

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

**COMMERCIAL CASE NO. 54 OF 2021**

TANSINO QUARRIES ..... PLAINTIFF  
VERSUS

GRAND TECH (T) LIMITED ..... 1<sup>ST</sup> DEFENDANT  
ATU PATRICK MWAKITWANGE ..... 2<sup>ND</sup> DEFENDANT

20<sup>th</sup> September, 2021  
29<sup>th</sup> October, 2021

**RULING**

**NANGELA, J.,**

This is a ruling on a preliminary objection raised by the 2<sup>nd</sup> Defendant, Atu Patrick Mwakitwange, against the hearing and determination of this suit. The Plaintiff in this suit is praying for judgment and decree as follows: -

- (1) Specific payment of TZS **150,488,885.00** being the outstanding purchase price for the aggregate supplied to the Defendants.
- (2) Interest on item (1) above at the commercial rate of 15%

per month from the date of February 2019 till the date of judgment.

- (3) Interest on above items at commercial rate of 12% from the date of judgment/Decree till the final payment.
- (4) General Damages to be assessed by the Court.
- (5) Costs of this Suit.
- (6) Any order of the Hon. Court deems just to grant.

Before going to the root of the Applicant's objection, let me briefly state the facts of this case. From the pleadings, it is gathered that, the 2<sup>nd</sup> Defendant is the Managing Director of the first Defendant, a company duly registered under the laws of Tanzania.

Sometimes in the year, 2019, the Plaintiff supplied aggregates to the Defendants' construction site projects from its quarries in Lugoba area of Dar-es-Salaam. It is averred that, under the terms and conditions of their supply agreement, the Defendants were obliged to pay for the goods within 30 days of the delivery.

However, the Defendants failed to pay a total of **TZS. 150,488,885.00/-** for the supply and, that, the amount has remained unpaid for a long period of time. On 15<sup>th</sup> January 2019, the Defendants issued post-dated cheques to the Plaintiff which ended up being dishonoured.

In an effort to have the monies paid, however, on 28<sup>th</sup> May 2019, the Plaintiff sent a reminder note which, although the Defendants responded to it on the 26<sup>th</sup> June 2019 promising to pay the outstanding monies in four installments, the Defendant did not honor that commitment either. At the end of the day, the matter ended up coming before this Court as a suit for recovery of monies arising from the parties' transaction as narrated here above.

The defendants filed a Written Statement of Defense (WSD) and, in that defense they have raised a preliminary objection, to wit that: *"The Plaintiff does not disclose any cause of action against the 2<sup>nd</sup> Defendant."*

On 20<sup>th</sup> September 2021, when the matter was called on for its hearing, Mr Fraterine Munale, learned

Advocate, represented the plaintiff while Ms Salha Mlilima, learned Advocate, provided her legal service and representation to the Defendants.

In her oral submission, Ms Salha submitted that, as a matter of law, a Plaintiff must disclose facts constituting the cause of action. She relied on Order IV Rule 1 (e) together with Order VII Rule I of the Civil Procedure Code, Cap.33 R.E 2019.

Relying on the case of **Salomon vs. Salomon & Co. Ltd [1987] AC 22**, Ms Salha contended that, under the doctrine of corporate legal personality, the company is a legal personality separate to its members or director. In her view, that is also meant that, the liabilities, obligation or rights of the Company and those of the directors or shareholders are distinct as the later are responsible only to their capital contribution. She contended that, therefore, that, in law, a Company can be sue or sued on its own.

Relating her submission to the case at hand, Ms Salha told this court that, the Plaintiff has failed to show any cause of action against the 2<sup>nd</sup> Defendant,

who is a Managing Director of the 1<sup>st</sup> Defendant. She contended that, the Plaintiff does not clearly show the 2<sup>nd</sup> Defendant how is accountable for the acts done by him in his capacity as the Managing Director of the 1<sup>st</sup> Defendant, or which were done or should be imputed to him in his own capacity as an individual.

In the view of the above, the learned counsel for the Defendants concluded her submission by stating that, the suit does not disclose any cause of action against 2<sup>nd</sup> Defendant, failure of which renders it open to being struck out with costs by the Court.

In rebuttal to the Defendants' counsel's submission, Mr. Fraterine Munale, the Plaintiff counsel, criticized the Defendant's submission. He stated emphatically that, the Plaintiff does disclose cause of action against the 2<sup>nd</sup> Defendant since it applies to both Defendants. He referred this court to paragraphs 4 to 11 of the Plaintiff arguing that those paragraphs apply to all Defendants and, hence, clearly show the cause of action for both.

To strengthen his submission, reliance placed on the case of **John M Byombalirwa vs. Agency Maritime [1983] TLR, 1** and the case of **Musanga Ng'andwa Andwa vs. Chief Japhet Wanzagi and Eight Others [2006] TLR 351**. He submitted that, what the Plaintiff is required by the law is to illustrate facts which discloses the cause of action.

As for him, paragraphs 4 and 5 of the Plaintiff show that both Defendants are liable because the supply of goods was made and delivered to both of them and, also, they made promises to pay after the delivery of the goods as disclosed in paragraph 6 of the Plaintiff.

He contended further that, to effect payment the 1<sup>st</sup> Defendant issued a cheque which was issued by was dishonored. He also stated that, some of the materials supplied, were supplied to the site of the 2<sup>nd</sup> Defendant.

According to Mr. Munale, to establish the liability of the 2<sup>nd</sup> Defendant, evidence will be required. He contended that at this stage, it will be premature to

say that the 2<sup>nd</sup> Defendant is not liable. He relied on the **Vodacom Tanzania Ltd vs. Registrar of Company, Misc. Commercial cause No. 24 of 2020 (unreported).**

Mr Munale submitted further that, under Order I Rule 1 of the Civil Procedure Code, the law allows for the joinder of the parties where the cause of action arose from the same transaction. He contended, therefore, that, in the present case the Plaintiff does disclose cause of action and the Defendants are all liable and have been sued jointly and severally.

