

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM DISTRICT REGISTRY)**

AT DAR-ES-SALAAM

CIVIL CASE NO. 42 OF 2020

M.A. KHARAFI & SONS LIMITED PLAINTIFF

VERSUS

THE PERMANENT SECRETARY OF THE MINISTRY OF

HEALTH AND SOCIAL WELFARE 1st DEFENDANT

THE ATTORNEY GENERAL 2nd DEFENDANT

RULING

Date: 28/03 & 05/05/2023

NKWABI, J.:

The plaintiff has sued the defendants in this Court for a declaratory order and other orders as follows:

1. A declaratory order that the 1st defendant has breached the agreement.
2. An order for payment of USD 3,296,300.26 being special damages.
3. Interest of Tzs 60,835,738.20 and USD 2,414,943.18 from July 2014 to the date of filing this suit.
4. Interest on (2) above at the commercial rate of 12% per annum from the date of filing the suit to the date of judgment.
5. General damages to be assessed by the Court.
6. Interest at Court rate on the decretal sum from the date of judgment to full satisfaction of the decree.

7. Costs of the suit; and

8. Any other relief(s) that this honourable Court shall deem fit and just to grant.

The defendants in their written statements of defence raised three grounds of preliminary objection. They are as follows:

1. The suit is untenable and bad in law for contravening the provision of section 6(2) of the Government Proceedings Act [Cap. 5 R.E. 2019] as the plaintiff sued the Government without issuing notice to sue.
2. The suit is untenable and bad in law for the plaintiff has no cause of action against the defendants.
3. That the plaintiff has instituted a case against a non-existing party.

I directed that the preliminary objection be argued by way of written submissions. Ms. Grace Lupondo, learned State Attorney for the defendants argued the preliminary objection. Mr. Gerald Shita Nangi, learned counsel represented the plaintiff.

On the first limb of the preliminary objection, it was argued for the defendants that section 6(2) of the Government Proceedings Act provides mandatorily that anyone who wishes to institute a suit against the

Government to first issue a 90 days' notice. In this suit, it was contended, the notices were issued from CLYDE & CO TANZANIA on behalf of their client one **Khalafi & Sons** who is not a party to this suit. It was insisted that one **M.A. Khalafi & Sons Ltd** (plaintiff) is different from **M.A. Khalafi & Sons** (the issuer) of the alleged attached notice Annexure MK- 7. Further, it was insisted that there is no notice to sue the Government issued and served to the defendants respectively by the Plaintiff prior to instituting of the present suit as required. The plaintiff decided to file a suit without a notice, such omission is fatal taking into consideration the nature of the present claim if any involving a lot of money posed to the Government which is taken by surprise.

The learned State Attorney for the defendants cited **Arusha Municipal Council v. Lyamuya Construction Company Ltd** [1998] TLR 13 CAT where the suit was held to be incompetent and unmaintainable in law for lack of notice to sue the Government. It is prayed that this Court upholds the first limb of the preliminary objection and dismiss the suit with costs.

In reply submission, it was contended that it is clear from the pleadings including annexure MK-7 that the defendants were served with 90 days demand notices from the plaintiff. It was argued that the defendant's

contention that M.A. Kharafi & Sons is different from MA. Kharafi & Sons Ltd is a question of fact that will require more evidence for the Court to satisfy itself that indeed the two names represent two different persons which offends the rule as to preliminary objection. The evidence will require documents from the Business Registration and Licensing Agency. She distinguished the case of **Arusha Municipal Council** (supra) because in this case the defendants allege that the 90 days statutory notice they received is not from the plaintiff but another person.

It was added that if it came from the two names (persons) the defendants have not shown how it prejudiced the defendants and the defendants have corresponded using the names interchangeably and the defendant settled a portion of the claim.

It was further contended that in **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011 CAT (unreported) the Court was of the view that confusion of the name of the respondent as Coca Cola Kwanza Bottlers Ltd instead of Coca Cola Kwanza Ltd is not fatal irregularity and that such irregularity is minor and does not go to the root of the matter. It was finally contented that there is no reasonable doubt as to the true identity of the plaintiff and its relations with the defendant and hence the

defendant cannot benefit from a factor raised as a disguised legal point without justification. It was prayed the first limb of the preliminary objection be dismissed with costs.

Making a rejoinder submission, the learned State Attorney maintained that the plaintiff concede the preliminary objection by admitting that the plaintiff and the issuer of the notice are distinct. The defendant insisted that the suit be dismissed as per **Municipal Council's** case (supra). It was insisted that the case of **Christina Mrimi** (supra) is distinguishable as there was discussion on confusion of names while in the case at hand the issue is whether or not the plaintiff issued notice before filing a suit.

At the outset, I should point out that, the rationale behind the serving of notice of intention to sue was adequately stated in the case of **Musanga Ngándwa v. Chief Japhet Wanzagi & 8 Others**, [2006] TLR 351 (HC) in the following convincing words:

The object of the Notice contemplated by section 80 of Civil Procedure Code is to give the concerned Government and Public Officer opportunity to consider the legal position and make amends or settle the claim if so advised without

litigation. The Legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The provisions of sec. 80 are not intended to be used as booby traps against ignorant and illiterate persons. Section 80 is not doubt imperative. Failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. ..."

One may also ask how could the defendants settle a claim from nobody? A business name is neither a natural person nor a legal person. Another question that follows is how could the defendants prepare for defence from a notice issued by a non-existent person? The plaintiff ought to know that. Actually, the notice was issued by no person, neither the plaintiff because the plaintiff is not styled in the name that is purported to give instruction to the office that drafted the notice and delivered it to the defendants or anyone else. The **Christina Mrimi's** case is distinguishable to this case because in the later case the party who instituted the application was a natural person

as opposed to the situation in this case where the one who instituted the suit is neither a natural person nor a legal person.

I am, therefore, of the considered opinion that the plaintiff ought to have issued the requisite notice and failure to do so entitles this Court to strike this civil case off the Court's register for the suit is incompetent. For avoidance of doubt, I rule that this is a pure point of law as opposed to the suggestion by the counsel for the plaintiff that the objection requires evidence to establish it.

On the second limb of the preliminary objection the learned State Attorney argued that Order VII Rule 1(e) of the Civil Procedure Code Cap. 33 R.E. 2019 provides for a mandatory requirement that the plaintiff must disclose a cause of action against a defendant. The learned State Attorney referred me to **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Chiara Malavasi** [2002] TLR 221 for definition of what entails a cause of action and **Auto Garage & Others v. Motokov** [1971] EA 514 and the case of **Juraji Shariff & Co. Fancy Store** [1960] EA 374 in respect of what is the effect of a plaintiff not disclosing a cause of action where it was stated that:

"For the plaintiff must disclose a cause of action against defendants, short of that, defendants must be discharged."

The learned State Attorney implored me to examine paragraphs 5, 9, 11 and 12th of the plaint and the annexures MK-1, MK-3, MK-4 and MK-5 where to the surprise, in all the said attachments the concerned party is one **M/S. M.A. Kharafi & Sons/ A/S Noremco Construction Joint Venture** who for the matter of law would have been one with a cause of action if any against the defendants and not one **M.A. Kharafi & Sons** the plaintiff. It was pressed that the plaintiff failed to disclose a cause of action against the defendants.

In reply submission, the counsel for the plaintiff argued that the point of objection does not stand the test of being a preliminary objection. It was added that the law does not go beyond to scrutinize on whether the cause of action is applicable to the defendant or not or whether it is involving the plaintiff. It was also added that the consequence of non-disclosure of the cause of action is rejection of the plaint and not dismissal as had been suggested by the defendants as per Order VII Rule 11(a). Else the court will be required to determine facts and receive evidence relating to the dispute. The counsel for the plaintiff cited **Anthony Leonard Msanze & Another**

v. Juliana Elias Msanze & 2 Other, Civil Appeal No. 76 of 2012, CAT (unreported) where it was stated that:

*"We laid down relevant legal principles on cause of action in **John M. Byombalirwa v. Agency Maritime Internationale**. Through this decision, we first pointed out that although the expression "cause of action" has not been defined under the Civil Procedure Code, but that expression simply means essential facts which a plaintiff in a suit has to plead and later prove by evidence if he wants to succeed in the suit ... it seems to us that with the claim manifested in their plaint that they are legal administrators of the estate of a deceased person, the High Court should not have concluded at that preliminary stage without further evidence that the appellants had no cause of action and locus standi in the Land Case No. 26 of 2010."*

Also, the counsel for the plaintiff cited the case of **A/S Numero Construction v. Dar-es-Salaam Water and Sewerage Authority (DAWASA)**, Commercial Case No. 47 of 2009, HC (unreported) where it was observed that:

*"Without in any way being disrespectful to his submissions and the plethora of authorities cited therein with regard to what kind of contractual rights and benefits are capable of assignment and which duties and obligations of a contract are not capable being assigned, these are matters which require evidence to establish. They cannot, and on the authoritative statement in **Mukica Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696, be said to be on a pure point of law. In the event and for this reason, the preliminary objection that the plaint does not disclose a cause of action is accordingly hereby dismissed."*

The counsel of the plaintiff also observed that the case of **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia and Malavasi** [2002] TLR 221 does not support the plaintiff's submission in totality and quoted the Court to say:

"In the Jeraj case where in it is stated: 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 and upon the assumption that any express or implied allegations of facts in it are true ...

therefore, examining the preliminary objection in the light of the above authority, I am of the view that what the defendants are asking this Court to do amounts to making this Court peruse beyond the plaint and its annexure. That stage is yet to come in the course of these proceedings. The Court should not at this stage, determine whether it is correct or not that the debt was guaranteed by the defendants; or whether or not such guarantees were valid. Likewise, the Court is not required to establish at this stage, the validity of the demand letter."

It was finally submitted for the plaintiff that the defendants are requesting this Court at this preliminary stage to examine the nature of relationship of a joint venture between the plaintiff and A/S Noremco as well as examining the validity of the name of the plaintiff in the suit with its business name appearing in the demand letters. It is prayed the limb of preliminary objection be dismissed with costs.

In rejoinder submission, it was maintained that failure to disclose a cause of action leads to striking out the suit and the remedy provided for under Order

VII Rule 11 (a) comes into play on admission stage and not after the preliminary objection is raised.

I have considered the 2nd limb of the preliminary objection and I agree with the submission of the learned State Attorney for the defendants that the plaint does not disclose a cause of action against the defendants. The counsel for the plaintiff did not claim that the plaint discloses a cause of action. However, I agree with the counsel for plaintiff that where a plaint does not disclose a cause of action, the suit has to be struck out as opposed to the view of the learned State Attorney who urged this Court to dismiss the suit. Since the plaint was admitted and the same does not disclose a cause of action against the defendants, the suit has to be struck out in terms of **Juraji Shariff & Co. Fancy Store (supra)**. The case of **A/S Nomero Construction (supra)** is distinguishable to the case at hand.

Arguing the 3rd limb of the preliminary objection, the learned State Attorney observed that the plaintiff sued the 1st defendant one Permanent Secretary, Ministry of Health and Social Welfare as the proper party in which her cause of action is concerned a party who does not exist as the existing party is one Permanent Secretary, Ministry of Health, Community Development, Gender,

Elderly and Children. She **cited Singida Sisal Products & General Supply v. Rofal General Trading Limited & 4 Others**, Commercial Review No. 17 of 2017 HC where it was stated that:

"Let me conclude by saying that a non-juristic person has no legs to stand, no hands to prosecute, no eyes to see and no mouth to speak either on her own, or on behalf of any other person before any court of law."

Another case that I was referred to is **Change Tanzania Ltd v. Registrar, Business Registration and Licencing Agency**, Miscellaneous Commercial Case No. 27 of 2019. Then, it was prayed that the 3rd limb of the preliminary objection be upheld and the suit be dismissed with costs.

In reply submission, the counsel for the plaintiff the legal point of objection does not satisfy the test of **Mukisa Biscuits** case (supra). It is argued that to determine this point at this stage will require the Court to examine the facts and evidence on whether the Ministry of Health and Social Welfare is actually different from the Ministry of Health, Community Development, Gender, Elderly and Children and if the difference occurred during the pendency of the case or before the case was instituted in Court. Also, the

Court will be forced to examine at this stage as to whether the two mentioned Ministries exist simultaneously and are actually performing different functions. It is questioned, does the change of the name of the Ministry create a different legal personality of the former to the new Ministry? The counsel for the plaintiff's answer is NO. The defendant is the same entity which entered into the Agreement subject to the Suit. It was equated with the situation that happened in **Christina Mrimi** (supra) where it was stated:

"As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd, and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued, this case falls within the scope of RSC Order 20, r. 5(3), it would be just to correct the name of the respondent from Charringtons Ltd. To Bass Holding Ltd. In view of the above authorities ... We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd to Coca Cola Kwanza Ltd ... the review is accordingly allowed."

It is thus maintained that the cases of **Singida Sisal Products & General Supply** (supra) and **Change Tanzania Limited** (supra) are distinguishable in the current suit on the basis that the 1st defendant had only changed its name but did not cease to exist. It is prayed the preliminary objection be dismissed.

In rejoinder submission it was argued that the Ministry keeping changing does not hold water for it is upon the plaintiff to appoint her defendants clearly. It was added that the plaintiff ought to act diligently and sue the right Defendant as required by law to assist the Court issuance of executable orders. It was prayed that the three preliminary points of objection be sustained and proceed to dismiss the suit with costs.

On the third limb of the preliminary objection, I do not think the anomaly cannot be remedied. I accept the view of the counsel for the plaintiff that the 2nd defendant's name kept changing, (I can as well take judicial notice to that effect), therefore the anomaly could be solved by amendment of pleading, but amendment of the pleading cannot be ordered by this Court because I think that the suit has to be struck out for the 90 days notice is

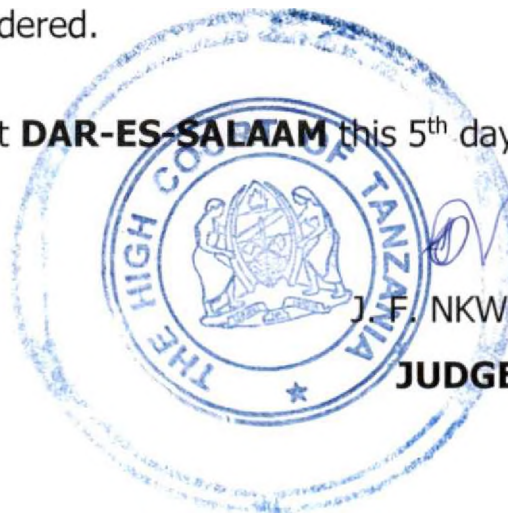
defective (actually the plaintiff did not issue the requisite notice). The 3rd limb of the preliminary objection is therefore, overruled.

I may also add, however, by way of advice to the plaintiff, that the plaintiff ought to have attached a board resolution or shareholders' resolution for the institution of this suit. This will make her subsequent suit not subject of being struck out for that reason as per **Ursino Palm Estate Ltd v. Kyela Valley Foods Ltd**, Civil Application no 28 of 2014 which quoted with approval **Bugerere Coffee Growers Ltd v. Sebaduka & Another** [1970] 1 EA 147. Also, the case of **Pita Kempap limited v. Mohamed Abdulhussein**, Civil Application. No. 128/2004 C/F 69 of 2005 CAT (unreported).

Consequently, the preliminary objection is sustained on the 1st and 2nd limbs. The suit is, thus, struck out with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 5th day of May, 2023.



J. F. Nkwabi
J. F. NKWABI
JUDGE