

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MWANZA SUB-REGISTRY)

AT MWANZA

CIVIL CASE NO. 34 OF 2021

THE REGISTERED TRUSTEES OF  
TANZANIA FIELD EVANGELISM.....PLAINTIFF  
VERSUS  
PIUS RWE GASIRA.....DEFENDANT

R U L I N G

23<sup>rd</sup> March & 24<sup>th</sup> May, 2022

**DYANSOBERA, J:**

The plaintiff, the Registered Trustees of Tanzania Field Evangelism, has instituted this suit against the defendant one Pius Rwegasira claiming, *inter alia*, a declaratory order that the defendant is not the member of /chairman of the Board of the Registered Trustees of the Tanzania Field Evangelism, an order against the defendant to hand over the plaintiff's properties and to be restrained from interfering with the plaintiff's affairs. It is averred in the plaint that the defendant is not a member of the plaintiff institution but crowned himself as the Bishop and leader of the plaintiff.

In resisting the claims, the defendant has not only filed a written statement of defence but also has filed a notice of preliminary objection on the grounds that:-

1. The suit has been filed in contravention of Section 67 of the Civil Procedure Code [Cap.33 R.E.2019].



2. In the alternative, the suit is premature, the plaintiff having failed to first rely on the provisions of Section 14 (1) and/or Section 26 of the Trustees' Incorporation Act [Cap.318 R.E.2019] before instituting the suit.

When the preliminary objection was called for hearing, learned Counsel for the parties prayed it to be argued by way of written submissions. The court granted the prayer and Mr. Joseph Kinango, learned Advocate, filed written submission in support of the preliminary objection whereas the written submission in objection was filed by Mr. Sosthenes Kulola, learned Counsel.

Before submitting on the raised points of preliminary objection, Counsel for the defendant drew attention to the court on an additional ground of preliminary objection that the plaintiff having filed Land Application No. 01 of 2022 before the District Land and Housing Tribunal for Mwanza, this suit is *res subjudice*. Counsel explained that in that suit the facts as well as the cause of action and reliefs claimed are the same as those in the instant suit. In support of his argument, Counsel relied on Section 8 of the Civil Procedure Code and the Treatise by C.K. Takwani titled, "Civil Procedure, 5<sup>th</sup> Edn" at p. 51.

Arguing in support of the first limb of preliminary objection, Mr. Joseph Kinango submitted that under the proviso to section 67 of the **CPC** there are matters of which the High Court has jurisdiction. According to him, the entire plaint and reliefs sought do not fall under the purview of paragraphs (a) to (h) of the Code. Furthermore, Counsel for the defendant contended that the plaintiff has not complied with the mandatory requirements of sections 14 (1) and section 26 of the Trustees' Incorporation Act in that the proviso empowers the Registrar General to investigate any complaint regarding the use or misuse of any property and take several measures including suspension or removal of any trustee or any person. He was of the view that since the plaintiff is seeking a declaration that the defendant is not the member of the plaintiff the court has no jurisdiction. To buttress this point, Counsel for the defendants cited the cases of the **Registered Trustees of Tabasamu Private Secondary School v. Amini Hussein Rukoba, Gicha Athuman Idd and Mwiru Abdallah Simba**, HC Civil Case No. 23 of 2017 and **Muhammad Rafik and 11 others v. the Ad Hoc Committee, Sunni Muslim Jamaat, Dar es Salaam**, Civil Case No. 119 of 2012 on the authority that if the dispute related to the misuse of properties or membership, the same should first be referred to the Administrator General under section 14 of the Act.



Counsel for the defendant concluded that the plaintiff being a religious organisation having valid board of trustees, is required to use statutory mechanism before coming to the court of law hence what the plaintiff is doing here is an abuse of court process.

In the submission in reply to the raised preliminary objection by the defendant, Mr. Sosthenes Kulola made the following submission. With respect to the defendant's additional preliminary objection raised without seeking leave of the court, Counsel for the plaintiff argued that according to the principles of the CPC, parties are bound by their pleadings and therefore, the defendant was enjoined to comply with Order VIII rule 2 of CPC. He cited the cases of **Alphonse Nicas Buhatwa t/a Coco v. DCB Comercial Bank PLC**, Commercial Application No. 187 of 2018 and **Yara Tanzania Limited v. Charles Aloyce Msemwa t/a Msemwa Junior Agrovert and Anor**. Commercial Case No. 5 of 2013.

Responding to the first preliminary objection, Counsel for the plaintiff submitted that Cap. 318 highlights the capacity to sue and be sued as provided for under section 8 (1) of the Act and, therefore, there is no consistency with the CPC. The case of **Kanisa la Anglikana Ujiji v. Abel s/o Solomon Heguye**, HC L D No. 5 of 2019 was cited. He was of the view that section 67 of the CPC has not been contravened as the section



shows how the Administrator General or two or more persons having an interest in the trust can take legal action.

Respecting the second limb of preliminary objection, Counsel for the plaintiff refuted the claims that the suit is premature. He argued that the plaintiff has option to use section 14 (1) or section 26 of Cap. 318 due to the use of the word, "OR" and the plaintiff has opted to use section 26 and that this explains why, learned Counsel for the respondent has not, in his submission, dwelt on section 14 (1). Besides, section 14 of the Act is on powers of the Registrar General investigation on the use or misuse of trustee's property which is not the case in this suit. Counsel for the plaintiff urged the court to dismiss the preliminary objection for being baseless and order the suit to proceed.

