

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 205 OF 2022

HAMZA SEIF.....1ST APPLICANT

AUSTIN MWOOGHA2ND APPLICANT

VERSUS

TANZANIA CIGARETTE PUBLIC COMPANY LIMITED 1ST RESPONDENT

CODSON KILIZA 2ND RESPONDENT

JOSHUA FOLKERTH 3RD RESPONDENT

SIMON MPONJI 4TH RESPONDENT

RULING

27th September & 4th November, 2022

KISANYA, J.:

By a Chamber Summons taken out under Order I, Rule 8 (1) and 95 of the Civil Procedure Code, Cap. 33, R.E. 2019 (henceforth the CPC), the Court is moved to be pleased to grant leave for the above named applicants to represent 301 other claimants in the same cause of action and commence civil suit against the respondents herein. The Chamber Summons is supported by a joint affidavit of both applicants

Briefly stated, the applicants and 301 other claimants are former employee of the 1st respondent. They also claim to be the beneficiaries of the Registered Trustees of Tanzania Cigarette Company Employees Share Option Scheme (henceforth "the Trust"). As beneficiaries of the proceedings

from the Trust, the applicants and other claimants intend to institute a suit against the respondents herein to claim for the proceeds from the sale of un-allotted shares and dividends held by the Trust on their behalf. Thus, upon obtaining the consent of 301 other claimants, the applicants filed this application for leave to file a representative suit.

The application is resisted by a counter-affidavit duly sworn by Mr. Godson Mosses Kiliza, Legal Director and Company Secretary of the 1st Respondent who stated to have been authorized to swear the affidavit on behalf of the other respondents.

At the hearing of the application, the applicant had the services of Mr. Reginald Martin, Mr. Kheri Martin and Ms. Ernestilla Bahati, learned advocates, whereas the respondents were represented by Mr. Seven Mponda, learned advocate. Hearing proceeded by way of written submissions filed in accordance with the schedule given by the Court.

Making reference to Order I Rule 8 of the CPC, the applicants' counsel submitted that an application for representative suit is determined by three aspects namely, whether there are numerous persons, whether there are similar/ common interest and whether one person or more has been appointed to represent others. To bolster their argument, the learned counsel cited the cases of **Emmanuel Ngw'andu and 3 Others vs**

Maswa District Court and 2 Others, Misc. Land Application No. 19 of 2020 and **Grace Lobulu and Others vs National Health Insurance Fund** (NHIF) and Another, Misc. Application No. 172 2019 (both unreported).

Starting with the question whether there are numerous persons, the applicants' counsel submitted that it has been established that the applicants and 301 other claimants who are ex-employees of the first respondent are intending to sue the respondents. Referring the Court to paragraph 5 of the affidavit sworn by the 2nd respondent, the learned counsel argued that it is undisputed fact that there are numerous persons who are ex-employees of the 1st respondent.

The learned counsel went on to submit that the law requires the numerous persons to be willing to be joined and be represented. Supporting that proposition, they cited the case of **Saulo Makungu and 18 Others vs Busirime Village Council and 2 Others**, Misc. Civil Application No. 29 of 2021, HCT at Musoma (unreported). It was then submitted that the other 301 claimants had consented to be presented by the applicants in the intended suit vide Annexure HA-1 to the joint affidavit in support of the application.

On the existence of same/common interest among the applicants and 301 other persons to be represented, this Court was referred to paragraphs 31 and 32 of the counter affidavit in which the 2nd respondent states that there is no common interest between the applicants and other 301 ex-employees of the 1st respondent. However, the learned counsel for the applicant argued that paragraph 31 of the respondent's affidavit shows the applicants and other 301 claimants are ex-employee of the 1st respondent and beneficiaries of the Trust before the change in the Trust Deed. It was therefore argued that the said paragraph supports and shows that the applicants have the same interest. This argument was based on the contention that the applicants and other claimants have a common grievance and seek for the same relief. To reinforce their argument, the learned counsel cited the case of **Said Sobo and Others vs Al-Naeem Enterprises Ltd**, Misc. Application No. 208 of 2019 [2020] TZHCLD17.

