

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

AT DAR ES SALAAM

CIVIL CASE NO. 191 OF 2022

THOMAS KIMBARI FLORENT NGUMA 1ST PLAINTIFF
EDWARD J. SIMBEYE 2ND PLAINTIFF
MUSTAFA ABDUL MURO 3RD PLAINTIFF

VERSUS

MARTHA RAPHAEL CHIOMBA 1ST DEFENDANT
HAJI AMBAR KHAMIS 2ND DEFENDANT
JOSEPH ROMAN SELASINI 3RD DEFENDANT
BEATI A. MPITABAKANA 4TH DEFENDANT
RAMDHAN MANYEKO 5TH DEFENDANT
MARTIN MNGO'NG'O 6TH DEFENDANT
SUSANNE PETER MASELE 7TH DEFENDANT
AMEIR MSHINDANI ALI 8TH DEFENDANT
HASSAN RUHWANYA 9TH DEFENDANT

RULING

4th April & 12th May, 2023

KISANYA, J.:

The plaintiffs, Thomas Kimbari Florent Nguma, Edward J. Simbeye and Mustafa Abdul Muro are members of a political party in the name and style of National Convention for Construction and Reform – Mageuzi (NCCR-Mageuzi). In addition, the 1st, 2nd and 3rd plaintiffs were members of the Board of Trustees, Secretariat and National Executive Committee (NEC) of the said party, respectively. They filed the

present suit praying for judgment and decree against the defendants jointly and severally as follows:

- 1. A declaration that the meetings held by the Defendants on 21st May, 2022 at Salvation Army Hostel Dar es Salaam, meeting held on the 22nd and 24th September, 2022 at St. Gaspar Hotel Dodoma are null, void and of no legal effect.*
- 2. An order that all resolutions arising out of the meetings dated 21st May, 2022, 2nd September 2022 and 24th September, 2022 are of no legal effect.*
- 3. An order that the leadership of the Party is the one registered by the party with the office of the Registrar of Societies on the 18th day of February, 2022 and that the same shall be in office till on the 20th July, 2024 or till when resolved by a proper meeting or an organ of the party.*
- 4. An order that all members of the party so expelled from the membership by illegal meetings above be reinstated to membership.*
- 5. Costs of the suit.*
- 6. Any other relief/reliefs that the Court may deem fit to grant.*

On receipt of the plaint, the 1st and 9th defendants filed their respective written statements of defence, while the 2nd to 8th defendants lodged a joint written statement of defence. The defendants further filed three sets of the notice of preliminary objection as follows:

One, through her recognized agent one, Faustin Sungura, the 1st defendant fronted the following points of law, in verbatim:

- a) The plaintiff has contravened the provision of Order I, Rule 3 of the Civil Procedure Code for not joining the institution (NCCR-Mageuzi) which is about to be condemned unheard.*
- b) The decision of the National Executive Committee of (NCCR-Mageuzi) held on 21st May, 2022 is premature to be determined in (sic) for the complainant has not exhausted the remedies in the Party Organs.*
- c) The Plaintiff has no locus standi to challenge the decision of the 24th September, 2022 National Congress for they have not asked to act on behalf of whom are alleged to be offended.*
- d) This matter contravenes the mandatory provision of Order I Rule 3 of the Civil Procedure Code for bringing a new suit while the same matter is pending in this Court.*
- e) The 1st Plaintiff has contravened the mandatory provision of Order VII Rule 15(1) and (2) of the Civil Procedure Code.*

Two, the 2nd to 8th defendants raised the following points of preliminary objection:

- (i) The suit has been instituted in violation of the provision of Order I, Rule 8(1) of the Civil Procedure Code, Cap. 33, R.E. 2019.*
- (ii) The suit has been brought in contravention of the mandatory provisions of section 21(1) and (2) of the Political Parties Act, Cap. 258, R.E. 2019 reading*

together with section 8(1)(b) of the Trustees Incorporation Act, Cap. 318, R.E. 2002.

- (iii) The suit has been filed prematurely before the Court for the Plaintiffs' failure to exhaust NCCR-Mageuzi Party's internal remedies in terms of section 8D (1) of the Political Parties Act, Cap. 258, R.E. 2019 and Article 22(3) (j) of the Constitution of NCCR-Mageuzi, 8th Edition of 2020.*
- (iv) The Plaintiff lacks a requisite locus standi to institute the present suit.*
- (v) The Complaint is incurably defective for non- joinder of the Registrar of Political Parties, the Registration Insolvency and Trusteeship Agency (RITA) and the Attorney General contrary to Order 1, rule 9, 13 of the Civil Procedure Code, Cap. 33, R.E. 2019.*

Three, the 9th defendant filed a notice of preliminary objection on the following point of law:

- (a) The suit is incompetent in law in that it has not been instituted in the lowest court with jurisdiction to hear and determine in terms of section 13 of the Civil Procedure Code, Cap. 33, R.E. 2019.*

With leave of the Court, the preliminary objections were heard by way of written submissions. Parties were also directed to address the Court, on whether the recognized agent of the 1st defendant, Mr. Faustin Sungura has *locus standi* or right to make appearance.

Both parties filed the written submissions for and against the preliminary objection according to the order of this Court. The written submissions were filed by Mr. Faustin Sungura, recognized agent of the 1st defendant, Mr. Novatus Muhangwa, learned advocate for the 2nd to 8th defendants, the 9th defendant who appeared in person and Mr. Mpare Mpoki, learned advocate for the plaintiffs.

I prefer to start with the issue raised by the Court, whether Mr. Faustin Sungura has right to enter appearance. In their respective submissions, Mr. Sungura, Mr. Muhangwa and the 9th defendant submitted that, Mr. Sungura was appointed by the 1st defendant as her recognized agent. They pointed out that the said recognized agent was appointed through a power of attorney issued under Order III, Rule 2(a) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). On that account, they were at one that, Mr. Sungura has right to enter appearance on behalf of the 1st defendant. To reinforce the said argument, Mr. Muhangwa cited the case of **Barreto Haulier (T) Limited and Another vs Mohamood Mohamed Duale**, Civil Appeal No. 7 of 2018 (unreported), while the 9th defendant referred the Court to the case of **Georgia Celestine Mtikila vs Registered Trustees of Dar es Salaam Nursery School and Another** [1998] TLR 512.

Responding, Mr. Mpoki submitted that the right to appear in court is governed by Order III, rule 1 and 2 of the CPC. He further argued that appearance in the court can be by a party in person, recognized agent or advocate. However, the learned

counsel submitted that a recognized agent has no permission to plead and that a person who is not an advocate has no right to argue in Court for the party without prior permission of the Court.

In his rejoinder, Mr. Sungura reiterated his submission in chief that he is legally before the Court as a recognized agent of the 1st defendant. Making reference to the case of **Respectus Kamuhanda vs Esther Regation**, PC Civil Appeal No. 106 of 2020, HCT at DSM (unreported) he submitted that the Court is bound to consider the position of law.

It is worth noting here that, in its ruling dated 7th March, 2023, this Court found no merit in Mr. Mpoki's argument that a recognized agent has no power to plead or enter appearance without leave of the Court. That being the case, I am *functus official* to hold that a recognized agent has no power to plead or enter appearance without leave of the Court.

As for the issue under consideration, I agree with both parties that, pursuant to rules 1 and 2(a) of Order III of the CPC, a recognized agent is among the persons authorized to make appearance before the court. The law provides further that, a recognized agent include, a person holding a power of attorney which authorizes him to make appearance or application or to do such acts on behalf of a party to the case. This implies that, it is the power of attorney which must authorize the person named therein to enter appearance on behalf of the party to the case. I am fortified

by the case of **Parin A.A. Jaffer & Another vs Abdulrasul Ahmed Jaffer & Two Others** [1996] TLR 110 where it was held that:

"...power of attorney is a formal instrument by which one perso empowers another to represent him or act in his stead for certain purposes. Under Order 3 Rule 2(a) CPC a grantee of such power is competent to go to law and make application on behalf of the grantor, providing that the instrument gives him such authority, and I am acutely aware that the terms of such instrument should receive a strict construction as giving only such authority as it confers expressly or by necessary implication..."

It is not disputed that, Mr. Sungura was issued with a power of attorney. Pursuant to the said power of attorney, the 1st defendant authorized him to "sign, act and execute any matter" on her behalf. Nothing to suggest that Mr. Sungura was authorized to enter appearance. The wording of Order III, rule 1 and 2 of the CPC is clear that, the holder of power of attorney may be authorized "to make appearances or applications and to do such acts on behalf of such parties". In that regard, I am of the view that the word "act" used in the power of attorney at hand does not imply that the 1st defendant authorized Mr. Sungura to make appearance on her behalf. Had the 1st defendant intended to be represented by Mr. Sungura, she would have authorized him as such in the special power of attorney. Since this was not done, I hold that Mr. Sungura has no right to make appearance on behalf of the 1st

defendant. In consequence, I will not consider his submissions on the preliminary objection.

