

**THE UNITED REPUBLIC OF TANZANI  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(IRINGA DISTRICT REGISTRY)  
AT IRINGA**

**LAND CASE NO. 01 2022**

**BETWEEN**

**MSAFIRI ABDALAH MWALONGO ----- PLAINTIFF**

**VERSUS**

**ANASTASIUS MBOGOLO ----- 1<sup>ST</sup> DEFENDANT**

**ZUBERI R. MWALONGO ----- 2<sup>ND</sup> DEFENDANT**

**ADMINISTRATOR OF THE**

**LATE ABDALLAH MWALONGO -----3<sup>RD</sup> DEFENDANT**

**ADMINSTRATOR OF ESTATE OF**

**THE LATE R. MWOLONGO ----- 4<sup>TH</sup> DEFENDANT**

**ADMINISTRATOR OF ESTATE OF**

**THE LATE MWAJUMA R. MWOLONGO ----- 5<sup>TH</sup> DEFENDANT**

**ADMINISTRATOR OF ESTATE OF**

**THE LATE ABDALAH SALEHE----- 6<sup>TH</sup> DEFENDANT**

*14/4 & 20/4/2022*

**MATOGOLO, J.**

**RULING**

This ruling emanates from the prayer by the counsel for the plaintiff Mr. Shaba Mtung'e to amend the plaint so as to insert the proper names of

the defendants. The prayer was done orally and it was made under O.I Rule 10(2) of The Civil Procedure Code (Cap 33 R.E 2019).

While Mr. Mtung'e represented the plaintiff, the 1<sup>st</sup> defendant enjoyed the service of Ms. Eneles Kitta learned Advocate.

Mr. Mtung'e submitted that, they have served all defendants except the 1<sup>st</sup> defendant, thus he prayed under O.I R. 10(2) of the Civil Procedure Code to amend the plaint by inserting the proper names of the defendants.

In reply Ms. Kitta did not agree with the prayer by the learned advocate for the plaintiff but, on her part she prayed for the plaint to be struck out for the following reasons;

The first reason is that, the 1<sup>st</sup> defendant has already filed Written statement of defence which is accompanied with Notice of preliminary objection on point of law to the effect that the plaint is defective. She was of the considered view that at this stage they don't see if it is proper for the plaintiff to apply for amendment of the plaint.

The second reason is that the plaintiff while filing the suit being assisted by an advocate, they assume he had already prepared to sue the defendants whom he knows. She went on arguing that, this is negligence on part of the advocate and inconvenience to the court. If the plaintiff has already known the defendant he has to sue them. He was not right to sue a person unknown that is why they pray for the plaint to be struck out with costs as it is defective.

In rejoinder Mr. Mtung'e submitted that, what contained in the WSD is a different person not defendant they have sued. He contended that, this appears in the verification clause in which the 1<sup>st</sup> defendant verified that he got the information from Anastasius Mbogoro while the 1<sup>st</sup> defendant is Anastasius Mbogolo. He submitted further that, information of WSD relied on a person they did not sue. He argued that, the difference in name of the 1<sup>st</sup> defendant in the verification renders it not to be valid.

The counsel for the plaintiff went on submitting that, the issue of verification clause was discussed in the case of ***Anatory Peter Rwebangira versus Principal Secretary Mistry of Defence and National Service and Another***, Civil Application No. 548/04/2018, CAT at Bukoba where at page 11 paragraph 1 lines 9-12. On the difference of names this was discussed in the case of ***Olam Vs. Zacharia D. Mahinya*** Revision No. 518 of 2019 High Court at page 9 paragraph 3. He went on arguing that, in their plaint they sued Anastasius Mbogolo whom they had not got him, and the one who filed WSD as first defendant is a different person, that is why they pray to amend the plaint so as to avoid unnecessary costs in order to add Anastasius Mbogoro and remove 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. He went on contending that, they pray for their application be aligned with Article 107A (1)(2) and (3) of the Constitution of the United Republic of Tanzania which requires the court to dispense justice without being tied up with technicalities. Thus, he prayed for their application to be granted.

Ms. Kitta regarding the issue in different of names, she said the plaintiff is the one who filed the suit and is the one who served a summons to the defendant who was on safari, and the summons was send to her. she argued further that, the issue of name containing letter "R" instead of "L" to her is a minor, this because the 1<sup>st</sup> defendant has appeared in court and filed WSD in time.