On the foregoing submissions, the learned counsel for the applicant prayed that the application be granted.

In his rebuttal submission, Mr. Mponda began by submitting that it was not in dispute that the applicant and other 301 persons are no longer employees of the 1st respondent. He further contended that it was not disputed that between 2000 and January, 2006 the applicants and 301 other claimants utilized the granted one-off operation for a total number of shares

equivalent to 25% of their respective basic salary divided by the IPO price on the date of listing of TCC's IPO on DSE as per article 8.1 of the Trust Deed. It was his considered view that this Court is not in a position of determining whether the applicants and other 301 claimants have a valid cause of action because the Trust Deed was not appended to the supporting joint affidavit.

The learned counsel went on giving summary of the applicants' basis of cause of action and respondent's opposition to the application. He submitted among others, that the applicants and 301 former employees of the 1st respondents are not beneficiaries of the un-allotted shares and accrued dividend as deposed by the applicants. He further submitted that, vide the resolution of the Trustees made in January, 2006, the Trust Deed was amended and the name changed to the Registered Trustees of TCC Employees Long Term Incentive Scheme. The learned counsel further pointed out that the basis of the scheme was also changed from share option to cash option. That being the position, Mr. Mponda argued that the object of the scheme changed from covering or benefiting employee of the 1st Respondent, to a selected group of employees who were performing.

It was his further contention that the applicants' common cause of action is based on the Trust between the 1st respondent as Settlor and the Trustees together with the Rules executed between 31st August, 2000 and

4th September, 2000. Therefore, the learned counsel argued that this application cannot be determined without examining the benefits provided for to employees of TCC in the Trust Deed and the Rules which the applicants claim the respondent fraudulently and illegally deprived of their entitlement as beneficiaries of the Trust and caused the above stated loss. He further contended that the applicants have not shown under which article in the Trust Deed or rule in the Rules, the respondents committed the alleged fraud or illegality to justify the application. Referring to several provisions of the Trust Deed and the Rules, Mr. Mponda submitted that the applicants and 301 other claimants have no common cause of action on the reasons that they fully utilized their respective share option when they were employees.

The learned counsel went on making analysis of the facts, issue and law. He argued that Order I, Rule 8 of the CPC and the authorities referred by the applicants' counsel empowers the court to grant leave to file a representative suit upon the applicants proving that; *one*, they have the same interest in the intended suit; *two*, there is evidence to show that the person on whose behalf the intended suit will be filed have consented; and *three*, the notice of filing of the representative has been communicated to other persons.

Mr. Mponda further argued that the term same interest is also referred to as common interest to mean same cause of action of the intended suit.

He urged this Court to find that the applicants had misrepresented the facts about the cause of action in their intended suit. He premised his argument on the contention that the applicants claim benefits pertaining to the Trust in which not only they are not eligible but also, they have fully exercised their granted one-off option as per Trust Deed. It was also his further argument that the applicants had not stated the provisions of the Trust Deed or Rules which form the basis of their claim. That being the case, the learned counsel was of the view that the applicants have no cause of action or *locus standi* because they are not employees of the 1st respondent. Citing the case of **Grace Lobulu (supra)**, he argued that the issue of cause of action is required to be determined at the earliest possible opportunity to save time of the court. In view of the foregoing submission, Mr. Mponda prayed that the application be dismissed with costs.

Submitting in rejoinder, the learned counsel urged this Court to direct itself to the main issues in the application of this nature and avoid going to the determination of the right of the parties. It was their contention that the respondent's counsel had not addressed the Court on the ingredients of the application for leave to file representative suit as per Order I Rule 8 of the CPC.

As for the contention that the affidavit filed does not disclose cause of action, the learned counsel replied that the issue of cause action will be dealt

within once the plaint is filed in the Court. Reinforcing their argument, the applicants' relied on the provision of Order VII Rule 11 and the cases of **Jeraj Shariff and Sons vs Chotai Fancy Stores** [1960] E.A and **Augustino George and Another vs Ubungo Municipality Council and Attorney General**, Misc. Land Application No. 616 of 2020 [2021] TZHC LandD 93 (22 April 2021), **Stanbic Finance Tanzania Limited vs Glusepe Trupya and Ghara Malavs** (2002) TLR 221, **John Mwombeki Byombalirwa vs Agency Maritime International (T) Ltd** [1983] TLR 1 and **Mulla on Civil Procedure**, 13th Edn.

