

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 98 OF 2019

JUNG HWAN KIM..... 1ST PLAINTIFF
SANG OK NAM..... 2ND PLAINTIFF

VERSUS

TANZANIA PRESBYTERIAN CHURCH.....DEFENDANT

RULING

17th February, 2022 & 25th February, 2022.

E.E. KAKOLAKI J.

When hearing of this suit was about to start the Defendant filed a Notice with *plea in limine litis* to the effect that, *the Court lacks jurisdiction to adjudicate the matter in which the defendant lacks legal capacity to sue and be sued*. As per the practice of the court, where there is preliminary objection raised before the court, the court is required to first determine the objection before going into the substance of the case. It is from that settled practice, the Court ordered parties to submit on the said preliminary objection. By consensus of both parties, the *plea in limine litis* was disposed orally. Both parties were represented, the plaintiffs hired legal services of learned

counsel Daniel Lisanga while the defendant had the services of Mr. Tesha Florence and August Mramba learned counsels.

Supporting the Preliminary objection, it was Mr. Tesha's submission that, this court lacks jurisdiction to entertain the matter for want of defendant's capacity to sue or be sued. He argued that, the plaintiff contravened the provisions of section 8(1) (b) of the Trustees Incorporation Act, [Cap 318 of 2002] hereinto referred as the Act by suing a non-existing entity or wrong party. He said, the church as legal person operating under trusteeship has to be incorporated as Registered Trustees as provided under sections 2(1) and 3 of the Act. Therefore its capacity to sue or be sued is governed by the provisions of section 8(1)(b) of the Act. According to him, the plaintiff's act of suing the defendant not as a Registered Trustees but rather in its local church name is illegal in law, hence this court cannot entertain the suit in which the defendant has no capacity to be sued. To fortify his argument Mr Tesha referred the court to the case of **Moravian Church in Tanzania (South West Province Vs. Adamson Mwaseba**, Revision No 50 of 2017, (HC- unreported) where this court cited several cases and ruled out that, it was the Registered Trustees which was supposed to be sued and not respondent in person. He further relied on the case of **Kanisa la Anglikana**

Ujiji vs Abel s/o Samson Heguye, Labour Revision No 5 of 2019, where the court held that,

“There are two types of persons who can be sued natural and legal or artificial persons. The artificial persons include companies as well as the registered trustees who can be registered as cooperate bodies.”

Mr. Tesha submitted further it is only the Registered Trustees of the church or religious body corporate which has powers to sue and be sue and not otherwise. To buttress his position, he placed reliance on the cases of **Board of Trustee of Good Neighbours Tanzania vs Doreen Augustine Dominic T/A Dawson’s Water Point Drilling**, Commercial Case No 69 of 2019(Unreported) and **Mariam Makwani vs African Inland Church Tanzania**, Pc. Criminal Appeal No 7 of 2020. (Unreported). Basing on the above cited authorities Mr. Tesha maintained that, this court has no jurisdiction to entertain this suit in which one of the parties has no legal capacity to sue or be sued. He then requested the court to dismiss the matter with cost. Next it was Mr. Mramba for defendant who added that, the requirement to sue the registered trustee is provided under section 6 (i) of the Act, and therefore the plaintiffs’ error of not suing the Registered

Trustees cannot be amended as it was observed in the case of the **Board of Trustees of Good Neighbours Tanzania** (supra).

In response, while admitting that he sued the wrong party, Mr. Lisanga with lamentations commented that, in all correspondences with the defendant, the later was using church's name and never disclosed that she is registered trustee. All said notwithstanding, he requested for waiver of costs and leave to refile the suit in case this Preliminary Objection is sustained. In a short rejoinder, Mr. Tesha submitted that, defendant was brought to court by the plaintiff, so it was not defendants' duty to disclose whether they are legal persons capable of being sued or not. He further argued, as members of the church, the plaintiffs ought to know the constitutionality of the church and that it is compulsory for a religious body corporate to be as a Registered Trustee as per section 3 of the Trustees Incorporation Act (supra). He finally requested the court not to grant the plaintiffs with leave to refile the suit rather the same be dismissed with costs.

I have dispassionately considered the submissions as made by both parties. As the law stands, it is true and I subscribe to Mr. Tesha's assertion that, only natural and juristic persons can sue or be sued before any court of law. And that under section 2(1) and 3 of the Act, a legal person operating under

trusteeship has to be incorporated as Registered Trustees. As for the church which is a religious organisation duly registered under **Societies Act**, [Cap 337 R.E 2002] like any other body corporate duly under Trustees Incorporation Act, when incorporated its name changes to include the words "Registered Trustees" as per the dictates of section 6 (2) of the Act. The said section 6(2) of the Act reads:

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

The above position of the law was once observed by this court in case of **Kanisa la Anglikana Ujiji** (supra), the observation which I subscribe to where the Court categorically stated that:

The applicant is a religious institution. Religious organization is required by law to be registered as societies under societies Act Cap 337 R.E 2002. The requirement is under section 12 (1) of the said Act. The procedure is well described under the societies the Societies (Application for Registration (Rules, GN no 119/1958. Upon being issued with a certificate of registration, the organization are required under section 2 of the trustee Incorporation Act [Cap 318 R.E 2002] to be incorporated and be issued with a certificate of incorporation stipulating its name which under section 5 of the same Act

shall include the words "Registered Trustees". Once the certificate is issued, the religious organization or association is deemed to have been incorporated, therefore, can sue or be sued in its incorporation name only. (Emphasis supplied).

As to when can a registered religious institution like the defendant can sue or be sued the provisions of section 8(1)(b) of the Trustee Incorporation Act [Cap 318 R.E 2002]. Section 8(1)(b) of the Act provides thus:

(1) Upon grant of a certificate under subsection 1 of section 5 the trustee or trustees shall become a body cooperate by name described in a certificate and shall have:

(a) NA.

*(b) **power to sue and be sued.** (Emphasis is mine)*

In this case there is no dispute that the defendant is the incorporated body corporate duly issued with certificate of incorporation as a Registered Trustees, thus acquired legal personality to sue or be sued as provided under section 8(1) (b) of the Trustee Incorporation Act [Cap 318 R.E 2002]. It is also uncontroverted fact that, the Plaintiffs herein sued the Defendant in the registered name which in my considered opinion is a non-existent entity as the registered name cannot give it a legal personality. The assertion by Mr. Lisanga that, the defendant did not disclose to the plaintiffs the fact that it

is a Registered Trustee with due respect to the learned counsel the same is unfounded. 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 the present suit incompetent. See the case **of Coseke Tanzania Limited v Public Service Social Security Fund (Formally known as LAPF)**, Commercial Case No 143 of 2019 HC Dar es Salaam.

In view of the above stated, I proceed to uphold this preliminary objection by the defendant as this court cannot proceed to hear the suit in which one of its party is not existing as to so do it tantamount to deciding the matter against no person before the court. The suit before this court therefore is incompetent.

Having so found, the next issue is what the remedy for incompetent suit is? As alluded to earlier on, while Mr Lisanga conceded the plaintiffs sued a wrong party, he never responded to the defendant prayer for dismissal of the suit, apart from praying the Court to waive costs and grant plaintiffs with leave to refile the suit, the prayer which was strongly resisted by Mr. Tesha who pressed the court to dismiss it with costs. I do not embrace Mr. Tesha's

prayer as it is well established that, the only remedy for incompetent case, is to strike it out. This position is well spelt in the case of **Mic Tanzania Limited Vs. Minister of Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004 (CAT-unreported), where the Court held that:

After all, it is now trite law once an appeal or application is found to be incompetent, the only option is to strike it out even if no body had been raised to it.

Though the present matter is neither the appeal nor application the above position of the law applies to it basing on the fact the suit before this court is incompetent for suing non-existing party or entity. That being the position the only course this court would take against the Plaintiffs' case is to strike it out which I hereby do with costs. The plaintiffs are allowed to institute a fresh suit subject to limitation of time.

It is so ordered.

DATED at DAR ES SALAAM this 25th day of February, 2022.



E. E. KAKOLAKI

JUDGE

25/02/2022.

Ruling delivered at Dar es Salaam today on 25th February, 2022 in the presence of Mr. Hamis Mbangwa and Mr. Daniel Lisanga, learned advocates for plaintiffs and Mr. Tesha Florence, Mr. August Mramba and Mr. Michael Kasungu, learned counsels for defendant and Ms. Asha Livanga, court clerk.



E. E. KAKOLAKI

JUDGE

25/02/2022

