

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 03 OF 2021

CHANGE TANZANIA LIMITED APPELLANT

VERSUS

**REGISTRAR BUSINESS REGISTRATION
AND LICENCING AGENCY..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania,
Commercial Division at Dar es Salaam)**

(Fikirini J.)

dated the 21st day of May, 2020

in

Commercial Case No.27 of 2019

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JUDGMENT OF THE COURT

18th August, & 5th September, 2023

KENTE, J.A.:

By any standards, the question for our decision in this appeal, falls within a narrow compass. It is no more than related to the capacity of the appellant namely Change Tanzania Limited following the amendment in 2019 of section 3 of the Companies Act, Chapter 212 of the Revised Laws (hereinafter the Companies Act) by section 6 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2019. As the parties to this

appeal are generally in agreement with the trial court's findings of fact, our task is to determine whether, in view of the said amendments, the decision by the learned trial Judge was in accordance with a proper interpretation of the law. Put in clear terms, we are enjoined to decide, on the basis of the evidence concurred with by the parties, whether or not, by operation of law, with effect from 30th August, 2019 the appellant became a non-existent legal entity after being automatically deregistered from the companies register as held by the trial judge.

In this regard, and in view of the above-posed question, before anything else, a quotation of section 3A (1) and (2) of the Companies Act as amended, is indeed apposite as it will serve both useful and needful ends. The said law provides that:

3A-(1). *A company referred to under section 3(3) which was incorporated or registered prior to the coming into operation of this section shall, within two months from the date of coming into operation of this section, be required to comply with the provisions of this Act.*

(2) *A company limited by guarantee not having share capital, incorporated or registered under this Act and obtained*

a certificate of compliance under the provisions of the Non-Governmental Organisations Act, shall, within two months from the date of coming into operation of this section be deemed to have been registered under the Non-Governmental Organisations Act and struck off from the register.

The facts giving rise to the petition before the trial court and by extension, to the instant appeal, are fairly simple and straightforward. Until the time which is contemporaneous with the occurrence of this dispute, the appellant was a private company limited by guarantee without share capital. Bearing registration No.89352, it had been duly registered by the Registrar of Companies on 20th February, 2012.

Following the earlier-mentioned amendment of section 3 of the Companies Act, on 18th August, 2019, after purportedly amending its Memorandum and Articles of Association and having replaced the initial objects with the ones which would enable it to promote trade, investment and commerce, the appellant sought to update its records through the respondent's Online Registration System (ORS) whereupon it was ordered to pay TZS 1,506,000.00 as a fee for the alterations to be effected in the register of companies. Surprisingly however, having paid the prescribed

re-registration fee, on 21st August, 2019 the appellant was informed that its application for alteration of its initial objects had been rejected for the reason that, by virtue of the amendment of section 3 of the Companies Act, it had to be registered and subsequently regulated by the Registrar of Non-Governmental Organisations. This information, it would appear, did not go down well with the appellant company which believed that, in terms of section 3(3), 8(1) (a) and 13(1) of the Companies Act, it was entitled, upon special resolution, to alter its memorandum and articles of association and subsequently continue to be under the registration and regulation of the Registrar of Companies. In brief, that is what prompted the appellant to refer its grievances to the Commercial Division of the High Court (the trial court) to seek redress.

It was the appellant's claim before the trial court that, the respondent's refusal to accept the alterations in its memorandum and articles of association would lead to its being struck off from the Register of Companies on 30th August, 2019 and cause it to suffer a substantial and unrecoverable financial loss for being rendered commercially inactive.

Upon the foregoing complaints, the appellant implored the trial court to make a declaratory order that, it was entitled to alter its memorandum and articles of association with a view to replacing its former objects, and,

subsequently, it asked the trial court to order the respondent to accept and confirm the said alterations for which the requisite fees had already been paid in full and received by the respondent.

As the factual basis upon which the appellant instituted the petition against the respondent was not materially traversed, in reply, the respondent seized the moment and turned it to its advantage. In a legal tactic that eventually worked, it raised a preliminary objection contending among other things that, the petition before the trial court was bad in law, for having been preferred by a non-existent petitioner and suing a non-existent respondent, all rolled into one.

After hearing the parties' respectful submissions and having taken into account the applicable law, the learned trial Judge (Fikirini, J as she then was) sustained the objection and went on dismissing the petition with costs. It bears emphasis here that, our reading through the impugned ruling of the trial court revealed that, the learned trial judge took the view that, having either refused, failed or otherwise neglected to comply with the requirements of the law which were introduced by the already mentioned amendments, with effect from 30th August, 2019 the appellant was virtually inexistent having been automatically deregistered from the Register of Companies.

With regard to the appellant's contention through its advocate that it had presented its documents for lodging the petition in court during the pendency of its life time well before the lapse of the grace period, the trial judge could not buy the appellant's story that the filing of its petition which was eventually lodged in court on 3rd September, 2019 was delayed by the bureaucracy in the court registry.

