IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 133 OF 2019

BETWEEN

HAREL MALLAC TANZANIA LTD.....PLAINTIFF

Versus

FALCON CHEMICALS COMPANY LIMITED.....1st DEFENDANT

DIVERSEY EASTERN &

CENTRAL AFRICA LIMITED.....2nd DEFENDANT

Last Order: 9th Mar, 2020

Date of Ruling: 21st Apr, 2020

RULING

FIKIRINI, J.

The 1st defendant, Falcon Chemicals Company Limited raised two preliminary points of objection namely:

1. The plaint does not disclose cause of action against the 1st defendant.
2. By joining the 1st defendant there is misjoinder of parties.

The 1st defendant urged the Court to discharge its name from this suit and the plaint be rejected with costs.

During the hearing the plaintiff was represented by Mr. John Gamaya, assisted by Mr Francis Walter, learned counsels, while the 1st defendant enjoyed the legal service of Mr. Abdul Kareem, assisted by Ms. Glory Mhina, learned counsels and Ms. Mariam Saidi, learned counsel appeared for the 2nd defendant.

The 1st defendant counsel submitted that, in order to understand if the cause of action has been disclosed one has to look at the pleadings and its annexures. Fortifying his position, he cited the case of **John M. Byombalirwa v Agency Maritime Internationale (T) Ltd [1983] T.L.R. 1,** which defined cause of action to mean:

> *"essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit."*

It was his submission that in this suit based on the guarantee letter annexed to the plaint under paragraph 7, as per clause II of paragraph 2 (a) of the agreement, the 2nd defendant took the primary obligation for payment of deliveries upon demand by the plaintiff. That the guarantor only comes in after the debtor has failed to pay its debt. If the 2nd defendant had paid or undertook the obligation as agreed in the guarantee agreement, all of the plaintiffs' claim could not have made the 1st defendant liable. To strengthen his position, he cited the case of **Stanbic Finance Tanzania Ltd v Giuseppe Trupia & Another [2002] T.L.R. 217,** in which it was

held that in determining if the plaint discloses cause of action, the plaint must be looked at its four corners including its annexures.

Coming to the second preliminary point of objection it was the 1st defendant submission that by joining the 1nd defendant there is misjoinder of parties because 1st defendant is neither the necessary party nor the proper party. From the guarantee agreement the plaintiff can only sue the 2nd defendant without joining the 1st defendant. To buttress his position, he cited the case of **Property Custodian Board v Jaffer Brothers Ltd [1999] EA 55,** where the Supreme Court of Uganda held that:

> *"there was a clear distinction between the joinder of party who ought to have been joined as defendant and the joinder of one whose presence before the court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit."*

He also cited the cases of **Benares Bank Ltd v Bhagwandas, A.I.R (1974) All 18** and the case of **Abdullatif Mohamed Hamis v Mahboob Yusuf Osman and Fatna Mohamed, Civil Revision No. 6 of 2017,** which laid down the two tests to determine whether the party was a necessary party or not.

Concluding his submission, he submitted that the 1st defendant be discharged from the suit and the plaint be rejected with costs.

Opposing the objection, Mr. Gamaya, for the plaintiff submitted that the 1st defendant has misconstrued the essence of the guarantee letter that it meant to cover the claim upon the 2nd defendant default in making payment as agreed. He argued to the contrary that the plaintiff under paragraphs 4, 5 & 6 has established the claim against both defendants joint and severally. That there was an oral agreement for supply of caustic soda flakes to the 1st defendant by the plaintiff, and that the business transaction being guaranteed by the 2nd defendant. He referred the Court to the case of **Nitro Explosive (T) Limited v Tanzanite One Mining Limited, Commercial Case No. 118 of 2018** at page 8 where the ingredients of an oral contract have been stipulated. To strengthen his position Mr. Gamaya referred this Court to paragraphs 7, 8, 9 and 10 of the plaint. He stated that under those paragraphs one will find there was a letter from the 1st defendant requesting supply of material from the plaintiff. Delivery notes acknowledging receipt of material verified by the 1st defendant, invoices issued in the name of the 1st defendant and demand letter addressed to the 1st defendant, all these implicating the 1st defendant being part of the agreement. It was therefore imperative to say that referencing to section 78 of the Law of Contract by the 1st defendant's counsel that the 2nd defendant, had departed from the agreement was misconstrued, as the guarantee letter has not completely excluded the liability of the 1st defendant upon the 2nd defendant's default, submitted the counsel.

In additional the counsel submitted that the plaintiff cannot proceed against the 2nd defendant alone without establishing the default by the 1st defendant. Supporting his position, he cited the cases of **Musanga Ng'andwa v Chief Wanzagi & Eight Others [2006] TLR 351** and the case of **John M. Byombalirwa (supra)** and **Zebedayo Mkodya v Microfinance Solution Ltd & 4 Others, Commercial Case No. 95 of 2016.**

On the second point of preliminary objection it was the counsel's submission that paragraph 4 of the plaint shows that both defendants are jointly and severally liable and therefore there was a cause of action against the defendants.

Taking a different route, in submitting on the second point of preliminary objection, the counsel contended that the raised preliminary point of objection does not qualify to be a point of objection because it would require ascertainment of evidence to establish the extent of liability of the 1st defendant in the present claim as per Order I Rule 9 and Order I Rule 7 of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC).

Concluding his submission, he submitted that the points of preliminary objection be dismissed with costs. In support he cited the cases of **Suryakant D. Ramji v Saving and Finance Limited and Others [2002] T.L.R 121, Exim Bank (Tanzania) Limited v Dascar Limited & Another, Civil Appeal No.92 of 2009 at page 17, Kundanmal Dabriwal v Haryana Financial Corporation, Civil**

Petition No. 2713/2009 at page 8, Mukisa Biskuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696 at page 700 and **Yakobo Magoiga Gichere v Peninah Yusuph, Civil Appeal No. 55 of 2017.**

In rejoinder the 1st defendant counsel maintained and fortified its earlier position by submitting that LPOs for the supply of the caustic soda by the plaintiff, were issued as an obligation of the 1st defendant but with no obligation to pay for the products, payment was to be done by the 2nd defendant as agreed between the plaintiff and 2nd defendant as reflected under clause II (d) of the guarantee letter. The invoices were issued by the plaintiff at the instance of the 2nd defendant. The LPOs issued by the 1st defendant were not those which had been referred in the agreement that 1st defendant had an obligation to pay.

Reacting to the plaintiff's counsel's submission he contended that the exclusion of the 1st defendant can be derived from section 80 of the Law of Contract which provides an exception. Otherwise parties' obligations have to be derived from their agreement. The 2nd defendant took the primary obligation to pay for the deliveries and not the secondary obligation. Based on the second point of preliminary objection, the 1st defendant counsel submitted that there was no need of evidence as the guarantee letter has stipulated all that. The guarantee letter did not state that upon default but upon demand by the plaintiff. The requirement was that 90 days after issuance of invoices, the 2nd defendant was required to pay. And that failure to

pay the 2nd defendant could be sued alone. For the 2nd defendant to be liable as provided under clause II paragraph (d) of the guarantee letter, showed that the 2nd defendant has an entire liability and 1st defendant was not party to the negotiation between the plaintiff and 2nd defendant.

In view of the submission the 1st defendant prayed for the objection be sustained and she be discharged.

In determining the merits and demerits of this application, the first task shall be to determine if the objections raised fall squarely under the ambit of pure point of law as provided in the famous case of **Mukisa Biscuit** (supra) whereby adducing of evidence is not required, in order for the objection raised to sustain.

Examining the submission in **Mukisa Biscuit's** (supra) light, I am content that the **second,** preliminary point of objection raised did not fall within the ambit of the propounded principles. This is due to the fact that the objection raised is not pure point of law as there will be a need to call for evidence to prove whether there was a contract between the plaintiff and the 1st defendant.

