IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 193 OF 2022

NIMROD NEHEMIA ELIREHEMAH MKONO..................................APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF THE

NATIONAL SOCIAL SECURITY FUND................................1ST RESPONDENT

MKONO & CO ADVOCATES...2ND RESPONDENT

WILBERT BASILIOUS LIYOYA KAPINGA..........................3RD RESPONDENT

RULING

Last Order: 22/07/2022
Judgment: 23/09/2022

MASABO, J.:-

In 2019, the 1st respondent herein filed a summary suit, Civil Case No. 186 of 2019, against the applicant and the last two respondents. Of the three defendants in the said suit, only the 3rd defendant, who is the 3rd respondent herein, filed an application for leave to appear and defend the suit. The other two, the applicant and the 2nd respondent herein, did not file any application and in consequences, a summary judgment was entered against them. After the summary judgment been entered against these two defendants, the applicant who was the 2nd defendant, resurfaced with an application for leave within which to file an application for setting aside the summary judgment entered against him. Upon obtaining the leave he has lodged the instant application.

By a chamber summons filed under Order XXXV rule 8 and section 95 and 93 of the Civil Procedure Code [Cap 33 RE 2019], the applicant is seeking the indulgence of this court to set aside the summary judgment entered

against the Applicant in Civil Case No. 186 of 2019 and to grant him, through Lea Midala Mkono, leave to appear and defend Civil Case No. 186 of 2019 which is still pending before this court. The application is braced by two affidavits, one by Lea Midala Mkono identified as a next friend of the applicant and the second by Grayson Laizer, identified as the applicant's counsel.

In the first affidavit, Lea Midala Mkono, who is also identified as a daughter of the applicant, purports to have been appointed a manager of the estate of applicant on 6th March 2020 following his illness and hospitalization in the United States of America. Together with Mr. Laizer, they have deponed that the summary suit proceeded without the applicant's notice as neither the applicant nor the caretaker of his estate was aware of its existence. They learnt about it later when the 1st respondent's counsel attempted to enforce the summary judgment against the applicant. Ms. Mkono and Mr. Laizer allege connivance between the 1st respondent and the 3rd respondent. They believe that these two respondents well knew that the applicant has for a long time been hospitalized abroad but they bothered not to inform the court. Moreover, they complained that the 3rd respondent being one of the three partners of the 2nd respondent (the other two are the applicant and one Audax Kameja) did not bother to inform his co-partners of the existence of the suit.

Other grounds raised in support of the application as depicted from the two affidavits is that the summary judgment is engrossed in the following irregularities. First, the summary suit was prematurely filed without

issuing necessary notice. Second, the computation of the actual claim is fraught as some of the staff were not employees of the applicant. Third, the suit was maliciously brought as the applicant and his next friend were not availed with the notice. Ms. Mkono deponed further that, if the application is granted and the summary judgment is set aside, the applicant shall rise a third-party notice to join another partner, Mr. Audax Kameja, who is handling employee matters.

The application was sternly resisted by the 1st respondent via two counter affidavits. Accompanying these two counter affidavits, is a notice of preliminary objection premised on the following two limbs:

i. Lea Midala Mkono has no locus to appear and defend the suit as next friend of Nimrod Elirehema Mkono (the applicant); and
ii. The application is bad in law and unmaintainable.

The third respondent neither contended nor supported the application.

Hearing of the preliminary objections and the application proceeded simultaneously in writing on anticipation that the preliminary objection shall be determined first and if overruled, determination of the application shall follow. Both parties had representation. Mr. Frank Mgeta, learned State Attorney and Geoffrey Paul Ngwembe, State Attorney were for the 1st respondent and Mr. Roman Masumbuko, appeared for the Applicant.

On the first limb of the preliminary objection, Mr. Mgetta passionately submitted that the application is accompanied by an incompetent affidavit of Lea Midala Mkono who has no locus to appear and defend the suit on behalf of the applicant as his next friend. He proceeded that, in her

affidavit, Lea Midala Mkono has purported to be the next friend of the applicant a status conferred on her on 6th March, 2020 by the Resident Magistrate's Court of Kivukoni at Kinondoni in Application No. 44 of 2020 by which the applicant was declared to be a person of unsound mind and she was subsequently appointed his *guardian ad litem* to manage the estate and affairs of the applicant.

