

**THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**CIVIL APPEAL NO. 111 OF 2017**

*(Originating from Judgement and Decree of the Kinondoni District Court in respect of Civil Case  
No.52 of 2015 by Hon. Mwingira, RM dated 29<sup>th</sup> December 2016)*

**COCACOLA KWANZA LTD.....APPELLANT**

**VERSUS**

**PETER JOHN MKENDA.....RESPONDENT**

**RULING**

*Date of the last Order 17<sup>th</sup> May, 2018*

*Date of Judgement 25<sup>th</sup> May, 2018*

**SAMEJI R.K, J:**

On 29<sup>th</sup> April 2015 the respondent herein had instituted a suit before Kinondoni District Court against the ***Managing Director CocaCola***

***Kwanza*** praying for the following relief(s):-

- (a) Payment of Tshs 4,808,600/= as a principal sum;*
- (b) Payment of Tshs 15,000,000/= the interest at Bank rate being holding the capital of the plaintiff since the year 2011 to 2014;*

- (c) General damages at the tune of Tshs 5,000,000/= to cover inconvenience caused by the defendant to the plaintiff;*
- (d) Interest on detrimental amount at the court's rate per annum from the date of judgement to the date of payment in full;*
- (e) The defendant to pay the costs of the case and incidental thereto; and*
- (f) Any other order or relief(s) this Honourable Court may deem fit.*

After full trial, the trial Magistrate on 29<sup>th</sup> December 2016 determined the matter in the favour of the plaintiff and ordered:-

- (a) the defendant to pay the plaintiff general damages at the tune of Tshs 3,000,000/= to cover all the inconvenience caused;*
- (b) interest rate of 15% of decretal amount from the date of cause of action to the judgement date;*
- (c) interest of 7% from the date of judgement to the date of full payment.*

Being aggrieved by that decision the appellant lodged this Appeal, as **COCA-COLA Kwanza LTD** with eight grounds of appeal couched in the following terms that, the learned trial Magistrate erred in law and fact by:-

- (1) *misdirecting herself on the issue of burden and standard of proof and wrongly evaluated the testimonies and credibility of witnesses;*
- (2) *Admitting secondary documentary proof to form part of respondent's evidence and in holding that the appellant has breached the contract;*
- (3) *Introducing facts that were not pleaded, neither testified nor submitted on and thereby making erroneous and unfair assumptions against the appellant's case;*
- (4) *Failing to diligently appreciate and deal with the appellant's defence case;*
- (5) *Disregarding or ignoring the appellant's final submissions;*
- (6) *Assessing, particularizing, justifying and awarding damages stated in the judgement and decree;*

- (7) *Imposing on the appellant an interest rate of 15% of the decretal sum and 7% of the general damages; and*
- (8) *Awarding costs of the suit against the appellant.*

At the hearing of this appeal, the appellant was under the services of Mr. Atlay Tawe, the learned Counsel, while the respondent was under the services of Mr. Dastan Nyakamo, the learned Counsel as well.

However, after thorough perusal of the record of the case, I had since observed that, the appeal before me was filed contrary to the requirements of the law. It is on record that, before Kinondoni District Court, the respondent sued the **Managing Director CocaCola Kwanza** and the appeal herein is brought by the **COCA-COLA Kwanza LTD** who was not party to the original case. All the pleadings before the District Court, (except the annexures) were in the name of the defendant, to wit, *plaint, the written Statement of Defence, list of proposed issues, proceedings, parties' final submissions, Judgement and Decree*. Taking into account that, the issues of *parties to the case* and *locus standi*, are legal matters and foundation of each case, I have decided to accord time to the

Counsel for the parties to address the Court on the same. Specifically, the Counsel for the parties were requested to address the Court *if the suit was properly filed before the trial court and whether the Appeal before this Court is competent.*

In their submission, all the Counsel for the parties admitted that there is a problem with the parties to the case. That, before the trial court the plaintiff sued the ***Managing Director CocaCola Kwanza*** and the appeal has been preferred by the ***CocaCola Kwanza LTD.*** Mr. Tawe added that, they noted the said defects though at a late stage and that is why they have decided to bring the appeal on the name of the proper party.

I should emphasize that, in law we have two types of persons a *natural person* and a *legal entity* with legal personality "*a juristic person*". It is obvious that, the plaintiff before the trial court sued the ***Managing Director CocaCola Kwanza,*** which is not a name of a natural person or even a *legal entity* with *legal personality* and legal existence, but rather a title or an office that exists within the administrative structure of the company. That is why even when the

appellant preferred this appeal decided to cite the proper and a right party recognized by the law. (*See parties to the case before the trial court and at the appeal in this Court*).

