

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 54 OF 2016

Between

MICHAEL NGALEKU SHIRIMA.....PLAINTIFF

Versus

AFRICAN BANKING CORPORATION (T)LTD.....DEFENDANT

RULING

MRUMA, J

The plaintiff borrowed a loan from the Defendant and as a security he mortgaged in favour of the Defendant 75,609 shares which he owns in a company called Tanzania Breweries Company Limited and another 108,721 shares which he owns in another company called Swissport. The relevant share certificates were deposited with the Defendant alongside with share transfer forms.

It is the Plaintiff's contention that the loan was fully repaid and the bank released all the mortgaged shares certificates under cover of a Mortgage Release Form dated 25th June 2007. However, the Plaintiff alleges that without her knowledge and consent the Mortgage Release Form was consequently altered to cancel out reference to TBL Shares and leave the Swissport shares only.

In 2005 in a transaction different from the loan extended to the Plaintiff, the Defendant extended a USD 2,500,000 loan called Global Facility to a company called Rombo Millers Company Limited (RMC). The loan to RMC was partly secured by a deed of surety by the Plaintiff Mr. Michael Ngaleku Shirima, Mr. Vincent Ngeleku Shirima and Mrs Triza Victoria Shirima.

On 14th December 2015, the Defendant wrote two letters to the Chief Executive Officer of the Dar Es Salaam Stock Exchange informing him that the loan to RMC was partly secured by a mortgage in favour of Banc ABC of 75,609 Tanzania Breweries Limited (TBL) shares held by the Plaintiff and advised the Dar Es Salaam Stock Exchange that Banc ABC has never released the share certificates and its interests are still registered on the shares. The Plaintiff alleges that that was misrepresentation on the part of the Defendant.

It is further averred by the Plaintiff that On 19th December 2013, the Defendant sent an e-mail by its Credit Administration Manager to the Plaintiff's brokers, Tanzania Securities Limited confirming that indeed the Plaintiff's TBL shares were not mortgaged with the Defendant.

On 22nd December, 2015 which is over two years after the confirmation referred above, the Defendant reported to the Central Police Station in Dar Es Salaam that on 25th December 2015 Certificates for TBL shares held by the Plaintiff had been stolen/lost and on 8th January, the Defendant applied to TBL for replacement of lost/stolen shares. It is the Plaintiff averment that this was another misrepresentation by the Defendant.

The Plaintiff contends that false allegation communicated to third parties impute criminal and fraudulent conducts on the Plaintiff. It is for those reasons that he instituted this suit claiming for various declaratory orders, general damages and costs of the suit.

Upon being served the Defendant filed a written statement of defence strenuously denying the Plaintiff's allegations. Together with the written statement of defence she filed a **counter-claim** claiming from the Plaintiff and three others who are now Defendants in the counter-claim for breach of repayment obligations on the loan granted to Rombo Millers Company Limited (RMC) and secured by the Plaintiff (i.e. 2nd defendant in the counter claim) and 3rd and 4th Defendants in the counter claim. In the Counter-Claim the first Defendant is Rombo Millers Company Limited the third Defendant is Michael Ngaleku Shirima (who is the administrator of the Estate of the late Triza Victoria Shirima) and Vincent Ngaleku Shirima is the fourth Defendant.

The Defendants in counter-claim raised preliminary points of law as follows; First, the defendant contends that the amended plaint does not conform with the court order issued on 28th Day of June 2017; secondly, the defendant portends that the counter-claim is bad for failure to comply with the provision of Order VII Rule 1(i) and that the suit against the Third Defendant is stale. Before the hearing of these preliminary objections the Defendants in counter claim filed a notice of 'additional preliminary objection' which is to the effect that the counter-claim is not maintainable on account of want of filing fees.

At the hearing counsel Maro for the Defendants in counter claim abandoned preliminary objection No. 1 and later on he conceded that additional preliminary objection was equally misconceived.

With regard to the alleged absence of a statement of value of the subject matter of the suit (in counter claim), learned counsel for the plaintiff argued that the counter-claim offends the provisions of Rule 1(i) of Order VII of the Civil Procedure Code as it does not contain a statement of the value of the subject matter of the suit for purposes of jurisdiction and court fees. The learned counsel contended that failure to state the value of the subject matter of the suit is fatal as it makes the suit incompetent and therefore not maintainable. To synchronise his position the learned counsel referred this court to P.C. Mogha the Law of Pleadings in India 14th Edition Page 259 and to its own decision in the case of **Juma Salehe Makongo Versus Exim Bank (T) Limited Commercial Case No 17 of 2013 (Makaramba J)** where the court found that the plaint was fatally defective in that it didn't state the value of the subject matter and proceeded to strike it out.

Regarding the contention that the suit against the third Defendant in the counter claim is stale the learned counsel submitted that Rule 4(3) of Order XXII of the Civil Procedure Code requires an application for legal representative to be made a party to the proceedings within the prescribed time and if it is not so made then the suit abates. The counsel states that the court was informed about the demise of Triza Victoria Shirima on 9th September, 2016 but it was up to 28th June 2017 when the present representative applied to be joined as a party to the suit. He said that in terms of item 16 of the Schedule to the Law of

Limitation Act, the application was out of time therefore the suit against the Third Defendant had abated.

In reply, Mr. Kibatata counsel for the Plaintiff in the counter-claim reiterated that the plaintiff had stated the value of the suit clearly under paragraphs 21 and 30 of the plaint and also under item (b) of the prayers' clause as being USD 2,993,867.00 and that basing on that value court fees were assessed and the Plaintiff in the counter-claim was charged and she paid T.shs 10,000,000/= vide ERV receipt No. 10348961 dated 26th May, 2016.

The learned counsel submitted that as there is no hard and fast rule about writing the plaint, this point ought to have not raised as a preliminary point of objecting the suit.

With regards to a suggestion that the suit against 3rd Defendant has abated, the learned counsel submitted that death of a party to the proceedings is a factual issue which cannot be argued as a preliminary objection.

Order VII rule 1(i) of the Civil Procedure Code under which this objection is premised requires the Plaint to contain among other, particulars, a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees so far as the case admits.

In the present case it is stated under paragraph 21 of the counter-claim (which a suit or plaint) that:-

'.....eventually the first Defendant defaulted in its repayment obligations such that the outstanding

amounts which are USD 2,993,867.10 ...remains unpaid to date as Statement of Account with respect to the 1st Defendant duly annexed...as annexure TAL CL-4 for which leave is craved that it forms part of this counter-claim”

Similar averment is made under paragraph 30 of the counter-claim and as stated by the counsel for the Plaintiff in this counter claim, basing on this value court fees were assessed, charged and duly paid. The law under Rule 1 of Order VII does not prescribe any format on how the content of the plaint or the plaint itself should be listed and/or drawn. The law simply states the purpose for stating the value of the subject matter of the suit. There are two purposes namely:-

- i. Jurisdiction and;
- ii. Assessing court fees.

I have no doubt about the jurisdiction of this court to entertain both the suit and the counter-suit or rather counter-claim. In the case at hand it is clearly stated under paragraphs 21 and 30 of the plaint in the counter claim and in the prayers clause that the amount outstanding and which the plaintiff is claiming is USD 2,993, 867.10. Based on this claim court assessed its fees which was duly paid. This amount is well within the pecuniary jurisdiction of this court.

Unlike **in Juma Salehe Makongo’s case [supra]** cited by the Defendant’s counsel, where the Plaintiff alleged that T.shs 40,000,000/= were taken from his account without authority, but in the plaint he was also claiming for T.shs 38,000,0000/= as special

damages as a result of which there was under assessment of the fees payable, in the case at hand the amount stated in the plaint as outstanding is the same as the amount stated as being claimed in the prayers' clause. The two cases are therefore distinguishable.

Just in passing I wish to observe that distinction must be made between points of objection as to the form of a pleading and those as to the substance of the case. It is one thing to object that a plaint does conform to **Rule 1 of Order VII of the Civil Procedure Code** and quite another to object that the claim in the suit is not maintainable in law. That is because the outcome is different. In the latter category, the court decides on the merits of the case on basis of law only. On the face of it, the point of objection in the instant case falls in the later category, where, the court decides on only the fate of the impugned pleading, without going into the merits of the case.

From the foregoing observations it seems to me that when a court is faced with a preliminary objection that pertains to the form of a pleading it decides the objection on the face of the impugned pleading without going into the merits of the case the court is ought to restrict its ruling to the defect of the plaint and not decide the issue on the merits of the case. If satisfied that the pleading does offend a legal requirement, the court may strike out the offending pleading and order amendment pursuant to the proviso to Rule 11 of Order VII of the Civil Procedure Code. This doesn't necessarily require for call to strike out or dismiss the entire suit.

In the instant case the first objection premised on the provisions of Order VII rule 1(i) of the CPC, in that the plaint does not disclose the

value of the subject matter of the suit. In determining this objection, this court has duly restricted itself to the face of the plaint itself without recourse to the merits of the case. Having gone through the contents of the counter-claim I find that the plaint states clearly the value of the subject matter of the counter-claim. This meets the requirements, purpose and intent of the law which is to ascertain jurisdiction of the court and assessment of court fees.

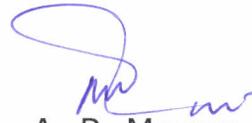
The second category of objection is pegged on law of limitation and the objection is that the claim in the counter-claim is not maintainable in law for being out of prescribed time. Item 16 of the Schedule to the Law of Limitation Act, requires an application to have a legal representative of a deceased party to be made a party in the suit to be made within ninety days.

The term legal representative is defined under section 3 of the Civil Procedure Code to mean a person who in law represents the estate of the deceased person.

In the instance case the late Triza Victoria Shirima was reported dead on 6th September 2016, the administrator Michael Ngaleku Shirima was appointed legal representative of the deceased on 16th February 2017, and the first prayer to join the legal representative of the deceased was made to this court 28th March 2017, well within the prescribed time

I am satisfied that the circumstances of this case dictate that the matter be heard on its merits. I therefore over-rule the preliminary objections raised by the defendant with costs to the plaintiff in the counter-claim. I

hereby order that the substantive suit proceed to be heard on its merits.



A. R. Mruma

Judge



Dated at Dar Es Salaam this 19th Day of February, 2018.