

TANZANIA / JUDGMENT

ms vidushi international fze vs ally issa makame ta makame general enterprises 2007 tzhccomd 45 7 may 2007

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TZHCCOMDDECIDED
7 May 2007

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 70 OF 2006 M/S VIDUSHI INTERNATIONAL FZE..... PLAINTIFF
VERSUS ALLY ISSA MAKAME t/a MAKAME GENERAL ENTERPRISES..... DEFENDANT

RULING

Date of final submission April 10, 2007. Date of ruling May 7, 2007. MJASIRI J The Plaintiff M/S Vidushi International FZE filed a suit against the Defendant under Order XXXV of the Civil Procedure Act Cap 33 R.E. 2002. Leave to defend the suit was sought by the Defendant and granted by the court. The Defendant raised the following preliminary objections in his Written Statement of Defence:

1. That the plaint is bad in law since claims of the Plaintiff do not fall within the ambits of the mandatory provisions of Order XXXV Rule 1 of the Civil Procedure Act Cap 33 R.E. 2002.
2. The suit has been brought against a wrong party since all the transactions of the Plaintiff were carried out between the Plaintiff and Makame General Enterprises Limited which is a body corporate, capable of being sued in its own name. The Defendant therefore prayed that the Plaintiffs suit be dismissed with costs. The Plaintiff in his reply to the Written Statement of Defence raised the following preliminary objections against the Defendant's counter claim and asked the court to strike out the counter claim on the following grounds:
 1. That the counter claim is bad in law and the court is not properly moved since the same is vague and wanting in particulars as required by law.
 2. That if the Defendant purports to be a limited liability company that it claims to be, then there is no 2 defence/ counter claim by the purported company. The Defendant has signed and has verified the plaint in his individual and not official capacity of the company. Hearing of the preliminary objections proceeded by way of written submission. The objections raised in the Written Statement of Defence and the defence to the counter claim were argued together. The Plaintiff is represented by Lugaziya Advocate and the Defendant is represented by Sikira Advocate. I will commence with the preliminary objections raised by

the Defendant. Mr. Sikira learned Counsel for the Defendant abandoned his second preliminary objection. Therefore we are left with the first objection that the plaint is bad in law as the Plaintiffs claim do not fall within the provisions of Order XXXV Rule 1 of the Civil Procedure Act. Mr. Sikira argued in his written submissions that the suit filed by the Plaintiff is not a summary suit. The Plaintiff in his plaint claims for re-imbursement of USD 86,942 general damages of US\$ 200,000 for breach of contract together with interest and costs. The suit has been wrongly brought and should be dismissed with costs. According to Counsel for the Defendant the provisions of Order XXXV Rule 1(a) of the Civil 3 Procedure Act are mandatory and non compliance to the rule renders the whole suit bad in law. Counsel cited the following cases in support of his arguments:

1. Uganda Transport versus Count de la Pasture (1954)21 EACA. 163.
2. Uddham Singh Versus Ambalal & Company Limited (1959) EA 67. Counsel for the Plaintiff Mr. Lugaziya in his written submissions stated that there was an agreement between the parties, secured by a cheque drawn by the Defendant which remains uncleared and therefore this brings the suit within the ambit of Order XXXV rule 1 (a). Counsel for the Plaintiff also submitted that in the event the suit does not fall under Summary Procedure, the Plaintiff did not resist the Defendant's application for leave to defend. In order to reach a finding as to whether the suit was properly brought under Order 35 Rule 1 (a) we need to look into the provisions of the said Order. Order XXXV Rule 1 (a) provides as under: 4 " This order shall, where the Plaintiff desires to proceed with the order, apply to:
 - (a) suit upon bill of exchange (including cheques or promissory notes)." On looking at the pleadings, the Plaintiffs claim against the Defendant is for USD 286,942 being for money had and received and damages for breach of contract. I have no doubt whatsoever that the plaint was irregularly presented under Order XXXV. The Defendant applied for leave to appear and defend the suit. The Defendant's application was not opposed by the Counsel for the Plaintiff. The Defendant did not make an application to strike out the plaint as embarrassing. In the case of Uganda Transport Co. Ltd V Count De La Pasture (1954) 21, EACA 163 (U) it was held as under:
 1. A Judge has no discretion to allow a claim to be brought summarily if it is not precisely within the terms of Order 33 Rule 2, Civil Procedure Rules.
 2. There is power to strike out a plaint irregularly endorsed for summary procedure upon an application by the Defendant but such application must be made at the first opportunity. The Defendant may waive his right to have the plaint struck, out by taking a step in the action without objection. In Haja Arjabu Kasule V F.T.Kawesa [1957] EA 611 (U) Uganda Transport Co.Ltd supra was cited. In the above case though the plaint was irregularly presented under Order 33 of the Civil Procedure Rules. Keating J took the following approach: "if the action is dismissed, the effect would be to make the Plaintiff begin again. This would put him to further expense and in my opinion nothing would be gained. " The Defendant was therefore given leave to appear and defend. In Uddham Singh V Ambalal the Defendant was given

leave to appear and defend in view of the letter from the Defendant's advocate on the intention of the Defendant to defend the suit. In view of what I had outlined above and taking into account that the Defendant did not raise an objection at the 6 first opportunity, the Defendant's preliminary objection fails. Costs will be costs in the cause. With regards to the Plaintiffs preliminary objection on the Defendant's counter claim, Counsel for the Defendant submitted that a counter claim is a cross suit. It is found on the same cause of action or is based on the same/similar set of facts or it is borne out of the series of transaction as the main suit. Therefore that being the case, most of the facts found in the counter claim will be pleaded as a defence in the Written Statement of Defence. Counsel for the Plaintiff in support of its preliminary objection submitted that a party presenting a counter claim is bound by the same rules as a party presenting a plaint. Order VIII Rule 9(2) and Order VII (1) and (2) of the Civil Procedure Act Cap 33 [R.E.2002] cited. According K.J. AIYER's Judicial Dictionary (13th Edition), "Counter-claim is substantially a cross suit. It is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as in an independent action. It need not be an action for the same nature as the original action or even analogous thereto." 7 Order VII Rule 9(2) of the Civil Procedure Act [R.E.2002] provides as under: "Where a counter claim is set up in a written statement of defence, the counter claim shall be treated as a cross suit and the Written Statement shall have the same effect as a plaint in a cross suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint." Order VII Rule 1(e) and (1) provides as under: "The plaint shall contain the following particulars:

- (e) the facts constituting the cause of action and where it arose and the facts showing the court has jurisdiction.
- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and court fees, so far as the case admits. On reviewing the counterclaim filed, it is obvious that the pleadings do not comply with the requirements under Order VII Rule 1, and do not disclose any cause of action. The said counter claim therefore is not tenable in law. 8 In Ndei V Mathira Dairymen's Cooperative Society Limited 1982 KLR 266 the court struck out the Defendant's counter claim for disclosing no cause of action and for being frivolous. The court was of the view that this would have embarrassed and delayed the fair trial of the action, and was an abuse of the process of the court. In view of what I had stated hereinabove the Plaintiff's preliminary objection is hereby upheld and the Defendant's counter claim is struck out with costs. Sauda Mjasiri Judge May 4, 2007. Delivered in chambers this 7th day of May, 2007 in the presence of Mr. Sikira, Advocate for the Defendant and in the absence of Mr. Lugaziya, Advocate for the Plaintiff. Sauda Mjasiri Judge May 7, 2007. 1,885 - words jd

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