

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 35 OF 2017

PHARMACY COUNCILAPPELLANT
VERSUS
KAGERA PHARMACY.....RESPONDENT

JUDGMENT

MURUKE, J.

On third December, 2012, the Pharmacy council officials in the cause of inspection, found the respondent undertaking a Pharmacy business without the followings.

- (i) Pharmacy business without paying the prescribed fee,
- (ii) Operating the Pharmacy business without Permit,
- (iii) DDA box,
- (iv) Prescription drug register and
- (v) Displaying prescription drugs over the counter drugs.

Also respondent did not display the permit and certificates of registration in an open conspicuous place in the said premises as required by law.

Following the anomalies, appellant ordered Kagera Pharmacy to be closed pending fulfillment of all the requirements. Being aggrieved by appellant decision, respondent instituted civil case No. 1 of 2013 which was dismissed for want of prosecution. The respondent did not challenge the dismissal order dated 1st December, 2014, instead, on the 8th day of December 2014, civil case No. 91 of 2014, instituted in the Resident Magistrate Court of Kinondoni at Kinondoni, between the same parties and the same subject matter.

Upon being served with the plaint, the appellant filed a written statement of defence on 9th June 2015. The written statement of defence contained preliminary objection that the court has no **jurisdiction to entertain the matter**, under section 51 of the Pharmacy Act Cap. 311 of 2011, the matter is **Res Judicata** and that the **plaintiff being not a juristic person has no capacity to sue**. That on the 9th day of September, 2015, Civil Case No. 91 of 2014 was called for mention before Hon. Mushi, RM. Respondent counsel, prayed for an order to proceed with the hearing ex-parte. Trial court did not grant the prayer, but ordered the Appellant to be notified and fixed the hearing to be on 17th day of September 2015. The order of the Court was not

complied, appellant was not notified as ordered. On 13th October 2015, one again respondent counsel prayed for an order for ex-parte hearing, whereby an order for notification to the appellant issued on 9th September 2015, was not complied with. The trial court ordered ex-parte hearing on 23rd October 2015. On 2nd day of December 2015, the ex parte hearing was conducted, two witnesses, Peter Tabu Massawe and Walter Tindwa testified. Plaintiff's case was closed on the same day. On the 17th day of December 2015, the trial court delivered the ex-parte Judgment and decree. Awarding the respondent Tshs. 100,000,000/= a general damages, Tshs. 13,200,000/= as specific damages being loss of Tshs. 400,000/= per day for 33 days, interest, and costs of the suit.

The appellant was not aware of the ex parte judgment and decree of the court until on the 11th day of August, 2016 upon receipt of the application for execution of Decree. Upon being served with the said notice, on 28 September 2016 the appellant filed an application in the resident magistrate court for extension of time to set aside the Ex-parte Judgment and Decree against the applicant issued on 17th December 2015. On 9th January,

2017, the Resident magistrate Court of Kinondoni dismissed the appellants' application and upheld the Ex-parte judgment and decree. Being aggrieved by the decision of the trial court, appellant filed present appeal advancing nine grounds of appeal.

It is principal of the law that, for the reason to be explained later, I will address myself to the ground eight on the locus of the respondent to file a suit at the trial court. For proceedings to be maintained in court person initiating the same must show that, he is entitled to bring the matter before the court.

A company acquires distinct legal personality, once it is incorporated and not when the name of the business is registered. The effect of incorporation of the company is provided under section 15 of the Companies Act (Cap 212 R.E. 2002) which read as follows:-

15. (1) on the registration of the memorandum of a company the Registrar shall certify under his hand that the company is incorporated and in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

The fundamental attributes of corporate personality or the concept of limited company from all other consequences of incorporation is that the corporation is a legal entity distinct from its members. The concept of a limited company came into effect with the historic decision of **Salomon v. Salomon (1897) AC 22**. Therefore, the Respondent Kagera Pharmacy is not a limited liability company. It is the registered business name of PETER TABU MASSAWE as evidenced by paragraph one of the plaint. Thus, respondent lacks *locus standi* to file a suit at trial court.

The term *locus standi* is defined in the **Blacks Law Dictionary, 9th (ed) 2009** at page 1028, as “***the right to bring an action or to be heard in a given forum.***”

The bolder definition was derived in the case of **Lujuna Shubi Balonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi** [1996] T.L.R 203 as cited by the counsel for respondent where the High Court of Tanzania, at page 208 that:-

"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court: Because a court of law is a court of justice and not an academy of law, to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application".

According to the trial court records, Kagera Pharmacy is a trade name not, a juristic person. Thus, lacks locus standi to sue. I allow ground eight of the appeal on the reason state.

It goes without saying that proceedings in Civil Case number 91 of 2014 and other resulted ruling and orders thereof, are nullity. Accordingly proceedings quashed, judgment and decree are set aside with costs. Ground eight is enough to dispose this appeal. Right of appeal dully explained.



Z. G. Muruke

JUDGE

06/04/2018

Judgment delivered in presence of Benjamin Mihayo State Attorney for the appellant and Doctor Tabu Massawe for the respondent.



Z. G. Muruke

JUDGE

06/04/2018