

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 112 OF 2017

BETWEEN

NAMEMCO ENERGY PTY LIMITED -----1ST PLAINTIFF
MOTO MATIKO MABANGA -----2ND PLAINTIFF

VERSUS

VODACOM GROUP LIMITED----- 1ST DEFENDANT
VODACOM TANZANIA PUBLIC LIMITED COMPANY-----2ND DEFENDANT
VODACOM INTERNATIONAL LIMITED -----3RD DEFENDANT
VODACOM CONGO DRC SPLR -----4TH DEFENDANT

RULING

SONGORO, J

Before me I have three preliminary objection on the points of law raised by four defendants namely Vodacom Group, Vodacom Tanzania Public Limited Company, Vodacom International Limited and Vodacom Congo DRC SPLR contesting that, ;-

1. The court has no jurisdiction to hear and determine Commercial Case No 112 of 2017 filed by Namenco Energy PTY Limited and Moto Matiko Mabanga, 1st and 2nd Plaintiffs respectively.
2. The plaint does not disclose a cause of action against the 2nd defendant.
3. The 2nd Plaintiff does not have a locus standi in the suit

In the light of the above mentioned three preliminary objection on points of law, the court invited parties to pursue objections raised. So, Ms Fatma Karume appeared pursue defendants three preliminary objection on points of law; while Mr Gabriel Mnyelee, Learned Advocate reply to the objection on behalf of the Plaintiffs.

To start with the defendant`s counsel explained that, from the plaint, it appears that, the plaintiff`s Commercial Case No 112 of 2017 is based on a foreign Judgment. It was her views that, the suit is governed by Section 11 of the Civil Procedure Code Cap 33

[R, E 2002]. The defendant`s counsel then in her skeleton arguments, faulted the plaintiff claim that, is not legally tenable because a foreign judgment which is the basis of the plaintiffs claim was annexed to the plaint. The counsel then argued that, what was annexed on the plaint is an order to pay issued by a court bailiff. The order was annexed as *Annexure Mabanga 6, 7 and 8*. The counsel then submitted that, the court has no right to recognize "a court bailiff". The defendant`s counsel then firmly insisted that, a party may sue and rely on Section 11 of the Civil Procedure Code Cap 33 only where a plaint is annexed and supported by a copy of a foreign judgment.

While on this point, the defendant counsel firmly insisted that, a foreign judgment to be enforced must involve the same parties. But in the file suit which is based on court bailiff order only Vodacom International Limited, and Vodacom Congo DRC SPRL, the 3rd and 4th Defendants were mentioned as parties to the said order and previous proceedings. But the 1st and 2nd Defendants, were not mentioned in the court bailiff order.

It was the argument of Ms Fatma Karume that, an order of court bailiff which plaintiff`s suit is based do not fall on the ambit and definition of "a foreign judgment" set out in Section 3 of the Civil Procedure Code Cap 33 [R.E 2002]. She then explained that, a suit based on section 3 of the Civil Procedure Code requires a foreign judgment be annexed to it and a court bailiff order may not suffice the requirement of the law. For reasons which advanced, the defence counsel prayed that, the plaintiff suit be dismissed because the court has no jurisdiction.

In pushing her objection further that, the court has no jurisdiction, the defence counsel insisted that, it is a requirement of the law that, a foreign judgment to enforce is the one which are defendants subject of the foreign country set out in the judgment. To substantiate her point, the defendants counsel drew the attention of the court to a decision between Rousillon Versus Rousillon (1880) 14 Ch D 351 at 371 where Fry J held that;-

The courts in this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained ; where he was resident in the foreign country when the action began ; where the defendant in the character of the plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared ; where he has contracted to submit himself to the forum in which the foreign jurisdiction in respect of which the cause of action arose whilst he was within that, jurisdiction”.

Then relying on decision in the above stated decision, the counsel then submitted that, the court has no jurisdiction of entertain a suit because, the 1st and 2nd Defendants, were not subject of foreign country were a foreign judgment or court bailiff originated. She further contested that, there was no legal process which shows that, the 1st, 2nd and 3rd defendants were summoned by court bailiff. The defendants also argued in such circumstances where some parties were not subject of foreign judgment the court has no jurisdiction.

