

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

AT DAR ES SALAAM

CIVIL CASE NO. 124 OF 2022

RICHARD WAMBOGA..... PLAINTIFF

VERSUS

LANCET LABORATORIES.....1ST DEFENDANT

MANAGING DIRECTOR }

LANCET LABORATORIES.....3RD DEFENDANT

RULING

05th July & 25th August, 2023

BWEGOGGE, J.

The plaintiff herein commenced civil proceedings against the defendants herein claiming TZS 250,000,000/= as compensation for professional negligence, among others. Upon filing defence, the defendants herein advanced a notice of preliminary objections on points of law as thus:

- 1. That the suit is not maintainable against the defendant since it has been filed against a non-existing creature but implicates the defendants.*

2. *That the plaintiff has no locus to institute these proceedings because his personality is questionable as it is not clear whether the same is Richard Wambogo or David Ricardo*

The plaintiff defendants were represented by Messrs Ngusa Erasto, and John Ignas Laswai, learned advocates. The preliminary objections herein were argued by written submissions. The substance of the submissions made by counsel herein follows hereunder.

Mr. Laswai, counsel for the defendants, in substantiating the 1st preliminary objection raised herein, submitted that the suit instituted herein is incompetent and not worth any consideration by this court. The gist of the counsel's argument is that the plaintiff erroneously sued the 1st defendant as "*Lancet Laboratories*," and the 2nd defendant as "Managing Director-*Lancet Laboratories*." That the name "*Lancet Laboratories*" is the creature of the plaintiff himself which doesn't legally exist.

Further, the counsel argued that the 1st defendant is registered by the Registrar of Companies under section 15 of the Companies Act [Cap. 212 R.E. 2019] as "*Lancet Laboratories Limited*" vide the certificate of registration No. 88905 on 27th January, 2012. Based on the above account, the counsel charged that the erroneous description of the parties herein offends the provision of Order VI, rule 1(c) of the CPC [Cap. 33

R.E. 2019] which makes it mandatory for the plaintiff to describe the proper name of the defendant and provide further particulars of the same.

In the same vein, the counsel argued that section 15 (2) of the Companies Act provides that once the company is incorporated, it becomes a body corporate by the name contained in the memorandum, capable of exercising all functions of an incorporated company, which includes suing and being sued, in its own name, as per the principle in the case of **Solomon vs Solomon**. In concluding his argument, the counsel asserted that the defendants herein are non-existent, incapable of being sued; and, if this suit proceeds, the decree of this court cannot be executed on account of the plaintiff's failure to make due diligence of actual parties he ought to sue and ensure that the suit filed is the suit properly so-called.

The cases, **Geofrey Mgaya versus NBC Limited Songea Branch and 2 Others** (Land Case No. 1 of 2019) [2022] TZHC 13594 and **Jung Hwan Kim and Another vs Tanzania Presbyterian Church** (Civil Case No. 98 of 2019) [2022] TZHC 273 were cited to bring the point home.

In respect of the 2nd objection, the counsel was brief in that the plaintiff has identified himself by different names, Richard Wambogo and David Ricardo which cast doubt on his actual identity. That there is no record herein to arrive at the conclusion that the names above refer to one and

the same person. That as the plaintiff's identity is questionable, the same has no *locus* to sue. The case of **William Sulus vs Joseph Samson Wajanga**, (Civil Appeal No. 193 of 2019) [2022] TZCA 92 was cited to buttress the argument that a person who has no *locus* cannot file proceedings in court.

On the above premises, the counsel prayed this court to sustain the preliminary objections and the suit herein be dismissed with costs.

On the other hand, Mr. Erasto, counsel for the plaintiff, in countering the argument made in respect of the 1st preliminary objection contended that the purported objections advanced by defendants herein do not fit in what is termed as preliminary objection in the strict legal sense as per the principle in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** [1969] EA 696

Otherwise, the counsel argued that the 2nd paragraph in the plaint filed herein correctly refers to the 1st defendant a limited company duly incorporated under the laws of Tanzania. That, generally, the averment in the plaint filed here identifies the 1st defendant in her proper name as Lancet Laboratories Limited. The counsel opined that the authorities relied upon by the counsel for defendants to buttress his objection are distinguished from this case in that, in the former case the plaintiff did

sue the branch, or subbranch, not the main company contrary to the scenario in this case.

And, in respect of the 2nd objection, the counsel briefly responded that the objection is premised on the facts requiring evidence not on point of law, hence cannot be termed as a preliminary objection in law in the strict legal sense.

On the above premises, the counsel asserted that the preliminary objections herein are misconceived, calculated to protract the trial and waste the precious judicial time of this court which should be overruled with costs.

The issue for determination is whether the preliminary objections on point of law advanced by the defendants are merited.

Primarily, this court joins hands with the counsel for the respondent in his assertion that the preliminary objections should be premised on points of law. In the case of **Attorney General vs The Board of Trustees of the Cashewnut Industry Development Trust Fund**, (Civil Appeal No. 72 of 2015) [2015] TZCA 80, the Court expounded that;

"A preliminary objection should raise a pure point of law based on ascertained facts from the pleadings or necessary implications not on facts which have not been ascertained, and even if ascertained if argued,

a preliminary objection should be capable of disposing of the case. A preliminary objection cannot also be raised if what is sought is the exercise of judicial discretion.” (Emphasis mine). See also the case of **Mukisa Biscuits vs West End Distributors Ltd** (supra).

I have scrutinized the pleadings filed in this court and annexures thereof. It is glaring on the laboratory test results record (annextures RICH 1, and RICH6) that the 1st defendant is depicted as "*Lancet Laboratories*." Presumably, the plaintiff had taken cognizance of the 1st defendant's name from these documents. Be that as it may, the error occasioned is a mere misdescription of a party. I have taken inspiration from the previous decision of this court in **Tanzania Leaf Tobacco Co. Ltd vs The District Labour Officer Kahama, on Behalf of Mohamed Cherwa**, DC Civil Appeal No. 18 of 2001 & 19 of 2001, HC Tabora, (unreported) whereas Hon. Justice Mwita, as he then was, quoting *Mulla, Code of Civil Procedure, 15th Edn* at pg 1034, held:

"Where there is a misdescription of defendant in the title of the suit, there is complete power in the court to make the necessary corrections without regard to lapse of time.

In the same vein, in the olden case of the erstwhile Eastern Court of East Africa in **JB Kohl and Others vs Bachulat Popatlal** [1964] EA 219, the

defendant was incorrectly described in the plaint (the deceased was named defendant) whereas the actual defendant was a firm bearing the name of the deceased, the Court held:

*"The magistrate was wrong in granting leave to discontinue the suit, for the case was not one in which the plaint had been issued against a non-existing person, but one of mere misnomer for which the court could allow an amendment. See also **Gaffoor vs Silntlal** [1973] EA 485.*

Likewise, in the case of **Christian Mrimi vs Coca-Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011 where the respondent was impleaded by the name "*Coca-Cola Kwanza Bottlers Ltd.*," instead of "*Coca-Cola Kwanza Ltd.*," the Apex Court was of the opinion that the confusion of the name of the respondent was not a fatal irregularity and it was curable by deleting the word "*Bottlers.*" The Court allowed the applicant to correct the name of the Respondent from "*Coca-Cola Kwanza Bottlers Ltd.*," to "*Coca-Cola Kwanza Ltd.*"

In this case, it cannot be alleged that the defendants are non-existent, but misnomers in the description of the 1st defendant. The error is not fatal in my opinion, but one of misdescription of a party. It can be amended by mere insertion of the missing word "*Limited*" at the end of

the defendants' names, vide Order VI, rule 17 of the CPC. I am on all fours with the counsel for the plaintiff in that the cases cited by the defendant's counsel namely, **Geofrey Mgaya versus NBC Limited Songea Branch and 2 Others** (supra) and **Jung Hwan Kim and Another vs Tanzania Presbyterian Church** (supra) are distinguishable from this case. In the former case, the court found that the plaintiff sued "*NBC Limited Songea Branch*" instead of "*NBC Limited*" the proper name registered under the Companies Act. Hence, the court reasoned that as the plaintiff sued the branch of "*NBC Limited*" which is not a legal person and, or non-existent person, no executable decree would be made by the court. And, in the latter case, where the religious organization was erroneously sued in the name of "*Tanzania Presbyterian Church*" the court held that the provision of section 5 of the Trustee Incorporation Act [Cap. 318 R.E. 2002] requires that the name of a religious institution shall include the words "Registered Trustees." That once the religious institution is issued with a certificate of incorporation per section 2 of the Act, can sue or be sued in its incorporation name only. I need not reiterate that I am of the opinion that the scenarios stated in the above cases are not obtained in this case. Be that as it may, the above decisions are the decisions of this court which, based on the premises above, I am not bound to follow.

The 2nd objection, need not detain this court. The plaintiff averred in paragraph 3.11 of the plaint that he disguised himself as David Ricardo to clear his doubt in respect of the laboratory tests he took at the defendants' institution. On any premise, based on the pleading filed herein, the defendants have no ground to lament that they are at a loss as to the actual plaintiff in this case. The 2nd limb of the objection is patently misconceived.

In view of the foregoing, I find the purported preliminary objections on points of law advanced herein by the defendants bereft of merit. I hereby overrule both preliminary objections with costs.

I so order.

DATED at DAR ES SALAAM this 25th day of August, 2023.



O. F. BWEGOGGE

JUDGE