

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MOROGORO)**

AT MOROGORO

CIVIL CASE NO. 3 OF 2022

SAMUEL FRANCIS KATENGU..... PETITIONER

VERSUS

THE REGISTERED TRUSTEES OF THE SEVENTH DAY

ADVENTIST CHURCH OF TANZANIA..... 1ST RESPONDENT

EAST CENTRAL TANZANIA CONFERENCE 2ND RESPONDENT

AMOS LUTEBEKERA 3RD RESPONDENT

RULING

15th December, 2022

CHABA, J.

This ruling stemmed from the preliminary objections on points of law raised by both parties in the present case. As background, on the 4th March, 2022, one Samuel Francis Katengu filed a civil case against the respondents through his petition praying for the judgment and decree against the respondents. The case was filed and registered as civil case No.3 of 2022.

Upon filing the petition, Mr. Katengu encountered a stumbling block from the respondent's counsel Mr. Isaac Nassor Tasinga who filed the reply to the petition together with a notice of preliminary objections on points of law to the effect that: -

1. The allegation being on Newspaper Publication which is a print media, then this petition is prematurely filed to this court in terms of section 28 (1), (2) (a), (b), 29 (1), (2), (3) of the Media Service Act, 2016.
2. The 2nd respondent not being a registered entity is wrongly sued as she has no capacity of being sued or that of suing.
3. The petition is scandalous, frivolous and vexatious against the 1st respondent as it does not disclose any cause of action against her.

On being served with the respondent's reply to the petition, the petitioner in his rejoinder through his learned advocate also raised a preliminary objection on the points of law reproduced hereunder: -

1. That, counsel for the respondents (Isaack Nassor Tasinga) who drafted and filled pleadings for the respondents developed conflict of interest and therefore he cannot lawfully prepare, file and appear on record for the respondents.
2. That, the counsel for the respondents is a potential witness to this matter; therefore, he cannot act as an advocate, the respondent's counsel attended to the ECCOM MID YEAR MEETING ON 11TH MAY, 2021, that issued a defamatory statement against the petitioner,

which with the leave of the court, the petitioner will rely upon among others to substantiate this conflict of interest.

On 9/06/2022 Mr. Tasinga raised his concern and asked for the direction of this court on how the preliminary objections (P.O's) raised by both parties could be determined. Considering the nature of the matter itself and the surrounding circumstance, on 28/06/2022 I ruled out that all the raised preliminary objections would be determined concurrently.

With the leave of the Court, the preliminary objections were disposed of by way of written submissions. Mr. Tasinga appeared for the respondents whereas Mr. Ambet Godfrey John entered appearance for the petitioner. To substantiate their respective written submissions, both parties submitted at lengthy.

I will, therefore, sum up the rival submissions advanced by the parties through their learned advocates in respect of each objection raised by each of them. I will start with the respondents being the party to raise the same and later the petitioner.

As pointed out earlier, the respondents' first preliminary objection is to the effects that the allegation being based on the newspaper publication which is a print media, then this petition is prematurely filed

to this court in terms of section 28 (1), (2) (a), (b), 29 (1), (2), (3) of the Media Service Act, 2016.

Submitting in support of the above P.O, Mr. Tasinga who appeared for the respondents, contended that according to the contents of the petition, specifically paragraph 7 which declares publicly that the petitioner was defamed through NEWSPAPER then it follows that if there was such allegation then the proper forum was the Complaint Committee established under section 27 (2) of the Act and not this court.

He added that, the allegations of the petitioner being based on newspapers which is a print media, then it could only come to this Honourable Court by way of appeal in-terms of section 29 (1), (2), and (3) of the Media Service Act, 2016 and not by way it has been brought in this court. He thus prayed the entire petition be dismissed for want of jurisdiction.

He further continued to submit that, even if this Honourable Court will be clothed with the appropriate jurisdiction, yet the petitioner's claims would have been time barred because by virtue of section 28 (1) of the Media Service Act, 2016 the complaint would have been filed within three (3) months from the date of publication that is on 17th May, 2021 whereas this petition was filed on 20th February, 2022, a period of 9 months.

On the second limb of preliminary objection, the learned counsel submitted that, the 2nd respondent is just an entity which is not incorporated anywhere in the Laws of Tanzania and it has no any legal liability to sue or being sued.

To reinforce his contentions, Mr. Tasinga referred this court to the cases of **St. Peters Junior Seminary v. Taylor Daud Magundu and Tupinde Lao Joseph**, Revision No. 62 of 2019, High Court of Tanzania, Labour Division at Morogoro and that of **Registered Trustees of Islamic Propagation Center (ipc) v. The Registered Islamic Center (TIC) Of Thaaqib Trustees** (Civil Appeal No. 2 of 2020) [2021] TZCA 342 (27 July, 2021) – Tanzlii (All unreported). He averred that, the Court in the above cited cases it has been held that unregistered entities cannot be sued.

Submitting on the 3rd ground, the learned counsel highlighted that, upon scrutiny of the entire pleadings there is nowhere it has been pleaded to extent at which the 1st respondent is connected by the petitioner's allegation. He stressed that, the result of such omission leads to absence of cause of action against the 1st respondent. He therefore, concluded that the petition is incompetent before this court and it deserves to be struck out.

Responding to the respondents' submission in chief, Mr. Ambet argued that, the petitioner has mentioned and stated categorically that he was defamed through social media and not the newspaper. According to him, this preliminary objection seems to be baseless and meaningless.

On the 2nd limb of preliminary objection, the learned counsel for the petitioner underlined that, there is no Constitution of the Registered Trustees of the Seventh Day Adventist Church of Tanzania which states clearly who to sue, hence the petitioner decided to sue both the 1st and 2nd respondents.

With regard to the final point of objection, Mr. Ambet contended that the cause of action was disclosed against the 1st respondent. And to cement on this point, he reproduced the petitioner's pleading, I quote: -

"That, the petitioner claim against the respondents is the following Orders, A court Order for unconditional apology and retraction of the false and malicious publication complained of with bold and large print in social media platform published by the respondent".

He concluded that, the petitioner managed to disclose the cause of action categorically, and that this P.O and two others previously argued, are

baseless and meaningless, hence he prayed for the same be overruled and the matter be heard on merit.

Having summarised and considered the rival submission from both parties, it is now my turn to determine the raised PO's in-terms of law. I will commence with the preliminary objections raised by the respondents. I have carefully gone through the respondents' pleadings in support of the raised POs. Having considered the rival submissions on this 1st limb of preliminary objection, I find it prudent to consider and determine whether the provisions of section 28 & 29 of the Media Services Act of 2016 are applicable in this case, as in so doing also will answer the first preliminary objection.

The respondents' counsel in his submission accentuated that, the alleged defamation case ought to be instituted under the Media Services Act of 2016 as the alleged defamatory statements was done through a newspapers publication which is a print media.

To equip myself and be able to confront the points of objections, I had ample time to peruse the Interpretation Section of the Media Services Act. Under section 3 of The Media Services Act of 2016 defines "print media" to mean newspaper, journals, magazines, newsletters, and any other related print intended for mass media".

From the above cited provisions of the law, I subscribe to the submission advanced by the learned counsel for the petitioner that as long as the petitioner was not defamed through any media as construed under Section 3 of The Media Services Act of 2016, the claim of defamation indeed does not fall under the provision of this Act and rules thereunder. The alleged defamatory statements were not published in any newspapers, journal, newsletter, magazine or any printout. But as exhibited at paragraph 7 of the petition the same was circulated through social media as reproduced hereunder: -

*".....on 17th May, 2021, Respondents jointly and severally, wrote, signed and stamped through the **social media** (Emphasis is mine) the following words.....".*

That being the position, I am constrained to rule out that the first point of preliminary objection by the respondents is hereby overruled.

Regarding to the 2nd limb of preliminary objection that the 2nd respondent has been wrongly sued as she has no capacity of being sued, I am alive to the fact that a preliminary objection should raise a pure point of law based on ascertained facts from the pleadings or by necessary implication, not on facts, which have not been ascertained; and even if ascertained and argued, a preliminary objection should be capable of

disposing of the case. The respondents have lamented that, the petitioner has sued the East Central Tanzania Conference as 2nd respondent, but the same is just an entity which is not incorporated anywhere in the laws of Tanzania. Now is this a purely point of law? In my considered view, this cannot stand because the claims by the respondents need to be ascertained by tendering proof. To gauge whether the point raised has the test of legal objection, the court must afford the parties with the rights to heard and adduce their testimonies in order to correctly determine whether the claims by the respondents are true. The parties cannot do this in any other way except through evidence to be presented orally and by exhibits, this cannot be at this initial stage.

In that respect the objection raised cannot be termed as purely point of law by virtue of landmark case of **Mukisa Biscuit Manufacturing Co. Limited v. West End Distributors Limited [1969] EA 696** as it requires ascertainment by way of evidence. Again, this 2nd limb of preliminary objection also crumbles.

The 3rd third objection is premised on the disclosure of the cause of action in the pleadings against the 1st respondent. Now, the question is whether the preliminary objection is meritorious. On reviewing the parties' pleadings. I have observed that, the act or conduct complained of by the

petitioner and which is fundamental and cornerstone of the suit is indicated at paragraph 5 (a) (1) of the petition and it refers to all respondents. The passage read, I quote: -

*"Para 5 (a) that the petitioner claim against the respondents is the following orders; A court order for unconditional apology and retraction of the false and malicious publication complained of with bold and large print in social media platform published by the **respondents**. (Emphasis is mine)."*

According to the afore-mentioned paragraph, the material facts are clear in the sense that, the persons involved here are the 1st, 2nd and 3rd respondents. My understanding of the requirement of Order VII, Rule 1 e) of the Civil Procedure Act [Cap. 33 R. E, 2019] is that, the facts connecting the defendants with the act which is the subject of the suit is mandatory. And the same has been adhered to accordingly in the petition. The plaintiff has a claim against the respondents for false and malicious publication through a large print in a social media platform. I am of the considered view that, this fact constitutes cause of action. On this facet, I therefore agree with the counsel for the petitioner that indeed the preliminary objection is devoid of merit.

In view of the above, I have no option other than to overrule the respondents' preliminary objection on points of law and proceed to consider the merits of preliminary objections raised by the respondents.

As I stated earlier on, the petitioner has raised two points of preliminary objections whereas the learned counsel for the petitioner opted to argue them jointly. Generally, the petitioner is challenging the locus stand of the respondents' advocate to the effect that the counsel for the respondents has a conflict of interest and that he is a potential witness to this matter. To expound on that point, the major complaint of the petitioner's counsel is that, Mr. Tasinga, learned counsel was among members to the meeting that finally came up with the defamation statement against the petitioner. He submitted further that advocate Tasinga has confidential information that would probably affect the petitioner's case. He therefore prayed this court to sustain this objection, disqualify and restrain him not to appear in this case and further struck out all the interest.

I have considered all the cases which were decided by this court, and which the respondents have called upon this court to emulate and be guided by their holding. In the circumstance, the argument that arises here and which I find it pertinent based on the arguments made by the petitioner, is that the advocate who is representing the respondents was

present in the meeting held against the petitioner, and that he has confidential information against him. The issue, therefore, is whether that act in itself is fatal.

In the first place, I have noted that the basis of the objection is anticipatory and presumptive that the advocate for the respondents would be called as a witness. But, in my considered opinion, this is not the case because until he is called as a witness there can be no violation of any rule of practice, and that the same cannot be sorted out by way of preliminary objection(s) but shall only occur once the advocate for the respondents is called as a witness. See the case of **Jafferali & Another v. Barroisaw & Another (1970) HCD 324** which was cited in the case of **Mohamedali S. Mohamedali v. Mohamoud Mwemusi Chotikunga & Another**, Misc. Civil Application No. 9 of 2021, HC Mtwara (Unreported).

Moreover, I have noted that the objection raised is not purely an objection on a matter of law but requires further evidence to prove that Mr. Tasinga was a member of the said meeting and that he has confidential information against the petitioner. I am of a firm view that the said objections does not fail within the ambit of the case of **Mukisa Biscuits Manufacturing Company Limited (Supra)**.

For the same reasoning, therefore, these grounds of objections cannot stand and I hereby proceed to overrule it.

In the final event, the preliminary objections on points of law raised by both parties are non-meritorious. In view thereof, I hereby proceed to make the following orders:

1. That, the three preliminary objections on points of law raised by the respondents against the petitioner are hereby dismissed.
2. That, the two preliminary objections on points of law which were raised by the petitioner against the locus stand of the advocate for the respondents are equally, hereby dismissed.
3. Each party is to bear its own costs, and hearing of the matter to proceed on merits. **I so order.**

DATED at **MOROGORO** this 15th day of December, 2022.




M. J. CHABA

JUDGE

15/12/2022