

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**LAND CASE NO. 1 OF 2019**

**GEOFREY MGAYA.....PLAINTIFF**

**VERSUS;**

**NBC LIMITED SONGEA BRANCH.....1<sup>ST</sup> DEFENDANT**

**GORAD BOIWANG'OMBE MTEWA.....2<sup>ND</sup> DEFENDANT**

**GADAU AUCTION MART.....3<sup>RD</sup> DEFENDANT**

**RULING**

**30/09 & 07/10/2022.**

**UTAMWA, J:**

This is a ruling on issues raised by the court *suo motu* on the competence of the suit at hand. The plaintiff, GEOFREY MGAYA sued the defendants, NBC LIMITED SONGEA BRANCH, GORAD BOIWANG'OMBE MTEWA and GADAU AUCTION MART (hereinafter referred to as the first,

second and third defendant respectively). The plaintiff claims for, among others a declaration that the disposition of a house in plot No. 62, Block G Njombe Urban was fraudulent, unlawful, null and void *ab initio*, payment of monies, the restoration of the suit property and costs of this suit.

In this suit, Mr. Edwin Msigwa learned advocate represented the plaintiff while Mr. John Laswai and Ms. Tunsume Angumbwike both learned advocates, represented the first and second defendant respectively. The court made an order to proceed *ex parte* against the third defendant since she neither appeared nor filed her written statement of defence (WSD) despite due service upon her.

When the suit came before me upon being so re-assigned following the retirement of the predecessor judge (Matogolo J, as he then was), I suspected the competence of the suit. This was due to the following facts: that, it was suspected that the amended plaint (lodged in court on 18<sup>th</sup> December, 2019) did not give proper description of the land in dispute. Again, the court suspected that the first defendant (NBC LTD Songea Branch) has no legal personality and capacity to be sued according to the law. I then directed the parties to address the court on the following two legal issues;

- i. Whether the suit is competent based on the two suspected legal irregularities mentioned above,
- ii. Which orders should this court make based on the answer to the above issue?

On the first court issue the plaintiff's counsel submitted that, Order VI of the Civil Procedure Code, Cap. 33 RE 2019 (The CPC) defines pleadings and Order VII of the CPC provides for contents of a plaint. Therefore, in his view the plaint contains the description of the land in dispute which is Plot No. 62 Block G Njombe Urban. He contended that, the same house has been identified by the first and second defendants in their respective WSDs.

In relation to the second suspected irregularity, the learned counsel for the plaintiff submitted that, the NBC Limited is a legal company registered as a legal person under the Companies Act, Cap. 212. It deals with banking business with its headquarters in Dar es Salaam. The plaintiff has branches all over Tanzania. One of the branches is the first defendant. The branches make up the NBC Bank Limited as a whole. Suing any branch of NBC Bank Limited is thus, automatically suing the headquarters which has the legal personality. He added that, the advocate representing the bank may either be an employee of the bank or an advocate instructed by the bank headquarters.

Regarding the second court issue, the learned counsel for the plaintiff urged this court to order for the continuation of the suit for the reasons shown above.

On his part, the counsel for the first defendant submitted in relation to the first court issue that, the suit is incompetent because the plaint is bad in law and ought to be struck out. The plaintiff filed his amended plaint which offends the mandatory provisions of Order VII Rule 3 of the CPC. Such provisions require the plaintiff to describe the suit property. They require the

plaint to contain a description of the property sufficient to identify it. The plaint in the present case has not described the immovable property which is the core subject of the dispute between the parties. The first defendant's counsel argued further that, the Certificate of Title number under which the property is registered in accordance with the Land Registration Act, Cap. 334 RE. 2019 has not been specified in the plaint. The description of the property cannot be thus, drawn from the reliefs prayed by the plaintiff as submitted by the counsel for the plaintiff.

The counsel for the first defendant also argued that, Order VII Rule 1(g) of the CPC provides for reliefs which the plaintiff is claiming before the court. However, a plaint should comply with the requirements of Order VI and VII of the CPC. He argued further that, since the subject matter in dispute is an immovable property registered under Cap. 334 the plaintiff ought to have properly described the property including the certificate title number within the paragraphs of the plaint which is paragraphs 1 to 16. To fortify his position, he cited the case of **Fatuma Shabani Said Dololo (as the legal representative of the late Shabani Said Dololo) and Another v. Abdalah Said Mgaza and Another, Land Case No. 138 of 2020, High Court of Tanzania (HCT), Land Division** (unreported) to support his contention.

The learned counsel for the first defendant also faulted the counsel for the plaintiff's argument that the description of the property can be drawn from the WSD because, the competence of a suit is determined by a plaint which initiates the proceedings.