In view of the above finding, the trial judge went on concluding that, the appellant lacked the capacity to sue and that, by operation of law, it was a non-existent legal entity having expired on 30th August, 2019. It is as well worthwhile to mention here that, the trial judge was equally convinced and she accordingly sustained another point of objection which challenged the appellant for suing a non-existent legal entity.

As did the learned trial judge, at the outset, we can hold without a ditch, that indeed, up to the time of the appellant's lodgment of the petition in the trial court, there was no legal entity in Tanzania capable of suing or being sued by the name of "Registrar, Business Registration and Licensing Agency". That said, for the reasons which will soon become obvious, we shall not delve into the remaining points of preliminary objection which were canvassed by the trial court, apparently for purposes of completeness.

The appeal before this Court is premised upon four complaints which can simply be paraphrased, thus:

1. *The High Court erred in law and in fact when it held that the appellant was automatically deregistered by operation of law and had no legal personality when she instituted the suit against the respondent.*
2. *The High Court erred both in law and fact when it held that the appellant had no **locus standi** to bring an action against the respondent.*
3. *that, by determining the matter on the basis of a preliminary objection, the trial court denied the appellant the right to be heard; and*
4. *the High Court erred in law and in fact in holding that the respondent is a non-existent legal entity.*

Before us, the appellant was represented by Mr. Daimu Halfan learned Advocate as he did before the lower court, while the respondent enjoyed the legal services of Mr. Lukelo Samwel learned Principal State Attorney assisted by Mss. Lilian Machagge, Grace Umoti and Frida Mollé, learned State Attorneys.

Considering the first and second grounds of appeal together, the question we need to determine as arising therefrom is whether or not, at the time of petitioning the trial court for the earlier mentioned orders, the appellant was a legal entity and thus clothed with the requisite capacity to sue.

Notably, through the petition that initiated the appellant's claim against the respondent, the appellant is on record as having pleaded in paragraph 1 thus:

*"That, the petitioner is a **private company limited by guarantee without share capital** registered with the respondent Agency ..."*
[Emphasis added]

It must be very elementary that, a civil action like the one which was filed by the appellant in the trial court, can only be instituted by a natural person or as in this case, a juristic entity created and recognized by law. Otherwise, as we shall later on demonstrate, a suit instituted in the name of a non-existent plaintiff or petitioner as the case may be, is void ***ab initio***.

Coming to the specifics of the present case, in a word, the thrust of the appellant's arguments is that, in view of the provisions of the already quoted section 3(A) (1) of the Companies Act, the appellant did not

automatically cease to exist as a company limited by guarantee and that, it had the right to amend its memorandum and articles of association to remove the objects which had no bearing on the promotion of commerce, investment, and trade or any other activity which the Minister could prescribe by notice published in the Gazette. According to Mr. Daimu, on being endorsed, the above changes would enable the appellant to sort of metamorphose from a company limited by guarantee not having a share capital into a fully integrated company with the object of promoting investment, trade and commerce in compliance with the requirements brought about by the newly introduced law.

For his part, Mr. Samwel had no much to say with regard to the appellant's contention. Without addressing the nitty-gritty of the applicant's intended change into a company as defined under section 2 of the Companies Act, the learned Principal State Attorney explained how the appellant was so apathetic as to be caught flat footed by the time limitation prescribed under section 3A (2) of the Companies Act. Specifically, Mr. Samwel submitted and we think correctly so that, the appellant was given a grace period of two months from 30th June, 2019 to comply with the requirements of the law, the opportunity which it however, squandered. It was the learned Principal State Attorney's final

conclusion that, in the circumstances and by operation of law, by the time the appellant lodged the petition in the trial court, it had been automatically deregistered from the Companies Register and that, for that matter, the orders sought by the appellant from the trial court had already been overtaken by events.

For our part, we do not consider it worthwhile to recount all the arguments made by counsel for the parties as we are of the settled opinion that the arguments which we have so far highlighted are sufficient enough to dispose of this matter.

We begin by stating that, in any judicial proceeding, capacity of the parties is a crucial matter that goes to the root of a suit and, on that account, being fundamental, it can be raised at any stage of the proceedings even after judgment upon appeal, but preferably at an early stage to enable a mindful court to resolve that issue before delving into the merits of the matter.

The question we ask is, what then is the burden placed on the plaintiff or petitioner whose capacity in a given proceeding is put in issue? Certainly, the answer can only be that, when the legal status of a plaintiff, petitioner or applicant in a civil action is challenged by the other party or even *suo moto* suspected by the court as to form an issue, it is incumbent

upon the plaintiff or petitioner whose capacity is put to question as the appellant in this case, to lead cogent evidence to satisfy the court that at the time of suing, it had the requisite legal capacity not only to sue but also to be sued.

In the present case, as can be gleaned from the record of appeal, the issue of the appellant's legal capacity was timely raised by the respondent by way of a preliminary objection in reply to the petition. Subsequently, upon the court's order, the objection was argued by written submissions. In his submissions, knowing that the petition was filed after the closing date, the appellant's counsel lamented that the appellant was a victim of bureaucracy in the trial court's registry as the appellant had timely presented its documents for filing on 30th August, 2019 but only to be told to its dismay that, the Court Registrar was on safari and that nothing could be done to process the filing of the petition in the Registrar's absence.

We have carefully considered the submissions made by both sides in light of the two grounds of appeal. We are alive to the fact that, in view of what was contested before the trial court and subsequently before this court, there was nothing factual for the appellant to prove by way of evidence. As revealed by the facts on the record, by the 3rd September,

2019 when the appellant formally lodged the contested petition in the registry of the trial court, the grace period of two months reckoned from 30th June, 2019 within which the appellant could register itself with the Registrar of Non-Governmental Organisations which was the only avenue available to the appellant to survive as a legal entity, had already elapsed and, by 30th August, 2019 in terms of section 3(A) (2) of the Companies Act, the appellant had been struck off the Register of Companies, hence a non-existent entity.

Now, as stated earlier, it is trite that, a non-existent person or entity can neither sue as a plaintiff nor be sued as defendant. In this connection, we find it expedient to clarify our position that, parties initiating civil proceedings must be either natural persons who are alive or their recognized legal representatives and juristic entities recognized by law. For, while it cannot be gainsaid that plaintiffs cannot always seal all the loopholes and eliminate all sorts of shortcomings in the plaint as to place it on the throne of an unassailable pleading, capacity of the plaintiff which may be among the issues of law of repeated occurrence in the course of litigation, is one of the guiding beacons towards prosecuting a valid cause in a court of law. For that matter, it goes without saying that, any

advocate up to the task, will give it premium as he rolls his sleeves to serve his client.

Coming to the instant case, given the facts on the record together with the applicable law, we are satisfied as was the trial judge that indeed, the well-timed objection raised by the respondent regarding the appellant's legal capacity as at 3rd September, 2019 was very legitimate and fundamental as to be endorsed by the trial court. On this point, we are further fortified by the holding in the case of **Fort Hall Bakery Supply Company v. Fredrick Muigai Wangoe (1959) EA 474**, to which we totally subscribe, that:

"A non-existent person cannot sue and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining an action, it cannot allow the action to proceed".

Upon the above succinct statement of the law which is certainly beyond debate, it must be settled law that, a suit by or against a non-existent party is not a suit in the eyes of law; it suffers the fate of being dismissed or struck out.

That said, we find no merit in the first ground of appeal which we accordingly dismiss.

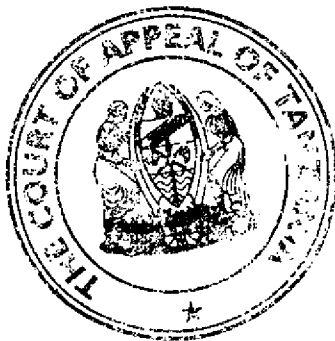
Regarding the fourth ground of appeal which faults the trial judge for holding that the respondent was a non-existent entity, being satisfied as was the trial judge, we entirely agree that indeed, there is no legal entity in the Tanzania Government Institutions' structure by the name of "Registrar, Business Registration and Licensing Agency". We only wish to observe by way of emphasis that, it is always fundamental in litigation that, parties must commence action against relevant and legally recognized parties to the suit. For, otherwise, to institute an action against a non-existent defendant or respondent who is incapable of being sued, puts the validity of the action in issue as to become a nullity together with the proceedings and the judgment founded on it. In the circumstances of the case now before us, for all practical purposes, it baffles the imagination as to how and against who the appellant could have gone on to execute or enforce the orders sought in the petition had the trial judge accepted the arguments advanced by Mr. Daimu and allowed the appellant's claim to graduate into a court decree without adequate scrutiny.

At the end of the day, therefore, without recourse to the remaining grounds of appeal the determination of which would certainly be an exercise in a superfluity, the net effect of the above analysis is that this

appeal has no merit. We think it has sufficiently been demonstrated that, by the 3rd September, 2019 when the appellant petitioned the trial court for the earlier mentioned orders, it was no longer existent as a legal entity and therefore it lacked the legal standing to institute a case in its name. Likewise, the respondent against whom the orders in the petition were sought, was not a recognised legal personality capable of being sued.

In the upshot, the appeal is dismissed in its entirety for lack of merit. Since the appellant does not exist and can neither pay nor receive costs, we make no order to that effect.

DATED at DAR ES SALAAM this 4th day of September, 2023.




A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of September, 2023 in the presence of Mr. Nashon Nkungu, learned advocate for the appellant and Ms. Grace Umoji, learned State Attorney for the respondent is hereby certified as a true copy of the original.


J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL