

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

COMMERCIAL CASE NO 95 OF 2016

**BETWEEN**

ZEBEDAYO MKODYA -----PLAINTIFF

**VERSUS**

BEST MICROFINANCE SOLUTIONS LIMITED -----1<sup>ST</sup> DEFENDANT

GEOFREY WILLIAM MALAMIA -----2<sup>ND</sup> DEFENDANT

ALOYCE KISSENGA MCHILI -----3<sup>RD</sup> DEFENDANT

VERONICA ALOYCE KISSENGA -----4<sup>TH</sup> DEFENDANT

REDIMNA GINWAS HAMAY-----5<sup>TH</sup> DEFENDANT

**RULING**

Date of the last Order: 23/11/2016  
Date of the Ruling: 16/2/2017

**SONGORO, J**

This is a ruling on three preliminary objections on points of law raised by Aloyce Kissenga Mchili and Veronica Aloyce Kissenga, the 3<sup>rd</sup> defendant and the 4<sup>th</sup> Defendants. The objections raised are as follows;

- 1) The plaint does not disclose a cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> defendants;
- 2) The 1<sup>st</sup> defendant is a registered company which has capacity to sue and be sued, joining the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are directors, and shareholder is a fundamental breach of the principle of company law.
- 3) By joining the 3<sup>rd</sup> and 4<sup>th</sup> defendants there is misjoinder of parties.

On the basis of objections raised, the 3<sup>rd</sup> and 4<sup>th</sup> defendants prayed to the court to dismiss the suit against defendants with costs in their favour.

In view of the objections raised, the court invited the parties and their counsel to pursue the objections raised. Ms. Prisca Chogero and Ms. Sassy Learned Advocates appeared for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and pursue the objection where as Mr. Francis Makota, Learned Advocate appeared for the plaintiff and opposed the objections.

In pursuing the objections, Ms. Chogero relying on skeleton argument briefly told the court that, in the plaint there are no allegations connecting the two defendants with the alleged plaintiff`s claims. It was also part her argument that, even if the trial proceeds against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants there is nothing which implicates the defendants.

Thus on the basis of her submissions, the counsel maintained that, the plaint does not disclose a cause of action at all against the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

To support her first objection that, the plaint does not disclose a cause of action against defendant, the Counsel drew the attention of the court to a decision in the case of Auto Garage and Others Versus Motokov (3) 1971 EA p 514 and Juraji Shariff and Co Fancy Store (1960) EA 374, which insisted that, for the plaint must disclose a cause of action against defendants, short of that, defendants must be discharged. She then prayed to the court to sustain the first objection and discharge the 3<sup>rd</sup> and 4<sup>th</sup> defendants and costs be awarded in their favour.

Turning to the second objection, the Defendant's Counsel told the court that, the plaintiff has sued Best Microfinance Solution Limited as the 1<sup>st</sup> Defendant which is a registered company and a legal entity capable of being sued and sue and at the same time has sued the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are shareholders and directors of the company

The counsel then contested that, by suing the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are directors of the first defendant's company, and the company which is a separate legal entity from its director it is obvious that, is a breach of fundamental breach principle of company law, that, only a company was supposed to be sued alone without involving its directors because it as a separate legal entity.

To substantiate her point the counsel drew the attention of the court to the decision in the case of Savemarks Insurance Brookers Ltd [2000] EA p141 which decided that, a company is a separate legal entity from its directors.

It was the argument of defendant's counsel's that, since the company has been sued it was improper for the plaintiff to sue the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are mere directors of the company. He prayed that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants be discharged

On the third objection, the Counsel relying on Order 1, Rule 13 of the Civil Procedure Code Cap 33 contested that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are directors have been wrongly joined in the suit which their company is

involved. The counsel claim a company is a separate legal entity. Which may be sued on its own name on the wrongs it committed for that, reason the counsel pressed the suit against two defendants be dismissed due to miss joinder of parties.

Responding to the two preliminary objection on points of law raised by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Mr Francis Makota, and Learned Advocate of the plaintiff submitted that, the plaint fully discloses a cause of action against all defendants. While on this point the plaintiff`s counsel referred the court to paragraph 11 of the plaint which states that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants are being sued as directors of the 1<sup>st</sup> defendant`s company.

He further referred the court to paragraph 13 of the plaint which alleges that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants committed fraud when the contract was existing under the umbrella of the 1<sup>st</sup> defendant`s company.

Then relying on a decision in case of Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and chiara Malavasi [2002] TLR 221 which decided that, in determining if the plaint discloses a cause of action against the defendant, a plaint must be considered within its four corners including its annexure's, he maintain that, the plaint connects the defendants with the breach of contract which is the cause of action.

To support his argument the plaintiff`s counsel referred the court to paragraph 13 of the plaint which alleges that, all defendants including the

3<sup>rd</sup> and 4<sup>th</sup> defendant s breached the contract. The counsel maintained that, from what is stated in paragraphs 11 and 13 certainly the plaint discloses a cause of action against them.

Moving on the objection that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants are shareholders of the 1<sup>st</sup> defendant may not be sued with their own company, the Plaintiff `s Counsel drew the attention of the court to a decision in the case of Yusuf Manji Versus Edward Masanja and Abdallah Juma [2006] TLR p 127 at page 131, which decided that, while a company is at law a different person altogether from its subscribers. But in certain special and exceptional circumstances , the court may go beyond the purview of the principle of corporate legal personality enunciated in the case of Salomon Versus Salomon and Co(1896)UK HL 1 and lift the veil of corporate personality , so as directors may be sued.

The Counsel then submitted that, in exceptional and special circumstances like the present suit directors may be sued. Then the counsel prayed to the court to follow the above mention decisions, and maintain the suit against the two defendant and dismiss the objection.

Regarding the objection on miss -joinder of the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the plaintiff`s counsel very briefly submitted that, the defendants have been properly joined because there are allegations that, they committed fraud therefore they must be held liable for wrong which they committed. Mr

Francis Makola, then submitted that, the two objections on points of law have no merit and he prayed for dismissal of the objections raised.

In her rejoinder, Ms. Chogero for the defendants maintained objections raised and prayed for the dismissal of the suit against defendants.

The court has carefully considered objections raised and find it is convenient to deal with the first preliminary objection on point of law of if the plaint discloses a cause of action the 3<sup>rd</sup> and 4<sup>th</sup> defendant

In addressing the above I will like to state that, it is cardinal principle emanating from Order 7 Rule 1(e) of the Civil Procedure Code Cap 33 [R.E 2002] that, , a plaint must discloses a cause of action against defendant.

What amount to "*cause of action*" courts in several decisions including a decision in the case of Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and chiara Malavasi [2002] TLR 221 have defined "*a cause of action*" as facts which gives a person a right to judicial redress, or relief against another as found on the plaint and its annexure.

In ascertaining if facts raised in the plaint discloses a cause of action against the defendant, the court in Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and chiara Malavasi relying on a decision in the case of Serafin Antunes Affonso Versus Porton Enterprises and Others (Com C.17 /2000

emphasized that, the court has to look and cast its eyes into the Plaint and its annexures.

Also, Mulla in the Code of Civil Procedure (12th Edn.) Vol. I, 120, defined "*a cause of action*" as a set of facts sufficient to justify a right to sue someone, and upon proof attract remedies.

Guided by the decision in the case of Stanbic Finance Tanzania Ltd Versus Giuseppe Trupia and chiara Malavasi [2002] TLR 221 and Mulla in the Civil Procedure Code, I revisited the filed Plaint , and found at paragraph 4 of the plaint, it is pleaded that, the suit is based on breach of contract. Also in the same paragraph 4 of the plaint, the plaintiff alleges and claims that;

"The plaintiff`s claim is against Defendants jointly and severally is for the breach of the contract dated 1<sup>st</sup> February, 2015 whereby the plaintiff claims against the defendants a total of shs 1,253,600,000/= being for specific damages"

Honestly, having carefully revisited facts of paragraph 4 of the plaint that, the claim is of breach of contract against all defendants , I find that, the claim raised tend to allege *and connect* all defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants with a breach of contract. So the set of facts alleging breach of contract in paragraph 4 of the plaint connects all defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants and once allegations are proved they may attract judicial remedies in favour of the plaintiff. Quite frankly I find

those set of facts alleged in paragraph 4 establish a cause of action against 3<sup>rd</sup> and 4<sup>th</sup> defendant.

Likewise in paragraph 9 of the Plaintiff, the plaintiff claims that, defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not honour the *terms and conditions of payment* of outstanding balance of shs 1,253,600,000. It appears those set of facts which appear in paragraph 9 of the plaintiff connects the 3<sup>rd</sup> and 4<sup>th</sup> defendants with allegations of failure to honour the terms and conditions of contract. In my view that, sufficiently justifies that, the plaintiff properly sued all defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

Therefore bearing in mind that, the plaintiff contains set of facts on allegations of breach of contract I am persuaded that, the plaintiff discloses a cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Thus I fully agree with Mr. Francis Makola, Learned Advocate of the plaintiff that, the plaintiff disclose a cause of action also against the 3<sup>rd</sup> and 4<sup>th</sup> defendants. For reasons explained, the objection on cause of action fails.

Turning to the preliminary objection on point of law that, by suing the 3<sup>rd</sup> and 4<sup>th</sup> Defendants with the 1<sup>st</sup> defendant`s company which is their company is a fundamental breach of principle of company law, , the court would like accept that, from the legal point of view a company is separate legal entity from its directors or shareholders.



But quite frankly there is an exception to that, rule which was also stated in the case of Yusuf Manji Versus Edward Masanja and Abdallah Juma [2006] TLR p 127 at page 131, In the above mentioned case Hon Justice Lobular JA (as then was) stated that, in certain special and exceptional circumstances, the court may go beyond the purview of the principle of a company is separate legal entity described in Salomon Versus Salomon [1897] AC 22

Thus it appears to me from the decision in the case of Yusufu Manji cited above, that, in a special circumstances, shareholders and directors may be sued with their company and where circumstances permits lift the corporate veil. So I quite agree with the submission and observation by Mr Francis Makola that, in certain circumstances directors or shareholder may be sued together with their company. So the issue whether or not the 3<sup>rd</sup> and 4<sup>th</sup> defendants were properly sued that, may be decided after hearing the plaintiff claim and evidence.

Therefore I find the objection, that, the 3<sup>rd</sup> and 4<sup>th</sup> defendants have been improperly joined or sued, has no merit, and it fails.

On the objection that, there has been a mis-joinder of parties by joining the 3<sup>rd</sup> and 4<sup>th</sup> defendants the court finds that, has almost been answered by this court while addressing the 1<sup>st</sup> and 2<sup>nd</sup> objections, that, in the plaint there are allegations of breach of contract made against all defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Thus going by the plaintiff allegations of breach of contract committed by all defendants and explanation that, the

breaches arose from same acts and transactions, it appears to me it was proper to join the 3<sup>rd</sup> and 4<sup>th</sup> defendants in the plaint and there is no miss joinder of parties.

After all alleged reliefs claimed in the plaint are being sought against all defendants including the 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is in this respect I find an objection that, there is miss joinder of parties has no basis and is dismissed.

All points considered I find and decide that, all three preliminary objections on point raised by defendants have no merit, and are hereby dismissed for lack of merit. Costs to follow the events.

Dated at Dar es Salaam this 16<sup>th</sup> day of February, 2017

  
H.T, SONGORO  
JUDGE



Delivered at Dar es Salaam this 16<sup>th</sup> day of February, 2017

  
H.T, SONGORO  
JUDGE



The Ruling was delivered in the presence of Mr. Francis Makota, Learned Advocate of the Plaintiff who is also holding a brief of Ms. Prisca Chogera Learned Advocate of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.