

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

LAND CASE NO. 09 OF 2023

GEOFREY MGAYAPLAINTIFF

VERSUS

**NATIONAL BANK OF COMMERCE (1997)
LIMITED.....1st DEFENDANT**

GORAD BOIWANG'OMBE MTEWA2nd DEFENDANT

GDAU ACTION MART3rd DEFENDANT

RULING

Date of last Order: 09/04/2024

Date of Ruling: 30/04/2024

LALTAIKA, J.

Upon receipt of a copy of the pleadings of the suit at hand, Counsel for the first defendant herein **NATIONAL BANK OF COMMERCE (1997) LIMITED** raised a preliminary objection. When the suit was called for mention on 5th March 2024, the plaintiff appeared through Mr. Frank Mpiluka holding brief for Mr. Lugomela. **Ms. Ngolo Balele**, learned Advocate appeared for the first defendant while also holding brief for Ms. **Tunsume**

Angumbwike, Counsel for the 2nd and 3rd defendants. After a brief discussion related to proper representation, parties opted to dispose of the preliminary objection by written submissions.

The following schedule was ordered accordingly: (i) First defendant's filing of the written submission on the PO: 19/3/2024 (ii) Plaintiff's reply to the written submission: 2/4/2024. (iii) First Defendant's Rejoinder (if any) 9/4/2024. (iv) Mention for necessary orders to schedule the date of Ruling 9/4/2024. I hereby register my commendation to the learned counsel for their attempt to comply with the court order save for a minor departure. The next part of this ruling is a summary of the rival submissions.

Ms. Balele, ably representing the first defendant, embarked on a comprehensive elucidation of the prerequisites for a preliminary objection to hold merit, underlining the necessity for it to constitute a pure point of law grounded either on pleaded facts or clear implications inferred from the pleadings. She invoked the authoritative ruling of **Mukisa Biscuit Company Ltd. v. West End Distributors Ltd.** [1969] E.A 696 to underscore the criteria delineated therein, particularly emphasizing the pivotal role of issues such as time and jurisdiction in determining the viability of a preliminary objection.

Expounding further, Ms. Balele meticulously delved into the legal doctrine that upon incorporation, a company assumes a distinct legal persona, thereby acquiring the capacity to litigate in its own right. She accentuated the imperative of accurately identifying the entity in legal proceedings, buttressing her stance with a series of jurisprudential references. Notably, she referenced the Companies Act [No. 12 of 2002], highlighting Section 15(2) and Section 16 as pivotal provisions governing the legal personality of incorporated entities.

Furthermore, Ms. Balele cited the persuasive case of **Kanisa La Anglikana Ujiji vs. Abel S/O Samson Heguye** Labour Revision 5 of 2019 [2019] High Court of Tanzania at Kigoma, which emphatically affirmed the legal principle that upon issuance of the certificate of incorporation, a religious organization or association is deemed to have acquired legal personality and may sue or be sued solely in its incorporated name.

More importantly, Ms. Balele underscored the significance of accurately naming parties in legal proceedings, positing that failure to do so renders the proceedings incompetent. She cited the case of **Christina Ivirinii vs. Coca-Cola Kwanza Bottlers Ltd** Civil Appeal 112 of 2008, Court of Appeal of Tanzania sitting at Dar es Salaam, which underscored the indispensability

of companies being sued under their correctly registered names, as any deviation from this requirement constitutes a fundamental procedural flaw.

In addition, Ms. Balele scrutinized the implications of instituting legal action against a non-existent entity, contending that such actions have profound ramifications for the execution and enforcement of judgments. She bolstered her argument with references to the case **of Change Tanzania Limited vs. Registrar Business Registration & Licensing Agency** Civil Appeal No. 3 of 2021 [2023], which elucidated the detrimental effects of suing a non-existent entity on the enforceability of court orders.

Further reinforcing her position, Ms. Balele invoked the legal maxim that capacity is a fundamental aspect of litigation, which can be raised at any stage of proceedings. She referenced the case of **Change Tanzania Limited** (Supra), where the Court of Appeal emphasized the crucial nature of capacity issues in legal proceedings, advocating for their resolution at the earliest opportunity to ensure a fair and just adjudication.

In her summation, Ms. Balele implored the court to strike out the suit against the first defendant, contending that it had been filed against a non-existent entity. She underscored the paramount importance of correctly

identifying parties in legal proceedings and requested costs for the first defendant due to the fundamental error in the case.

Mr. Lugomela, representing the Plaintiff, stood firm in contesting the preliminary objection. He meticulously outlined the procedural history, highlighting the Plaintiff's filing of Land Case Number 9 of 2023 against the 1st Defendant, National Bank of Commerce (1997) Limited, and the subsequent challenge to the Defendant's existence.

Expanding on the timeline, Mr. Lugomela noted that on April 3rd, 2023, the Plaintiff initiated the lawsuit, only to face the preliminary objection regarding the Defendant's legal status. Subsequently, on March 18th, 2024, Ms. Ngolo submitted comprehensive written arguments in support of the objection, advocating for the dismissal of the case with costs.

Drawing on legal precedent, Mr. Lugomela acknowledged the significance of the **Mukisa Biscuits Manufacturing Company Limited vs. Westend Distributors Ltd** (supra) which elucidates the criteria for a valid preliminary objection. While he concurred with Ms. Ngolo's invocation of this case, he refuted her assertion regarding the non-existence of the

Defendant, emphasizing the absence of concrete evidence, such as a current certificate of incorporation, to support such a claim.

Furthermore, Mr. Lugomela meticulously dissected the provisions cited from the **Companies Act No. 12 of 2002**, underscoring their applicability to the issue at hand. He argued that while these provisions affirm the legal capacity of companies to sue and be sued, they do not directly address the specific question of the Defendant's existence.

In a detailed rebuttal, Mr. Lugomela challenged the relevance of the cases cited by Ms. Balele, tirelessly parsing through each citation, and highlighting their applicability. He contended that many of these cases were appellate decisions and therefore not directly analogous to the present situation. Instead, he spotlighted three cases that he deemed pertinent, where courts either admitted the non-existence of parties or permitted amendments to pleadings rather than striking out the cases. Through this comparative analysis, Mr. Lugomela underscored the need for a case-specific approach and asserted the distinctiveness of the present case from those cited by Ms. Balele.

In a forceful conclusion, Mr. Lugomela urged the court to exercise prudence in adjudicating the matter, imploring it to overrule the preliminary objection. He characterized the objection as lacking in substance and motivated by a desire to impede the pursuit of justice for the Plaintiff. As such, he urged the court to proceed with determining the case on its merits, ensuring that the interests of justice prevail.

Ms. Balele, in her rejoinder submission, emphasized the importance of reiterating the points made in her initial submission and using the rejoinder to further solidify their arguments. Firstly, Ms. Balele clarified the name of the advocate who filed the written submission and preliminary objection as **Dickson Tugara**, not **Amon Tugara**, as stated by the Plaintiff. She stressed the significance of correctly naming parties in civil litigation, particularly when suing corporate entities, as misnaming renders the suit incompetent.

Regarding the essence of preliminary objections, Ms. Balele emphasized their purpose in addressing legal irregularities before proceeding to the substantive issues of a case. Once again, she cited the **Mukisa Biscuits** case, which underscored the assumption of truthfulness of the plaintiff's pleaded facts. She reiterated that the Plaintiff's pleadings clearly

indicated the name of the 1st Defendant as **NATIONAL BANK OF COMMERCE LIMITED, not NATIONAL BANK OF COMMERCE (1997) LIMITED** as pleaded by the Plaintiff.

Ms. Balele highlighted the legal provisions under the Companies Act, Cap 212, particularly Section 15(2), which stipulates that the name listed on the certificate of incorporation is the sole name that can be used for legal purposes. She argued that by amending its name, a corporate **entity forfeits legal personality under the previous name**, emphasizing the importance of correctly identifying parties in litigation. Referring to relevant case law, such as **Christina Mrimi vs. Cocacola Kwanza Bottlers Ltd** Civil Appeal 112 of 2008 and **Geoffrey Mgaya versus NBC Limited Songea Branch** & Others Land Case 2 of 2019, Ms. Balele underscored the court's insistence on correct identification of parties and the legal implications of misnaming.

In conclusion, Ms. Balele reiterated the irreparable defect in the Plaintiff's case due to suing a non-existent entity and urged the court to strike out the matter with costs to the 1st Defendant. She emphasized that hearing the case further would be equivalent to making a decision against no one, as per the legal precedents cited.

I have dispassionately considered the rival submissions. I choose to cut a long story short by focusing on the central issue raised namely, the purported non-existence of the 1st Defendant, **National Bank of Commerce (1997) Limited**. For many years courts in our jurisdiction strictly held the view advocated by Ms. Balele. Any slight change of name especially that of a corporate entity was considered birthing of a new error akin to the scriptural promise: the past is gone, be hold a new creature. (Inspired by 2Kor 5:17 "Yakale yamepita tazama amekuwa kiumbe kipya")

Needless to say, that unscrupulous companies would use the above loophole in the law to put a preliminary objection whenever they are sued. They would, if they were kind enough or had some more important stake to protect, as expected, approach their adversary, and negotiate an out of court settlement.

As a matter of fact, outside court corridors, the purported old designations such as a name without some newly added prefix, enjoy commercial value and are considered a part of the brand and goodwill of the "new" entity. As will be clearer soon, this situation is going to change for the better. Liabilities will follow the "new creature" to as far as legal pragmatism can go.

In the light of the above, the Court of Appeal of Tanzania (CAT), speaking through His Lordship **Ismail, JA** (with concurrence of **Levira and Galeba, JJA**) signaled this new dawn our country, in the groundbreaking decision of the apex Court in **ALLIANCE LIFE ASSURANCE LIMITED vs. ELIHURUMA NGOWI** CIVIL APPEAL NO. 487 OF 2021 thus:

*"Any fundamental change of the name of a party has the effect of changing the identity of a party...If the change is in the form of a misnomer that is done inadvertently, the settled position is that the court enjoys the discretion of choosing to focus on the rights and substance of the parties and their case, rather than punitively truncating the proceedings through striking out of the cases. **In arriving at such conclusion, the question which will be posed by the court is whether a reasonable defendant in looking at the document as a whole, and in all the circumstances, would conclude that they were, in fact, the defendant.** If the answer is yes, courts are allowed to be tolerant and, in fitting situations, to order amendment of the pleadings, especially where the error involves the name of a corporate personality of the person sued. The condition precedent, however, is that the corporate personality of the person sued should not be in doubt.."*

While Counsel for the first Defendant contends that the Plaintiff has sued a non-existing entity, this is not the case that is why she was instructed to appear in the first place. Furthermore, the argument put forth by Ms. Balele regarding the incompetence of the suit due to misnaming overlooks the fundamental principle that legal proceedings should not be derailed by technicalities, especially when the substantive issues at hand warrant adjudication. I entertain no iota of doubt that a reasonable defendant, looking at the pleadings as a whole, would conclude that is indeed the defendant who has been impleaded.

At this juncture I would like to emphasize that the above decision of the Highest Court of our land, which is binding to this Court, was handed down only a fortnight ago, **that is to say the 9th day of April 2024** to be exact. It is my hope that future decisions will widen the horizon to some even greater heights.

In the upshot, light of the preliminary objection lacks merit and warrants to be overruled. The suit should proceed on its merits, where the substantive issues raised by the parties can be fully examined and adjudicated upon.

It is so ordered.



Court

A handwritten signature in blue ink, appearing to read 'E.I. Laltaika'.

**E.I. LALTAIKA
JUDGE
30.04.2024**

Ruling delivered this 30th day of April 2024 in the presence of **Elias Lugomela for the plaintiff**, Noah Utamwa h/b for Tunsume Angumbwike for the Second Defendant, Mr. Fredrick Mгимwa, Adv. h/b for Ngolo Balele Counsel for the first defendant.



A handwritten signature in blue ink, appearing to read 'E.I. Laltaika'.

**E.I. LALTAIKA
JUDGE
30.04.2024**