

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 19 OF 2021

THE BOARD OF TRUSTEES OF

NATIONAL SOCIAL SECURITY FUND PLAINTIFF

VERSUS

KAMPALA INTERNATIONAL UNIVERSITY LIMITED ... DEFENDANT

RULING

28th July, & 27th September, 2022

ISMAIL, J.

At the instance of the plaintiff, a summary suit has been instituted by the plaintiff, seeking to recover the sum of TZS. 1,461,964,332.50. The sum owing constitutes unremitted members' contributions and penalties accruing thereon for the non-remittance.

The defendant is gallantly opposed to the claim and, upon securing leave to appear and defend, she instituted a written statement of defence in which the allegations of non-remittance have been shrugged off. Simultaneously, the defendant has raised four grounds of objection, challenging the competence of the suit. These objections are:

- 1. That the entire suit is barred in law and wrongly filed against the defendant;*
- 2. That the plaint is defective for failure to be signed by the advocate who drafted the same and representing the plaintiff;*
- 3. The plaintiff's suit is time barred in law for want of board resolution; and*
- 4. The plaintiff's suit offends Order VII rule 1 (a) for lack of proper name of the Court.*

On 28th July, 2021, this Court issued an order, calling upon the parties to dispose of the objections by way of written submissions. This order was duly complied with. These submissions were preferred by Mr. Florence Aloyce Tesha, learned counsel for the defendant; and Mr. Kennedy Kasongwa, learned advocate who featured for the plaintiff.

Submitting on ground one, Mr. Tesha's contention is that the defendant is incorporated under the Trustees Incorporation Act, Cap. 318 R.E. 2002, and that any suit for or against it must implead its registered trustees. In this case, Mr. Tesha argued, the suit instituted by the plaintiff ought to have been instituted against the defendant's registered trustees. Taking exception to the action taken by the plaintiff, the learned advocate argued that such misstep constituted an infraction of the provisions of section 8 (1) of Cap. 318, and it renders the suit incompetent. Mr. Tesha argued that a party that features as the defendant is a mother company

registered in Uganda and without any capacity to be sued. He buttressed his argument by citing the decisions of the Court in ***Mariam Makwani v. African Inland Church Tanzania***, HC-(PC) Criminal Appeal No. 7 of 2020; and ***Jung Hwan Kim and Sang Ok Nam v. Tanzania Presbyterian Church***, HC-Civil Case No. 98 of 2019 (both unreported).

Regarding ground two of the objections, the argument by Mr. Tesha is predicated on Order VI rule 14 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), which requires that a pleading in a matter in which an advocate is involved must be signed by him. He argued that, in the present suit, the advocate who drew and filed it did not append his signature on it. He contended that this was fatally anomalous as the wording of the law is couched in mandatory terms. The fault renders the pleading defective and liable to striking out with costs, he contended.

With regards to ground three, the clamour by the defendant is that the suit should be struck out for being instituted without any board resolution. In this case, the trustees did not give their mandate for institution of the case. Mr. Tesha also contended that the plaint is signed by a Mr. Cosmas Sasi, the principal officer who is not a trustee who can be held liable for any outcome of the case. He argued that the need for issuance of a board resolution is premised on the legal position which is to the effect that a

company is a distinct legal personality which acts through a board of directors, and that an authority of the board must be expressly provided for and not assumed or perceived. The defendant's advocate cited several decisions to back up his position. These are: ***Bugere Coffee Growers Ltd v. Sebaduka & Another*** [1970] EA 147; ***Ursino Palms Estates Limited v. Kyela Valley Foods Ltd & 2 Others***, CAT-Civil Application No. 28 of 2014; ***Tanzania American International Development Corporation 2000 Limited (TANZAM) v. First World Investment Auctioneers, Court Brokers***, HC-Civil Case No. 15 of 2017; and ***Evarist Swai & Another v. The Registered Trustees of Chama Cha Mapinduzi & 2 Others***, HC-Land Case No. 147 of 2018 (all unreported).

The fourth ground of objection faults the use of the words "Dar es Salaam Zone", a non-existent registry of the Court, instead of Dar es Salaam District Registry as established under High Court Registries Rules. Mr. Tesha argued that the wrong citation was offensive of Order VII rule 1 (a) of the CPC. The defendant prayed that the objections be sustained and that the suit be dismissed with costs.

The plaintiff's rebuttal began by raising a question regarding the purity of the preliminary objections raised by the defendant. In counsel's view, the objections would require evidence to prove their worth and potency. This,

he argued, disqualified them from being objections within the meaning set out in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*** [1969] EA 696.

Regarding the first ground of objection, the plaintiff argued that the defendant was a separate legal personality with rights and obligations that include the right to sue and be sued. Mr. Kasongwa argued that, applying the principle in ***Salomon v. Salomon*** [1897] AC 22, the defendant is a proper party to be sued.

Submitting on ground two of the objection, the plaintiff's counsel contended that absence of the principal officer's signature would not render the plaint defective. He argued that, in this case, both the principal officer and the advocate appended their signatures on the plaint. He argued that the legal position is that no evidence would be required to prove that the signatories are authorized to sign for the plaintiff. He relied on the decision in the case of ***Baretto Hauliers (T) Ltd v. Mahamood Mohamed Duale***, HC-Land Case No. 33 of 2016 (unreported). He argued that signing of the pleadings is a discretion to be exercised by either a party or his advocate. Mr. Kasongwa argued that presence of the signature of the principal officer is a testimony of authorization by the Board.

