

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CIVIL CASE NO. 16 OF 2011

1. ALPITOUR WORLD HOTELS AND RESORTS S.P.A
2. KIWENGWA STRAND HOTEL LIMITED
3. JUMBO TURISMO S.A. ----- PLAINTIFFS

V E R S U S.

KIWENGWA LIMITED ----- DEFENDANT.

R U L I N G.

Abraham Mwampashi, J.

The Defendants Kiwengwa Limited through her advocate Mr. Suleiman Said of Nassor & Associates Advocates, have raised two Points of Objection praying for the suit filed by three Plaintiffs, namely Alpitour World Hotels & Resorts SPA, Kiwengwa Strand Hotel Limited and Jumbo Turismo SA, hereinafter to be referred to as the 1st, 2nd and 3rd Plaintiff respectively, to be dismissed or struck out. The Defendant's two Points of Objection are on want of proper parties and want of cause of action.

It has been argued by Mr. Suleiman (Adv.) in his Written Submission that basing on what is alleged in the plaint particularly on paragraphs 9 and 10 the proper party to sue should be M/S HI – POLY Limited. He has further submitted that according to annexure K-2 to the plaint the 3rd Plaintiff has no locus to sue the defendant. As for cause of action it has been shortly submitted by Mr. Suleiman that the plaint does not clearly show any act done by the Defendant which gives rise to a cause of action.

Mr. Rosan Mbwambo, learned advocate for the Plaintiffs has vehemently opposed the objection. Firstly he has pointed out that the two points taken by the defendant are not pure points of law and therefore that they are not Preliminary Objections in view of the decision in **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors** Ltd (1969) E.A. 696 where it was held at page 701 that a Preliminary Objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all facts pleaded by the other side are correct. The court

insisted further that a Preliminary Objection cannot be raised if any facts has to be ascertained.

It has therefore been argued by Mr. Mbwambo that the Preliminary Objection raised by the defendant should be dismissed because they have failed the test in the celebrated case of **Mukisa Biscuits**. He has pointed out that the credibility and legality of annexure K-2 need to be ascertained by evidence. Whether or not there is contractual relationship between the Plaintiffs and the defendant also needs ascertainment by way of trial etc.

On the merits of the objections it has been submitted by Mr. Mbwambo that on the basis of annexure K-2 the 3rd Plaintiff is not only a proper party but is in fact a necessary party. Either annexure K-4, K-5, K-6 and K-7 clearly show that the 1st Plaintiff is a proper as well as a necessary party. Mr. Mbwambo has insisted that the pleadings show that the Plaintiffs have a cause of action against the defendant.

Mr. Mbwambo has also submitted that even if this court finds that the objections raised by the defendant are of merits still the defects are not fatal. He has referred this court to Mulla the Code of Procedure, 13th Edition, at pages 564 – 594 as well as to Sarkar's The Law of Civil Procedure, Vol. I, Reprint 1994 at pages 509-541 where the two learned authors insist that mis-joinder of parties is not fatal to the suit. It is also emphasized that non-joinder or mis-joinder does not defeat any suit. Where there is mis-joinder or non-joinder of Plaintiff the court may order amendment of plaint or separate trials.

For the above reasons Mr. Mbwambo has asked the court to dismiss the objection with costs.

This court finds that the gist of the defendant's objection which is styled as want of proper parties is on the claim that M/S.HI-POLY Limited is a proper party who should be joined to the suit as a Plaintiff. It should be reminded that a proper party is a party whose presence is a matter of convenience to enable the court to adjudicate

more effectively and completely. As it has been correctly submitted by Mr. Mbwambo a suit cannot be defeated for mis-joinder or non-joinder of parties and where a person who is a necessary party to a suit is not joined as a party to the suit the suit cannot be dismissed but the plaint may be amended so that the omitted party is added to the suit. It has to be borne in mind however that no person can be added as a Plaintiff without his consent. The non-joinder of M/S. HI-POLY Limited who is not a necessary party, as a Plaintiff to the suit is therefore not fatal and the Plaintiffs have locus to sue the defendant.

The objection on the ground that no cause of action has been disclosed as against the defendant is also found to be of no any merits. A cause of action is a bundle of the material facts which it is necessary for the Plaintiff to allege and prove in order to succeed. In considering whether a cause of action is disclosed or not the court confines itself to the plaint. Looking at the plaint in question it cannot be said that no cause of action has been disclosed as against the Defendant. This court is satisfied that the allegations leveled against the defendant in the plaint regardless of whether they are

true or not, sufficiently disclose a cause of action against the defendant.

Notwithstanding the above findings upon a thorough perusal of a 33 paragraph plaint and in consideration of the fact that the Plaintiffs' rights to reliefs appear not to arise from same acts or transaction, it has come to a considered view of this court that the dispute between the parties can be efficiently tried if each of the Plaintiff brings her own separate suit against the defendant. The joinder of Plaintiffs in this suit will not only delay the trial of the suit but it will also make it more complex. It is a settled view of this court that from the nature of the suit separate suits will not only simplify the trial but will also do away unnecessary delays.

In the final analysis therefore the objection taken by the Defendant fails but for the reasons given above it is hereby ordered under Order I rule 2 of the Civil Procedure Rules, Cap. 8 that each of the three Plaintiffs should file her own separate suit against the Defendant and no fees for the new separate suit to be paid.

Sgd: Abraham Mwampashi

Judge

25/07/2012.

Delivered in court this 25/07/2012 in the presence of the two
counsels for the parties.

Sgd: Abraham Mwampashi

Judge

25/07/2012.

I hereby certify that this is a true copy of the Original.

Sgd. GEORGE J. KAZI

REGISTRAR

HIGH COURT

ZANZIBAR.

/Mau: