

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

AT DAR ES SALAAM

CIVIL CASE NO. 64 OF 2015

**YUSUPH SAID GUZO as a legal representative of
ALLY SAID GUZO (deceased) and ABDUL ALLY GUZO.....PLAINTIFF
VERSUS**

**DEODATI AMTONI MSAKI.....1ST DEFENDANT
FATUMA LOSINDILO KIMARO.....2ND DEFENDANT
GHM INSURANCE BROKER LIMITED.....3RD DEFENDANT
MAXIINSURE (T) LIMITED.....4TH DEFENDANT**

RULING

Date of last Order: 22/08/2019

Date of Ruling: 16/10/2019

MLYAMBINA, J.

This suit has been preferred by Yusuph Said Guzo as a legal representative of Ally Said Guzo (deceased) and Abdul Ally Guzo. When the matter came for defence hearing (DW1) before me as a successor judge, I noted anomaly on the face of the pleading and called upon the parties to address the Court on whether the plaintiff had leave of the Court to file a representative suit on behalf on the Said Abdul Ally.

Counsel Edward Nelson Mwakingwe for the plaintiff admitted that one of the plaintiffs has mistakenly been joined as a co-plaintiff and there is nowhere, he has signed the pleading.

It was the humble submission of counsel Edward Mwakingwe that the defect is curable as it has no massive defects to the issues in controversy between the proper parties in this suit.

Counsel Edward Mwakingwe maintained that, under **Order I Rule 9 of the Civil Procedure Code Cap 33 (R.E 2002)** no suit should be defeated by reason of misjoinder or non-joinder of the 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 duly before it.

It was the submission of counsel Edward Mwakingwe that **Order VI Rule 17 of the Civil Procedure Code** allows either party at any stage of the proceedings to alter or amend the pleadings for the purpose of determining the real issue in controversy.

In the light of the afore provision of the law and with the overriding objective principle, counsel Edward Mwakingwe prayed to amend his plaint and remove Abdul Ally Guzo so that the remaining party can proceed with the suit.

On his part, counsel Abubakary Salim told the Court that since the plaintiff's counsel conceded to the preliminary objection, the suit has to be struck out.

Counsel Abubakary submitted that misjoinder and nonjoinder refers to a party who is wrongly joined and nonjoinder of a party who has been not joined to the suit.

Counsel Abubakary added that, while it is admitted Ally Said Guzo is deceased, there are no legal reasons whatsoever as to why Yusuph Said Guzo is a legal representative of Abudl Ally Guzo.

It was the submission of counsel Abubakary Salim that, at the time of institution of this suit, Abdul Ally Guzo was of majority age. He was not incapacitated anyhow. So, Yusuph Said Guzo would not purport to represent Abdul Ally Guzo before the Court of Law.

It was maintained by counsel Abubakary Salim that no amendment of the plaint can be made when the preliminary objection is raised.

Most important, in view of counsel Abubakary Salim, one can amend something which is legally before the Court. It was the view of counsel Abubakary that since in the present suit there is no plaint legally so to speak, there cannot be an amendment. The usual consequence for the conceded preliminary objection is to struck out the plaint.

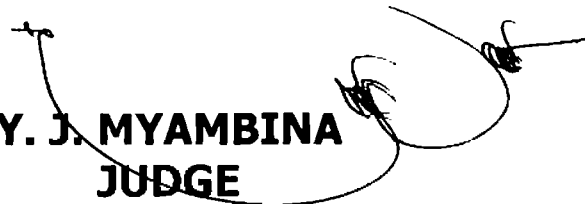
Counsel Paul Kibuuka on his part for the 4th defendant joined issues with counsel Abubakary Salim.

In the view of the foregoing parties submission, I must state at the outset, that in a number of times this Court, even the Court of Appeal has insisted that it will not tolerate the practice of an advocate trying to pre-empt an objection either by raising objection or trying to rectify the error complained of. That is per method **Kimomogoro v. Board of Trustees TANAPA**, Civil Application No. 1 of 2005. The act of the plaintiff counsel praying to amend the plaint ought to have been made prior the preliminary objection been raised by the Court.

Indeed, the plaint is signed by the plaintiff advocate and the plaintiff it is not known whether it is the 1st plaintiff or the second plaintiff. The same plaint is verified by Yusuph Said Guzo as a close relative (uncle) of the beneficiary's family. It is not put specifically as to who are those beneficiaries as between the plaintiffs.


I do agree with the defendants counsel the point of overriding objective principle as crafted in **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 do not apply in this case. The same applies for misjoinder and nonjoinder of parties as ailed under **Order 1 Rule 9 of the Civil Procedure Code** (supra) do not apply to illegal suit like the present one.

In the end, the suit is hereby marked struck out with costs for the anomaly on the face of the plaint pointed out. It is so ordered.



Y. J. MYAMBINA
JUDGE
16/10/2019

Ruling delivered and dated this 17th day of October, 2019 in the presence of the 1st Plaintiff in person and Tesiel Kikoti holding brief of Abubakary Salim Advocate for the 2nd Defendant. The rest been absent.



Y. J. MYAMBINA
JUDGE
16/10/2019