

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 39 OF 2023

KEEMAN LIMITEDPLAINITFF

VERSUS

ALLOYCE ISSA 1ST DEFENDANT

LEOPORD B. DEMBE 2ND DEFENDANT

HUSSEIN MAGOMA 3RD DEFENDANT

MWADEMBE COMPANY LIMITED 4TH DEFENDANT

CHINA RAILWAY SEVENTH GROUP....5TH DEFENDANT (NECESSARY PARTY)

RULING

11th & 29th September, 2023

MWANGA, J.

The plaintiff, **KEEMAN LIMITED**, filed a suit in Civil Case No.39 of 2023 against the defendants seeking declaratory orders that **one**, the 1st, 2nd, 3rd, and 4th defendants individually and severally, fraudulently misrepresented to the 5th defendant at all times that the 5th defendant

was dealing with the actual plaintiff herein, a fact which was not true. **Two**, the 1st, 2nd, 3rd, and 4th defendants individually and collectively obtained an unfair benefit through their fraudulent misrepresentation to the tune of Tshs. 700,345,000/= . **Three** compelling the 1st, 2nd, 3rd, and 4th defendants, individually and collectively, to refund the full amount of Tshs. 700,345,000/= to the plaintiff that they obtained through the fraudulent misrepresentation and unauthorized use of the plaintiff's reputational, intellectual, and image rights. **Four**, the 1st, 2nd, 3rd, and 4th defendants individually and collectively pay damages to the plaintiff to the tune of Tshs. 100,000,000/ to obtain a financial and market advantage for their fraudulent and unauthorized use of the Plaintiff's intellectual, reputational, and image rights. **Five**, the plaintiff also claims for interest and costs of the suit.

Before dealing with the points of preliminary objections raised, let me know and give some brief facts herein. The allegations are that the 1st, 2nd, and 3rd defendants, camouflaged as directors and principal officers of the plaintiff, impersonated and defrauded the plaintiff and extended a contract with the 5th defendant to construct Njombe/Mbeya road. In due course, a dispute arose between imposters and the 5th defendant, believing he was dealing with the plaintiff.

The dispute was referred to the High Court at Mbeya vide Civil Case No. 07 of 2016, which refused the matter. Subsequently the suit was settled amicably by signing a deed of settlement dated 18th July, 2022. The 1st and 2nd defendants signed the Deed as Directors of the plaintiff, while a principal officer represented the 5th defendant.

As per the deed of settlement, the 5th defendant paid a total of Tshs 700,345,000/= through the 4th defendant, account No. 0150350634000 CRDB Bank, believing the 1st defendant is a sister company of the plaintiff. Upon execution of the court's decree, the 5th defendant paid the decretal amount to the 4th Defendant per the terms of the Deed of settlement.

According to the plaintiff, the 1st, 2nd, 3rd, and 4th defendants were fraudulent, malicious, opportunistic, and calculated to benefit from the plaintiff's hard-earned goodwill, reputation, and intended credibility by which the 1st, 2nd, 3rd, and 4th defendants received a monetary advantage. Regarding the place of suing, the plaintiff contends that all defendants reside in Dar es salaam and Mbeya, and the plaintiff resides in Dar Es Salaam.

Together, the counsels for the 2nd, 4th, and 5th defendants presented their WSD containing three points of preliminary objection.

- i. This court has no jurisdiction over this suit

- ii. The suit is bad in law for none joinder of the necessary parties.
- iii. That plaint does not disclose the cause of action against the fourth and the fifth defendant.

During the hearing, the 2nd and 4th defendants were represented by Advocate Shaba Mutung'e, while Advocate Frank Ngafumika represented the 5th defendant. The learned advocate, Grace Ndera, represented the plaintiff. During the hearing, both counsels dropped the 2nd ground of appeal, agreeing that the plaintiff must choose the person to sue.

The first point relates to the question of jurisdiction of this court. The counsel Mr, Frank, raised contentions that this court lacks territorial jurisdiction to entertain the matter because the dispute emanates from cases conducted outside the court's jurisdiction. According to him, the centre of the claim is the contract extended in Mbeya, which is related to constructing a Njombe/Mbeya road. Further, even the deed of settlement was extended at the high court of Mbeya. Hence, the cumulative effect concludes that the suit should be filed in Mbeya Registry.

Mr. Shaba, Advocate, on the other hand, contended that the High Court registry amended Rules of 2022 GN No. 611 of 28th October 2022, Rule 2 established the High Court – Dar es Salaam Registry as Registry No. 1, and it serves Dar es Salaam Region and coastal Region which is the

limitation jurisdiction of the high court Registry. The counsel argued that **annexure** three is the plaint, the source of the dispute. And in this annexure, paragraphs 4 – 6 of the plaint annexure state that it was for constructing the Mafinga – Igawa road project; the contract in paragraph 4 talks about the road at Mbeya Region.

He also said, the deed of settlement in annexure “4” originates from Civil Case No. 6/2016, and it is execution No. 9 of 2021 in Mbeya Registry. Hence, the cause of action occurred in Mbeya. According to him, since all contracts were extended in Mbeya and executed after that, and at paragraph 2, the persons are both residents of Dar es Salaam and Mbeya, it is prudent that the case should be filed in Mbeya region where the dispute arose since the defendants are living in different places. The counsel cited the case of **Mantin Ngunda Vs Helman M. Ngunda** (1995) TLR 155, where it was stated that the jurisdiction of any court goes to the root of the case.

The second point argued by the counsel for the 5th defendant is that the suit does not disclose the cause of action against the 5th defendant. The counsel Mr, Frank, submitted that reading the plaint as a whole, there is no claim directed to the 5th defendant, as the plaintiff has only mentioned the 5th defendant as a person who has been cheated or

defrauded by the other defendants. In that case, the plaint shall be rejected against the 5th defendant.

In the 3rd preliminary objection, the counsel emphasized that the plaint does not disclose the cause of action against the 4th defendant. Annexure "3" in paragraph 4 does not show why the 4th defendant is included in the suit.

Per contra, Ms. Ndera, counsel for the plaintiff, submitted that the preliminary should be purely on the point of law as a matter of principle. The counsel referred to the case of **Mukisa Biscuit**. According to her, no facts or evidence is required. She argued that the learned counsels for defendants have submitted mixtures of facts and evidence, and its determination requires the court to look further into evidence. She referred to the case in Civil Appeal No. 269 of 2020 between **Mantrax Tanzania Limited Vs Goodwill Ceramic Tanzania Limited**, Civil Appeal No. 269 Of 2020 CAT(Unreported), where it was held that preliminary objection should be based on pure point of law.

In the point of jurisdiction, the counsel stated that the 2nd paragraph of the plaint shows that the 1st, 2nd, and 3rd defendants are adults, natural persons, and residents of Dar es Salaam and Mbeya. In contrast, the 4th

and 5th defendants are Board Corporate, and their principal offices are in Dar es Salaam and Mbeya.

It was further submitted that since the plaintiff was not involved in matters or proceedings before the high court in Mbeya, the decision reached there should not affect her.

On the issues regarding the cause of action, the counsel referred to paragraph 4 of the plaint that the filing of this case deals with impersonated fraudulently obtaining money at the detriment of the plaintiff, and paragraph 8 shows the role played by the 5th defendant leading to the rise of the dispute. According to her, in the **Johari Ibrahim Chata V Mpanda Municipal Council** land case No. 4/2021, the court on page 6 referred to the definition of cause of action. She also cited the Civil Appeal No. 76 of 2012 between **Anthony Leornard Msanze and Another Vs Julian Elias Ms and Two Others, Civil Appeal No. 40 of 2003** the court of appeal held that in Order VII Rue 1, the suit must state a cause of action.

Given the above, the counsel humbly submitted that this court has jurisdiction. The defendants are Mbeya and Dar es Salaam residents, and the cause of action is shown per the pleading.

In rejoinder, Mr. Frank submitted that jurisdiction is a pure point of law. The law shall be read with the facts/plaint and its annexure; the question of fraud or contract can be ascertained by looking at the facts pleaded.

To him, in the written statement of defence, the 2nd and 4th defendants in paragraph 2 show that they are residents of Mbeya only. He argued that Section 18 (b) of CPC states that if the defendants have different residents, the court has to grant leave, or parties must consent. Mr. Shaba, the advocate, insisted that the plaintiff's counsel had failed to show the court where the cause of action arose at the plaint. He reiterated that paragraph 4, line 6, refers to constructing some "roads." Which was not disclosed. To him, the plaintiff intended to hide where the cause of action arose; doing so, she goes against Order VII Rue 1 (e) of CPC. He said that since the facts are concealed, it is not the fact that the cause of action arose in Dar es Salaam.

I appreciate the authorities cited both counsels. The rules regarding preliminary objections are set out in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd Versus West End Distributors LTD** [1969] 1 E.A. 696. The preliminary objections must be on the pure point of law.

Likewise, it is trite law that parties are bound by their pleadings. See the case of **Ernest Sebastian Mbele Versus Sebastian Sebastian Mbele and 2 Others**, Civil Appeal No 66 of 2019 (unreported). Also, in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88, the court had this to say: -

'In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence; he is not permitted to set up a new case.'