I have, with circumspection and deserving concern, considered the preliminary objections and the corresponding written submissions filed by learned Advocates in support and in objection.

As far as the additional preliminary objection is concerned, I align myself with the argument by Counsel for the plaintiff that it was raised without leave of the court and is in contravention of clear provisions of O. VIII rule 2 of the Civil Procedure Code [Cap. 33 R.E.2019] which enjoins all matters which show the suit is not maintainable to be raised in the pleadings so as to avert the other party being taken by surprise.

Further, the objection has been raised without giving the other side sufficient notice. In my view, it is a good practice that reasonable notice of the preliminary objection should be given to the opposite party so that he may not only not be taken by surprise but also be in a position to prepare a response in advance of the issues raised in the preliminary objection. The importance of giving reasonable notice to the other side was emphasized by the court of appeal in case of **Ms Majembe Auction Mart versus Charles Kaberuka**, Civil Appeal No. 110 of 2005 (Unreported) where at p. 4 of the typed judgment the court had the following to say.

*"It is to be emphasized that in fairness to the parties and in the interest of just counsel intending to raise a preliminary objection are enjoined as far as possible to serve the notice of preliminary objection within reasonable time".*

In the instant case, apart from the fact that the defendant's additional preliminary objection was not given with leave of the court, it was not pleaded and no prior notice was given to the court and the plaintiff additional preliminary objection is in contravention of the law. It was, therefore, improperly raised, ~~the same.~~

Besides, even if, for the sake of argument, the said preliminary objection was properly raised, still it could not be sustained because the suit does not qualify to be *subjudice*. This is so because, the subject matter in issue in the former suit, is not directly and substantially in issue court in the matter under consideration. While in Land Application No. 1 of 2022 the subject matter is ownership of the landed matter, the subject matter in this suit is on membership or otherwise of the defendant.

For those reasons, the additional preliminary objection falls away.

6  




As to the argument in the first limb of preliminary objection that this court has no jurisdiction in view of the provisions of section 67 of the Civil Procedure Code in that the reliefs sought by the plaintiff do not fall under paragraphs (a)- (h) of section 67 of the said Code, I think learned Counsel for the defendant has missed the point.

Section 67 of the above Code stipulates thus:-

67.

*In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney-General, may institute a suit, whether contentious or not, in the High Court to obtain a decree—*

- (a) removing any trustee;*
- (b) appointing a new trustee;*
- (c) vesting any property in a trustee;*
- (d) directing accounts and inquiries;*
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;*
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;*
- (g) settling a scheme; or*
- (h) granting such further or other relief as the nature of the case may require."*

That section does not oust the jurisdiction of this court as learned Counsel for the defendant would wish this court to believe otherwise, the

7  


spirit and purpose stipulated under the provisions of section 26 the Trustees' Incorporations Act would be defeated. This is, I think, not what the Parliament envisaged in enacting that provision. The 1<sup>st</sup> limb of preliminary objection is overruled.

As regards the argument that this suit has been prematurely filed, I think the authorities cited by Counsel for the defendant are clear. For instance, this court in the case of **Muhammad Rafik and 11 others v. The Ad Hoc Committee, Sunni Muslim Jamaat, Dar es Salaam** (supra) which was followed by this same court in the case of **Registered Trustees of Tabasamu Private Secondary School v. Amini Hussein Rukoba, Gicha Athuman Idd and Mwiru Abdallah Simba** (supra), the legal position is that:

"Disputes over properties of a registered Trustee must firstly be taken to the Registrar General before rushing to the court as the Trustees' Incorporation Act vested with the Attorney General....sufficient statutory power to regulate and bring order in the affairs of Registered Trustees in Tanzania before these disputes reach courts of law'.

The reason for this was clearly stated by this court in the case of **Muhammad Rafik and 11 others** (supra) where at p. 16 of the decision observed that:

'this court holds in a very high regard the rights of an association of persons who , in an incorporated trust, have agreed to be bound together by custom, religion, kinship or nationality, or organisation established for any religious , educational, literary, scientific, social or charitable purposes'




It is my firm but considered view that parties should always resort to a court of law after they have exhausted their internal mechanisms to put their house in order.

Being guided by the principle of *stare decisis* which means to stand by the decision and not to disturb the undisturbed, I am highly persuaded to respect the precedent established by the prior decisions as shown above. Since the above decisions of this court have not been disturbed, I feel obliged to respect them.

For those reasons, I am satisfied and hereby find that this suit has been prematurely filed. The preliminary objection in the second limb is sustained and the suit is struck out.

Each part to bear is own costs.



**W.P. Dyansobera**  
**Judge**  
**24. 5.2022**

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 24<sup>th</sup> day of May, 2022 in the presence Mr. Stephen Kaijage, learned Counsel holding briefs for Mr. Sosthenes Kulola, learned Counsel for the plaintiff and also holding brief for Mr. Joseph Kinango, learned Advocate for the defendant.



**W.P. Dyansobera**  
**Judge**