He reasoned that by this order, the Ms. Mkono was to serve as the guardian *ad litem* for the applicant until the time when he will regain his normal condition and be able to leave from hospital. By implication, the order is no longer effective as it was rendered redundant by a subsequent appearance of the applicant in Land Case No. 09 of 2020 before this court (Dar es Salaam Registry) in which, the applicant was litigating with his wife. He argued that at the final disposition of this suit which was disposed of by a consent judgment delivered on 6th August 2020, the applicant who was the defendant was physically present in court whereas his wife, Mary Louise Elikana, was represent by Mr. Mganyizi, learned counsel. He proceeded that the applicant's physical appearance in court suggests that he regained his sound mental health and was no longer hospitalized otherwise, he could not have entered appearance and negotiated a settlement judgment in court. Thus, it is ironical for the applicant to purport to rely on the said order which was pronounced a long time before the applicant physically appeared in court and negotiated for the settlement judgment. Therefore, this application is misconceived. Mr. Mgeta argued that as the order had become nugatory, the deponent, if interested to appear nd defend the applicant's right, was duty bound to follow the procedure XXXI rule 3(1) and (2) and 15 of the Civil Procedure

Code [Cap 33 RE 2019]. Since she did not, the application had been rendered incompetent for want of *locus standi.*

In regard to second preliminary objection, he submitted that the application is bad in law for being an omnibus. It contains two distinct applications; namely, an application to set aside the summary judgment and an application for leave to appear and defend. He argued that the two are predicated on different laws, their factors for determination and consideration are different and they have different time limitation to be filed before the court. The case of **Rutagatiana C.L v Advocates Committee and Another**, Civil Application No. 98 of 2010 (CAT) was cited in support. Mr. Mgetta submitted further that for a summary judgment to be set aside, the applicant must avail the court with sufficient reasons for non- appearance (as per Order XXXV rule 8 of the Civil Procedure Code) whereas for the leave to be granted there must be a triable issue depicted in the affidavit as Order XXXV rule 3 of the Civil Procedure Code.

With regard to time limitations, he submitted that the leave to appear and defend the suit is to be filed within 21 days which is not similar to the time limitation for an application to set aside a summary judgment. In the alternative, he submitted that as the application purports to have been filed by Lea Midala Mkono, the said Lea Midala ought to obtain leave to file the application for leave to defend as the time within which to file the said application has lapsed. Based on the foregoing he submitted and prayed that the application be struck out.

In his reply submission. Mr. Masumbuko, the learned counsel for the applicant, challenged the two preliminary objections for being premised on facts as opposed to law. Hence, contrary to the principle underlined in **Mukisa Biscuit Manufacturing Co. Limited v. West End Distributors Limited** [1969] E.A 701 where it was held that a preliminary objection must raise a pure point of law as opposed to facts. He prayed that the first preliminary objection be overruled. He also criticized the 1st respondent for appending submission to his submission in chief.

In regard to the merits of the preliminary objection, he submitted that the first preliminary objection is devoid of any merit as the applicant being the applicant's daughter and a person of sound mind and majority age, daughter of the applicant has capacity to sue on behalf of the applicant as his next friend as per Order XXXI rule 4 of the Civil Procedure Code. Mr. Masumbuko relied on Order XXXI Rule 3 and rule 5(1) Civil Procedure Code which prescribes procedures applicable in cases involving minors and proceeded that if a person is of unsound mind, the court is empowered to appoint a proper next friend to represent him.

On the second limb, he submitted that, the application is made under Order XXXV Rule 8 of the Civil Procedure Code which vests in this court the powers to set aside the summary judgment and grant leave for the defendant to appear and defend. Thus, the authority in **Rutagatina C.L v Advocates Committee & Another** (supra) is distinguishable. Mr. Masumbuko argued further the prayers in the present application are properly made as they are in line with each other as decided in **MIC**

Tanzania Limited v Minister for Labour & Attorney General, Civil Application No. 103 of 2004 (CAT) and **Tanzania Knitwear v Shamsu Esmail** [1989] TLR 48.

In the rejoinder, Mr. Mgetta argued that the first limb of the preliminary objection is not a factual issue. It is premised on jurisdiction of the court hence correctly raised as a point of preliminary objection and does not any how offend the principle in **Mukisa Biscuit Manufacturing Co. Limited v West Distributors Limited** (supra). He proceeded that his submission in support of this limb was premised on the applicant's affidavit in which it was deponed that Lea Midala Mkono is a next friend of the applicant. Also, it was based on undisputed fact that Land Case No. 9 of 2020 was adjudged after the applicant was declared a person of unsound mind. He referred the court to paragraph 7, 8 and 9 of Lea Midala Mkono's affidavit and paragraph 2 and 4 of Mr. Masumbuko's affidavit in which these matters were deponed. He added that, copies of the ruling and consent judgment/proceeding appended to the submission were just meant to clarify matters deponed by Ms. Mkono and Mr. Masumbuko.

On the merits of the preliminary objection, he reiterated hat the application is incompetent for being preferred by a person who has locus and foe being an omnibus.

I have accorded a due regard to the rival submissions by the counsel as summarized above and I am now ready to determine the two points raised by Mr. Mgetta. Since Mr. Masumbuko has questioned the competence of the first limb of the preliminary objection I will, at the outset, resolve this

issue before proceeding to the merits of the two limbs of the preliminary objection. The pertinent question awaiting determination at this preliminary stage is whether the first limb of preliminary objections has the traits of a preliminary objection. Answering this question requires me to interrogate whether this limb of the preliminary objection passes the test underlined in **Mukisa Biscuit Manufacturing Co. Limited v West Distributors Limited** (supra) where it was stated that:

> "…. a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration." Law, J.

Further, in the same case it was held that:

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."
> Sir Charles Newbold. [Emphasis mine]

There is a plethora of authorities from the Court of Appeal which have cemented this principle. These include, **Hezron M. Nyachiya Vs. 1. Tanzania Union Of Industrial and Commercial Workers, 2. Organization of Tanzania Workers Union,** Civil Appeal No. 79 of 2001 and **Soitsambu Village Council v Tanzania Breweries Limited and Tanzania Conservation Limited,** Civil Appeal No. 105 of 2011, CAT at Arusha (unreported). In the later case, the Court underlined that:

> "a preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law."

In the present case, the point raised by Mr. Mgetta is on *locus standi* understood in law as the right to seek a remedy/institute a proceeding before a court of law (**Chama Cha Wafanyakazi Mahoteli Na Mikahawa Zanzibar (HORAU) vs Kaimu Mrajis Wa Vyama Vya Wafanyakazi Na Waajiri Zanzibar,** Civil Appeal No. 300 of 2019, CAT (unreported). Mr. Mgetta has argued that, *locus standi* is a jurisdiction issue hence, a competent point of preliminary objection. His argument appears to be at one with the decision of the Court of Appeal of Tanzania in **Godbless Jonathan Lea v Mussa Hamis Mkangaa & others,** Civil Appeal No. 47 of 2012 (unreported). In this case, the Court cited with approval the decision of the Malawi Supreme Court of Appeal in **The Attorney General v. The Malawi Congress Party & Another**, Civil Appeal No. 32 of 1996 which stated that *locus standi* is a jurisdictional issue (also see the decision of the High Court of Ugandan Case **Dima Dominic Poro and Another vs Inyani Godfrey Civil Appeal No.17 of 2016** [2017] UGHCCD 154). Since jurisdiction is among the points of law listed in **Mukisa Biscuit Manufacturing Co. Limited v West Distributors Limited** (supra), on the strength of this authority, I am inclined to agree with Mr. Mgetta that the point he has being a jurisdictional issue is a competent preliminary objection.

Concerning the annextures appended to Mr. Mgetta's submission, the law as stated in **Tanzania Union of Industrial and Commercial Workers**

(TUICO) at Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited [2005] TLR 41 is that, save for extracts of a judicial decision or text books, annextures should not to be appended to written submissions. If the annexture appended to the submission is other than an extract of a judicial decision or text book, it should be expunged from the submission and totally disregarded. Thus guided, I have perused the annextures to see if they do not fall in any of the exceptions hence liable for expungement as prayed by Mr. Masumbuko. In this adventure, I have observed that, the annextures comprise of a copy of an order of the Resident Magistrate's Court of Kivokoni in Application No. 44 of 2020; a copy of the decree of this court in Land Case No. 9 of 2020; and a copy of ruling of this court (Labour Division) in Misc. Application No. 329 of 2021. For this reason, I respectfully decline the invitation to disregard them as they are all within the permissible annextures. The complaint is thus without merit and is disregarded.

Reverting to the merits of the first limb of the preliminary objection, as held in **Chama Cha Wafanyakazi Mahoteli na Mikahawa Zanzibar (HORAU) v. Kaimu Mrajis wa Vyama vya Wafanyakazi Na Waajiri Zanzibar,** Civil Appeal No. 300 of 2019 CAT:

> Locus standi is a common law principle which provide that only a person whose right or interest has been interfered with by another person has a right to bring his claim to court against that person.

In the same spirit, the High Court of Ugandan in **Dima Dominic Poro and Another vs Inyani Godfrey** (supra) stated thus;

> The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. (see **Njau and others v. City Council of Nairobi** [1976–1985] 1 EA 397 at 407)."

In the present case, much as the title suggests that the application has been preferred by Nimrod Nehemia Elireheemah Mkono, the Applicant, the accompanying affidavits demonstrates that it has been filed on his behalf by his daughter, Lea Midala Mkono, who has deponed to have filed the application in her capacity as the next friend/guardian *ad litem* of the applicant who has been adjudged of unsound mind. As correctly submitted by both counsels, the procedure for institution of suits/applications by a next friend of a person of unsound mind is regulated by Order XXXV of the Civil Procedure Code. Rule 15 of this Order provides as follows:

> 15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to person who though not so adjudged are found by the court on inquiry, by reason or unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

According to rule 4, any person of sound mind and majority age may act as next friend of a minor or a person of unsound mind provided that his interest in the suit is not averse to the interest of the person of unsound mind. In the present case, it has been deponed and in deed uncontested that Lea Midala Mkono who is the biological daughter of the applicant was once appointed a manager of the estate of the applicant after he was

adjudged of unsound mind. What is contested is the status of the order appointing Lea Midala Mkono as *guardian ad litem*. The question to be answered is whether Lea Midala Mkono can competently rely on the said order in pursuit of the instant application.

The order by which the applicant was adjudged by the Court of the Resident Magistrate to be of unsound mind and his daughter Lea Midala Mkono subsequently appointed his care taker was pronounced on 6th March 2020. The most relevant part of this order reads as follows:

"IT IS HEREBY DECLARED:

1. That, Nimrod Elirehemah Mkono who is trading in the name of Mkono & Co. Advocate has a mental disorder.
2. That, any asset(s), any liability(s) and debts(s), any case(s) any other respect of Nimrod Elirehemah Mkono trading in the name of Mkono & Co. Advocate be stayed, preserved and safeguarded until the time when the patient (Nimrod Elirehemah Mkono) becomes a person of normal condition and is able to leave hospital.

FURTHERMORE:

The applicant Lea Midala Mkono, the first daughter of the patient is hereby appointed to be the manager of the estate of the patient Nimrod Elirehemah Mkono t/a Mkono & Co. Advocate for the purposes of safeguarding the property of the patient until such time as the patient becomes of his normal condition nd is able to leave from the hospital." [emphasis mine]

It is obvious from this order that Lea Midala Mkono's status as guardian of the applicant was contingent upon the applicant being of a mental disorder and being hospitalised. Now that it is not contested that the applicant physically appeared in this court five months later on 6th August

2020 when the court pronounced a judgment on admission against him which presupposes that he was not only physically present in court but was of a sound mind hence capable of admitting to the claims against him, Ms. Lea Midala Mkono cannot competently rely on the order as, according to the precise wording of the order, her status as caretake was automatically extinguished by the above event.

In the foregoing, I find merit in Mr. Mgetta's submission that Lea Midala Mkono has no *locus standi* to institute the present application and if she is interested in the representing the applicant, it is incumbent for her to follow the step by which she was appointed a caretaker. As this finding sufficiently dispossess of the application, I find no reason to proceed to the next limb as the application has been rendered incompetent for want of *lucus standi.* Accordingly, it is struck out with costs.

DATED at DAR ES SALAAM this 23rd day of September, 2022.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE