IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE No.398 OF 2002

SAFARI ENTERPRISES - PLAINTIFF

VERSUS

THE EXECUTIVE DIRECTOR

AXIOS FOUNDATION - DEFENDANT

ORDER OF THE COURT

IHEMA, J.

In its plaint filed in this court on 7th November 2002 the Plaintiff Safari Enterprises prays for judgment and decree for :-

- payment of Tshs.23,520,000/= being principal amount due
- payment of Tshs.3,600,000/= as expenses/costs of rehabilitation
- costs and interest thereto.

The claim by the plaintiff allegedly arises from breach of agreement by the defendant, the Executive Director, Axios FOUNDATION.

In its written statement of defence, in particular paras 4,5,6,7 and 8, the defendant has denied the claim on the basis that no lease agreement was executed between the two parties and further that whatever liability existed on the part of the defendant, the same was discharged. However in its reply to the written statement of defence the plaintiff avers emphatically that an agreement was concluded with the defendant.

The above notwithstanding, the defendant has filed a notice of preliminary objection that the plaintiff's suit is incompetent for lack of cause of action. The preliminary objection was agreed to be disposed of through written submissions. The defendant through its counsel, ADILI Attorneys (Advocates) has filed its written submission. The plaintiff on the other hand has chosen not to do so.

I have carefully gone through the contention of the defendant vis a vis the parties pleadings and I am satisfied that the preliminary objection must fail, for the bone of contention lies on whether or not there existed a lease agreement upon which the suit is founded.

This undoubtedly is a matter primarily of evidence and cannot in my humble view, be disposed of in a preliminary hearing or objection.

Indeed as correctly submitted by Adili Attorneys for the defence case law is abound of what constitutes a cause of action in a civil suit for a court of law to determine. Both the English case of Letang vs Cooper 1960 7 2 AUER 929 and the Tanzanian case of Leornard Mulumba Shango vs Edwin Mtei and 4 ORS (HC) Civil Case No.387 of 1998 (unreported) quoted by defendant's counsel have clearly restated the legal proposition on what constitutes a cause of action. In the English case supra it is " factual situations, the existence of which entitles one person to obtain from a court a remedy against another person", While in the Tanzanian case it is "a bundle of facts alleged by the plaintiff constituting an infrigement of a right of a person which are necessary for the court to infer... that the plaintiff has a complaint".

In the present suit I find paragraphs 3, 4, 5, 6, 7 and 9 of the plaint do contain "a bundle of facts constituting an infringement of the plaintiff's right for this court to infer that the plaintiff has a complaint or a remedy against the defendant."

Accordingly I decline to grant the preliminary objection by the defendant and I will dismiss it with an order that costs follow the event.

S. Ihema
JUDGE

Court: Ruling delivered in Chambers this 3rd March 2004 in the absence of the parties who are to be notified.

S. Ihema
JUDGE
3/3/2004

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 85 OF 2002

PAUL JOSEPH ..... APPLICANT

Versus

DEVOTA GEORGE ..... RESPONDENT

R U L I N G

MASSATI, J:

George s/o Joseph died intestate on 28/12/97. The deceased's wife DEVOTA D/O GEORGE the Respondent herein applied for letters of administration from Chalinze Primary Court, Bagamoyo District. The Appellant filed an objection to oppose the application. The objection was dismissed by the trial court by its judgment dated 15/1/2002. The Appellant was not amused. He appealed to the District Court. In a brief judgment, the District Court dismissed, the appeal on 18/4/2002. Still aggrieved the Appellant has filed this appeal.

The appellant initially filed the appeal himself. On reflection however the Appellant decided to engage the services of Mr. Henry S. Mkumbi, learned counsel. On 20th February 2003. Mr. Mkumbi filed an application for additional evidence under S. 29 (a) and 27 (4) of the Magistrates' Courts Act 1984 or alternatively for an order that the opinion of the Wakwere be sought. On 28/10/2003 I ordered that the said application be arguad by way of written submissions. In his submission Mr. Mkumbi learned counsel said that as the estate of the deceased was to have been administered under / by the Wakwere customary law evidence of the Wakwere customs was vital, but was not produced at the trial court. He submitted that if the court did not give directions on this aspect there would be discord in the distribution of the estate. On these grounds, he prayed that the application be allowed.

In responce, the Respondent objected to the order of aditional evidence, particulaly on the customs of the Wakwere. It was her fear that the additional evidence would be prejudicial to her rights as a wife of the deceased and in any case the Respondent's own witness Salum Kazinyingi had testified on this aspect.

It is true that under S. 29 (a) of the Magistrates' Courts Act, 1984 this court has power to take or to order another court take additional evidence. But it is think the law that except on grounds of fraud or suprise the general rule is that an appellate court will

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