

**IN THE HIGH COURT OF TANZANIA  
(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**CIVIL CASE NO. 05 OF 2022**

**THE REGISTERED TRUSTEES OF THE KITUO**

**CHA ELIMU NA MAENDELEO MATEMANGA**

**(KIUMMA) TRUST FUND..... PLAINTIFF**

***VERSUS***

**THE REGISTERED TRUSTEES OF KANISA LA**

**UPENDO WA KRISTO (KIUMA)..... 1<sup>ST</sup> DEFENDANT**

**BISHOP NOEL J. MBAWALA ..... 2<sup>ND</sup> DEFENDANT**

**ASSISTANCE ALPHONCE MANJONDA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*12/05/2023 & 30/06/2023*

**E.B. LUVANDA, J.**

On 30/12/2022, the Defendants filed their amended written statement of defence where they embedded with a notice of preliminary objection comprising three points, thus: One, this honourable court has no jurisdiction to entertain this matter; Two, the suit is incompetent for contravening the mandatory provision of section 67 of the Civil Procedure Code [Cap 33 Revised Edition 2022 (sic, 2019)]; Three, the

suit is incompetent for the Plaintiff is a non-existing and unknown creature in law.

Both parties were represented. The Defendants are represented by a team of three defence lawyers, Mr. Eliseus Ndunguru learned Advocate, Mr. Kaukuya, K. Y learned Counsel, Mr. Ndumbaro, H. J. learned Advocate while the Plaintiffs enjoyed service of Mr. Vicent P. Kassale learned Advocate and Mr. Daimu Halfan learned Advocate.

The preliminary objection was argued by way of written submissions.

The learned Counsel for the Defendants submitted for the first point of preliminary objection that, the Plaintiff claims is for declaratory orders against the defendants. The Counsel for the Defendants submitted that apart from other factors to be considered in assessing jurisdiction of the Court include pecuniarily and subject matter of the case. The Counsel added that the jurisdiction of the subordinate courts is to be found in the Magistrates Courts Act [Cap 11 R.E. 2019] while the jurisdiction of the High Court is found in the Constitution of the United Republic of Tanzania and in The Judicature and Application of Laws Act [Cap 358 R.E. 2019]. In terms of section 6 of the Act (sic, The Judicature and Application of Laws Act) the subordinate Court cannot deal with the

matters from which jurisdiction has been exclusively conferred to the High Court.

The Counsel for the Defendants submitted that, the relief sought in this case are not within the exclusive jurisdiction of the High Court of Tanzania in the sense that they may be granted also by a subordinate Court, citing section 3 of the Civil Procedure Code [Cap 33 R.E. 2022 (sic, 2019)] to support their argument and they insisted that, this Court has no jurisdiction to try the matter since the subordinate Court has jurisdiction to try the same.

On the second preliminary objection, the Counsel for the Defendants submitted that this suit is incompetent for contravening the mandatory provisions of section 67 of Cap 33 (*supra*). The Counsel submitted that the Plaintiff under paragraph 10 of the plaint through Dr. Matomora K.S. Matomora and his wife one Ann Jemima Matomora claims to be the owners of the Plaintiff are seeking declaration on vesting the properties and settlement of accounts of the trust known as Kituo cha Elimu na Maendeleo Matemanga (KIUMMA) Trust Fund. It is the Counsel for the defendant's opinion that Dr. Matomora and his lovely wife Ann Jemima Matomora were required to obtain a written consent from the Attorney General before instituting the case at hand. Failure to obtain a written

consent renders the suit to be incompetent. He cited the cases of the **Registered Trustees of Tanzania Assemblies of God *Versus* William Lusito and Emmanuel Lazaro** (1990) TLR 26 and **Fayaz Shamji *Versus* The Registered Trustees of Khoja Shia Ithnasheri Jamaat Mwanza and 5 Others**, High Court of Tanzania at Mwanza (unreported) to buttressed their argument.

On the third preliminary objection, that the suit is incompetent for the Plaintiff is a non-existing and unknown creature in law. The Counsel for the Defendants submitted that, Plaintiff purports to be a registered trustees as per paragraphs 1 and 2 of the plaint, as per the provisions of the Trustees Incorporation Act Cap 318 R.E, 2019 section 8 (1) (b) which provides that upon the grant of certificate of incorporation, trustee or trustees become(s) a body corporate by the name described in the certificate, and it acquires power to, sue and be sued in such corporate name. At paragraph 2 of the plaint, the Plaintiff has annexed annexure "A" collectively where one of the documents annexed thereto is a certificate of incorporation which shows that the registered entity is The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (Matemanga Educational and Development Center (KIUMA)

Trust Fund. They argued that, to the contrary the plaintiff in this case is The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (KIUMMA) Trust Fund different from what is in the certificate of incorporation and on a registered entity. It is the Counsel for the Defendants view that, since the law requires a suit by a Trustee(s) be brought by registered entity under section 8(2) of the said Trustees Incorporation Act, this suit is incompetent as the Plaintiff is a non-existing legal entity.

In response, the Counsel for the Plaintiff conceded to the Defendants Counsel that the reliefs they prayed can be granted by subordinate court too. But he insisted that nothing in the Civil Procedure Code shall operate to give jurisdiction over the suit which its value or subject matter exceed the pecuniary limit of its ordinary jurisdiction, citing the provision of section 6 of Cap 33 (*supra*) to support his argument. The Counsel insisted that, this court has a jurisdiction to try this matter and no any law barred this court to entertain the matter, he cited the provision of section 7(1)(2) of Cap 33 (*supra*) to support his submission. Also, the Counsel submitted that the provision of section 13 of Cap 33 (*supra*), should not be construed to ouster the general jurisdiction of the

High Court, he cited the case of **Shriram Pistons & Rings Ltd v. Manju Awasthy** (1997) 117 PLR 15, **Peter Keasi v. The Editor of the Mawaio News Paper & Another**, Civil Case No. 145 of 2014, to support his argument.

As for the second point of preliminary objection the Counsel for the Plaintiff submitted that the Counsel for the Defendants assertion that Dr. Matomora and his wife Ann Jemima Matomora required to obtain consent of the Attorney General under section 67 of Cap 33 (supra) to institute this suit as per paragraph 10 of the Plaintiff plaint, arguing that failure to obtain such consent made this suit incompetent. It is the Counsel for the Plaintiff views that the Counsel for the Defendants submission in relation to paragraph 10 and section 67 of the Civil Procedure Code is irrelevant, on the following grounds; One, the Plaintiff does not allege the breach of any express or constructive trust of the 1<sup>st</sup> Defendant, he does not seek the direction of this Honorable Court for the administration of any trust or the 1<sup>st</sup> Defendant; or the Plaintiff does not claim to have an interest in the trust or the 1<sup>st</sup> Defendant; Two, the Plaintiff is not seeking the judgment and decree removing any trustee of the 1<sup>st</sup> Defendant or appointing a new trustee of the 1<sup>st</sup> Defendant, vesting any property in a trustee (the 1<sup>st</sup> Defendant), directing accounts

and inquiries of the 1<sup>st</sup> defendant, nor declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, or authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged, or settling a scheme of the 1<sup>st</sup> Defendant; Three, Plaintiff is not a member of the 1<sup>st</sup> Defendant and they are distinct institutions. He submitted that the claims are well averred in paragraphs 18, 19, 20, 21, 22, 23 and 24 of the plaint and the suit does not fall within section 67 of Cap 33 (*supra*). To support his argument, he cited the case of **Gafuralli Sayad Anwar vs Mohiddin Sham sudd in** (1931) 33 BOMLR 1575 and **Bishwanath and Another vs Shri Thakur Radhaballabhji & Others** (1967) AIR 1044.

Coming to the 3<sup>rd</sup> ground, the Counsel for the Plaintiff submitted that the issue whether the Plaintiff is a non-existing and thus unknown creature in law is a matter of facts and not pure point of law. He submitted that the Defendants did not deny that fact stated in paragraph 1 of the plaint that, the Plaintiff is a body corporate, they just noted. The Defendants in paragraph 2 of the amended written statement of defense have denied and further stated that the certificate of incorporation and certificate of registration (annexure "A") does not relate to the Plaintiff.

It is the Counsel for the Plaintiff contention that, this is a factual issue which requires evidence by tendering and explaining annexure "A" to the plaint in relation to the Plaintiff. That, the submissions of the learned advocates for the Defendants what they seem to suggest is that name of the Plaintiff has omitted some words which are mentioned on the certificate of incorporation. But that cannot make the Plaintiff a non-existing but may be argued as a case of insufficient description.

The Counsel for the Plaintiff submitted that the Plaintiff is THE REGISTERED TRUSTEES OF THE KITUO CHA ELIMU NA MAENDELEO MATEMANGA, (KIUMMA) TRUST FUND. They submitted that her name indicated in the certificate of incorporation (annexure "A" to the plaintiff) is The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (Matemanga Educational and Development Center) (KIUMA) Trust Fund. What is missing is the words Matemanga Educational and Development Center which is the English translation of Kituo cha Elimu na Maendeleo Matemanga. The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (KIUMMA) Trust Fund, and The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (Matemanga Educational and Development Center) (KIUMA) Trust Fund is and refers to and is the same person who is the plaintiff. In order to determine the existence of the Plaintiff paragraph 2 and the two

certificates (annexture "A" collectively) has to be read together, and the plaint has been signed by Dr. Matomora as a Trustee of the Plaintiff which fact is supported by the Administrator General through the letter Annexture "J" to the plaint which contains official information from the official records. Thus, it cannot be seriously argued that the Plaintiff is a non-existing. The advocates for the Defendants have not suggested that the Plaintiff was deregistered or its incorporation has been revoked.

It is the Counsel for the Plaintiff submission that, if the name is insufficient, or a misdescription or a misnomer the same and in the present case, is not a fatal defect. It can be corrected- by the court issuing an order of amendment under Order VI rule 17 read together with section 95 of Cap 33 (supra). According to them such amendment will not amount to substitution and would not prejudice any person, in the event the Honorable Court finds that in the circumstances of the case requires inserting "Matemanga Educational and Development Center" in the name of the Plaintiff then we pray that the order for amendment be made. He cited the case of case of **Atlas Mark Mark Group Tz. Ltd v. Kennedy Ourna Omotc**, Revision Application 17 of 2023, **Chang Quing International Investment Ltd v. Tol Gas Ltd**, Civil Application 292 of 2016, **Feruzi Mustafa and Another v. Ngibwa Farmers Association (NFA)**, Miscellaneous Land Application

16 of 2020 (unreported).

To start with the first point of preliminary objection. It is a fundamental principle that, jurisdiction is a creature of statutes neither court or a party to a dispute can confer jurisdiction to a court to adjudicate a dispute. Arguably, the jurisdiction of the High Court is provided under the Article 108(2) of the Constitution of the United republic of Tanzania (*supra*) while the subordinate court's jurisdiction is provided under the Magistrate Courts Act (*supra*). Article 108(2) of the Constitution, provides that:

***108(2) where this constitution or any other law does not expressly provide that any specific matter shall first be heard by a court specified for that purpose, then the high court shall have jurisdiction to hear every matter of such type.***

*Similarly, the high court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily deal with by a High Court provided that:*

*The provisions of this sub article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this constitution or in any other law. [emphasis added]*

Apart from Article 108 (2) quoted above, the jurisdiction of the High Court is also provided under the provision of section 7 of the Judicature and Application of Laws Act [Cap 358 Revised Edition 2019] and section 7(2) of Cap 33 (*supra*). All provisions mentioned provides for unlimited jurisdiction to the High Court.

The Counsel for the Defendants did not cite any provision of the law which expressly requires the matter at hand to be heard by another court as provided by the Article 108(2) of the Constitution (*supra*). The provision of section 13 of Cap 33 (*supra*) cited by the Counsel for the Defendants cannot ouster the jurisdiction of the high court but rather it aimed at preventing the overcrowding in the court of higher grade where a suit may be filed in a court of lowest grade, to avoid multifariousness of action and to ensure that the case involving huge amount must be heard by higher court. More importantly, the jurisdiction of the court cannot be ascertained from the reliefs sought in a plaint but within the body of the plaint, see the case of **Mage Minga v. Egid Lazaro Chingilile (administrator of the late Lazaro Chingilile)**, Land Appeal No. 71 of 2022, High Court of Tanzania at Morogoro (unreported). Therefore, this court has jurisdiction to entertain the matter at hand. The first objection is therefore overruled.

As for the second point of preliminary objection, that Dr. Matomora and his wife one Ann Matomora did not comply with the mandatory provision of section 67 of Cap 33 (*supra*) prior to the institution of the case at hand and for that reason the Counsel for the Defendants claimed that the case become incompetent. Section 67 provides that:

*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. [Emphasis added]*

Going through the Plaintiff's plaint there is no any allegation of a breach of an express or contractive trust by the Defendants which was created for public purpose of a charitable or religious nature. Furthermore, the Plaintiff and the Defendants are two distinct entity and the Plaintiff is not among the trustees of the 1<sup>st</sup> Defendant. Consequently the provision of section 67 Cap 33 (*supra*) is in applicable to the case at hand. Therefore, the second point of objection is overruled.

As to the third objection, the same is meritorious. In the plaint, the Plaintiff is named The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (KIUMMA) Trust Fund. Annexure 'A' to the plaint, which is a certificate of incorporation in other words creature of the Plaintiff reflected the Plaintiff was certified to have been incorporated as The Registered Trustees of the Kituo cha Elimu na Maendeleo Matemanga (Matemanga Education and Development (KIUMA) Trust Fund. Therefore, the argument of the Plaintiff's Counsel that the omitted portion is a mere English version, is legally unsound.

If that was true, annexure 'J' which is an official record, could reproduce it in a short form, but reproduced the entire name as reflected in the

certificate of incorporation. When the learned Counsel for Defendants, were winding up their submission on the third point they argued that the suit is incompetent, arguing the Plaintiff is a non-existing legal entity. But did not suggest the way forward. On the other hand, the Plaintiff's lawyer, proposed for issuance of an order for amendment, arguing it being not fatal. I think this is a more progressive approach, the remedy for this misnomer, is to cure by way of amendment. The provision of Order VI rule 17, Cap 33 (*supra*), provide;

*'The court may, at any stage of the proceedings allows either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties'*

The Plaintiff is ordered to amend the plaint, by confining to what has been adjudged herein above. The amended plaint to be filed within seven days from the date of delivery of this ruling. Accordingly ruled. No order for cost.



E.B LUVANDA

**JUDGE**

30/06/2023