

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL CASE NO. 8 OF 2021

**DAFROZA D/O MWANAKATWE (Administratrix of the
Estate of the late Martin s/o Mwanakatwe PLAINTIFF**

VERSUS

JUMA S/O SAID 1st DEFENDANT

MPANDA DISTRICT COUNCIL 2nd DEFENDANT

THE ATTORNEY GENERAL 3rd DEFENDANT

RULING

Date: 01/04 & 12/05/2022

NKWABI, J.:

The plaintiff is seeking decree and judgment against the defendants in accordance with the following reliefs which she seeks to be paid:

1. T.shs 100,000,000/= general damages which the family suffered due to death of the deceased who was the bread earner to the family.
2. Tshs 2,800,000/= compensation for the damaged motor cycle.
3. Tshs 2,000,000/= burial cost.
4. Interest at 10% from filing this suit util final payment of the principle sum.

With the joint written statement of defence of the 2nd and 3rd defendants, there came a notice of preliminary objection having four limbs of legal points of law to constitute the preliminary objection. The State Counsel urged this court to dismiss the suit with costs based on the same. Two of them were abandoned in the written submissions filed by the learned State Attorney and remained with the following which they argued:

- 1. That, this suit is bad in law for non-joinder of necessary parties, i.e. deceased's dependants.*
- 2. That this suit is bad in law for suing a wrong party.*

Starting with first limb of the preliminary objection, the State Counsel, Mr. Mjahidi Kamugisha strenuously argued that the legal point is based on part II section 3 and 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E. 2019. He maintained that section 3 of the above cited law provides for the right of action to recover damages when death caused by wrongful act. Section 4 of the above cited law requires the action brought by the executor or administrator must be brought in the name(s) of all or any of the dependants of the deceased person. He insisted as well that in this case that is not the situation as the plaintiff Dafroza Mwanakatwe is

administratrix of the estate of the late Martin Mwanakatwe without joining dependants of the deceased contrary to the mandatory requirement of the law which is offensive of the law. He was of the view that the suit is incompetent and the same has to be struck out with costs.

Ms. Sekela Amulike, learned counsel for the plaintiff, in her written submissions was of a contrary view. She argued that the said section does not provide for administrator or executor to join deceased dependants as one of the parties. She was also of the view that the interests of the dependants are protected by the plaintiff. Else, Ms. Amulike was of the view that the suit shall not be defeated just by misjoinder or non-joinder of parties under Order 1 rule 9 of the Civil Procedure Code Cap 33 R.E. 2019.

In rejoinder, Mr. Kamugisha urged that the plaintiff has admitted the alleged non-joinder hence did not comply with the law. Regarding the argument that the suit should not be defeated by misjoinder or non-joinder of a party, Mr. Kamugisha insisted that their objection has merits as it is provided under Order 1 Rule 13 of the Civil Procedure Code, Cap 33 R.E. 2019 as such objections have to be done at the earliest possible opportunity.

I have duly considered the arguments of both parties to the suit, with profound respect to Mr. Kamugisha, I am of the view that the first limb of the preliminary objection as per his submission in chief is misconceived. Reading the provisions of section 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E. 2019 as cited and quoted by Ms. Amulike, which provision Mr. Kamugisha has not challenged in the rejoinder submission, there is an option where the plaintiff could have opted to sue just alone as she has done or join the dependants. In the premises, this limb of objection is unmerited and crumbles to the ground.

On the objection on point of law to the effect that this suit is bad in law for suing a wrong party, Mr. Kamugisha, vehemently contented that the same is centred on first paragraph of page 6 of the proceedings dated 27/12/2018 where it was stated by the trial court: *"I have taken into account the fact that the accused person is a first offender a driver of the Mpanda Municipal Council ..."*

He further maintained that the trial court issued an order to the effect that the driving license No. 4001204963 to be returned to the first defendant and he has been employed by Mpanda Municipal Council as such the suit ought

to have been brought against Mpanda Municipal Council and not Mpanda District Council as it appears in this suit because the duo are different local government authorities established by different laws hence, they are distinguishable. He cited the laws which establish the said local authorities. He added that, the records of the trial court which are still intact to date and they have never been rectified by review if any mistake was done in recording and this court has no jurisdiction to review the trial court's proceedings.

He further maintained that the plaintiff has sued a wrong party who does not exist in the trial court proceedings (Traffic case No. 51/2018 of Mpanda district Court. The plaintiff is not sure who she has to sue. Suing Mpanda District Council instead of Mpanda Municipal Council contrary to traffic's case court records, creates chaos in this Honourable Court which may cause troubles at execution stage. It is in the premises the suit is incompetent for suing a wrong party and prayed the same be struck out with costs.

Ms. Amulike succinctly and dexterously argued that this limb of the preliminary objection is not maintainable as it requires proof (bringing evidence) thus offending the well-established rule in **Mukisa Biscuit**

Manufacturing Co. Ltd vs West End Distributors Limited [1969] E.A.

696. That it ought to contain a pure point of law. She prayed the preliminary objection be dismissed with costs.

In rejoinder submission on the last leg of the preliminary point of objection, Mr. Kamugisha was of the view that one cannot file this suit without commencing traffic case. He added, proceedings of the trial traffic case are court records which require no proof, hence, the cited case of **Mukisa Biscuit** is distinguishable under the circumstances of theirs. That the case is not a point of fact but a pure point of law as such this court has to take judicial notice of the same in that regard not requiring proof. Moreover, he maintained that pleadings are to be read in totality together with annexures in order to understand cause of action. In the circumstances the **Mukisa** case is inapplicable in this case, he pressed.

He also urged, failure to annex judgment and decree which are mandatory court records for establishing cause of action emanated from traffic case which creates doubt to this Honourable Court to believe whether the traffic case was determined to its finality or is still in progress in subordinate court.

With the greatest respect to Mr. Kamugisha, this limb of objection is as well misconceived. I fully subscribe to the view of Ms. Amulike that this limb of objection does not qualify to be a preliminary objection on a point of law as the complained situation requires proof. That is not all, civil suits (tortious liability suits) and traffic cases are quite distinct. It is unfortunate that Mr. Kamugisha did not cite any provision of law or case law to support his views. In any case this court is not bound by the decision of the District Court.

In fine, the preliminary objection on both legal points of law is overruled. Costs shall abide with the outcome of the suit.

It is so ordered.

DATED at **SUMBAWANGA** this 12th day of May, 2022.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE