

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL No. 148 OF 2019

DR. HAMZA K. KHALIFA.....PLAINTIFF

Versus

**EXECUTIVE SECRETARY- THE TANZANIA COMMISSION FOR
UNIVERSITIES (TCU).....1st DEFENDANT**

**PERMANENT SECRETARY MINISTRY OF EDUCATION AND
VOCATIONAL TRAINING UNIVERSITIES.....2nd DEFENDANT**

THE ATTORNEY GENERAL.....3rd DEFENDANT

RULING

30th April – 2nd June, 2020.

J. A. DE-MELLO J;

Four (4) Preliminary Objections have been raised by the three Defendants in their **Joint Written Statement of Defence** filed on **23rd September, 2019** on points of law as follows;

- i. **That, the suit is bad in law for suing a Non- Existent Party.**

- ii. **That, the Plaint is bad in law for containing a Defective Verification Clause.**
- iii. **The Plaintiff has no Cause of Action against the Defendants.**
- iv. **The Plaint has no Locus Standi to institute the suit.**

Written submissions was prayed for and, duly granted, with **Margaret Ringo Counsel** for the **Plaintiff**, whereas **Charles Mtae Solicitor** for the **Defendants**, one who raised the said objections.

Arguing on the first limb of the objection **Counsel Charles Mtae Solicitor** for the **Defendants** submitted that, the second Defendant named the **Permanent Secretary Ministry of Education and Vocational Training Universities in the United Republic of Tanzania** is non existing, as there is no such Ministry place. Further that, it is the **Ministry of Education, Science and Technology** which is responsible for Higher and, Ordinary learning in the **United Republic of Tanzania** since the **5th November, 2015 vide G.N No. 143** which was published in **2016**. Counsel cited the case of **Christina Mrimi vs. Coca Cola Kwanza Bottles Ltd., Civil Appeal No. 112 of 2008**, faced with a similar fact which ended up **Struck Out** for failure to identify the appropriate party by inserting **Coca Cola Kwanza Bottles Ltd.** instead of **Coca Cola Kwanza**. Further that, not even **Article 107A** of the **Constitution** of the **United Republic of Tanzania** could cure rather remedy, it being not a technical irregularity. Counsel highlighted several other cases namely; **Attorney General vs. Rev. C. Mtikila, Civil Appeal No. 2 of 2007**, **Fortunatus Masha vs. William Shija, [1970] TLR 91** and, **Hotel Travertine's case civil Appeal No. 138 of 2004**. To reiterate this position, the case of **Fort Hall**

Bakery Supply Company vs. Fredrick Muigai Waingoe (1959) E.A 474 where it was stated;

"A non-existent, and therefore incapable of maintaining an action it cannot allow the action to proceed"

In the case of **Paul Nyamarere vs. UEB, Civil Appeal No. 27 of 2012 and Chemonges Kamis vs. Kapchowa Referral Hospital Civil Suit No. 27 of 2012**, that suits in the names of a non-existence party are rendered, a nullity. However, in a different finding but, from a similar issue, the Court had in the case of **Small Simba Club vs. Miembeni Sports Club [1988] TLR 1** where the Court stated that, it does **not wish to spend argument on positions of ex members in the Baraza la Michezo Zanzibar and other issues, because they would only be relevant if it was satisfied that there was in existence the " Baraza la Michezo Zanzibar"**. The Appeal was dismissed. In another case of **Beranes Bank Ltd. vs. Bhagwandas AIR (1947) AII 18**. the Court found itself constrained to discharge its duty for the reasons of non existing of the party sued. It went further to observe that the anomaly cannot be cured by virtue of **Order 1 Rule 10 (2) of the CPC** considering absence of valid point before the Court. The case of **Trustees of Rubaga Miracles Centre vs. Mulangira Simbwa, Misc. Application No. 576 of 2006** was referred in support of that, line of reasoning stating;

"The law is settled. A suit in the names of a wrong plaintiff or Defendant cannot be cured by amendment. The Defendant described as the board of trustees of Rubaga Miracle Centre Cathedral does not exist in law"

Addressing the second limb of objection on a defective verification clause in the Plaint, Counsel brought to light what **Order VI Rule 15 (1)** of **Cap. 33** has as it stipulates;

“Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.”

Further, **Order VI Rule 15 (3)** of **Cap. 33** states that;

“The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed”.

Drawn from the facts, it is evident that the allegations revolves from correspondences between the **Vice Chancellor (VC)** of the **Muslim University of Morogoro (MUM)** and, the **Tanzania Commission for Universities (TCU)**, to which the verification is wanting at to the source of knowledge. With regard to **Cause of Action** and **Locus Standi**, Counsel is of a firm view that, it is even wanting and based in the case of **John M. Byombalirwa vs. Agency Maritime Internationale (T) Ltd. [1983] TLR** where **Kisanga J**; as he then was, held;

“Cause of action mean essentially facts which it is necessary for the Plaintiff to prove before he can succeed in the suit”.