Also, while on the same objections defendants counsel contested that, as a matter of legal principle a suit which intends to enforce a foreign judgment must involve the same parties The counsel then draw the attention of the court on details of order of court bailiff which is being relied upon by the plaintiffs, and said it is only against Vodacom International Limited, and Vodacom Congo DRC SPRL, the 3rd and 4th Defendants respectively. But in the filed suit Vodacom Group and Vodacom Tanzania Public Limited Company the 1st and 2nd defendants have were not parties to previous proceedings and were not even mentioned in an order of court bailiff. So the suit is not legally maintainable against the 1st and 2nd defendant because were not parties in the foreign judgment, and an order of court bailiff do not fall within the ambit of definition of “a foreign judgment set out in Section 3 of the Civil Procedure Code. The counsel insisted that, the court has no jurisdiction on the suit.

On the second objection, the defence counsel submitted the plaint does not disclose a cause of action against the 2nd defendant. While on this point the counsel contested that, the 2nd defendant was not a party to proceeding which took place in Democratic Republic of Congo or settlement agreements leading to an order of court bailiff. Therefore it was the argument and objection of the defendant counsel that, since the 2nd defendant was not a party to any proceedings and the plaint does not disclose a cause of action against the 2nd defendant the name of the second ought to be deleted from the plaint with costs

In the third preliminary objection on point of law, the counsel submitted that, Section 11 of the Civil Procedure Code Cap 33 [R.E 2002] requires a judgment to be reinforced by conclusive legal issues adjudicated between the same parties. The counsel then submitted that, the order to pay which is the basis of plaintiff claim was issued by court bailiff in favour of NAMEMCO Energy (PTY) Limited the 1st plaintiff and not in favour of the 2nd plaintiff. So the 2nd plaintiff cannot under the circumstances of the case stand as a person with right on the court bailiff order. Under normal circumstance NAMEMCO Energy PTY (Limited) who is the 1st plaintiff may sue on his own. But the 2nd plaintiff cannot under any circumstances sue on the basis of Court bailiff order because he lacks *locus standi* and also may not stand as a receiver of NAMEMCO the 1st plaintiff. For reason explained above the 2nd respondent ought to be struck out. . The defence counsel prayed that, all three objection be sustained and the plaintiff`s suit be dismissed.

In reply to the 1st defendant preliminary objection, the plaintiff counsel submitted it is well known that, a preliminary objection on point of law was defined in the case of Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd. (1969) EA 696, page 701 as it raises a pure point of law which is argued on the assumption that, all the facts pleaded by the other side is correct. The court insisted it cannot be raised if any fact has to be ascertained or where there is exercise of judicial discretion. The counsel then pointed out these are objections like issues of jurisdiction or plea of limitation.

Turning to the 1st preliminary objection on point of law, the plaintiff counsel pointed out that, defendants have a misconception of the plaintiff suit and Section 11 of the Civil

Procedure Code Cap 33 has been misquoted. He further submitted that, the suit is not even about recognition of a foreign judgment. Instead a suit is about enforcement of a foreign judgment which is governed by Section 2(3) of the Judicature and Application of Law Act, which is invoked where no written law applies and the High Court may exercise its jurisdiction and entertain the matter on the basis of doctrine of equity.

Commenting on the defendant's argument that, there is no judgment of the court which has been annexed to the plaint, the plaintiff counsel submitted that, the judgment of the Commercial Court of Kinshasa has been annexed to the plaint as Annexure Mabanga 3 and 4 respectively. Further, he explained that, Annexure Mabanga 3 is in French language while Mabanga 4 is in English language.

The plaintiff counsel, then submitted that, preliminary objections on points of law which were raised contains matters of facts which are reflected in paragraphs 3.18, 3.19, 3.20, 3.21, 3.23, and 3.25 of the plaint and may be proved by evidence. Next the counsel argued that, the point raised by the plaintiff may not be resolved by a way of preliminary objection because they requires evidence. So in the first preliminary objection raised by the plaintiff a test of Mukisa Biscuit has not been met.