As regards to the second legal point raised by the court, the learned advocate for the first defendant submitted that, it was improper for the plaintiff to sue the first defendant because, the proper party should have been the National Bank of Commerce (NBC) Limited which was registered on 23<sup>rd</sup> September 1997 under the certificate of incorporation number 32700. The first defendant in this case is a mere branch of the bank. Section 15(2) of Cap. 212 provides for legal personality of a company once registered. Such company thus, has the capacity to sue and be sued. He also contended that, even the decree in the present suit cannot be executed because the first defendant has no legal personality.

On the second issue related to the orders which this court can make, the learned counsel for the first defendant argued that, the court should strike out the suit with costs as it was done in the **Fatuma Shabani case** (supra).

On her side, the learned counsel for the second defendant submitted in relation to the first issue that, for a suit to be competent it has to be instituted by a plaint which contains all the necessary requirements of the law. Order VII Rule 2 of the CPC provides for the requirement of describing an immovable property appropriately where the suit involves such property. The plaint in the present suit does not describe the suit property sufficiently to identify it. She cited the **Fatuma case** (supra) and **Anderson Makeula and Another v. Andrew Hongoli, Land Appeal No. 14 of 2020, HCT at Iringa** (unreported) to cement her position on the effect of the failure to describe the suit property.

The learned counsel for the second defendant also contended that, the provisions of law on pleadings cited by the counsel for the plaintiff has nothing to do with the legal issues raised for non-disclosure of the suit property. Moreover, the cited Order VII Rule 9 is non-existent. She added that, the counsel for the plaintiff cited Order VII Rule 1 which provides for contents of a plaint, however since the suit involves immovable property Order VII Rule 3 should be considered in order for the suit to be competent. The plaint does not disclose the title number as required under Cap. 334. She contended further that, it is the duty of the plaintiff to sufficiently describe the subject matter at issue. The plaintiff cannot thus, rely upon the WSD filed by the defendants.

It was also the submissions by the counsel for the second defendant in relation to the second legal point that, it is the duty of the plaintiff to sue a proper party by citing the names of the defendant correctly for the purpose of enabling the court to make executable orders in law. She cited the case of **Uganda v. Commissioner of Prisons, ex parte Matovu (1966) EA 514** to enhance her contention. She added that, the first defendant is a branch for a company incorporated under Cap. 212, the company is limited and has legal capacity capable of suing and being sued on its own name. The company has been registered under the name of National Bank of Commerce (NBC) Ltd. It was therefore, improper for the plaintiff to sue NBC LIMITED SONGEA BRANCH. She supported this particular contention by citing the case of **Raphael Juma Kaswera v. Katibu Diocese/ Dayosisi ya Mara, Labour Revision No. 1 of 2020, HCT at Musoma**

(unreported), **Kanisa la Anglikana Ujiji v. Abel Samson Heguye, Labour Revision No. 5 of 2019, HCT at Kigoma** (unreported).

The learned advocate for the second defendant argued additionally that, suing the first defendant in the name other than the name of its incorporation amounts to suing a wrong party in law. This course thus, renders the suit incompetent and liable to be struck out as it was held in the case of **Respicius Emilian Mwijage v. The Municipal Director, Ilala Municipal Council and Two Others, Land Case No. 27 of 2021, HCT at Dar es Salaam** (unreported). She further challenged the plaintiff's argument that, suing a branch of NBC amounts to automatically suing its headquarter. She did so because, that argument is not supported by any legal authority.

Regarding the second court issue on the kind of orders which this court can make, it was submitted by the counsel for the second defendant that, the suit is incompetent for want of sufficient description for the suit property and for suing a wrong party. The suit should thus, be dismissed with costs for the faults which were due to the plaintiff's negligence.

By way of rejoinder, the plaintiff's counsel contended that, Order VII of the CPC provides for the contents of a plaint and he has duly complied with the requirements provided. The reliefs-section is part of the plaint. The suit property was therefore, well described in the plaint (at the relief section) as House on plot No. 62 Block G Njombe Urban area. He distinguished the **Fatuma Saidi case** (supra) with the present case on the ground that, in

the previous case the land was un-surveyed while the present case involves a surveyed land.

The plaintiff's counsel also contended that, the first defendant is properly sued since she is part of the Bank. He further argued that, the Bank of Tanzania issues one license to NBC Limited for all branches. Therefore, suing the first defendant is like suing NBC Limited itself. The loan agreements are processed in the bank branches, but the loaning authority is the NBC Limited headquarters. Even the defence counsel comes from NBC Limited headquarters. He distinguished the precedents cited by the counsel for the defendants and urged the court to grant leave to the plaintiff to amend the name of the first defendant so that the case can proceed.

I have considered the record, especially the amended plaint, submissions from both sides and the law. I will thus, test the two issues posed above separately.

Regarding the first court, I am of the view that, before testing it, I have to firstly answer the following two sub-issues:

- i. *Whether the first defendant has legal personality, hence capable of being sued.*
- ii. *Whether the amended plaint properly described the land in dispute.*

Concerning the first sub-issue just posed above, I hasten to agree with the counsel for both the first and second defendant that, according to section 15(2) of Cap. 212, once a company is registered, it becomes a body corporate. It is also clear that, in law, a body corporate can sue or be sued



by its own registered name. In the present case, the plaintiff pleaded under paragraph 2 of the amended plaint that, the first defendant (i.e. NBC LIMITED SONGEA BRANCH) is a legal person. It is common ground that, in law, non-natural persons obtain legal personality/capacity in their own names by various means set by the law. The modes include being registered under the provisions of Cap. 212 cited above, or by being incorporated under the Trustees' Incorporation Act, Cap. 318, or under the Cooperative Societies Act, 2013. There are indeed, more other ways. Nonetheless, the plaint in the present suit did not go further to show the specific legal way which made the first defendant (i.e. NBC LIMITED SONGEA BRANCH) a legal person. This omission was in my view, fatal since it offended the provisions of Order VII rule 1 (c) of the CPC. These legal provisions mandatorily require a plaint to show *inter alia*, the name and description of the defendant.

In his submissions the learned counsel for the plaintiff however, basically changed mind and admitted that the first defendant is a mere branch of another company, the NBC Limited which is a legal person registered under the Companies Act, Cap. 212 with its headquarters in Dar es Salaam. He added that, suing a branch of a company is tantamount to suing the company itself. It is however, surprising that the plaintiff did not sue the said registered company by its own registered name, but opted to sue its branch. No reason was shown for that abnormality. Moreover, the contention that suing a branch of a company is tantamount to suing the company itself, is, with due respect to the learned counsel for the plaintiff, misleading. One cannot sue a branch of a company, unless the branch itself is also a company with its own legal personality, which is not the case in

respect to the first defendant in the matter at hand. The plaintiff could not thus, sue the first defendant (i.e. NBC LIMITED SONGEA BRANCH) for want of her legal personality as correctly contended by the two counsel for the two defendants.

Moreover, suing a branch of a company which has no legal personality has been discouraged by courts of this land in a number of decisions. In the case of **Novoneca Construction Company Ltd and another v. National Bank of Commerce, Commercial Case No. 8 of 2015, High Court of Tanzania (HCT), Commercial Division [2016] TZHC CommD 28**, for instance, this court held that, suing a branch of a body corporate or a registered company is improper and is equated to suing a wrong party. The court used the following words to stress the point, and I reproduce the pertinent paragraph for ease of reference:

"In the case at hand, it is without dispute that the first defendant has several branch offices throughout Tanzania. None of those branches has independent legal existence or personality. That is to say; those branches including the second defendant do not have a legal entity of their own separate from the first defendant's. None of them can therefore sue or be sued in its own name."

The position of the law was also underscored in the case of **South Freight & Co Ltd v. The Branch Manager, CRDB Tanga, Civil Case No. 5 of 2002, HCT at Tanga** (Unreported). I further underlined the position in deciding the case of **Mustapha Lyapanga Msovela v. Tanzania Electric Supply Co. Ltd Iringa Regional Manager & Another, Civil Appeal No. 16 of 2020, HCT at Iringa, [2020] TZHC 11142**.

In fact, our law is clear that, only persons, and not any other creature or object, can be made parties to suits as plaintiffs or defendants; see the

context under Order I rule 1 and 3 of the CPC. A person in law may be natural or legal (i.e a natural or legal person). It follows therefore, that, only natural persons or legal persons can sue or be sued in law. This stance of law was emphasized in the case of **The Registered Trustees of the Catholic Diocese of Arusha v. The Board of Trustees of Simanjiro Pastoral Education Trust, Civil Case No. 3 of 1998, HCT at Arusha** (unreported). In that precedent, it was held that, a party to court proceedings who does not have natural or legal personality is a non-existent party in the eyes of the law. The court held further that, a suit by a plaintiff or against a defendant, who lacks natural or legal personality/capacity cannot be maintained for incompetence, and must be struck out.

Indeed, the irregularity under consideration cannot be cured under the principle of overriding objective. Admittedly, this principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court. Nevertheless, it cannot be considered that the principle of overriding objective came to suppress other important principles that were also intended to promote justice like the ones underlined by the precedents cited above. The holding by the CAT in the recent case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view that, the principle of overriding objective does

not operate mechanically to save each and every blunder committed by parties to court proceedings.

The reason why the abnormalities pointed out above cannot be cured by the principle of overriding objective are that, suing a non-existing person like the first defendant in the case at hand, is fatal to a suit since no executable orders can be made by a court as against such non-existing person. It follows thus, that, entertaining a suit of this nature will be like toiling for nothing.

Due to the above reasoning, I answer the sub-issue posed above negatively that, the first defendant (NBC LIMITED SONGEA BRANCH) has no legal personality/capacity, hence incapable of being sued.

The finding I have just made above, and the holdings by the precedents cited above in my view, suffice to answer the first issue without considering the second legal point in the suit at hand (on the inadequate description of the suit land). Instead, I will proceed to answer the first issue.

Now, following the precedents cited above, and since the first defendant in this suit lacks legal personality and could not be sued, and since the plaint offended the provisions of Order VII rule 1(c) of the CPC as discussed earlier, I am settled in mind that, all these irregularities render the suit incompetent. The first issue is therefore, answered negatively.

Concerning the second legal issue, I promptly agree with the learned counsel for the first defendant that, the only legal remedy for an incompetent matter like the suit at hand is to strike it out. It cannot be dismissed as urged by the learned counsel for the second defendant. In law, an order dismissing a matter is distinct from an order striking it out. The former order applies

when the court has heard a matter on merits. On the other hand, the latter order is made when a court finds a matter before it incompetent for any reason. The above dissimilarity between the two kinds of orders was highlighted by the CAT in the case of **Mustafa Songambe v. The Republic Criminal Application No.3 of 2016, CAT at Iringa** (unreported). Indeed, one exception is worth of notice. According to section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2029, a matter can also be dismissed for being time barred, even when it has not been heard on merits; see also the case of **Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, CAT, Civil Appeal No. 79 of 2001** (unreported).

The two counsel for the two defendants also prayed for costs of the suit. However, in my settled opinion, their clients are not entitled to such relief under the circumstances of the case. Indeed, the law is trite, settled and clear that, costs are awarded at the discretion of the court to be exercised judiciously. They also follow event unless there are good reasons to be recorded by the court for departing from this general rule; see section 30 of the CPC and the decision by the CAT in the case of **Njoro Furniture Mart Ltd v. TANESCO [1995] TLR. 205**. In the case at hand, it is common ground that, the two legal points which led to a finding that the present suit is incompetent were raised by the court *suo motu*. They were not raised by the defendants as a preliminary objection. This, in my concerted view, is a good reason for apportioning costs to parties. I therefore, find that, a proper order in relation to costs should be for each party to bear its costs.

I have also considered the prayer made by the learned counsel for the plaintiff in his rejoinder submissions. He urged this court to permit the plaintiff amend the plaint. This prayer cannot be tenable at this stage, in my view. This is for the following reasons; the prayer is contradictory to the previous contention by the same counsel through his submissions in chief that in law, suing a branch of a company is automatically suing its head office itself. Again such prayer is tantamount to pre-empting the legal issues raised by the court. The counsel could have properly made such prayer earlier on and before the court raised the two legal issues. Furthermore, the learned counsel for the plaintiff lodged such prayer belatedly in the rejoinder submissions in which said stage the two counsel for the two defendants could not have an opportunity to reply. Again, since the abnormality rendered the suit incompetent, the plaintiff cannot be permitted to amend the plaint. In law, an incompetent matter cannot be amended. The only legal remedy for it is to strike it out.

Due to the reasons adduced above, I find that, an appropriate order to be made by this court under the circumstances of the suit at hand, is to strike it out as per the **Registered Trustees case** (supra). This finding constitutes therefore, an answer to the second court issue posed above.

I accordingly strike out the suit for incompetence. I however, order that each party shall bear his own costs for the reasons shown previously in discussing costs of this suit. It is so ordered.



JHK UTAMWA  
JUDGE  
7/10/2022.

07/10/2022.

CORAM; JHK. Utamwa, J.

For Plaintiff: Mr. Ambindwile, adv. holding briefs for Mr. Msigwa, adv.

For Defendants: Mr. Ambindwile, adv. holding briefs for Ms Tunsume, adv.

For second defendant.

BC; Ms. Gloria.

**Court;** Ruling delivered in the presence of Mr. Moses Ambindwile, learned counsel holding briefs for Mr. Msigwa, advocate for the plaintiff and for Ms. Tunsume, advocate for the second defendant, this 7<sup>th</sup> October, 2022.



JHK UTAMWA  
JUDGE  
07/10/2022.