In additional Order I Rule 9 of the CPC, clearly provides prohibits barring suit by reason of misjoinder, when it stated *inter alia* that:

> "No *suit shall be defeated by a reason of misjoinder of parties."*

To that end it is obvious that this Court cannot reject the plaint based on this ground. Furthermore, in protecting the plaintiff from exercising its right only because was not sure who exactly to sue, under Order 1 Rule 7 of the CPC, a room has been created whereby the plaintiff can join two or more defendants in case he is in doubt, as to the person from whom he is entitled to obtain redress. In the case of **NBC Holding Corporstion V Shirika la Uchumi na Kilimo Ltd (SUKITA) and 63 Others, Commercial Case No. 24 of 2001** it was held that:

"suit cannot be defeated for misjoinder of parties"

Lastly, in the plaint there are two allegations: *one*, is the existence of an oral agreement between plaintiff and all defendants, including 1st defendant as indicated in paragraphs 4, 5 and 6, and *two*, is an allegation of breach of contract as illustrated in paragraphs 7, 8, 9 & 10 of the plaint. The plaintiff claims against the defendants jointly and severally from the same act and transaction. Going by the case of **MIC (T) Limited v Tanzania Telecommunication Company Limited, Commercial Case No. 146 of 2002,** once the assumption is that any express or implied allegation of facts in plaint are true, against the defendants being sued, then there is no misjoinder at all.

Coming to the **first** point of objection on whether the plaint disclosed cause of action. It is not disputed and essentially is agreed by counsels for the parties that the Court of law in determining if the cause of action has been disclosed relies on

the plaint and its annextures on assumption what is stated is true. Both counsels referred to the case of **John M. Byombalirwa case** (supra). I am at one with their stance, that pleadings and its annextures are what the Court relies on and nothing else. Since the Court has no room to adjudicate on hypothetical questions, as it was held in the case of **Legal Brain Trust LBT Limited v Attorney General, Civil Appeal No. 4 of 2012 E.A,** the plaint must therefore disclose cause of action and failure to do so will certainly lead to the discharge of defendants.

In the suit at hand the plaintiff had disclosed cause of action against 1st defendant. The allegations that there was an oral agreement between the plaintiff and 1st defendant is clearly stated under paragraphs 4, 5, & 6 of the plaint. Similarly, the allegations of breach of contract have been raised under paragraphs 7, 8, 9 & 10 of the plaint against the defendants, including the 1st defendant. In the case of **Auto Garage (supra),** the Court maintained that a plaint must show that the plaintiff enjoyed the right and that right has been violated and that the defendant is liable. The plaintiff undeniably enjoyed the payment rights upon supply of caustic soda flakes to the 1st defendant, who was guaranteed by the 2nd defendant. And those rights are alleged to be violated by the defendants for failure to pay, what he deserved to be paid, for two months, and therefore the defendants allegedly liable. Although there are grey areas as far as the 1st defendant is concerned, but at this juncture those lingering issues cannot be answered unless evidence is adduced in

one way or the other. The exercise which can be carried and be determined during the hearing of the suit, if the case, would be allowed to continue. In the case of **Sugar Board of Tanzania V 21st Century Food and Packaging Limited & 2 Others, Civil Application No. 49 of 2005,** the Court of Appeal had the following to say:

> *"A preliminary objection is in the nature of legal objection not based on the merits or facts of the case, but stated legal, procedural or technical grounds.* ***Such an objection must be argued without reference to evidence.*** *The fundamental requirement is that any alleged irregularity, defect or default must be apparent on the face of notice of motion so that the* ***objector does not condescend to affidavits or other documents accompanying the motion to support the objection."*** [Emphasis mine]

Based on the pleadings and the annextures thereto, this Court considers the cause of action has been disclosed. The rest of the contested issues are matter of evidence which its proper place is hearing of evidence.

The first point of objection is therefore also overruled.

From the above findings I find that the preliminary points of objection are devoid of merits and I hereby overrule and dismiss them with costs. It is so ordered.

P.S. FIKIRINI
JUDGE

21st APRIL 2020