

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

CIVIL CASE NO. 05 OF 2022

THE REGISTERED TRUSTEES OF THE KITUO

CHA ELIMU NA MAENDELEO MATEMANGA (KIUMA)

TRUST FUND.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF KANISA LA

UPENDO WA KRISTO MASIHI (KIUMA).....1ST DEFENDANT

BISHOP NOEL J. MBAWALA 2ND DEFENDANT

ASSISTANT ALPHONCE MANJONDA 3RD DEFENDANT

RULING

Date of Last Order: 13/10/2022

Date of Ruling: 21/10/2022

MLYAMBINA, J.

It is a guiding principle of cardinal importance that summons must be served to proper parties and in accordance to the requirement of the *Civil Procedure Code [Cap 33 Revised Edition 2019]*. The importance of summons to the first Defendant just like other Defendants are *inter alia*: *One*, it initiates a due process of law by giving a notice that a case has been filed against the Defendant before the Court of law or Tribunal. *Two*, it informs the Defendant of the Court and sitting of the Court to appear. *Three*, it informs the Defendant of the time scheduled to appear

before the Court. *Four*, it informs the Defendant of what has to do. *Five*, it conforms with the rules of natural justice that no party should be condemned unheard. *Sixth*, it gives the Court jurisdiction to render a decision that may affect the right of the Defendant. If summons is served in contravention of the Rules, it renders the decision illegal. Such position is reflected in the case of **Metro Petroleum Tanzania Limited and 3 Others v. United Bank of Africa**, Civil Appeal No. 147 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported).

In circumstances where there are several Defendants, *Order V Rule 11 of the Civil Procedure Code [supra]* requires service of summons must be made on each of the Defendant. *Order V Rule 13 of the Civil Procedure Code (supra)* permits service on any manager or agent by whom Defendant carries business. *Order V Rule 17 and 20 of the Civil Procedure Code (supra)* permits substituted service of summons to Defendants who cannot be found or avoids summons by affixation on the outdoor or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain or by way of publication through circulation in News Paper. While *Order V Rule 30 (1) of the Civil Procedure Code (supra)* permits electronic substituted service.

The Civil Procedure Code (supra) does not tell the modality of service in circumstances where the Defendant is the Board of Registered Trustees whose Trustees are all dead or where the administration of the Board is inoperative. This ruling will address a contentious singular issue whether summons on behalf of the first Defendant should be issued to the Trustees who have no conflict of interest in this case or/and to the Principal Officers of the first Defendant who are running the Church.

In this case, it is not in dispute that the one who signed the plaint is the Trustee on the part of the Plaintiff and he is the Trustee on the part of the first Defendant. The Trustees on the part of the Plaintiff are three, namely: Dr. Matomola K. Matomola; Mr. Joseph Erasto Mtumah and Ms. Ann Jemima Matomola. The Trustees of the first Defendant are ten (10) including the three Trustee of the Plaintiff.

Further, the following facts were not disputed by both parties: *One*, the circumstances of this case show that the Trustees of the Plaintiff cannot be served because they will have conflict of interest. *Two*, the ten (10) Trustees of the first Defendant have not convened a meeting since 2020. *Three*, the Registration of the new Trustee of the first Defendant to RITA has failed because the ten (10) Trustee are still recognized by RITA. *Four*, there are other Trustees of the first Defendant who have been appointed (on the modality unknown to the

Court at this stage), yet recognized by RITA. *Five*, in practice, the Chairman of the first Defendant Board of Registered Trustees was Dr. Matomola and the Secretary was Ann Jemima Matomola.

Bearing the afore circumstances, Counsel Vincent Kassale has beseeched this Court to issue summons be served to any Officer who is running the Church Services of the first Defendant. To the understanding of Counsel Kassale, the second and third Defendants are the Bishop of that Church and his Assistant respectively.

Counsel Kassale was of supposition that the Church services of the first Defendant are still run by the second and third Defendants. The Bishop is Noel J. Mbawala. The Assistant Bishop is Alphonse Manjonda. Counsel Kassale made reference to the decision of the Supreme Court of Nigeria in the case of **Rev. Rufus Lwuajoku Onuekusi and 8 Others v. The Registered Trustees of the Christ Methodist Zion Church**, Sc. 58/2003 Supreme Court of Nigeria holden at Abuja. In that case, the suit was filed at the time when all the Trustees of the Registered Board were dead. The new Board was yet to be registered. The Officers of the Church who were serving in that Church were attending the case. After been registered, the new Board went to challenge the decision because those who were attending the case had no *locus*.

In its decision the Supreme Court held that the legal point of suing the Registered Board of Trustees is the legal requirement of suing or being sued. The issue of attending and replying to the Court is not confined to the Trustee. Any Officer in that Church Institution can appear and defend the case. It is for that reason, Counsel Kassale beseeched the Court to issue summons to the Officers working in the Church Institution who are the second and third Defendants. These are the one running services of the Church since 2020.

In reply, Counsel Eliseus told the Court that the remaining Registered Trustees of the first Defendant are seven who are available. He therefore prayed summons be issued to the ten (10) Trustee who are still existing at RITA including the three Plaintiff's Trustees. It was the postulation of Counsel Eliseus that if the three Trustees of the Plaintiff have conflict of interest, there is a duty to disqualify themselves as per the law. Counsel Eliseus, however, being taken by surprise did not tell the Court the said law. It is not known if he was referring to *Section 16 (2) of the Trustees Incorporation Act [Cap 318 Revised Edition of 2019]*.