It was also argued that the applicants are seeking to be granted leave to represent other 301 claimants who have the same interest in this case and have authorized the applicants to represent them in the intended suit. The learned counsel reiterated that the cause of action is based on breach of Trust by the respondents against the Applicant and other 301 claimants who were employees of the 1st respondent and beneficiaries of the Trust. According to the learned counsel for the applicants, the term same interest is distinguished from having same cause of action. To cement their argument, they cited **Mulla on Civil Procedure**, 6th Edition, page 151-152 where the term same interest is defined as follows:

"It is essential that the parties should have the same interest in the suit. Thus, where there are numerous legatees under a will, any one legatee may sue the

executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands, as they have all the same interest in having the will proved."

Reciting the provision of Order I, Rule 8 of the CPC, the learned counsel submitted that this Court need only to see if the parties have the same interest which is evidenced by all person being beneficiaries of the Trust and ex-employees of the 1st Respondent, claiming for the same benefit and have consented to be represented by the applicant. The learned counsel reiterated their prayer that the application be granted.

I have carefully considered the rival arguments by the learned counsel for the parties. It is common ground that the mandate of the Court to grant application for representative suit is articulated under Order I, Rule 8 of the CPC. The said provision reads as follows: -

"Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct".

The rationale behind seeking leave to file a representative under the above cited provision was stated by the Court of Appeal in the case of **K. J. Motors and 3 Others Vs. Richard Kishamba and Others**, Civil Application No. 74 of 1999, at Dar es Salaam, (unreported), in the following terms: -

"The rationale for this view (meaning the contents of Order 1 Rule 8 of The Code) is fairly apparent. Where for instance, a person comes forward and seeks to sue on behalf of other persons, those other persons might be dead, non-existent, or otherwise fictitious. Else he might purport to sue on behalf of persons who have not, in fact, authorized him to do so. If this is not checked it can lead to undesirable consequences. The court can exclude such possibilities only by granting leave to the representative to sue on behalf of the person whom he must satisfy the court that they do exist and that they have duly mandated him to sue on their behalf."

Flowing from the provisions of Order I, rule 8 of the CPC, it is clear that a representative suit stands if the parties are numerous; the parties have same interest; the necessary permission of the Court has been obtained; and the notice to all persons interested in the suit has been issued. It is further settled law that the numerous persons must be willing to be joined in the suit and appoint one or more person to represent them in the suit. I am fortified by the cases of **Emmanuel Ngw'andu and 3 Others**

(supra), **Grace Lobulu and Others** (supra) cited by the applicants' counsel.

In the latter case, this Court held as follows:

"In applications for representative suit the applicants have to prove that they stand on the same interest in the suit and that they have appointed one or more persons to appear and be heard or defend in such dispute on behalf of or for the benefit of all interested persons. The affidavit in support of the application has explained the reasons why applicants are coming with the prayers they have placed before the court in this application".

In the view of the above legal position, the point for determination is whether the application meets the conditions set out under Order I, Rule 8 of the CPC.

As for the first condition, the term numerous persons implies a group of persons. However, the number must be definite for the court to recognize non-impleaded parties to the suit. In the instant case, the chamber summons and paragraph 2 of the supporting joint affidavit bear it out that the intended suit will involve the above named applicants and 301 other claimants. It is also on record that the applicant and other claimants were all employees of the 1st respondent. That being the case, I am of the humble view that there are numerous persons in the intended suit. Thus, the first condition for representative suit have been met.

The crucial issue is whether the applicants and 301 claimants have the same interest in the intended suit. Mr. Mponda was of the firm view that the applicant and 301 other claimants have no same interest. I have hinted herein that his argument was premised on the reason that the applicants and other claimants have no cause of action against the respondents.

On my side, I agree with the applicants' counsel that, the term "same interest" used under Order I Rule 8 of the CPC does not mean "same cause of action". Further to this, nothing suggests that the persons being represented in the suit must have the same cause of action. That requirement is not provided for under the provision governing representative suit. In the first place, the issues whether the intended parties have no cause of action, common cause of action or *locus standi* cannot be determined at the leave stage. Such issues are required to be determined after institution of the main suit. For instance, the issue whether parties have no common cause of action is dealt with under Order I, Rules 1 and 2 of the CPC while the provisions on misjoinder of parties are provided for under Order I, Rule 9. On the foregoing reasons, Mr. Mponda's argument that the applicants and other claimants have no cause of action, common cause of action or *locus standi* was raised prematurely. I find it not appropriate to address them at this stage.

As far as same interest for purposes of representative suit is concerned, it is sufficient for the applicant (s) to demonstrate that the persons to be represented have common interest, grievance or relief that is common to all. See also the case of **Duke of Bedford vs Elis**, 1901 AC 1 (HL) where it was held that:

"A representative suit was in order in order if the relief sort was in its nature beneficial to all whom the plaintiff proposed to represent."

Back home, in the case of **Said Sobo and Others** (supra), this Court was satisfied common interest had been established after considering, inter alia, that the applicants were working for the same employer. Other factors considered were the fact that the applicants were intending to contest the award in respect of the labour dispute which had been referred to the Commission for Mediation and Arbitration.

Applying the above legal position, it is not disputed that the applicants and 301 other claimants were employees of the 1st respondent. It is further not disputed that at one point in time the applicants and other 301 claimant were beneficiaries of the Trust before the change in the Trust Deed. Reading from the supporting joint affidavit as a whole, I am satisfied that the applicants and other 301 claimants have same interest namely, claim for the proceeds of the sales of unallocated share and dividends alleged to have been held by the Trust

on their behalf. This fact is reflected, among others, in paragraph 3 of the supporting affidavit which reads:

"That, as beneficiaries of the proceeds accruing from the Trust, we intend to commence a civil case against the Respondent herein and claim for the proceeds from the sale of unallotted shares and dividends on our behalf. Thus, the proceeds and dividends intended to be claimed by us, as lawful beneficiaries of the Trust."

Responding to the above paragraph, the respondents deposed as follows in paragraph 5 of counter-affidavit of the 2nd respondent: -

"The contents of paragraph 2 and 3 of the Applicants' affidavit are admitted to the extent that they are former employees of Tanzania Cigarette Public Limited Company, the 1st Respondent herein. It is however strongly disputed that the Applicants and the other three hundred and one (301) are beneficiaries of the Defunct Trust as alleged at all, and their intention to commence a civil suit against the Respondents herein is misconceived and abuses the court process"

In the light of the foregoing deposed facts it is vivid that the respondents do not dispute that the applicants and other claimants were employee of the 1st respondent. Being guided by the legal position stated afore, the issue whether the intended suit on claim for the proceeds of the sales of unallocated share and

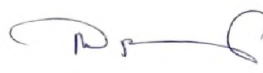
dividends alleged to have been held by the Trust on their behalf is misconceived and abuse of the court process cannot be determined at this stage.

Last for consideration the issue whether the other 301 claimants have consented to be represented by the applicant in the intended suit. The answer to this issue is not hard to find. Paragraph 15 of the supporting joint affidavit and Annexure HA 1 thereto shows that the applicants have been appointed as such by other 301 claimants. Indeed, each claimant signed consenting to be represented by the applicants. It follows therefore that, the foresaid issue is answered in the affirmative.

In the end of all this, I find merit in the application and grant leave for the applicants, Hamza Seif and Austin Mwogha to file a representative suit on behalf of 301 others. It is further ordered that the suit be filed within sixty days from the date hereof. Lastly, the applicants are directed to ensure that all intended plaintiffs are duly notified of the institution of the intended suit, preferably by public advertisement. Costs shall follow the event in the intended suit

DATED at DAR ES SALAAM this 4th day of November, 2022.




S.E. KISANYA
JUDGE

