

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE NO. 26 OF 2020

**BOARD OF TRUSTEE OF ST. THADEUS PRIMARY
SCHOOL.....PLAINTIFF**

VS

**BOARD OF TRUSTEE OF ST.THADEUS SECONDARY
SCHOOL.....1ST DEFENDANT**

JOSEPH JOHN MASSAWE.....2ND DEFENDANT

JUDGMENT

Date of last order: 31-5-2022

Date of Judgment:24-6-2022

B.K.PHILLIP,J

The plaintiff instituted this case against the defendants alleging as follows; That it is a lawful owner of unregistered land located at Engorora area, Kisongo ward within Arusha City, (Hereinafter to be referred to as "the suit land"). It bought it from three different vendors namely Julius Metui, Edward Loi Lukumai and Magdalena Loisiligaki through the efforts of its Managing Director Mr. Thadeus Joachim Lyamuya who secured loans from Akiba Commercial Bank and Richard Hardware to a tune of Tshs 80,000,000/= and 28,750,000/= respectively, for construction of the school buildings in the suit land. He Mortgaged his Houses located on plot No.448 Block "EE" and Plot No.449 Block "EE" to secure the aforesaid loans. The Village executive Officer of Engorora was involved in the transaction for the purchase of the suit land. However, sometimes in December 2014, the Plaintiff's Managing Director (Mr. Thadeus Joachim

Lyamuaya) realized that there were some ill motives orchestrated by the 2nd defendant under the umbrella of the 1st defendant to temper with the ownership of the suit land which involved fraudulent registration of several documents contrary to what was agreed between Mr. Lyamuya and the 2nd defendant. In 2009 Mr. Lyamuya travelled to the United States of America leaving some administrative responsibilities to the 2nd defendant regarding the registration of the 1st defendant. Unexpectedly, the 2nd defendant decided to register the 1st defendant into his name and started operating his activities in the suit land contrary to what was agreed. The plaintiff has requested the 2nd defendant several times to stop interfering with the ownership of the suit land and reported the matter to the chairman of Engorora Village, but in vain. Finally, in the extra ordinary meeting held on 5th May 2020, the plaintiff, made a resolution to institute this case, in which it prays for judgment and decree as follows;

- i) Declaration that the Plaintiff is the lawful owner of the suit land and that the 1st and 2nd defendants are trespassers.
- ii) The 1st and 2nd defendants, their agents, servants, workmen and whoever acting under their instructions be ordered to give vacant possession.
- iii) An order restraining the 1st and 2nd defendants, their agents, servant, workmen and whoever acting under their instructions permanently from interfering with the plaintiff's ownership of the suit land.
- iv) General damages for trespass and loss of use of the property as may be assessed by this honourable Court.

- v) Costs of the suit.
- vi) Any other reliefs this Honourable Court may deem fit.

No written statement of defence was filled by the 1st defendant. In his defence the 2nd defendant stated as follows; That he is a lawful owner of the suit land, founder and managing director of St Thadeus Secondary School. Mr. Thadeus Joachim Lyamuya was the manager of that school but he was dismissed following the misunderstanding which arose between him and the 2nd defendant due to insubordination and misappropriation of the school fees and money for staffs' salaries committed by him. The suit land was purchased using the money raised from St. Thadeus Pre & Primary School which was jointly owned by Mr. Lyamuya and the 2nd defendant. St. Thadeus Pre & Primary School and St. Thadeus Secondary School were owned jointly by Mr. Lyamuya and the 2nd defendant. It was agreed that the 2nd defendant would hold the position of a school manager of St. Thadeus Pre & Primary School and Mr. Lyamuya would be the Director of the School. The 2nd defendant would be the Chief Director (owner) of St. Thadeus Secondary School and Mr. Lyamuya would be the school manager. Mr. Lyamuya and One Carol Mushi (now deceased) were assigned a duty to purchase 10 acres for establishment of St. Thadeus Secondary School and hand over the same to the School Director, but they purchased only 7 acres. Mr. Lyamuya misappropriated the money intended to be used for purchasing the said 10 acres. Consequently, the school incurred losses. St. Thadeus Secondary School is properly and legally registered under the name of the 2nd defendant who is the founder, owner and chief Director. Mr. Lyamuya and the late Carol did secretly complain to

the Engorora Village Executive Officer about the suit land in their endeavour to unfaithfully appropriate St. Thadeus Secondary School and all the properties there in. The money alleged to have been obtained from the loans secured by Mr. Lyamuya were not used for construction of the school buildings because the funds for construction of St. Thadeus Secondary School were obtained from the contributions made by St. John Vocational Training Center, St. Thadeus Pre & Primary School, donors including parents and a NGO, known as Irpayan O'ngera. No any complaints had been lodged at the Engorora Village Executive officer concerning the ownership of the suit land. He never committed any fraudulent acts as alleged by the plaintiff and there is no any criminal charge against him for the alleged fraud, but he (the 2nd defendant) did institute Criminal Case No. 282 of 2014 at Arusha Urban Primary Court and Civil Case No. 130 of 2013 at the Resident Magistrates' Court of Arusha against Mr. Lyamuya when he forcibly evicted him from his office and confiscated most of his documents. It is not true that in 2009 Mr. Lyamuya travelled to United States of America.

The 2nd defendant raised a counter claim in which he alleged as follows; That he is the founder of St. Thadeus Pre & Primary School and a manager. There is a Memorandum of Understanding signed between him and Mr. Lyamuya in which they agreed on the management of the schools (St Thadeus Pre& Primary School and St Thadeus Secondary School) , but contrary to what was agreed in the Memorandum of Understanding, Mr. Lyamuya and the late Carol hired hooligans who forcefully evicted him from his office and seized all the documents relating to the

establishment of the schools and various reports on the development of the schools which were under his possession. He has been denied to enjoy the fruits of the school. Consequently ,he is suffering from damages and loss of property. He has 40% shares in St.Thadeus Pre & Primary School. He contributed to money for running the school and acquisition of all school teaching materials, furniture, books and all working materials, mobilizing teachers and pupils. He built 14 class rooms for the school and bought 1/4 acre to add up the school compound. Mr. Lyamuya contributed part of the school land and one administrative building only.

Moreover, the 2nd defendant alleged that Mr. Lyamuya misappropriated 2½ acres purchased at Kisongo area valued Tshs 5,000,000/= which were bought for the purpose of expansion of St. Thadeus Pre & Primary School. He secretly sold that land and pocketed the money for himself. Thus caused a loss to the school.

In his counter claim the 2nd defendant prayed for judgment and decree against the plaintiff as follows;

- i) A declaration that the suit land claimed by the plaintiff is jointly owned by the 2nd defendant and Thadeus Joachim Lyamuya, holding the position of a main director and having 60% of the shares thereof, while the 2nd defendant , John Joseph Massawe the co-director and school Manager owns 40% share thereof.
- ii) A declaration that the 2nd defendant has interests in the plaintiff to a tune of 40% of the total value of the School.

- iii) The 2nd defendant be declared the school manager of the plaintiff in the main suit and a declaration that the act of forcefully evicting him from the office effected by the Managing Director thereof, Mr. Thadeus Joachim Lyamuya is unlawful.
- iv) Payment of damages to the 2nd defendant to a tune of Tshs. 200,000,000/=.
- v) A declaration that the 2nd defendant has suffered loss of profit at the rate of 40% of the actual value of the plaintiff 's school.

In its reply to 2nd defendant's written statement of defence the plaintiff reiterated the contents of the plaint and further averred that the dispute in this case is on the ownership of the suit land. The 2nd defendant forged and inserted signatures of the plaintiff's Managing Director, Mr. Lyamuya which resulted into fraudulent registration of several documents for the school. Upon close follow up, the plaintiff's director Mr. Thadeus Joachim Lyamuya was advised by the officers from the Ministry of Education to report the concern on the forgery of his signatures to the Police and has already reported that matter to Arusha Police Station for further criminal investigation. Mr. Lyamuya has never been assigned a duty to purchase the suit land.