Counsel Eliseus went on to notify the Court that the Trustees of the 1st Defendant namely; Rev. Canon Gabriel Ngalya and Prof. Hanz Horst Deinchmann are dead. The rest are alive living in Tanzania except

Mr. Jakob Adolf who is residing in Essen German. Counsel Eliseus being obsessed with practicalities of service, was therefore, of view that those who are in Tanzania can be issued with physical summons and the one who is in German can be served electronically. Counsel Eliseus was ready to avail the Court with his address.

In rejoinder, Counsel Kassale admitted that the second and third Defendants are the Officers of the Church who are running the day to day activities of the Church. He added that all the Registered ten (10) Trustees are not in the local jurisdiction of the Court. In the alternative, however, Counsel Kassale prayed summons be issued to all the Trustees and the Principle Officers. I find the later trenchantly call by my noble and learned friend Kassale to be a concern which no one can lightly dismiss. I will explain later.

To kick-off, I must state that there is a presumption of service of a document if the same is returned with an affidavit of the process server endorsing that proper service was done but the Defendant refused summons or could not be traced or received summons. However, such presumption is rebuttable and the burden would be upon the person denying such presumption. In this case, it is unfortunate that the summons served to the 1st Defendant does not indicate on whether any

of its Trustees or Principal Officers refused to receive the summons or was nowhere to be seen.

I have further considered the submissions of all parties. I find the differences of view in the present case of the two legal minds illustrate the difficulties of serving summons to the first Defendant. The hitch is actuated by the conflict of interest of the three Registered Trustees who are the decision-making of the Plaintiff and part and parcel of decision making of the first Defendant.

Based on the afore reasons, the fair-minded person would think the appropriate way forward would be for the Plaintiff's Registered Trustees to disqualify themselves in the Board of the first Defendant before initiating this suit. Such view would be influenced by cynicism and suspicion that the said Trustees have conflict of interest or that in case the Plaintiff succeeds, the execution of the Decree would face huddles.

It is my humble view that such pessimism is infructuous for two reasons. *One*, the Plaintiff and the first Defendant in terms of *Section 8 (1) (b) of the Trustees Incorporation Act [supra]* are two different legal entities with distinct legal personalities regardless of the Plaintiff's Trustees being Trustees of the first Defendant. *Two*, in terms of *Section 13 of the Trustees Incorporation Act (supra)* liability of the corporation is

not perfunctory. Trustees can be liable notwithstanding incorporation. They can be accountable for their own acts, receipts, neglects and defaults in the same manner and to the same extent as if no such incorporation has been effected.

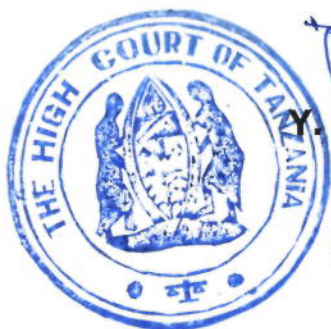
Needless, relying on the analogy of the Nigerian case of **Rev. Rufus Lwuajoku Onuekusi** (*supra*), the 1st Defendant in this case is still retaining its corporate capacity when three of its Trustees are dead and seven of its Trustees are alive but scattered in Tanzania and in German. It follows naturally that since the 1st Defendant's corporate existence is still intact, the 1st Defendant's ability to sue or be sued is no way affected by its inoperability. The suit against the 1st Defendant is competent notwithstanding that at the time it was filed three of the Trustees were dead and its Board of Trustees is inoperative.

However, there is no rule prescribing on the modality of service in the circumstances of this case where the Board of Trustees is inoperative and the Principal Officers by deed are not ready to receive summons on behalf of their employer. As such, this Court worthy of the name has the duty to look into the matter compassionately with a broad mind and most realistic slant to make sure that the first Defendant is dully served so that the issue of service does not become a spigot of the

trial or a ground of appeal. For that reason, the Court has to apply the inherent jurisdiction conferred under *section 95 of the Civil Procedure Code (supra)* in order to promote just, speedy and equitable resolution of the matter.

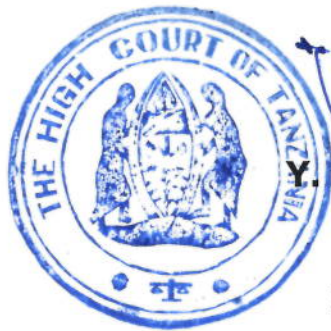
Bearing in mind that the ten (10) Trustees of the first Defendant have not convened a meeting and the Board is inoperative since 2020, I find it will not throw a terrific burden upon the seven remaining Trustees of the 1st Defendant and to the Principal Officers of the 1st Defendant if the summons is issued to them because the former are still the decision maker of the Board of Trustees and the later are still running the Board's day to day activities.

In the end result, I order summons be issued to the second and third Defendants as Principal Officers of the first Defendant and to all of the seven remaining Trustees who have no conflict of interest in this suit. Mr. Jakob Adolf a Trustee who is residing in Essen German be issued with electronic summons under the provisions of *Order V Rule 30 (1) of the Civil Procedure Code (supra)*.



Y. J. MLYAMBINA
JUDGE
21/10/2022

Ruling delivered and dated 21st October, 2022 in the presence of learned Counsel Kassale for the Plaintiff and Yusuph Kaukuya for the second and third Defendant and in the absence of the first Defendant.



Y. J. MLYAMBINA

JUDGE

21/10/2022