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

COMMERCIAL CASE NO.16 OF 2011

MOHAMED ENTERPRISES (T) LTD.....PLAINTIFF

VERSUS

CMA CGM TANZANIA LTD.....DEFENDANT

Date of the final order: 30/03/2011
Date of final submissions: 17/05/2011
Date of ruling: 26/07/2011

RULING

MAKARAMBA, J.:

This is a ruling on a preliminary objection on a point of law that the Plaintiff has no cause of action against the Defendant.

The preliminary objection by consent of learned Counsel for the parties was disposed of by way of written submissions, the Plaintiff being represented by Mr. Bwana, learned Counsel and the Defendant by Mr. Mbakileki, learned Counsel.

The learned Counsel for the Defendant submitted that the plaint has failed to meet the requirements of Order IV Rule 1(1) and (2) of the Civil Procedure Code, [Cap.33 R.E 2002] which provides as follows:-

> *"1(1) every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in this behalf.*

(2) Every plaint shall comply with the rules contained in Order VI and VII, so far as they are applicable."

The Defendant's Counsel submits further that it is the requirement of Order VII Rule 1(e) of the Civil Procedure Code that the plaint shall contain facts constituting the cause of action and when it arose. Failure of which the plaint shall be rejected by the Court as provided for under Rule 11 of Order VII of the Civil Procedure Code, the Defendant's Counsel further submitted.

In buttressing his point further, the Defendant's Counsel explored the definition and explanation on the meaning of "cause of action" as could be gathered from different sources, citing the famous land mark case of **JOHN M. BYOMBALIRWA VS. AGENCY MARITME INTERNATIONAL (TANZANIA) LTD (1983) T.L.R 1** where Kisanga J. (as he then was), held that;

"The expression "Cause of action" is not defined under the Civil Procedure Code, 1966....but may be taken to mean essentially facts which it is necessary for the Plaintiff to prove before he can succeed in the suit..."

The Defendant's Counsel submitted further the Court of Appeal of Tanzania in ***John M. Byombalirwa's case*** held further that:

"The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form a part of it, and upon the assumption that any express or implied allegations of fact in it are true."

The learned Counsel for the Defendant also summoned to his assistance ***Mogha's Law of Lleadings in India,*** **15th Ed. 1997,**

Chapter XIV at p. 266 which defines a cause of action in the following terms:

> *"Cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree, in other words, it is a bundle of essential facts which it is necessary for the Plaintiff to prove before he can succeed in the suit."*

The Defendant's Counsel did not leave aside ***Osborn's Concise Law Dictionary*** 5th Ed 1964 at page 63 ***where*** cause of action is defined as *"the fact or combination of facts which gives rise to a right of action."*

In his endeavour to expound further on what a cause of action mean, the Defendant's Counsel also cited the decision in **Civil Appeal No.2 of 2003 between CONSOLIDATED HOLDING CORPORATION AND RAJANI INDUSTRIES LIMITED (1ST RESPONDENT) AND BANK OF TANZANIA (2ND RESPONDENT)** where the Court of Appeal of Tanzania observed that:

> *"It is now settled law in Tanzania that the Plaint does not disclose a cause of action, it shall be rejected. The provisions of Order VII Rule 11 (a) of the Civil Procedure Code, 1966 are to this effect. In **John M. Byombalirwa v. Agency Maritime International (T) Limited (1983) TLR 1**, a preliminary objection was raised in the Written Statement of Defence that the Plaint did not disclose a cause of action. This Court, among other things, held that where the plaint discloses no cause of action, the court should reject it. The Court also held that for purposes of deciding whether or not the plaint discloses a cause of action the plaint and not the reply to the written statement of defence should be looked at."*

The Plaintiff's Counsel in reply submitted that the Plaintiff has disclosed enough facts which the Plaintiff needs to ascertain by way of evidence against the Defendant at the hearing. This distinguishes all cases and authorities cited by the Defendant's Counsel on privity of contract and cause of action, the Plaintiff's Counsel further submitted. The Defendant does not refer to the paragraphs where he is accused of wrong doing and/or breach of contract or negligence at all, the Plaintiff's Counsel hinted. The purpose is to impose liability on the Defendant for his failure to sail the Plaintiff's cargo on or before the agreed time which failure caused the Plaintiff to suffer losses, the Plaintiff's Counsel surmised.

