**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 340 OF 2023**

**CRDB BANK PLC (formerly known as**

**CRDB (1996) Limited) ..................................................APPLICANT**

**VERSUS**

**GEORGE MPELI KILINDU as an Administrator**

**of GEORGE MATHEW KILINDU............................1ST RESPONDENT**

**ANNE SUBILAGA KILINDU as an Administratrix**

**of GEORGE MATHEW KILINDU....................................2ND RESPONDENT**

[Application for leave to change or substitute its old name (CRDB 1996 Limited) in subsequent records of the court with its new name (CRDB Bank Public Limited Company) in respect of documents necessary for the institution of an appeal against Civil Case No. 269 of 1996]

**RULING**

02nd &20th November,2023

**CHUMA, J:**

Pursuant to sections 95 and 97 of the Civil Procedure Code, Cap. 30 R.E 2019, the applicant is moving the Court to grant leave for change or substitute the name in the proceedings, judgment, decree, and other necessary documents in Civil Case No. 269 of 1996. The applicant is also seeking the costs of the application and any other reliefs the Court may deem fit to grant.

The facts giving rise to the application, albeit briefly, go thus: The deceased George Mathew Kilindu whose estate is administered by the respondents, successfully sued the CRDB (1996) Limited in Civil Case No. 221 of 1994 whereas a default judgment was entered for the respondents that the sale of the house at Plot No. 500 Tosamaganga Road, situated at Masaki, Dar es Salaam was unlawful. Subsequently, upon being informed that CRDB (1996) Limited Board resolved that the applicant was no longer interested in selling the suit property, the respondents instituted another suit, Civil Case No. 269 of 1996, which again ended in their favor.

Previously, during the pendency of that subsequent suit, CRDB (1996) Limited went through a corporate transition where on 29th July 1999 it changed to CRDB Bank Limited. Some few years later the said CRDB Bank Limited changed its corporate name to CRDB Bank Public Company Limited who turned out to be the present applicant. However, such changes were neither communicated to the Court nor featured in the Court proceedings.

The outcome in Civil Case No. 269 of 1996 referred to above aggrieved the applicant. As a result, on 23rd July 2017, the counsel for the applicant lodged a notice of appeal and applied for certified copies of the proceedings in the name of CRDB Bank PLC. Similarly, the same counsel filed Civil Appeal

No. 110 of 2017 before the Court of Appeal in the name of CRDB Bank PLC. Due to the names of the applicants on appeal being different from the previous ones, the respondent raised a preliminary objection on the ground that the notice of appeal was lodged by the wrong party. The Court of Appeal sustained the preliminary objection and struck out the appeal.

Such sequence of events prompted the applicant to prefer the present application which is supported by an affidavit sworn by Prosper Mwangamila, Principal Officer of the applicant. The respondents have resisted the application vide a joint counter affidavit. In essence, they have contended that the applicant knew all along from 1999 on the changes but failed to disclose it to the Court. It is also their argument that the applicant is negligently pursuing the alleged interest at their expense thus they are very much prejudiced as there has to be an end of litigation.

In addition, on 18th July 2023, the respondents lodged a notice of preliminary objection raising the following grounds: -

1. *That the Court does not have jurisdiction to entertain the present application and substitute any party after the delivery of the judgment.*
2. *That the present application is hopelessly time-barred.*
3. *That the Court has no jurisdiction for being improperly moved.*

4. *That the present application is misconceived and bad for being a review in disguise.*

When the application came for hearing on 2nd November 2023, the applicant had the service of Mr. Ndurumah Keya Majembe, a learned advocate. The respondents on the other hand were represented by Mr. Frateline Munare, learned counsel. At the outset, with the view of /aiming to expedite the disposal of the matter, I ordered parties to address their arguments on the preliminary objection as well as the merits of the application. Neither of the parties had an objection to the course taken.

Mr. Munare commenced his submission with the 1st and 3rd grounds of objection by challenging the jurisdiction of the Court to entertain the application to amend the name of the party in a matter which it had substantially concluded. According to him such powers under section 95 and 97 of the CPC is only reserved in the course of trial therefore since the substantive matter had already been determined, the Court becomes *functus officio*. In support of his arguments, Mr. Munare cited the cases of **CRDB Bank PLC v. George Mateni Katindu**, Civil Appeal No. 110 of 2017, and **Mohamed Enterprise Nasser v. Masoud Mohamed Nasser**, Civil

Application No. 33 of 2012 on pages 17 and 18. He also referred the Court to the Code of Civil Procedure by Mulla on page 644.

Regarding the 2nd and 4th grounds of objection, Mr. Munare submitted that the application is a review in disguise which in essence is time-barred. He amplified that the issue of changing names had to come by way of review because the applicant was raising a new fact or an error in the face of the record.

In turn, Mr. Majembe the applicant had an opportunity of responding to Mr. Munare's submission. Starting with jurisdiction, the learned counsel whilst relying on **Pacific Diagnostics Limited v. Burafex Limited formerly known as AMETAA Limited**, Civil Review no. 4 of 2020 and section 97 of the CPC, submitted that it is only the trial court vested with power to determine application to change names. He distinguished the circumstances of this application with the findings in CRDB's case that in the latter the Court of Appeal insisted that there was no order allowing changes of names by the trial court. Mr. Majembe added that the Court is not *functus officio* because the Court is not called upon to contradict its judgment rather the applicant is moving the Court to determine the application on change of names which has never been attended.

Regarding the argument that the application is a review in disguise, Mr. Majembe replied that the change of names cannot be done by way of review because there is no error on the face of the record and the alleged new fact neither goes to the root of the matter nor affects the right of the parties.

I have carefully followed and considered the rival submissions in so far as the preliminary objection is concerned. The common practice is settled that once a preliminary objection is raised questioning the competence of any proceedings before a court of law, the court is enjoined to hear the parties on the objection and determine the point before it deals with the other substantive aspects of the suit or proceedings. As such, should I uphold the preliminary objection, that will mark the end of the instant application. However, if the said preliminary objection fails, then I will proceed to determine the application on its merits. This course of action has been followed by the Court of Appeal in its several decisions, for instance the cases of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser,** Civil Application 33 of 2012 [2012] TZCA 67 (23 August 2012, TanzLII) and **KCB Bank Tanzania Limited v. Exim Bank Tanzania Limited &**

**Another,** Civil Application 331 of 2018 [2022] TZCA 480 (26 July 2022 TanzLII).

The main issue standing for my determination centers on the jurisdiction of this Court. Section 97 of the CPC in which the application is predicated as the enabling section vests general powers to the Court to amend any defect or error in the proceeding in a suit and such amendments must only be made to determine the real issue in question raised by or depending on such proceeding. Such powers of the Court may be exercised at any time. For easy reference, section 97 of the CPC is couched in the following wording: -

> **The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.**

The scope and application of the above-quoted provision are twofold. There must be a defect or error in the proceedings and the amendment of such an error must be made to determine a real question at issue in the proceeding. Further incidents capable of moving the court to exercise its powers under section 97 were mentioned in **Mulla, the Code of Civil**

**Procedure, 18th Edition** when the Author was interpreting section 153 of the Indian Civil Procedure Code which is in *pari materia* to section 97 of the CPC. *One*, the section is applicable in a case where an incorrect description of a property in a mortgage deed was repeated in the plaint and proceedings. *Two*, the omission or incorrect description of the plaintiff in a plaint may also be served under the provision. *Three*, if an appeal is presented against a person, who is dead at the date of the presentation, the court may permit the appellant to amend the cause title by filing an appropriate appeal. *Fourth*, the power to amend the defect or error is vested in both, the trial court as well as the Appellate Court.

Considering the above instances and the import of section 97, it is my firm opinion that this Court has jurisdiction to permit the amendment of any defect or error in the proceeding at any time when it thinks fit. To be precise, the Court has powers to substitute the names of the applicant as prayed for determining the real issue between the parties in the instant application. The argument by Mr. Munare that the Court has become *functus officio* has no merit. The law is settled that, a court becomes *funtus officio* over a matter if it has already heard and made a final determination over the matter concerned. In **Kamundi v. R,** (1973) E.A 540, the erstwhile Court of Appeal

for Eastern Africa held that the court becomes *functus officio* it disposes of a case by a verdict of not guilty or by-passing sentence or making some orders finally disposing of the case. Later in the case of **Yusuf Ali Yusuf @Shehe @ Mpemba and others v. Republic**, Civil Appeal No. 81 of 2019 (unreported), the Court of Appeal held that:

> "... we are settled that, the purpose of the principle of *functus officio* is to provide finality. That, once a matter is finally concluded by the court, that court cannot re-open or alter its decision and any challenge to its decision must be taken to a higher court by way of appeal or revision".

For that legal position, the doctrine of *functus officio* is inapplicable since the present application has never been heard and decided by this Court. Mr. Majembe, in my opinion, was correct that the Court is not called upon to contradict its findings in Civil Case No. 269 of 1996 over ownership of Plot No. 389 Block J Mbezi Area. Rather the applicant is moving the Court to determine the application regarding change of names which has never been attended. The cases of **CRDB Bank PLC v. George Mateni Katindu**, and **Mohamed Enterprise Nasser v. Masoud Mohamed Nasser** which were cited to me by Mr. Munari have no bearing from the facts of this

application as there were no orders allowing changes of names. In the former case, the Court of Appeal struck out the appeal on the ground that the notice of appeal was having a stranger party. As for the later case, the issue for consideration concerning *functus officio* where as the Court of Appeal held that a subsequent judge is not competent to reopen a matter which has already been conclusively determined by the predecessor judge.

Again, the proposition made by Mr. Munare that the issue of changing names needed to be preferred by way of review because it is a new fact or an error in the face of the record, is unsupported. The application for review under section 78 and Order XLII of the CPC is intended to correct the mistake or error apparent on the face of the record in the judgment/ruling and decree/order upon discovery of new matter or evidence. It is through a review that the court has the power to reconsider some facts afresh and to make such orders as it thinks fit. That is not the case in applications for the amendment under section 97 of the CPC aims at bringing the proceedings in harmony.

That said and done, the preliminary objection lacks merit and the same is hereby overruled.

I shall now proceed with the merit of the application. The affidavit in support of the application gives an account of what had befallen before and after the change of the applicant's corporate name. It is averred that on 29th July, 1999 the name of the applicant changed from CRDB (1996) Limited to CRDB Bank Limited but such changes were not brought to the attention of this Court in Civil Case No. 269 of 1996. In clarifying what is asserted in the affidavit, Mr. Majembe argued that the applicant had no duty to disclose the changes to the respondent but to the Court. He added that the lodgment of this application was meant to seek justice.

Not surprisingly, Mr. Munare resisted the application. Reiterating the averments in paragraphs 6 and 9 of the counter affidavit, the learned counsel blamed the applicant for not disclosing to the Court the corporate name changes that occurred in 1999, 2007, and 2016. The learned counsel replied further that the unexplained delay in disclosing the changes prejudiced the respondent who was no longer alive. Despite conceding that the change of names is central to the suit, Mr. Munare suggested that the application ought to have been brought by way of revision. In the end, he prayed for dismissal of the application as the applicant failed to demonstrate good cause.

Mr. Majembe's rejoinder was that failure to disclose the changes was not fatal because the application may be filed at any time. He argued further that despite the changes, the applicant's status in terms of obligation, and rights are still the same. It is also Mr. Majembe's argument that various essential steps to prosecute the appeal to the Court of Appeal have been halted because of this application. Regarding good cause, the learned counsel submitted the intention of the applicant to challenge the impugned judgment to the Court of Appeal suffices.

Having considered the chamber summons, affidavits, and oral submissions, the question is whether the applicant has made out her case deserving an order to amend the proceedings. Section 97 of the CPC requires the applicant to demonstrate defects and errors in any proceeding which are necessary for the purpose of determining the real question at issue between the parties to the suit. Both parties are not in dispute that the proceedings, judgment, and decree Civil Case No. 269 of 1996 have defects for having an incorrect description of the applicant. However, they appear to be parting ways on the propriety of the application seeking rectification of the error. The evidence in paragraphs 2, 3, 4, and 6 of the affidavit sufficiently establishes that the applicant changed its corporate name. With that, I agree

with Mr. Majembe's submission that if those changes will not be effected in the proceedings, obviously the real question which is still at issue between parties will not be determined. Saying the least, the applicant will not be able to take various essential steps to pursue her intended appeal to the Court of Appeal. For instance, lodging a notice of intention to appeal or making any ancillary application depends upon the outcome of this application.

More so, without changing the names in the proceedings, to my opinion, will not only affect the applicant but there is also a possibility that the execution of the High Court decree may encounter a hiccup because to date the judgment debtor is not in existence.

There was an argument from Mr. Munare that the applicant failed to justify her delay in disclosing the change of names. Indeed, the period from 1999 to 2016 was not accounted for by the applicant. However, I agree with Mr. Majembe's proposition that applications of this nature have no time limitation. The court may be moved at any time to amend any defect or error in any proceeding in a suit upon satisfaction that there is a real question at issue between the parties to the suit. I also find that the applicant's duty to the Court to disclose the corporate name changes cannot prevail over the requirement of law.

Lastly, the suggestion by Mr. Munare that the application should have been preferred by way of revision has no basis. Gleaned from the chamber summons as well as affidavit in support of the application, it is clear that the applicant is not challenging the jurisdiction of the Court which is a prerequisite condition for an application for revision. The applicant is only seeking to amend the defect apparent in the proceedings, judgment, and decree, the prayer which falls within the ambit of the Court's jurisdiction pursuant to sections 95 and 97 of the CPC. In any case, there is no indication that the respondent will be prejudiced in the event the application is granted.

In the upshot, I grant the application and allow the applicant to substitute the name in the proceedings, judgment, decree, and other necessary documents in Civil Case No. 269 of 1996. Each party shall bear its own costs.

**W.M. CHUMA**

**JUDGE**

**20/11/2023**