With regard to the case cited by the counsel for the Plaintiff in support of his argument she said is distinguishable. Starting with the case of **Anatol Rwebangira**, she said the circumstances in that case are different to the circumstances of the present case. She contended that, in that case it was discussed that, in the verification clause it must be stated clearly the source of information, should be stated clearly. With regard to the case of **Olam** is also distinguishable to our case at hand, in that case the defendant denied his name but in the instant case the 1<sup>st</sup> defendant did not deny his name. she went on arguing that, as the 1<sup>st</sup> defendant did not disown his name, she don't think if there will be any problem for the orders which will be issued by the court unlike in **Olam** case. She contended that, the error of spelling of a name does not make the plaintiff's plaint competent before this court as there is another serious error of suing unknown defendants which renders the whole plaint defective.

The counsel for the 1<sup>st</sup> defendant concluded by submitting that, as they have already filed WSD and raised preliminary objection, she prayed for the plaint be struck out with costs.

Having heard the parties and having carefully read the pleadings, the issue to be determined here is whether this court can grant the prayer prayed.

Mr. Mtung'e prayed for amendment of the plaint so as to insert a proper person as the 1<sup>st</sup> defendant who was sued is Anastasius Mbogolo but in his WSD specifically on verification clause verified as Anastasius Mbogoro, to him these are different persons and not a person they have sued. According to him the person they sued as (1<sup>st</sup> defendant) they have not got him. He also prayed for an amendment of plaint so that he can remove the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.. Thus, he prayed for his prayer to be granted. Despite the fact that, the learned counsel cited two cases as stated above to support his arguments but the same were not supplied to this court so as to have chance to read them and see what was discussed in those cases and see if are similar to the case at hand or not.

Ms. Kitta on her part objected for the prayer basing on reason, that the 1<sup>st</sup> defendant has already file WSD which is accompanied with Notice of preliminary Objection on point of law on the defectiveness of the plaint, such as suing unknown defendants.

I have an ample time and have carefully perused the pleadings specifically the plaint and WSD, the 1<sup>st</sup> defendant who was sued as Anastasius Mbogolo but in his WSD the 1<sup>st</sup> defendant is verified as Anastasius Mbogoro. Thus the difference here is on letter "L" and "R". I join hand with Ms. Kitta in her submission that, as the first defendant appeared in court after been served with the summons to appear and has

filed WSD accompanied with the preliminary objection on point of law and also, he is not denying his name, there is no reason for the prayer for an amendment of the plaint to insert a proper name of the 1<sup>st</sup> defendant to be granted.

It is settled principle of law that, where there is a PO raised the same must be determined first before dealing with the substantive matter, this position was taken in the case of ***The DPP Versus Farid Hadi Ahmed and 36 Others***, Criminal Appeal No. 205 of 2021, CAT (unreported).

Also as there is a PO raised by the 1<sup>st</sup> defendant, allowing the plaintiff to amend the plaint will amounts to circumventing the objection raised. As it was correctly submitted by the counsel for the 1<sup>st</sup> defendant that, the plaintiff while filing the suit being assisted by an advocate it is assumed that he had already prepared to sue the defendants whom he knows or suing a proper party. Even though the complained of difference in names of the 1<sup>st</sup> defendant in my opinion it was the mistake by the counsel of the plaintiff for his failure to make sure that, before filing the suit he sues a proper person with their proper names.

Having discussed as herein above it is needless to say that, the available remedy in this case is to struck out the plaint, so that the counsel for the plaintiff can get time to re-organize himself and refile the same as this court cannot grant prayer to amend the plaint while the defect complained of was caused by sheer negligence on part of the counsel for the plaintiff, and is not good reason for the court to grant him with the prayer he made. It is my firm view that, the prayer by the counsel for the

plaintiff cannot be implemented. The only remedy available is for the plaintiff to be struck out as I hereby do. The plaintiff has to bare costs.

It is so ordered.



  
**F.N. MATOGOLO**

**JUDGE**

**20/4/2022.**

Date:	20/04/2022
Coram:	Hon. F. N. Matogolo – Judge
L/A:	B. Mwenda
Plaintiff:	Absent
For the Plaintiff:	Absent
Defendants:	Absent
For the Defendants:	Eneles Kitta for 1 <sup>st</sup> defendant
C/C:	Grace

**Eneles Kitta – Advocate:**

My Lord I am appearing for the 1<sup>st</sup> defendant who is sick today. The matter is for ruling wed are ready to receive it.

**COURT:**

Ruling delivered this 20<sup>th</sup> day of April, 2022 in the absence of the parties and in the absence of Mr. Shaba Mtung'e learned advocate for the plaintiff, but in the presence of Ms. Kitta learned Advocate for the 1<sup>st</sup> defendant.



*F. N. Matogolo*  
**F. N. MATOGOLO**

**JUDGE**

**20/04/2022**