With due respect to the trial Magistrate, it was improper for him to try a case against a party who in law is not in existence, not a natural person or a legal entity, with no capacity to sue or even to be sued "a juristic person" in law. Pursuant to Order VII Rule I (c) of the Civil Procedure Code "a plaint **shall state the name of a person or an entity that is capable of being sued**. The word used in this Order is "**shall**" as opposed to "**may**." As such the same denote mandatory compliance with those requirements. Therefore, the plaintiff in the case before the trial court was supposed to comply with that requirement without any further justifications. The failure for the plaintiff to comply with these mandatory requirements renders the plaint to be defective in law. In the case of **Beldo P. Kikao V. AfisaTawala Bishop's Office** Revision No. 9 of 2011 High Court Iringa (unreported), the court considered the same issue on non-citation of a party and quashed the entire proceedings of the lower court on this ground. Furthermore, in the case of **Sebastian**

**Abdalah Msola V The Njombe Regional Manager, TANROADS,**  
Civil Case No. 3 of 2014, High Court of Tanzania at Iringa,  
(unreported), the Court held that:-

*"In the present case the plaintiff has sued the **Njombe Regional Manager, TANROADS** who **does not exist** hence by any stretch of imagination **one cannot sue a defendant who does not exist in the eyes of the law** and this is a plain fact which cannot seriously be disputed by any legal mind...Hence **the plaint is defective for being brought against a non existing legal entity.**" [Emphasis added].*

See also case of **Ami Mpungwe V. Abas Sykes**, Civil Appeal No. 67 of 2000 where the Court of Appeal considered the same issue and decided to remove the name of the defendant who was not a legal person.

I should as well emphasize that, the person who is bringing the matter before the Court should have a *locus standi* to sue. The issue

of *locus standi* is also a very crucial or central in all proceedings. It goes to the very root of the matter. So, for the appellant herein to have the *locus standi* on this matter was supposed to be part of the proceedings before the trial court. In the case of **Mbeya Rukwa Autoparks and Transport Ltd V Vestina George Mwakyoma** 2003 TLR 251, the court held that:-

***“Any person who was not a party in the original case has no locus in the matter at the appellate level. On the sole reason that, all what that person adduced will be a hearsay, because he was not there during the Trial”***  
[Emphasis added].

It is on record that, the appellant herein was not a party to the case before the trial court. It is therefore my respectful view that, all these defects revealed in filing of this appeal boils down to the points that, there were sheer negligence in pursuing this appeal and the same had since rendered the entire appeal to be *void ab initio* and un-maintainable in law. Now, since the original case was between the appellant and the ***Managing Director of CocaCola Kwanza***, even

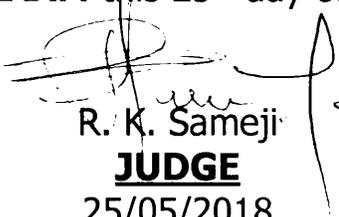
the appeal before this court was also supposed to be against the same parties. It was wrong for the appellant to change the parties at the appellate level without even seeking the leave of this Court. This is illegal and unaccepted procedure.

All the above stated defects are to the effect that, the whole proceedings of the trial court and its subsequent judgment thereto becomes a nullity *ab initio*. I am therefore constrained to hold that the so-called judgment of the trial court on record is not a judgment at law as the same is emanating from unfounded and nullity proceedings. There was no judgment of the trial court from which an appeal could be preferred to the High Court. Therefore, the appeal in the High Court and which is now before me is misconceived in law and is hereby struck out for being incompetent.

I therefore, nullify the entire proceedings of the trial court and the judgment therefrom. The parties, if still interested to pursue this matter, are at liberty to institute a fresh suit by following proper procedures and legal requirements. I make no order as to cost as the detected anomalies were raised by the Court *suomotu*. It is so

ordered.

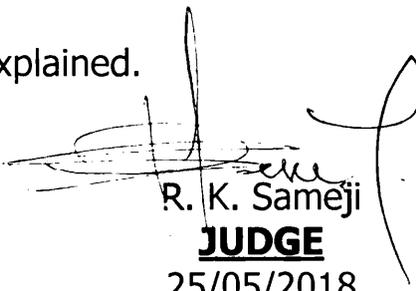
**DATED** at **DAR ES SALAAM** this 25<sup>th</sup> day of May 2018.



R. K. Sameji  
**JUDGE**  
25/05/2018

**COURT-** Ruling delivered in Court Chambers in the presence of Mr. Atlay Tawe, the learned Counsel for the appellant and Mr. Dastan Nyakamo, the learned Counsel for the respondent.

A right of Appeal explained.



R. K. Sameji  
**JUDGE**  
25/05/2018