Second for determination is the preliminary objection by the 9th defendant. It is to the effect that the suit is incompetent because it was not instituted in lowest court with jurisdiction to hear and determine the same as required by section 13 of the CPC. The 9th defendant prefaced his submission by stating the trite law that jurisdiction is creature of statute and that a party to the case cannot confer jurisdiction to the court. He further argued that if the law does not specifically direct otherwise, the forum to determine the matter is gleaned from the prayers sought.

Making reference to section 13 of the CPC, the 9th defendant argued that every suit should be instituted in the court of lowest grade competent to try it even if the court of higher grade has the same competence. He was alive to the general powers of this Court provided for section 2(1) of the Judicature and Application of Laws Act, Cap. 358, R.E. 2019 (the JALA). However, basing on the case of **Hon. Zitto Zuberi Kabwe vs The Board of Trustees Chama cha Demokrasia na Maendeleo and Another**, Civil Case No. 1 of 2015 (unreported), he submitted that the orders sought in the plaint can be granted by courts of lower grades. His argument was based on ground that the reliefs sought herein are general and discretionary. To expound his argument, he cited the case of **Manjit Singh Sandru & Others vs Rubiri R. Robiri**, Civil Appeal No. 121 of 2014, CAT at Mwanza (unreported).

The 9th defendant went on to submit that the proviso of section 13 of the CPC should not be construed to mean that parties are at liberty to file, in the High Court, matters which can be determined by lower courts. In conclusion, he prayed that the suit be struck out with costs and that parties be advised to file it in the proper forum.

In rebuttal, Mr. Mpoki admitted that the forum with mandate to entertain the claim can be determined by looking at the reliefs sought. He then submitted that the pleadings reveal that this is a declaratory suit in which the plaintiffs are praying for a declaratory order only. It was his submission that the plaintiffs have not attempted to show that there is a monetary claim.

The learned counsel went on submitting that jurisdiction of the courts is not determined by the CPC only. He contended the preliminary objection is premised on section 13 of the CPC. Referring the Court to the case of **SMT Fula Mangtu Maharaj and Another** AIR 1969 and section 7 of the CPC, Mr. Mpoki argued that the 9th defendant has failed to show how this Court is barred expressly or by necessary implication to entertain the matter. He went on to argue that, sections 40(1) and 41(1) of the Magistrates' Courts Act, Cap. 11, R.E. 2019 (the MCA) show that the District Courts and Resident Magistrates' Courts are subordinate to the High Court. He contended that the 9th defendant was expected to expound why this is not Court of the lowest grade competent to try the matter.

Mr. Mpoki reiterated that the reliefs claimed by the plaintiffs are purely declaratory and that the District Courts, the Resident Magistrates' Courts and the High Court have concurrent jurisdiction to entertain the same. In that regard, he argued that the objection is without merit as the 9th defendant has failed to show the legislation which bars suits on declaratory reliefs to be instituted in the High Court.

I have considered the contenting submissions. It is a settled position of law, and both parties are at one that, jurisdiction the court is statutory. See for instance, the case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported) in which the Court of Appeal cited with approval the case of **Shyam Thanki and Others vs. New Palace Hotel** [1971] 1 EA 199, where it was observed that:

"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess. "

This Court is established under Article 108 (1) of the Constitution. In terms of Article 108(1) and (2) of the Constitution and section 2(1) and (2) of the JALA, the general jurisdiction of this Court is subject to the provision of other written laws. There is also a list of authorities on that position, one of them being the case of **Tanzania Breweries Limited vs Anthony Nyingi**, Civil Appeal No. 110 of 2014, CAT (unreported) in which the Court of Appeal underlined that:

"It is therefore clear from these provisions of JALA and the Constitution, that the jurisdiction of the High Court is subject to the provisions of other written laws. So, it was wrong for the learned trial judge to have decided the question of jurisdiction by looking at Article 108(2) of the Constitution alone. In other words, Article 108 (2) of the Constitution should not have been read in isolation, without discussing whether or not such other written laws to the contrary exist."

This matter was instituted by a plaint and thus, governed by the CPC. Reading section 7(1) of the CPC together with section 40(1) and 41(1) of the MCA, I agree with Mr. Mpoki that, the District Court, the Resident Magistrates' Courts and the High Court have jurisdiction try suits of civil nature, unless suits of which their cognizance is either expressly or impliedly barred. For clarity, the provision section 7(1) of the CPC is reproduced hereunder:

"Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

It is undisputed fact that, the substantive claim in this suit is declaratory judgment or orders. Therefore, the issue is whether suits of this nature are expressly or impliedly barred from being instituted in this Court. It is worth noting here that, the objection is based on the provision of section 13 of the CPC which stipulates:

"13. Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section,

a court of a resident magistrate and a district court shall be deemed to be courts of the same grade:

Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court."

Reading from the above cited provision, it is clear that, every suit must be lodged in the court of the lowest grade which is competent to entertain the same. In that regard, the High Court is expressly and impliedly barred from entertaining suits which can be entertained by the courts subordinate to it. This gives rise to the question whether the District Court or the Resident Magistrates' Court has mandate to try the suit at hand. Section 6 of the JALA provides:

"Subject to the provisions of any written law and to the limits of its jurisdiction, a magistrates' court shall exercise its jurisdiction in accordance with the laws with which the High Court is required by this Act to exercise its jurisdiction and with such other laws as shall be in force in Tanzania from time to time, and applicable to the proceedings before it, but no magistrates' court shall exercise any jurisdiction or powers that are by any such law conferred exclusively on the High Court as such or on a court of record."

My interpretation of the above provision is that, the district courts and resident magistrates' courts exercise their respective jurisdictions according to the laws with which the High Court exercises its power. Further to this, the district

courts and resident magistrates' courts are barred from entertain a matter in which the law has exclusively conferred it on the High Court or court of record.

In view of the said position, the plaintiffs were duty bound to prove that this Court has exclusive jurisdiction to try the reliefs prayed in the plaint. This was not done. To the contrary, Mr. Mpoki admitted that the resident magistrates' courts and the district courts have jurisdiction to entertain the matter. This fact is inferred from his written submission in which the learned counsel stated:

"In our case no monetary reliefs is claimed, the plaintiff prayers are purely declaratory in which the case the High Court, the District Court and the Court Resident Magistrates both have jurisdiction to try the same concurrently."

Yet, the learned counsel did not cite the provision of law to support his contention that the High Court, resident magistrates' courts and district courts have concurrent jurisdiction to entertain suits with no monetary reliefs.

I have now considered the settled law that, jurisdiction is determined by substantive claim. [See the case of **Tanzania- China Friendship Textile Co. Ltd v. Our Lady of Usambara Sisters** (2006) TLR 70]. It follows that, the High Court has no exclusive jurisdiction to entertain every suit with no specific damages or monetary reliefs. The law is further settled that, a suit with no specification should be instituted in the lower courts namely, the District Courts or Resident Magistrates' Courts. I am supported by the case of **Mwananchi**

Communications Limited and 2 Others vs. Joshua K. Kajula, Civil Appeal

No. 126/01 of 2016 (unreported) in which Court of Appeal underlined that:

"The absence of such specification meant the suit should have been tried in the lower courts, that is, the District or Resident Magistrate's courts under section 40(2)(b) of the MCA. For the foregoing reasons, it is clear that the High Court erroneously crowned itself with jurisdiction in entertaining and determining the suit that it did not possess.

Being guided by the above position, I find merit in the objection raised by the 9th respondent. It is clear that this suit was wrongly filed in this Court. The plaintiffs ought to have lodged it in the District Court or Resident Magistrate Court. Similar stance was taken in **Hon. Zitto Zuberi Kabwe**, (supra) in which Hon. Mziray, J (as he then was held):

"Section 13 strictly commands that every suit should be instituted in the Court of lowest grade competent to try it. On carefully going through the plaint filed, it is clear that the nature of the dispute and the prayers sought will not qualify to be filed in the High Court...The remedy is to strike out the same."

For the foregoing reasons, the objection by the 9th defendant is hereby upheld. I am also satisfied that the 9th defendant raised a preliminary objection within the meaning ascribed to it by the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd**, [1969] EA 696.

Considering that the issue of jurisdiction goes to the root of the case, I find it not necessary to determine the objections raised by other defendants.

In the event, this suit is hereby struck out for being incompetent before this Court. The plaintiffs are at liberty to institute it in a court of competent jurisdiction. Given the nature of this case and as both parties claim to be members of the same political party, I refrain from making an order as to costs. Each party shall bear its own costs.

DATED at DAR ES SALAAM this 12th day of May, 2023.



S.E. KISANYA
JUDGE
12/05/2023