In conclusion, Mr Munale relied on Order VII Rule 14 (e) of the Civil Procedure Code, which allows the Plaintiff to bring in further documents not attached to the plaint, and, on that basis, he contended that, the objection does not have merit.

In a brief rejoinder, Ms Salha maintained that although the Plaintiff contains facts which suggest that the Defendants are jointly sued, none of the facts have touched the 2<sup>nd</sup> Defendant's liability in his personal

capacity. She insisted that the suit should be dismissed as against the 2<sup>nd</sup> Defendant.

I have objectively considered the rival submissions of the learned counsel for both parties. The issue which I am confronted with is whether the preliminary objection is of any merit. In law, a cause of action refers to a set of facts sufficient to justify suing to either obtain money, property, or the enforcement of a legal right against another party.

The principle for determining whether a Plaintiff discloses a cause of action or not, are also well settled. The legal position is that, when deciding whether or not the plaintiff discloses the cause of action, one had to look at the plaintiff as a whole together with its annexure, if any. The case of **John M Byombalirwa** and the case of **Musanga Ng'andwa Andwa** (supra) and **Lucy Range v Samwel Meshack Mollel and Others Land case No. 323 of 2016 (unreported)** confirm that legal position.

In the current case, it is clear to me that, the Plaintiff and its annexure do not disclose how the 2<sup>nd</sup>



Defendant is, specifically, liable for the claims made by the Plaintiff. Besides, looking at paragraphs 4 to 11 of the Plaint which the Plaintiff's counsel contends that they show general claims directed to both Defendants, there is nothing that reveals that the supply was made to the 2<sup>nd</sup> Defendant in his personal Capacity so as to disentangle him from the supply made to the 1<sup>st</sup> Defendant, a Company in which the 2<sup>nd</sup> Defendant is said to be a Director.

In particular, if I may quote from paragraph 4 alone, the Plaint reads as follows:

That from the year 2019, the plaintiff has been supplying **the Defendants** with aggregate from its quarries in Lugoba **to the Defendants' construction sites** for Nyuki projects and others. The said **goods were delivered and utilized by the Defendants** for road construction."

From that paragraph, one may gather that the goods supplied were to both Defendants for the purpose of constructing a road. However, since it has been sated that the 2<sup>nd</sup> Defendant is a mere Director of the 1<sup>st</sup> Defendant, does such a disclosure allow that he also be joined in the suit or do such facts sufficiently disclose that he should be sued on his personal capability?

In my view, I tend to agree with the submissions made by Ms Salha that, the 2<sup>nd</sup> Defendant being a mere Director of the 1<sup>st</sup> Defendant cannot be sued in his personal capacity unless there facts that disentangles him from the Company and makes him to stand on his own personal capacity. The company has its own legal personality distinct from its directors and shareholders, and, as argued by Ms Salha, there has never been a lifting of the Corporate Veil.

In his submissions, the Plaintiff's learned counsel tried to argue that, some of the building materials supplied to the Defendants, were also supplied to the 2<sup>nd</sup> Defendant's site. However, nothing of that sort is

ascertainable as a fact neither the Plaintiff nor the annexure to it.

In his submission, the counsel for the Plaintiff did contend as well that, the issues raised by the 2<sup>nd</sup> Defendant would necessitate the calling of evidence to establish the liability of the 2<sup>nd</sup> Defendant and reveal that the cause of action as well pertains to him. Reliance was placed on the case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited [1969] 1 EA 969.**

In that case, the defunct Court of Appeal for Eastern Africa set out what a preliminary objection is and what it should contain. At page 701, of the reported case, the Court observed that:

"A preliminary objection is in the nature of a demurrer. It is 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 if what is sought is the exercise of judicial discretion.”

While I agree that a preliminary objection has to be a pure point of law and should be argued on assumption that all facts are correct, and while I agree that such an objection should not call for evidence to establish it, in the case at hand, I am satisfied that what was raised by the 2<sup>nd</sup> Defendant is a point of law sufficient to dispose of the case against that Defendant.

Unlike what the Plaintiff's counsel alleged, no evidence is required to ascertain whether the Plaintiff discloses cause of action in respect of the 2<sup>nd</sup> Defendant. As I stated, the mere looking at the Plaintiff itself and the annexure to it, if any, is what the Court is supposed to do if it is to decide if a Plaintiff discloses a cause of action or not. That is what this Court has done, and, I am satisfied with the findings that the Plaintiff does not disclose a cause of action against the 2<sup>nd</sup> Defendant.

In other words, the Plaintiff does not have a claim or legal right against 2<sup>nd</sup> Defendant, but rather against the 1<sup>st</sup> Defendant as a Company. In the upshot, this court settles for the following orders, that:

- (i) The 2<sup>nd</sup> Defendant's preliminary objection has merit, and it is hereby upheld.
- (ii) The Case against the 2<sup>nd</sup> Defendant is hereby struck out with costs.
- (iii) The Case shall proceed to its next stage of hearing against the 1<sup>st</sup> Defendant.

It is so ordered.

DATED at DAR ES SALAAM ON 29<sup>TH</sup> OCTOBER, 2021



A handwritten signature in blue ink, appearing to read 'Deo John Nangela', written over a horizontal dotted line.

**DEO JOHN NANGELA**  
**JUDGE,**  
**The High Court of the United Republic of**  
**Tanzania**  
**(COMMERCIAL DIVISION)**