The he Court of Appeal held further that for purpose of deciding whether or not a Plaint discloses a cause of action, it must be determined upon a perusal of the Plaint, together with anything attached so as to form a part of it, upon the assumption that, any express or implied allegations of fact in it, are true.

In the case of **Mashando Game Fishing Lodge and 2 Others vs. Board of Trustees of TANAPA [TLR] 2002** at **page 319-320** the Court stated that;

"A person is said to have a cause of action against another where that person has a right and other person has infringed that right with result that the person with right suffers material loss or any other loss".

On **Locus Standi** borrowing what the case of **Lujuna Shubi Ballonzi Senior vs. Registered Trustees of Chama cha Mapinduzi [1996] TLR 203 (HC)** the Court held that;

"Locus Standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with".

Counsel based her contention from that same letters with **ref. No. AB.4/324/20/12** dated **2nd May, 2018**, **CBA.40/78/01C/13** dated **9th August, 2018** (**Annexure TCU 1 in the Written Statement of Defence**) together with **letter ref. No. CBA.40/78/01/113** dated **27th June, 2017**, to ascertain that, the correspondences between **TCU** and, the **Vice Chancellor of the Muslim University of Morogoro**, not permitting to bring this suit as the Plaintiff does not possess any power of Attorney in that regard.

Opposing the said objections **Counsel Margaret J.R Ngasani**, for the Plaintiff and, basing her submissions on the rules govern Preliminary point of objections, caution on what Points of law are, as laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors**

Ltd. (1969) E.A 696 at page **700** of which the said do not to conform. Sir Charles Newbold had this to state;

"So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which raised by clear implication out of pleadings and which is argued as preliminary objection may dispose of the suit". Referring the case of **COTWO (T) OTTU Union & Another vs. Hon. Iddi Simba Minister of Industries & Trade & Others TLR [2002]**

"A preliminary objection should raise a point of law which is based on ascertained facts not on a fact which has not been ascertained and if sustained and if preliminary objection should be capable of disposing of the case"

Further that; **Order 1 Rule 10 (2) of the CPC, CAP 33** states that;

"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."

Submitting on the second limb of the objection relating to verification, *Counsel Ngasani* shares the provision of **Order VI Rule 15(2)** of the **CPC, CAP 33** stipulating that

“The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.”

Further, is what the case of **Aloys Lyenga vs. Inspector General of Police and Another (1997) TLR 101** instating as follows;

“... what the verifier was required to do was to itemize in the verification clause matter which were his personal knowledge and those based on information or belief”

It her submission that, the Plaint is in order with proper verification in all its paragraphs, within the knowledge and, belief of the Plaintiff. On **Cause of Action** and **Locus Standi**, the third and fourth objections, while borrowing what **Order II Rule 2(1) of the CPC, Cap. 33** has as hereunder that;

“Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court”

They all are regulated by Government Proceedings Act, 1967, the Defendants are Government departments to be joined when suing. In the case of **Stanbic Finance Tanzania Limited vs. Giuseppe Trupia and Chiara malavasi [2002] TLR**. In determining if the Plaint discloses a Cause of Action against the Defendant, the Plaint must be considered within its four corners including its annexures. That in this suit the facts connects the Defendants with the defamatory statements made against the Plaintiff,

citing the other case of **Serafin Antunes Affonso vs. Porton Enterprises & Others** (Unreported) which emphasized that, the Court has to look and cast its eyes into Plaintiff and its annexures. This she contends is provided under **Order VII Rule 1(e)** of the **CPC, Cap. 33** that the Plaintiff must disclose a Cause of Action.

It does not require energy rather magic to agree with Counsel for the Defendant that the first limb of objection has merit. There is not in place 'Permanent Secretary Ministry of Education and Vocational Training Universities in the United Republic of Tanzania', but one for **Ministry of Education, Science and Technology** since **5th November, 2015 vide G.N No. 143** which was published in **2016**. This then renders the objection valid as I share what all the case cited relevant in support of the same. The essence of all this is to ensure that the decree resulting therefrom is applicable for execution to Parties. Similarly, is the verification clause and for clarity I import;

"what is stated herein above **in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14** is true to the best of my knowledge and belief.

.....

Plaintiff

True, **Order VI Rule 15 (3)** of **Cap. 33** clearly spells out that;

"The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed". It is obvious that the verification clause does not indicate the place where it took place and

date. This is important with a view of ascertaining credibility towards the facts. On the third point of objection and subscribing to all the cases shared by the Defendant, but also what the case of **Joraf Shariff & Sons vs. Chotai Fancy Stores (1960) E.A at 375** perusal of the Plaintiff in its totality as well as all the annexed documents to ascertain what the **Cause of Action** is.

However, and, in disagreement with Counsel for the Defendant, I see the Plaintiff to be one alleged to have been defamed and hence with "**Locus Standi**". The three of them have merits and, whose effect is to pave room for the Plaintiff to come back with proper record. The remedy here is to "**Strike Out**" as opposed to a "**Dismissal**", with **Leave to Re-File**, within **fourteen (14) days** from the date of this order.

I order.


J. A. DE-MELLO

JUDGE

2nd June, 2020.