In its written statement of defence to the Counterclaim the plaintiff disputed all of the 2nd defendants' claims and averred as follows; That the plaintiff's managing director Mr. Lyamuya never entered into any agreement with the 2nd defendant including the alleged Memorandum of Understanding. The 2nd defendant forged the signature Mr. Lyamuya and that matter has already been reported at Arusha Police Station. The 2nd

defendant's claims for shares are unfounded as since there is no Company that was formed with such share holding structure as claimed by the 2nd defendant. The 2nd defendant's allegation on misappropriation of the school funds by the plaintiff's managing director, Mr. Lyamuya are unfounded. Had it been true, the 2nd defendant would have reported the same to the police. He prayed for the dismissal of the counterclaim with costs.

At the final Pre-trial Conference the following issues were framed for determination by the Court;

- i) Who is the rightful owner of the suit land.
- ii) Who is the rightful manager of St. Thadeus Primary School
- iii) To what reliefs are the parties entitled to.

At the hearing the learned Advocate Nicodemus Mbugha appeared for the plaintiff whereas the learned Advocate Elidaima Mbise appeared for the 2nd defendant. The case proceeded ex-parte against the 2nd defendant.

In the course of composing this judgment I noted that the plaint does not disclose the laws under which the plaintiff and the 1st defendant are registered. Unfortunately, the no evidence was adduced by the plaintiff's witnesses concerning the plaintiff's and 1st defendant's legal personality. What was adduced in evidence was mainly concern with the registration of St Thadeus Pre & Primary School and St.Thadeus Secondary School not "The board of Trustee of St.Thadeus Primary School" (the Plaintiff) or "The Board of Trustee of St.Thadeus Secondary School" (the 1st

defendant). For clarity and ease understanding of the coming discuss let me reproduce the 1st and 3rd paragraphs of the plaint hereunder.

Paragraph 1. *"That the plaintiff is a legal person registered under the laws of the United Republic of Tanzania, with capacity of suing and being sued in its respective names , her address for the purpose of this suit shall be in the care of ;*

*MOHA Attorneys and Legal consultant, 4ht Floor, Denso Building Opp-
Kaloleni Secondary School,*

P.O.Box 10599,

Arusha- Tanzania

Cell: + 255 788 236 925

Email: mohaattorney @gmail .com"

Paragraph 2. *"That the 1st defendant is a legal person registered under the laws of the United Republic of Tanzania, with capacity of suing and being sued in its respective names ,located at Kisongo within Arusha City and her address of service for the purpose of this suit shall be pointed out to the Court process sever where the defendant my easily be located.*

Since the plaint just states that plaintiff and the 1st defendant are legal entities registered under the laws of the United Republic of Tanzania without disclosing those *"laws"*, before proceeding with the determination of the dispute between the parties, it is imperative to ascertain the legal personality of the plaintiff and the 1st defendant.

In order to resolve the concern stated herein above, I decided to summon the learned advocates appearing in this case to address me on the same.

In his response to the aforesaid concern, Mr. Mbugha conceded that the plaint lacks necessary information on the laws under which the plaintiff and the 1st defendant have been established /registered as a legal entities. He went on submitting as follows; That according to section 62 (d) of the National Education Act, No. 25 of 1978 (Henceforth " The Education Act") in secondary schools there are School Boards which do control and oversee the management of the School whereas in Primary Schools there are School Committees which do similar jobs to the School Boards. He prayed for an order for amendment / correction of the names of the plaintiff and the 1st defendant pursuant to the provisions of section 95 and 97 of the Civil Procedure Code (Henceforth "the CPC") so that the plaintiff's name should read as " the School Committee of St. Thadeus Primary School " instead of " the Board of Trustee of St Thadeus Primary School" and 1st defendant's name should read as "the School Board of St. Thadeus Secondary School" instead of "The Board of Trustee of St. Thadeus Secondary School" .He contended that the correction/ amendment of the names of the parties will not prejudice the defendant as it does not go to the root of the case/dispute between the parties in this case. The name St Thadeus remains intact. Mr. Mbugha was of the view that this Court being a trial Court can rectify/amend the names of the parties as it deems fit provided that the amendment/ rectification does not go the root of the dispute between the parties. To cement his arguments

he referred me to the case of **Christina Mrimi Vs CocaCola Kwanza Bottlers Ltd, Civil Application No. 113 of 2011**, (unreported).

Furthermore, Mr. Mbugha insisted that the amendment sought is in line with the principle of overriding objectives and Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania 1997 as amended from time to time which requires Courts not to be tied up with technicalities but should concentrate in dealing with substantive issues.

In response Mr. Mbise objected strongly to Mr. Mbugha's prayer. He argued that the amendment sought by the Mr. Mbugha will prejudice the 2nd defendant since the hearing of the case has been closed and during cross examination the questions posed to PW1 (Mr. Thadeus Lyamuya) included the concern on the existence of the plaintiff and in his response, PW1 told this Court that the plaintiff is a legal entity. Mr.Mbise contended that the amendment/ correction of the name of the plaintiff prayed by Mr. Mbugha was supposed to be done before the closure of the hearing of the case.

Furthermore, Mr. Mbise contended that the prayer for amendment of the names of the parties is a pure afterthought which should not be granted. Citing the provision of Order 1 Rule 10 (2) of the CPC, Mr. Mbise argued that Mr. Mbugha was supposed to make a formal application for changing the names of the parties not the way he is moving this Court. He distinguished the case of **Christina Mrimi** (supra) on the ground that its facts are not similar to the facts in this case and the scenario behind the

prayer made by Mr. Mbugha is quite different from the one in the case of **Christina Mrimi** (supra).

In rejoinder, Mr. Mbugha, reiterated his submission in chief and argued that the 2nd defendant's advocate did not raise any preliminary objection pertaining to the plaintiff's legal personality. He insisted that no prejudice will be caused to the 2nd defendant.

From the foregoing it is not in dispute that the plaintiff and the 1st defendant are not legal entities. Thus, they are not into existence. I have perused the provisions of sections 95 and 97 of the CPC which Mr. Mbugha relied upon in moving this Court to amend the names of the Plaintiff and the 1st defendant. Section 95 provides for the inherent powers of the Court. It is normally applicable where there is not specific provision for the relief sought. It is my settled opinion that section 95 cannot be applicable in the instant case because there are provisions of the law which caters for applications for amendment of pleadings, the relief sought by Mr. Mbugha in this matter. In the case of **Oysterbay Properties Ltd and Another Vs Kinondoni Municipal Council and 2 others and Patric Rutabanzibwa and 2 others , Civil Revision No.4 of 2011, (CA) (unreported)** said the following;

"... To start with , as already stated, the application was made under section 95 of the CPC. This is a general provision which is usually invoked where there is no specific provision to cover the particular situation..."

[Also, see the case of **Tanzacoal East Africa Mining Limited Vs Minister for Ernergy and Minerals , (2016) TLS LR 152]**

With regard to section 97 of the CPC , the same is not helpful in this matter because it provides for the Court's power to amend defect or error in any proceedings in a suit and such amendment has to be for the purpose of determining the real question in controversy.

For ease of reference let me reproduce the provisions of section 97 of the CPC hereunder;

Section 97: *"The Court may at any time , and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit ; and all necessary amendments shall be for **the purpose of determining the real question or issue raised by or depending on such proceedings**"*

(Emphasis is added)

In the case in hand, the amendment sought by Mr. Mbugha has nothing to do with the real issue in controversy between the parties. As I have alluded earlier in this judgment, the Court's concern is on the legal personality of the plaintiff and the 1st defendant whereas the real issue in controversy in this case is the ownership of the suit land. There is no problem with that since parties have already testified on the same. In fact, Mr. Mbugha's prayer was for amendment of pleadings since his prayer aimed at amendment of the names of the parties in the plaint. The term "pleadings" is defined in Order VI Rule 1 as follows:

Order VI Rule 1: *" Pleadings" means a plaint or a written statement of defence (including a written statement of defence filed by a third party)*

and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII”.