Having looked at those principles, whether this court has jurisdiction or the plaint subject of this suit discloses a cause of action against the mentioned defendants can also be deduced from what is pleaded in the plaint and its annexures. In my view, I think the counsels for the 2nd, 4th, and 5th defendants have raised a fundamental issue that jurisdiction is a pure point of law. The court has held severally that the question of jurisdiction goes to the root of the case. See **Mantin Ngunda Vs. Helman M. Ngunda**(supra).

In the case of **Abdallah Ally Selemani t/a Ottawa Enterprises (1987) Versus Tabata Petrol Station Company Ltd and Another (unreported)**, Civil Appeal No.89 of 2017, the court held that: -

"...it is not enough for a party to state that a court had jurisdiction; rather, the court has a duty to ascertain that indeed it has the jurisdiction stated. This is mainly because, as we have earlier stated, jurisdiction is conferred by statute so that even if the party is agreed, they cannot confer jurisdiction to a court that does not have it." (emphasis is mine).

Having looked at the plaint in paragraph 4.0 and the annexures, the subject matter of the dispute is the contract for road construction (Njombe/Mbeya road) executed in the Mbeya Region. For instance, Annexure TAL 3, part of the plaint, in paragraph 4, shows that the contract was for rehabilitating the Mafinga-Igawa road project. As rightly contended by those who raised this point, Annexure TAL4, the settlement deed, shows that it was executed in the High Court Mbeya. All these facts are well placed in the plaint and the annexures.

It seems the plaintiff is not objecting that, in the circumstances above, the cause of action arose in Mbeya. However, she is of the view that the suit follows the defendants. According to her, since it is not objected that the defendants are both residents of Mbeya and Dar es salaam, as the plaintiff pleaded in paragraph 2 of her plaint. Therefore, the suit is appropriately filed in this court.

I have perused the WSD of the 2nd and 4th defendants. As contended by Mr. Shaba in his submission, paragraph 2 shows that the 2nd and 4th defendants are residents of Mbeya only, and their offices are in Mbeya. The said paragraph 2 reads;

"That contents of paragraph 2 are disputed to the fact that the 2nd and 4th defendants are residents of Mbeya and their offices are at Mbeya only not otherwise fore service address will be ..."

Given the above, I am inclined to hold a similar view that the High Court Registry amended 2022 G.N No. 611 of 2h October 2022 at rule 2, establishing the Dar es Salaam Registry as registry No. Serves Dar es Salaam Region and Coastal region only.

Section 18(b) of the CPC that since the defendants have different residents, the court has to grant leave to the parties or both provided consent where the suit shall be filed. Therefore, the plaintiff is required under the law to satisfy the court that the suit was instituted according to the requirement of section 18 of the CPC. That the law suit was filed where the defendant resides or carries on business, or personally works for gain or cause of action wholly or partly arose. The relevant provision reads:

"Section 18. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there is more than one, at the time of the commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain;

(b) any of the defendants, where there is more than one, at the time of the commencement of the suit, actually and voluntarily resides, carries on business, or personally works for gain, provided that in such case, either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or part, arises.

[Explanation I: Where a person has a permanent dwelling at one place and a temporary residence at another location, he shall be deemed to reside at both places regarding any cause of action arising at the place where he has such temporary residence.]

[Explanation II: A corporation shall be deemed to carry on

business at its sole or principal office in Tanzania, or, in respect of any cause of action arising at any place where it is, also has a subordinate office at such place.]

Having observed the above position of the law, I am inclined to hold that the cause of action arose in Mbeya. This is notwithstanding that the plaintiff was not part of the case in Civil Case No.39 of 2022, as contended by Ms. Ndera. Likewise, this honorable court has no jurisdiction to entertain the plaintiff's suit against the defendants; the purported lawsuit filed before this court contravenes the provisions of sections 18(a) (b) and (c) of the Civil Procedure Code, Cap. 33 R.E 2019, which, among other things, requires a suit to be filed where the defendant typically resides or carries on business, or personally works for gain and/or where the cause of action arose or in the absence of a jurisdiction clause, as agreed between the parties to this suit.

Undoubtedly, from the pleadings, the cause of action did not arise in Dar es salaam. The 2nd and 4th defendants, in their written statement of defence, show that they reside in Mbeya only.

That being said and done, this court lacks jurisdiction to entertain this suit as the preliminary objections are merited. The suit is, therefore, struck out—no order to costs.

Order accordingly.



A handwritten signature in black ink, appearing to read "H. R. Mwangi".

MWANGA

JUDGE

29/09/2023

COURT: Ruling delivered in the presence of Ms Grace Ndera, learned Advocates for the Plaintiff, Nehemia Gabo, learned counsel holding briefs for the 2nd and 4th Defendants, and absence of 5th defendant.



A handwritten signature in black ink, appearing to read "H. R. Mwangi".

H. R. MWANGA

JUDGE

29/09/2023