It was the further submission of the Plaintiff's Counsel that Paragraphs 3, 4, 5, 11, 12, 13, 14, 16 and 17 of the Plaint shows the losses suffered by the Plaintiff as a result of the failure by the Defendant to ship the cargo on the agreed time. It is premature now to strike out all paragraph mentioned herein above prior to them being tendered in evidence, the Plaintiff's Counsel further submitted. The Plaintiff's Counsel submitted further that it is trite law established in the case of **MUKISA BISCUITS CO. V. WEST END DISTRIBUTORS (1969) E.A 696 AT 701** by Sir Charles New Bold, P. that:

> *"The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".*

The Plaintiff's Counsel further referred to the case of **BIKUBWA ISSA ALI V. SULTAN MOHAMED ZAHRON (1997) TLR 295** that "*where a fact at issue needs to be proved in one way or the other, cannot be relied upon to dispose of the suit on a preliminary objection.*"

The Plaintiff's Counsel surmised that the alleged paragraphs which the Defendant's Counsel prays this Court to dispose them off are set of facts which show the consequences suffered by the Plaintiff due to the failure by the Defendants to ship the cargo within the time frame as agreed by the parties herein.

In rejoinder, the Defendant's Counsel submitted that paragraphs 6, 7, 8, and 9 of the plaint contain facts which impose certain obligations on the Plaintiff within Tanzania International Containers Terminal Services (TICTS) before shipment of the consignment. There are no facts whatsoever in those paragraphs requiring delivery of the Sesame Seeds on or before 30th June 2010 to Xingang Port in China (the destination Port), the Defendant's Counsel further submitted in rejoinder. Those paragraphs prove compliances by the Plaintiff with TICTS but not as an assurance by the Defendant as alleged by the Plaintiff, the Defendant's Counsel further submitted. The date in the Bill of Lading does not show the delivery date of the consignment but rather the date when the Bill of Lading was issued upon request by the Plaintiff for it to be dated, the Defendant's Counsel pointed out. The Plaintiff's plaint does not provide facts relevant enough to hold the Defendant privy and therefore liable to the Plaintiff under those contracts, the Defendant's Counsel surmised in rejoinder.

It was the further submission of the Defendant's Counsel in rejoinder that it is in the interest of the public that litigation should come to a speedy end, that is, ***interest republicae ul sit finis litiuum***. There is no reason to go to the main suit while we can remedy the situation by rejecting the Plaint before it is too late to achieve those objectives of the principle in question, the Defendant's Counsel opined. The Plaintiff's plaint ought to have conformed to the legal procedures set out in the Civil Procedure Code, 1966 [Cap.33 R.E 2002] under the provisions of Order VII Rule 1(e) and Rule 11 of the Civil Procedure Code but does not, so it renders the plaint incompetent and should be rejected with costs, the Defendant's Counsel prayed.

I have carefully considered the submissions by Counsel for both parties and I have examined the impugned paragraphs in the Plaintiff's Plaint in order to satisfy myself as to whether the Plaintiff's Plaint discloses a cause of action against the Defendant. I am alive to the observation by Hon. Dr. Justice Bwana (as he then was) in the case of **IPP LIMITED V. ERNEST COOVI ADJOVI AND KORA ENTERTAINMENT S.A (PTY) LTD, Commercial Case No. 66 of 2002** that "*when considering a cause of action, the Court has merely to peruse 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.*" The same view had earlier been expressed by the Court of Appeal in the now famous case on cause of action, that of **JOHN M. BYOMBALIRWA V. AGENCY MARITIME INTERNATIONAL (TANZANIA) LTD [1983] T.L.R. 1** to

the effect that "*for the purposes of deciding whether or not a plaint discloses a cause of action, it is the plaint that must be looked at.*"

In a nutshell, I can safely propose that a cause of action arises where there exists facts giving rise or occasioning to a party to make a demand or seek redress, depending on the nature and kind of the claim. In other words, a cause of action arises when facts on which liability is founded do exist. As rightly submitted by the Plaintiff's Counsel, the Defendant does not refer to the paragraphs where the Defendant is accused of wrong doing and/or breach of contract or negligence at all. Paragraphs 6, 7, 10 and 11 of the Plaint contain the following essential facts which, in my view, disclose cause of action against the Defendant. That the Plaintiff was looking for a shipping company to ship the cargo from the Dar es Salaam Port to the destination port in China. That the Defendant assured the Plaintiff that indeed it had a ship called DELMAS NACALA which expected to sail on or by 29th June 2009 and therefore could ship the cargo before the final date of 30th June 2010. That the Plaintiff booked a shipment of a fleet of 26 containers each of 20 feet destined to the Destination Port vide shipping order number DAR 001986 issued by the Defendant on 24th June 2009. That on the 30th day of June 2009, the Defendant supplied the Plaintiff with BILLS OF LADING Numbers DAR 002886, DAR 002887 and DAR 002877, which confirmed to the Plaintiff that the cargo had actually left Dar es Salaam Port destined to the Destination Port by or before the mentioned date and as understood and agreed between them before 30th June 2009. That on the 7th July 2009 the Plaintiff came to know that the ship did not actually depart on the expected date but it actually sailed off

on or about 5th July 2009. That consequently, the buyer refused to accept the cargo on the ground that the cargo was shipped later than the mandatory date of 30th June 2009. Looking at what was pleaded in the Plaintiff's Plaint, specifically at paragraphs 6, 7, 10 and 11 as I have endeavoured to explain above, it is without any doubt whatsoever that the Plaint discloses some cause of action against the Defendant. The facts contained in the Plaint also raise questions and issues which ought to be determined by this Court at an appropriate stage of the proceedings.

In view of the above, I am satisfied that the Plaintiff's Plaint has complied with the mandatory requirements of Order VII Rule 1(e) and Rule 11 of the Civil Procedure Code [Cap. 33 R.E. 2002].

I should point out here that in any event, the so-called preliminary objection does not meet the ***Mukisa Biscuits's*** test of pure point of law as it is based on the facts pleaded in the plaint, which require this Court to venture into evidence in order to establish it. As rightly submitted by the Plaintiff's Counsel referring to the case of **BIKUBWA ISSA ALI V. SULTAN MOHAMED ZAHRON (1997) TLR 295**, *where a fact at issue needs to be proved in one way or the other it cannot be relied upon to dispose of the suit on a preliminary objection.* Furthermore, a preliminary objection which is based on facts as is the case presently violates the established general principle in **MUKISA BISCUITS CO. V. WEST END DISTRIBUTORS (1969) E.A 696 at 701** that a preliminary objection has to raise a pure point of law argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial

discretion. In the event, this Court finds, on the reasons adumbrated above, that the Plaintiff's Plaint together with its annextures the Plaintiff lodged in this Court on the 2nd day of February 2011 contain facts sufficient to constitute a cause of action against the Defendant.

In fine, the preliminary objection raised by the Defendant is without merits. It is hereby accordingly dismissed with costs, which costs shall be in the cause. Order accordingly.

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R.V. MAKARAMBA
JUDGE
26/07/2011

Ruling delivered in Chambers this 26th day of July 2011 in the presence of Mr. Bwana Ali, Advocate for the Plaintiffs and Mr. Mbakileki, Advocate for the Defendant.

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R.V. MAKARAMBA
JUDGE
26/07/2011.

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