Pleadings can be amended pursuant to Order 1 Rule 17 of the CPC which provides as follows;

*Order 1 Rule 17: The Court may , at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and terms as may be just , **and all such amendment shall be made as may be necessary for the purpose of determining the real question in controversy between the parties”***

(Emphasis is added)

The condition for amendment of pleadings are similar to the ones stated in section 97 of the CPC, that is, the amendment has to be for determining the real question in controversy.

In addition to the above, In his submission Mr. Mbugha did not explain whether “ The School Committee of St Thadeus Primary School” and “ School Board of St. Thadeus Secondary School” which he prayed to be substituted for the plaintiff and 1st defendant respectively, are legal entities capable of suing and being sued. Upon perusing the Education Act, I have noted that the School Boards and School Committees are established under sections 39 and 40 of the Education Act. Their functions are basically supervisory. The Education Act does not indicate that the School Boards and School Committees shall have legal personality capable of suing and being sued. It is noteworthy that legal

entities are creatures statutes. They have to be registered under a specific law, such as the Companies Act, or the Trustees' Incorporation Act or established by statute which states categorically the legal personality of an entity established therein.

The above aside, I have read the case of **Cocacola** (supra) and am of a settled view that the same is distinguishable from the facts of this case as will elaborate soon hereunder;

In the case of **Coca Cola** (supra) the amendment that was done in the name of the defendant was by deleting the word " Bottler" .The respondent's name before amendment read as " Coca cola Kwanza Bottlers Ltd" instead of " Coca cola Kwanza Ltd". The respondent by the name of "Coca cola Kwanza Ltd" was into existence .In the case in hand I have explained herein above the "School Committee of St Thadeus Primary School" and the "School Board of St Thadeus Secondary School" which Mr. Mbugha prays that they should be substituted to the names that appears in the plaint , that is, "Board of Trustee of "St Thadeus Primary School" (the Plaintiff) and "the Board of Trustee of St Thadeus Secondary" (the 1st defendant) are not legal entities.

To cap it all, for the sake of argument and without prejudice to my findings herein above, if this Court grants the prayer made by Mr. Mbugha for amendment of the name of the 2nd defendant by substituting it with the name "the School Board of St. Thadeus Secondary School" how will the School Board get the opportunity to be heard?.Definitely, it won't get the opportunity to be heard because hearing has been closed. Under the

circumstances I am inclined to agree with Mr. Mbise, that amendment of the names of the parties at this stage in the manner suggested by Mr. Mbugha will cause injustice to the defendants, in particular the 1st defendant.

Last but not least, with due respect to Mr. Mbugha the principle of overriding objective cannot be applicable in this case. The fact that the plaintiff is not a legal entity is a fatal defect in this case. Our Courts have said several times that the principle of overriding objectives should not be used to circumvent the well established legal principles and violate the laws. In the case of **Puma Energy Tanzania Limited Vs Ruby Roadways (T) Limited, Civil Appeal No.3 of 2018**, (unreported), the Court of Appeal said had this to say regarding the application of the principle of overriding objectives.

".....What emerges from the above decision is that the overriding objective is not meant to overhaul the rules of procedure but to facilitate their application . As the Supreme Court of Kenya stated in Mradian Sureshi Kantaria Vs Sureth Nanalal Kantaria , Civil Appeal No. 277 of 2005 (unreported), the overriding objective is not a panacea for all ills and in every situation . A foundation of its application must be properly laid and the benefits of its application judicially ascertained"

Likewise, the provisions Article 107A(2) (e) of the Constitution of the United Republic of Tanzania, 1977 , cannot be applicable in this matter because the plaintiff is not into existence, thus the issue of the right to be is misconceived and raised out of context.

In the upshot, the prayer for amendment of the names of the plaintiff and the 1st defendant is hereby dismissed. From the foregoing, it is now

evident that the plaintiff is not into existence. Under the circumstances, I am compelled to strike out this case together with the Counterclaim as I hereby do. This case together with the Counterclaim is hereby struck out. Since the case has been struck out on the ground raised by this Court *suo motu* each party will bear its own costs.

Dated 24th day of June 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", is written over the printed name.

B.K.PHILLIP

JUDGE.