is not necessarily a land matter that falls within the jurisdiction of the Land Division of the High Court. It is a result of commercial transaction and it has to be dealt with by the Commercial Division of the High Court not the Land Division....."

From that observation, the Court of Appeal despite its former observation, stressed the importance of each dispute to be filed to the specialized division/registry.

The Judicature and Interpretation of Laws Act (JALA) was amended by the Written Laws (Misc. Amendments), Act No.3 of 2016 which now empowers the Chief Justice in consultation with the President, to establish such number of divisions of the High Court. Section 18 of the said amendments provides thus;

18. The Principal Act is amended by adding immediately after section 4 the following new section;

4A (1) The Chief Justice may, after consultation with the President, by Order published in the Gazette, establish such number of divisions of the High Court as may be required for the purpose of facilitating the

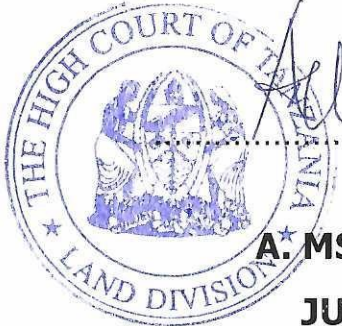
discharge of judicial functions in respect of specific matters as may be determined by the Chief Justice.

(2)The divisions established under subsection (1) shall, notwithstanding any other law, exercise jurisdiction over such judicial functions as may be prescribed in the establishing Order. (emphasis added).

By the above provisions, the High Court Land Division exercise jurisdiction over land disputes. Having made the above analysis, again, it is my finding that having looked at the pleadings in the plaint and the reliefs, it is clear that this is a contractual dispute and not land dispute.

In the upshot and foregoing reasons, I find that this Court cannot entertain the matter which is purely based on contractual transactions and it is hereby dismissed with costs.

It is so ordered.



A. Msafiri
A. MSAFIRI
JUDGE

27/10/2023