

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

COMMERCIAL CASE NO. 44 OF 2004

SAVINGS & FINANCE COMMERCIAL
BANK LIMITED.....PLAINTIFF
VERSUS
MINAZ KANJI.....1ST DEFENDANT
KARIM KANJI.....2ND DEFENDANT
FAUZIA JAMAL MOHAMED.....3RD DEFENDANT

R U L I N G

KALEGEYA, J:

The Defendants have fronted preliminary objections as follows:

The 1st and 2nd Defendants urge,

“The suit is bad in law for not joining UNIAFRICO Limited who is the primary debtor to the Plaintiff’s claim under the Facility Letter and on whom the guarantees of the Defendant are predicated upon.”

while the 3rd Defendant insists,

- “(i) The suit is res sub – judice since there is land case number 118 of 2004 in the High Court of Tanzania (Land Division) on the legality, regularity and propriety of the mortgage that forms the basis of the guarantee relied on by the plaintiff in this suit against the 3rd defendant.*
- (ii) In the alternative, the suit is bad in law for non – joinder of UNIAFRICO LIMITED because in any case the liability of the 3^r defendant, if any, is subject to the liability of the said UNIAFRICO LIMITED.*
- (iii) The mortgage that forms the basis of the guarantee which in turn underpins the suit against the 3rd defendant is illegal for*

want of consent of the Commissioner for Oaths thus unenforceable before this Honourable Court.”

The Plaintiffs are represented by Mr. Rwechungura, Advocate while the 1st and 2nd Defendants are represented by Mr. Ringo, Advocate. The 3rd Defendant is represented by Mr. Lutema, Advocate.

I will start with the preliminary objection by the 2nd Defendant and preliminary objections (ii) and (iii) raised by the 3rd Defendant.

With respect to Mr. Ringo and Lutema, the purported respective preliminary objections are not, legally, preliminary objections worth the title. As was stated in celebrated guidance in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** and consistently thereafter followed by our Courts,

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (by Law, JA at Page 700) and taken further by **Sir Charles Newbold, P,** at **page 701**, thus,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It

cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”

Now, the question of non – joinder of a UNIAFRICO LTD cannot finally determine the case. As properly observed by the Counsel, UNIAFRICO LTD, the borrower, is a necessary party, but non – joinder of a borrower in a suit does not make a case against the guarantor to collapse. A case can properly proceed provided all proper parties are impleaded. In any case, the law is very clear as per the provisions of **O. 1, Rule 9 CPC**, which runs as under,

“No suit shall be defeated by reason of the misjoinder or non – joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.”

He who alleges has to prove. Though not a party, the Plaintiffs would be bound to prove so far that a facility was extended to the borrower; secured by the Defendants’ personal guarantees and that the borrower has defaulted.

The complaint on non – joinder is accordingly dismissed.

Similarly, the 3rd Defendant’s complaint on lack of the Commissioner for Lands consent is not a preliminary objection recognized under the law. Why? Determination thereon can only be made upon production of evidence. The same stands dismissed.

This brings us to the third complaint fronted by the 3rd Defendant – the alleged existence of a similar case – cc 118 of 2004 in the High Court of Tanzania, Land Division.

Parties are agreed on the existence of cc 118 of 2004 in the Land Division of the High Court. The question is whether, legally, its existence bars the present suit from proceeding.

The Court is well versed with s. 8 CPC which provides,

“No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanganyika having jurisdiction to grant the relief claimed.”

and so is O. IV, Rule 1 (3) CPC with the following wording,

“No suit shall be instituted in the Commercial Division of the High Court concerning a Commercial matter which is pending before another court of tribunal of competent jurisdiction or which falls within the competency of a lower court.”

Having carefully considered the law and submissions, I am satisfied that also this last complaint has no legs upon which to stand.

Apart from the obvious that the parties are different, the causes of action are also different. As per annexures to the plaint, parties in Land Case No. 118 of 2004 are, **Fauzia Jamal Mohamed (as the next friend of Abdulkarim Jamal)** as Plaintiff and **UNIAFRICO LTD and Savings and Finance Ltd** as Defendants.

In the present case however, parties are **Savings & Finance Commercial Bank Ltd** as Plaintiffs and **Minaz Kanji, Karim Kanji and Fauzia Jamal** as Defendants. Apart from the obvious that the 1st and 2nd Defendants are not reflected either as proper or necessary parties in land case No. 118 of 2004, the third Defendant simply appears as a next friend. In the present case however, she has been sued personally as a guarantor.

I am on all fours with the Plaintiffs' Counsel that "the subject matters and the cause of action between these cases are quite different." The complaint on this is also dismissed.

In conclusion, all the purported preliminary objections stand dismissed with costs.

L.B. KALEGEYA

JUDGE

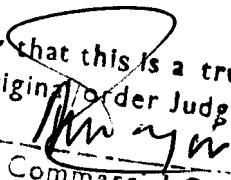
Delivered

L.B. KALEGEYA

JUDGE

1,076 words

22/11/2004

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign 
Registrar Commercial Court Dsm.
Date 22/11/04