With respect to ground three, the contention by the plaintiff is that Board resolution is not a mandatory prerequisite for purposes of instituting proceedings in court. Learned counsel sought a refuge in section 53 (1) and (2) of the National Social Security Fund Act, Cap. 50 R.E. 2018. The cited provision establishes the Board of Trustees that has the legal capacity to commence proceedings, and that such act would not require a board resolution. On this, the plaintiff's advocate referred me to the decisions of the Court in ***Plasco Ltd v. EFAM Ltd & Another***, HC-Comm. Case No. 60 of 2012; and ***Mwananchi Insurance Co. Ltd v. Elias Masija Nyong'olo & 2 Others***, HC-Comm. Case No. 135 of 2015 (both unreported).

Submitting on the absence of a board resolution, the contention by Mr. Kasongwa remained that this is a factual issue which requires evidence to prove it. He premised his argument on the decision of the Court in ***East Africa Cables Limited v. Spenco Services***, HC-Comm. Case No. 42 of 2016 (unreported).

On the lack of the proper name of the Court, the argument by Mr. Kasongwa is that this is a clerical mistake attributed to the use of electronic filing system in lodging cases. He took the view that this is a curable error as was held in ***Stephen Mpalange v. Evangelical Lutheran Church of***

Tanzania, Eastern & Coastal Diocese, HC-Labour Revision No. 669 of 2019 (unreported).

The plaintiff urged the Court to overrule the objections and let the matter proceed on merit.

The defendant's rejoinder was a reiteration of the position stated in the submission in chief. It draws no significant importance worth reproducing.

The disposal journey begins with ground one of the objections. In this, the contention by the defendant is that the party impleaded as the defendant is a wrong party whose preference is inconsistent with the provisions of Cap. 318. The argument is premised on the fact that the defendant is a body of registered trustees who should be sued as a Board of Registered Trustees of Kampala International University. The plaintiff is adamant that this is a body corporate who should be sued as a company. As she submitted so, the plaintiff did not deny that the defendant is a Ugandan entity that has not set its feet in Tanzania, or that there is a Board of Registered Trustees under whose hands the affairs of the defendant are placed. Such silence brings an impression that the contention by the defendant is not controverted, meaning that there are registered trustees who should have been sued by the plaintiff.

With this understanding, there comes the legal requirement set out under section 5 of Cap. 318. This provision makes it mandatory for a trustee or trustees holding property in trust of educational purposes to be incorporated under the provisions of the law. It states as follows:

"Notwithstanding section 2, a trustee or trustees holding property in trust for any religious, educational, literary, scientific, social or charitable purposes who has not or have not been incorporated under any law or whose incorporation is not provided by any law, shall apply for incorporation under this Act."

The rights of an entity subsequent to registration under section 5 are described in section 8 (1) of Cap. 318, one of which is the power to sue and be sued in the corporate name. I must add, that suing or being sued in the corporate name refers to suing in the name for which the entity is registered. In our case, if the entity is a trust registered as "The Registered Trustees of Kampala International University", then the expectation is that such name would feature in all proceedings to which such entity is a party.

This does not appear to be the case here, and I can only join hands with Mr. Tesha, and hold that failure to observe the said requirement in this matter renders the proceedings anomalous, and the numerous decisions cited by Mr. Tesha confirm this position. In ***Ilela Village Council v. Ansaar***

Muslim Youth Centre & Another, CAT-Civil Appeal No. 317 of 2019, the Court of Appeal of Tanzania quoted with approval, its own decision in ***Registered Trustees of Chama Cha Mapinduzi v. Mohamed Ibrahim Versi and Sons & Another***, CAT-Civil Appeal No. 16 of 2008 (both unreported). In the latter it was held:

"Naibu Katibu Mkuu C.C.M is neither a corporate body possessed of the power to sue or be sued nor are the properties of C.C.M vested in him. if anything, he or she is a different person from the Board of trustees of C.C.M., an incorporated body on whom is vested the power to manage the properties or any business or investment of C.C.M The effect of incorporation of the Board of Trustees of C.C.M under the Trustees Incorporation Act, renders it a body corporate by that name (see section 8 (1) and (6). Therefore, in law, the Registered Trustees of C.C.M is a separate person with its own legal identity distinct from Naibu Katibu Mkuu C.C.M."

The above holding amplifies what the law stipulates under section 6 (2) of Cap. 318. It provides as follows:

"The name of everybody corporate created under this Act shall include the words "Registered Trustees."

The plaintiff would feign ignorance of the fact that the defendant was incorporated under Cap. 318. If that were to happen, the plaintiff would still be duty bound to learn of that fact through the imperative condition set under section 3 of Cap. 318, which requires that trustees who are holders of property in trust for educational purposes to be registered.

The foregoing position is fortified by the finding in the case of ***Jung Hwan Kim v. Sang Ok Nam*** (supra), wherein this Court (Hon. Kakolaki) pronounced itself on this point, and went ahead to state the effect of non-compliance. It held:

"In law the plaintiffs ought to have known that without being incorporated the church cannot operate. It was expected of them prior instituting this suit in court, to make inquiries or search to determine the correct entity to sue, failure of which rendered not only the whole process futile but also present suit incompetent."

Significantly, this position is a restatement of what was held by the Court in ***Mariam Makwani v. African Inland Church*** (supra) in which it was concluded as follows:

"That said, I find the appeal incompetent for being preferred against a wrong party."

Such is the predicament that the instant matter finds itself in. It is simply built on shaky ground that cannot hold and, as I sustain the defendant's preliminary objection, I find the appeal incompetent and strike it out with costs.

This ground of objection is potent enough to dispose of the matter, and I find that the discussion of other grounds of objection is a mere academic exercise that I will not indulge in.

It is so ordered.

DATED at **DAR ES SALAAM** this 27th day of September, 2022.



M.K. ISMAIL

JUDGE

27.09.2022

