IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 108 OF 2020

COFACE SOUTH AFRICA
INSURANCE
CO.LTD.....PLAINTIFF

VERSUS

KAMAL STEEL

LIMITED.....DEFENDANT

Last Order: 09/09/2021
Ruling: 15/10/2021

RULING

NANGELA, J.,

Privity or no privity of contract, and, hence, the question regarding whether there is a cause of action in this suit or not, is the crux of the preliminary issues which arose in the course of handling this suit. In law, a party can only be sued on contract if he is a party to that contract, and not a stranger to it. Is there any exception?

Before I delve into the details or respond to that question, let me set out its facts, which are brief.

Sometimes in June 2013, Portland Steel International (PSI), a South African based company, entered into a verbal agreement with the Defendant herein to supply the latter with steel and other related

products on credit. Later the Defendant failed to pay all amount due having been supplied with several consignments.

Subsequently, PSI ceded, by agreement, its rights to claim the amount due from the Defendant to the Plaintiff herein. The cession agreement was parallel with the Plaintiff paying an equal amount to PSI and the PSI ceding all its rights against the Defendant to the Plaintiff.

On the 5th of November 2020 the Plaintiff filed this suit seeking for judgment and orders of this Court as follows:

1. Payment of an amount of USD 33,535.56
2. Payment of statutory arrear interest on the USD 33,535.56 from 19th August 2015 until date of final payment.
3. General damages to be assessed by this Honorable court
4. Costs of this suit; and
5. Any further relief this Honorable Court deems fit.

On the 8th day of December 2020, the Defendant filed its Written Statement of Defence and raised two preliminary legal issues, to wit that:

1. The Plaintiff has no cause of action against the Defendant

2. The Plaintiff's case is an abuse of Court process.

This ruling, therefore, is in respect of the two preliminary objections which were argued by way of written submissions filed in compliance with the orders of this Court dated 3rd August 2021.

Submitting in support of the preliminary objection, the Defendant's learned counsel, Mr Jovinson Kagirwa, submitted that, it is a trite rule that, for a Plaint to be looked at in a Court of law, it must, in the first place, disclose a recognized and acceptable cause of action against the Defendant. He contended that, in this present suit, the Plaint does not disclose a cause of action, which, he defined, by reference to Mulla, Code of Civil Procedure (12th Edition) Vol.1, at page 120 as: *'a set of facts sufficient to justify a right to sue someone and upon proof attracts remedies'.*

Referring this Court to the decision of the Court of Appeal in the case of **John M. Byombalirwa vs. Agency Maritime Internationale (Tanzania) Ltd**, [1983] T.L.R 1, Mr Kagirwa submitted therefore, that, a Plaint that discloses a cause of action must establish at least two things: (1) that, the defendant has a right to sue, and (2) the right to sue attracts remedies upon proof by the Plaintiff.

Mr Kagirwa has maintained a position that, reading the Plaint before this Court, the same indicates that the Plaintiff is seeking for payment of an amount of money due and arising from an alleged oral agreement between Portland Steel International (PSI) and the Defendant.

He submitted that, the Plaintiff is and was not privy to that agreement and referred this Court to paragraphs 3, 4, 5, 6, 7, 8 9, 10 and 11 of the Plaint. He argued that, facts disclosed do indicate that the Plaintiff is a stranger with no legal obligation or right under the alleged oral agreement. He contended that it is PSI who has the right to bring a case and not the Plaintiff herein.

To support his submissions, Mr Kagirwa has referred this Court to the case of **Mashado Game Fishing Lodge Ltd and Another vs. Board of Trustees of Tanganyika National Parks (t/a TANAPA),** Civil Case No. 9 of 2000(unreported) and **BIMEL Enterprises Company Ltd vs. Tanzania National Roads Agency and Others**, Civil Case No 23 of 2014 (unreported).

In **BIMEL's case** (supra), this Court, (Mzuna J.,) was of the view that, the doctrine of privity of contract bars the Plaintiff from suing the 1st and 2nd Defendants in that case. Referring to the famous English case of **Tweedle vs Atkinson** [1861] EWHC QB J 57, his Lordship observed that, "*only parties to the contract can sue and be sued.*"

Mr Kagirwa has sought to rely on those authorities to support his view that the Plaintiff herein lacks a cause of action against the Defendant and as a stranger to the agreement, under which the claimed amount arose; there is lack of privity on the part of the Plaintiff. He submitted that, the Defendant is also not privy to the second cession agreement which is pointed out under paragraph 12 of the Plaint as he was not involved. He concluded by asserting that, as a stranger the Plaintiff cannot sue the Defendant and, the Defender being a stanger cannot be sued by the Plaintiff.

Mr Kagirwa has further referred to this Court the case of **Banny Maijo t/a Banny Technical and General Supply vs. Medical Officer in Charge, Geita Referral Hospital and 2 Others**, Civil Case No,. 12 of 2020. He concluded his submissions by referring to Order VII Rule 11 of the Civil Procedure Code, Cap.33 R.E 2019 urging this Court to strike out the Plaint for lack of sufficient cause of action.

On the 30th of August 2021, the Plaintiff's legal counsel, one Deogratius W. Ringia, filed a reply submission. In his submission, he submitted that, since on 29th day of March, 2016 the rights to sue the Defendant were ceded to the Plaintiff by an agreement entered between the Plaintiff and PSI, the Plaintiff has all rights to

sue and receive from the debtor (Defendant) the total amount due.

He contended that, the gist of a cession agreement is to transfer rights and obligations under an agreement need to be ceded and assigned to another person, whereby the "***cedent***" agrees to transfer to the ***"cessionary"*** rights, including that of claiming money. To support his position, he referred this Court to a South African decision in the case of **Carswald & Another vs. Brews** (245/2016) [2017] ZASCA 68.

Concerning the issue of privity of contract, Mr Ringia submitted that, the Plaintiff has a right and liberty to sue the Defendant solely on the fact that the latter had entered into cession agreement with PSI, and had obtained such a right against the Defendant from such a juristic arrangement. Mr Ringia has maintained that the Plaintiff has a cause of action against the Defendant.

He has referred to various cases including the case of **Mackenzie vs. Farmers' Co-operative Meat Industries Ltd** 1922 AD 16, **Evins vs. Shield Insurance Co. Ltd** 1980 [2] SA 814, **Stanbic Finance Tanzania Ltd vs. Giuseppe Trupia & Claria Malavis** [2002] T.L.R 221, and **Vodacom Tanzania Fundation vs. Registrar of Companies,** Misc. Commercial Case No.24 of 2020 (unreported).

He submitted, therefore, that, in the interest of justice, there is a need to hear the Plaintiff regardless of whether he wins the case or not. He argued that, if the Court will uphold the objections that would defeat all senses of justice.

A brief rejoinder submission was filed by Mr Kagirwa. He argued that, in the first place the alleged oral agreement between PSI and the Defendant lacked a clear provision or clause that would or could allow for a "***cession***" in future. Second, there was no way a cession agreement could be concluded without availing the Defendant with a notice. He thus urged this Court to uphold the preliminary objections and struck out the suit.

Having given a careful consideration of the above rival submissions, the issue I am confronted with is whether the preliminary objections raised by the Defendant's learned counsel have any merit. As a matter of principle, well captured by this Court in a number of cases, one being the case of **Motohov vs. Auto Garage**, (1971) HCD No.81 this Court has maintained a legal position that:

> "a plaint must set out with sufficient particularity the plaintiff's cause of action."

In the present case, the Defendant has raised the issue of lack of cause of action as a preliminary point of

law seeking that this suit be struck out. The rationale for such a plea is further premised on the submission that, the Plaintiff is a stranger to an alleged contract between the Defendant and PSI, the latter being a company alleged to have ceded its rights to the Plaintiff, including the rights to sue.

The above scenario is what made the Defendant to argue that, the Plaintiff was a stranger to the contract between PSI and the Defendant and, that, since the Defendant was not notified of the cession arrangements between the Plaintiff and PSI , the Defendant being as well a stranger to such arrangements, the Plaintiff lacks cause of action. Is the Defendant legally correct?

In my view, an answer to this question will dispose of the objections without much ado. Let me examine the matter closer and see what should, therefore, be the appropriate answer to the question I have posed in light of the law and facts disclosed in this case. It has been the view of this Court, as stated in the case of **MIC (T) Limited vs. TTCL, Commercial Cause No.146 of 2002 (unreported)**, that:

> "the question whether a Plaint discloses a cause of action must be determined upon perusal of the Plaint alone together with anything

> attached so as to form part of it."

A similar view was held by the Court of Appeal in the case of **John M Byombalirwa v Agency Maritime** (supra), at page 5, where the Court of Appeal stated, that:

> "for purposes of deciding whether or not the Plaint discloses a cause of action, the Plaint and not the Reply should be looked at."

In this present case, the three annexure have been attached to the plaint, (**Annex. P.1, P.2 and P.3**). **Annexure P.3** is a "Settlement of Claim and Cession Agreement" between PSI and the Plaintiff wherein the former cedes all rights against the Defendant, including the right to claim from the Defendants. The Defendant herein has not challenged the validity of the Cession Agreement.

What he has raised is the issue regarding privity of contract in either of the two scenarios, i.e., as between the Defendant and the PSI (for which the Plaintiff is said to be not privy to their alleged oral contract and as between the Plaintiff and PSI (for which the Defendant is said to be not privy).

As I stated earlier at the beginning of this ruling, it is common knowledge that a stranger to a contract is precluded from suing on the basis of the contract to which

he is not a party. In other words, no one is entitled to or may be bound by the terms of a contract to which he is not an original party.

The right to sue under a contract, therefore, is a reserved right, available only to a person who is a party to the contract. This, in law, is referred to as the Doctrine of Privity of Contract. The more than century old cases of **Price vs. Easton** (1833) 4 B AD 433, **Tweddle vs. Atkinson** (1861 EWHC J57 (QB) and the Case of **Berswick vs. Berswick** (1966) Ch 538, which espoused this doctrine, are still good law to date.

However, there is an exception or rather a relaxation to the doctrine of privity, in particular, when there is an assignment of contractual rights. An assignment of contract occurs when a party to an existing contract (the "assignor") hands off the contract's obligations and benefits to another party (the "assignee").

In that regard, the assignee will ideally step into his shoes and assume all contractual rights of the assignor and can sue upon the contract for the enforcement of his rights and interests. It will mean, therefore, that, a creditor can as well assign a debt to a third person without the consent of the debtor.

In this instant case, the concept that has been used as between PSI and the Defendant is "the cession of rights by way of a contract" or "cession agreement". This is

particularly a common concept under the South African Law of contract, which concept, even though it has a mix of Roman-Dutch origin, does not, in my view, differ from the concept of "assignment of contractual rights" as we may refer to them under our law or in common law.

In defining what amounts to "a *cession agreement*", Theron, JA stated, in the case of **Carswald & Another vs. Brews** (245/2016) [2017] ZASCA 68, at paragraph 9, that:

> "Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between transferor (cedent) and transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession ...."

As it may be noted in this present suit before me, the Plaintiff derived its right to sue from the contract which it entered with PSI, in which, having paid the amount which the PSI was claiming from the Defendant by virtual of their alleged oral agreement, PSI transferred or ceded all the rights and obligation under the contract to the Plaintiff. Under the law in South Africa cessionary act is an exception to the doctrine of privity of contract.

In one of the South African decision in the case of **Jacobsz vs. Fall** 1981 (2) SA 863, the Court stated as follows, at 869A-B:

> "'it is trite law that, as a general rule, rights may be ceded by a creditor without the consent of the debtor, but obligations may not be delegated by a debtor without the consent of the creditor'. Watermeyer, J (as he then was) said in Milner v Union Dominions Corporation (SA) Ltd 1959 (3) SA 674 (C) at 676F:
> 'It is trite law that generally speaking, rights may be freely ceded without reference to the debtor, but that obligation may not be handed over to someone else without the concurrence of the creditor'.."

Taking into account that the parties had their affairs and arrangements done in South Africa, it follows, therefore, that, in view of the above cases and their discussion in relation to the facts at hand, the preliminary objection raised by the Defendant herein cannot stand.

In my view, the doctrine of privity of contract will not apply as the case at hand falls within an exception to

it. In the upshot, I hereby dismiss the preliminary objections as being without merits. The dismissal is with costs to the Plaintiff.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 15TH OCTOBER 2021

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DEO JOHN NANGELA
JUDGE

ORIGINAL