IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 04 OF 2023

SUNFORD AMINIEL URIO (Administrator of the Estate of the Late Aminiel Theofilo Urio) .... PLAINTIFF

VERSUS

ROMBO DISTRICT COUNCIL .... 1ST DEFENDANT

THE REGISTERED TRUSTEES ROMAN CATHOLIC CHURCH .... 2ND DEFENDANT

THE ATTORNEY GENERAL .... 3RD DEFENDANT

RULING

19/07/2023 & 11/08/2023

SIMFUKWE, J

This is the ruling on the preliminary objection raised by the second defendant to the effect that this suit is incompetent as the plaintiff has sued a wrong party.

The preliminary objection was heard viva voce. The plaintiff was represented by Mr. Andrew Magai learned counsel, the 2nd defendant had the service of Mr. Aristides Ngawiliau learned counsel and the first and

third defendants were represented by Mr. Yohana Marco and Cornelia Bitegeko learned State Attorneys.

Mr. Aristides submitted that pursuant to the plaint which they were served, paragraph 3, the second defendant is stated to be a religious institution called Registered Trustees of Roman Catholic Church, care of Roman Catholic Church, Kigango cha Holili Shuleni without any Postal address. He stated that, it is well known that religious institutions are registered in the United Republic of Tanzania under the **Trustees Incorporation Act, Cap 318 R.E 2019**. The learned counsel cited section 8(1) (b) of the same Act which provides that:

> *"Upon the grant of a certificate under subsection 1 of section 5, the Trustee or Trustees shall become a body corporate by the name described in the certificate and shall have power to sue and be sued in such corporate name."*

Elaborating the quoted provision, Mr. Aristides stated that the word **'shall'** has been used to signify that it is mandatory to comply with the provision. He notified this court that the second defendant is not named Roman Catholic Church. He warned that if we proceed with the mentioned name, it means the decree or judgment that will come out of this, will be impossible to execute. He prayed that the plaint be strike out because the second defendant is a wrong party. He cemented his submission with the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Limited, Civil Appeal No. 112 of 2008**, at page 4, 5 and 6 where the Court of Appeal observed that:

> *"Companies, like human beings, have to have names. They are known and differentiated by their registered names. In the instant*

case, it is apparent that the names "Coca Cola Kwanza Bottles", "Coca Cola Kwanza Bottlers Ltd" or Coca Cola Bottlers Ltd" have been used inter changeably. Although the Appellant wants this court to hold that they mean one and the same Company, strictly, this view cannot be accepted without same risk of in exactitude. We are mindful of the provisions of Article 107A of the Constitution of the United Republic of Tanzania, an Article which requires Courts of law to give purposive interpretation of laws as they are and not impeding them with mere technicalities or procedural irregularities. However, as has been held by this Court in some of its recent decisions, not all procedural or technical irregularities can be ignored. Some technical irregularities cannot be ignored as they touch on the very fundamentals of the issue at hand….

It is our considered opinion that in the instant appeal, the REGISTERED NAME is fundamental to the whole case. There could be either different companies or simply a confusion in the use and application of the correct name of a company which bottles "Sprite" soft drink….

In the result, this appeal, incompetent for failure to identify the appropriate party, is struck out."

Referring to the instant matter, Mr. Aristides asserted that since the plaint is incompetent, can equally be said that there is no plaint before this honourable court. He said that the position was fortified by the decision of the Court of Appeal of Tanzania at Mwanza in the case of **Ghati Methusela v. Matiko Marwa Mariba, Civil Application No. 6 of 2006**, at page 2 of the Order where it was stated that:

"It is now established law that an incompetent proceeding, be it an appeal, application, etc, is incapable of adjournment, for the court cannot adjourn or allow to withdraw what is incompetently before it….

All said and done, this incompetent application is hereby struck out."

Mr. Aristides was of the view that pursuant to the cited authorities, the plaintiff has failed to fulfil his duty of identifying a proper second defendant. That, in the eyes of law, the plaint is invisible before this honourable court. He prayed that the plaint be strike out with costs.

In his reply, Mr. Andrew Magai stated that the raised preliminary objection is devoid of merit and that the same should be dismissed with costs. He supported his argument by citing **Order I rule 9 of the Civil Procedure Code, Cap 33 R. E 2019** which provides that:

"No suit shall be defeated by reasons of misjoinder or nonjoinder of parties; and the court may in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Mr. Magai contended that under the cited provision, it is clear that, what the court ought to do or consider in the circumstances of this matter, is to confine itself in dealing with matters which are controversial which may affect the rights and interests of the parties before the court. He contended further that the submission made by the learned counsel for the second respondent does not supersede what the law provides.

It was replied further that according to the plaint and written statement of defence of the 1st and 3rd defendants, paragraph 8, it is undisputed that

the second defendant is the actual and proper party in our case. That, the 1st defendant confirmed that they identified the 2nd defendant and allocated the disputed land to them. The fact which was not denied even by the 2nd defendant.

Responding to the cited cases, Mr. Magai was of the view that the same are highly distinguishable to the case at hand. Regarding the referred section of the **Incorporation Act** (supra), the learned counsel noted that the learned counsel for the 2nd defendant failed to tell the court who is the actual 2nd defendant considering that even the 1st and 3rd defendant confirmed the 2nd defendant as the actual party in this case. That, even the subject matter of this case is currently in the hands of the 2nd defendants as the same was allocated to them.

The learned counsel for the plaintiff prayed that the raised preliminary objection be dismissed with costs because it lacks merit.

Mr. Yohana learned State Attorney for the 1st and 3rd defendants opposed the submission of the learned counsel for the plaintiff in respect of the referred paragraph of their written statement of defence. He averred that in law what the court has to look in respect of the raised preliminary objection is the plaint only. He made reference to the famous case of **Mukisa Biscuits Ltd v. West End Distributors Ltd (1969) EA 696,** in which it was held that:

> *"A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is exercise of judicial discretion."*

The learned State Attorney observed that the nature of preliminary objection is that facts pleaded in a plaint are presumed to be correct. That assumption restrains the court from seeking evidence and deal with the law only. Thus, the raised point in respect of paragraph 8 and reliefs clause of the written statement of defence, should be dismissed as it is contrary to the law.

In his brief rejoinder, Mr. Magai submitted that in the case cited by the learned counsel for the 1st and 3rd defendants, he had not seen where it is prohibited to refer to the written statement of defence.

Mr. Aristides for the 2nd defendant, reiterated his submission in chief. He added that the party or the person who was served with summons to enter appearance before this court in respect of this case is not one and the same person referred in the plaint and 2nd defendant.

I have considered the rival submissions of the parties. The issue is whether the raised preliminary objection has merit.

In his reply the learned counsel for the plaintiff among other things cited the provision of **Order I Rule 9 of the CPC** (supra) and submitted that in the circumstances of this nature the court has to confine itself in dealing with matters which are controversial which may affect the rights and interests of the parties before the court. In rebuttal Mr. Aristides for the 2nd defendant stated that the person who was served with summons to enter appearance before this court in respect of this case is not one and the same person referred in the plaint. **Order I Rule 10(2) of the CPC** (supra) provides that:

"10. (2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary ***in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit,*** *be added."* Emphasis added

Being mindful of the above quoted provision of the law, this court is of considered opinion that this matter cannot be effectually and completely adjudicated upon and settle all the questions involved if the 2nd defendant is sued in a wrong name. With due respect to the learned counsel for the plaintiff, the provision of **Order I Rule 9 of the CPC** is irrelevant to the circumstances of this matter. Suing the 2nd defendant in a wrong name or unregistered name goes to the root of the matter itself which may in the future affect execution of the decree in case the matter is decided in favour of the plaintiff. I am alive with the application of the overriding objective. However, it may be noted that the raised defect in this case is not among the defects which may be cured by using the overriding objective principle. In the case of **Leticia Mwombeki v. Faraja Safarali and 2 Others, Civil Appeal No. 133 of 2019,** CAT at Dar es Salaam, at page 10 of the judgment stated inter alia that:

"Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasion a

failure of justice. See MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS, Civil Appeal No. 66 of 2017 and NJAKE ENTERPRISES LIMITED VS BLUE ROCK LIMITED AND ANOTHER, Civil Appeal No. 69 of 2017."

In the case at hand, I am of the same considered view that suing a party in a wrong name goes to the root of the matter and it is obvious that it will occasion a failure and delay of justice. Thus, for expeditious dispensation of justice, it is prudent that the plaintiff sues the proper parties.

In the upshot, I am of considered opinion that the raised preliminary objection has merit. I therefore strike out this matter for being incompetent before the court. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 11th day of August 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

11/08/2023