In respect of the 2nd preliminary objection, that, there is no cause of action against the 2nd defendant which has been disclosed in the plaint the counsel submitted that, the cause of action has been well explained in paragraph 16 of the plaint. The plaintiff the submitted that, plaintiffs seeks also a relief of lifting corporate veil so that, the corporate veil of defendants companies , to see who is actually inside each veil because the defendants constitute a single economic unit and that, is the reason, the 2nd defendant has to be a party in the present suit. So Mr Mnyele argued that, the second objection has no merit.

Submitting on the third preliminary objection on point of law, that, the 2nd plaintiff has no *locus standi* the counsel submitted that, the 2nd plaintiff has a locus standi because

previously and even today has been part and parcel of the dispute. It was therefore plaintiff`s counsel argument that, the 2nd plaintiff has locus standi and he prayed that, the 3rd preliminary objection be dismissed for lack of merit. Essentially those were defendants and plaintiff arguments on three preliminary objections which were raised.

The court has consider all three preliminary objection on points law raised by defendants and subscribe to views that, , any preliminary objection on point law raised by any party must fall squarely on the test stated in case of Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd. (1969) EA 696, page 701 in which the court insisted and emphasized that, in its nature must be a pure point of law which is argued on the assumption that, all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is there is exercise of judicial discretion.

Now turning to the 1st preliminary objection on point of law of whether the court has jurisdiction to hear and determine the suit, I find it is important to highlight in this ruling what is meaning of "Jurisdiction" when used in relation to a particular court.

While considering that, point I revisited a Court of Appeal decision in Civil Appeal No 84 of 2009 between Tanzania Revenue Authority Versus Tango Transport Company Limited Arusha Registry (Unreported Case) and find Hon. Othman C J (as then was)relying on paragraph 314 of Halsbury`s Laws of England, Vol. 10, he noted that, a term "jurisdiction" is defined as

"The authority which a Court has to decide matters that, are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended, or it may partake of both these characteristics (Emphasis added)"

So going by a definition of what is the meaning of the term "Jurisdiction" in relation to a court it appears to me that, , once there is a statutory authority from any Act of parliament including, the Judicature and Application of Law Act Cap 358 or the Civil Procedure Act Cap 33 which allows the court to hear and determine the suit and the suit is brought under the provisions of the said Act, certainly the court has jurisdiction notwithstanding the merit and demerit of the suit of what is contained in the suit.

Now looking at the plaint the court find the suit is labelled at Commercial Case and the sum being litigated is about USD 20,080, 000 and 11,250,000.

Next the court find Rule 3 of the High Court (Commercial Division) Procedural Rule GN 250 of 2012 defines "commercial case;

"As a civil case involving a matter considered by the court to be of commercial significance including any claim or application arising out of transaction of trade or commerce.

The words *any claim* applied in Rule 3 of GN 250 OF 2012 are very wide and in my view captures claims raised in the plaint and convinces the court that, claims raised are commercial in nature. Further, the court finds Rule 5(2) of the High Court Commercial Division Procedural Rule GN 250 of 2012 stipulates the jurisdiction of the court on commercial cases The Rule in brief provides that, ;

"The Court shall be a commercial have and exercise original jurisdiction in Commercial Case in which the value of the claim shall be at least seventy million shillings in case of proceedings for recovery of a subject matter is capable of being estimated at money value"

So going by a definition of jurisdiction in relation to a commercial court it appears to me from Rules 3 and 5 of the Commercial Court Rules GN 250 of 2012, which are made under the Judicature and Application of Law Act Cap 358 the court has

jurisdiction to hear and determine a case which has commercial significant and notwithstanding the merit and demerit of the suit.

It follows therefore since the plaintiff commercial case a sum which is being its litigated exceed shs 70,000,000, and the issue involved are of commercial significant it follows this court has jurisdiction to determine the filed suit.

The defendant`s legal arguments that, parties involved in the suit were not involved in the commercial transactions or in foreign judgment or a copy of foreign judgment or some document were not annexed, those are not matters which may be investigated in the cause of hearing the suit, and strictly are not pure points of law because they requires some facts and evidence. The important point on the jurisdiction of the court is if the statute has vested jurisdiction to the court, and if the suit fall squarely on the jurisdiction of the court. That, is all about jurisdiction and objection as to the jurisdiction fails.

Turning to the objection that, the plaint does not disclose a cause of action against the 2nd defendant, I noted that, it is important to consider what is the meaning of *cause of action* in a suit. I noted that, in the case of Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and chiara Malavasi [2002] TLR 221, it was held that, a *cause of action* are the facts which gives a person a right to judicial redress or relief against another as found on the plaint and its annexure. Now defendant counsel is stating that, in the order of court bailiff which the plaintiff wants to enforce the 2nd defendant is not listed as debtor.

Quite frankly as stated in the case of Stanbic Finance Tanzania Limited the court find a cause of action is supposed to traced in the plaint and all it annexures. It follows therefore one has to ask himself if in the plaint and its annexures there are any facts which may give the plaintiff judicial redress or relief against the 2nd defendant.

Guided by that, principle I revisited the plaint and find in paragraph 2, the 2nd defendant is mentioned specifically as necessary party for the purpose of identifying assets of the 1st and 3rd defendants. Also, the 2nd defendant company is a subsidiary company of the 1st defendant. In my view, it seem paragraph 2 of the plaint sufficiently establish a cause of action against the 2nd defendant as necessary party.

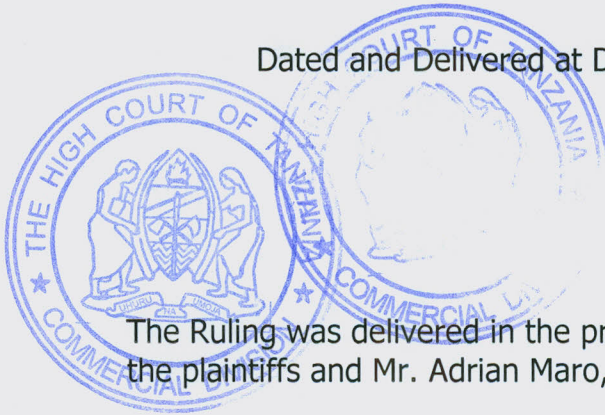
The issue whether or not the 2nd defendant is not mentioned in the bailiff order or foreign judgment that, in my view is a "defence" which may not be resolved at this stage. so the objection on cause of action also fails

On the third preliminary objection that, the 2nd Plaintiff does not have a locus standi in the suit, So the 2nd plaintiff cannot under the circumstances stands as a person with right on the Order to pay, I have consider the point and find the issue of locus standi was discussed in the case of Lujuna Shubi Balonzi Senior Versus Registered Chama Cha Mapinduzi [1966] TLR 203 that, what must be looked upon is if a party to the proceedings must show not only has power to bring the matter to the court but must also show that, has interest in the matter So for the 2nd plaintiff to claim that, has a locus standi has to maintain in the plaint that, has an interest in the matter. Now turning to the plaint the court find at paragraph 7 of the plaint the 2nd plaintiff maintain and claims that, was representing the 1st plaintiff in the transactions which are also subject of the present suit and others previous contracts. In that, respect, I find the 2nd plaintiff had interests in previous contract and proceedings of the 1st plaintiff and therefore has an interest in the Commercial Case 112 of 2012 The issue whether or not his interest will succeed or is not mention in the order of court bailiff are not matter which the court may base it decision on the 2nd plaintiff has locus stand. The point here is that, the 2nd plaintiff has just to show in the plaint that, has interest in the matter, and that, has been shown in paragraphs 7 and 8 of the plaint. So the objection as to the locus standi of the 2nd plaintiff also fails.

Admittedly other issues advanced by the plaintiff like whether there is a foreign Judgment or what is contained in the bailiff order , who are the parties may be relevant in the cause of hearing the suit because they need more evidence and facts to be in place.

For the reasons explained above I hereby find three preliminary objection on points of law have no merit and are hereby dismissed. Costs to follow the event.

Dated and Delivered at Dar es Salaam this 26th day of February, 2018



A handwritten signature in blue ink, consisting of several fluid, connected strokes.

H.T, SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Levina Kagashe Learned Advocate of the plaintiffs and Mr. Adrian Maro, Learned Advocate of defendants.