

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

CIVIL CASE NO. 9 OF 2023

THE REGISTERED TRUSTEES OF THE EVANGELICAL
LUTHERAN CHURCH OF TANZANIA PLAINTIFF

VERSUS

MBARAKA NDELELE1ST DEFENDANT
JOYCE HONGOLI2ND DEFENDANT
HELENA MOSES.....3RD DEFENDANT
EMMANUEL PYUZA.....4TH DEFENDANT
BENARD CHIBINDA.....5TH DEFENDANT
PERIAS SIMTALA.....6TH DEFENDANT
JAPHET MGURUTA.....7TH DEFENDANT
ANGELA NDOMBA.....8TH DEFENDANT
SYMPHORIAN MUTAYOBA.....9TH DEFENDANT
FLORA CHUMA.....10TH DEFENDANT
DAVID DUNIA.....11TH DEFENDANT
SANJO NGELYAMA.....12TH DEFENDANT

JUDGMENT



22/04/2024 & 29/05/2024

KINYAKA, J:

The Registered Trustees of the Evangelical Lutheran Church in Tanzania herein after "the plaintiff" or "the Registered Trustees", interchangeably, preferred the present suit as a result of what she alleged to be the defendants' illegal occupation of the houses hereinafter "the school's residential houses" within the Evangelical Lutheran Church in Tanzania (ELCT) Lutheran Junior Seminary Morogoro situated at Morogoro, which has denied her the right to utilize the same.

A brief factual background to the instant suit as gathered from the plaintiff's plaint is that the defendants were employees of the Lutheran Junior Seminary Morogoro, herein after "the School" at different periods up to 31st July 2021 when they were retrenched by the School. By virtue of their employment, the defendants were provided with residential houses located at the School's premises subject to terms and conditions provided for in their contracts of employment. Upon retrenching the employees, the plaintiff's efforts to have the defendants vacate the School's residential premises proved futile which prompted institution of the present suit.



The plaintiff prayed for judgment and decree against the defendants jointly and severally for, a declaration that the 1st to 12th defendants are illegally staying in the houses within Junior Seminary Morogoro since July 2021 while they are no longer staffs or employees of Junior Seminary Morogoro; a declaration that the illegal acts by the 1st to the 12th defendants of using the houses and facilities within ELCT Junior Seminary Morogoro which are owned by the plaintiff herein not only cause harm to the plaintiff but also they threatened the peace of the community; a declaration that the acts of the defendant's occupation of the houses and its surrounding environment causes hardship to the plaintiff in accessing and enjoying her right of using the said houses and the surrounding or facilities to the extent they create unpredictability to the plaintiff herein and to the public at large; an order to compel the defendants to vacate, surrender and handover the houses to the plaintiff within 14 days from the order of this honourable court; an order against the defendants to pay the plaintiff special damages to the tune of Tanzanian Shillings two hundred thirty million, six hundred forty thousand (TZS 230,640,000) whereas each of the defendant has to pay the plaintiff herein a total of 19,220,000; an order against all the defendants to pay the plaintiff general damages to be assessed by the Court; punitive damages to

be assessed by the Court for the loss of income; interest on the decretal amount at the rate of 7% per annum from the date of judgment to the date of final payment and satisfaction of decree in full; costs of the suit; and any other relief(s) that this honourable court may deem fit and just to grant.

On their joint written statement of defence, the defendants vehemently disputed the plaintiff's claims averring that they are legally staying in the School's residential houses, and therefore prayed for the claims to be dismissed with costs.

It is worth mentioning that the 8th Defendant, Angela Ndomba did not enter appearance despite being served with the plaint and summons of the Court. Hearing of the suit proceeded *ex parte* against her.

At the hearing of the suit, whilst the plaintiff was at different stages under the legal representation of Mr. Benjamin Jonas, Mr. Ignas Punge and Mr. Daudi Mkilya, all learned Advocates, the defendants appeared in persons fending for themselves.

On 20th December 2023 on the final pre-trial conference, the following issues were framed and agreed upon by the parties herein and recorded for determination of the Court: -



- (i) Whether the Defendants are illegally occupying or staying in the Plaintiff's houses from July 2021 onwards;
- (ii) Whether the Plaintiff has suffered damages or loss arising from the Defendants' illegal occupation of the houses in the Plaintiff's houses; and
- (iii) What reliefs are the parties entitled.

In substantiating her claims against the defendants, the plaintiff fronted two witnesses namely, Robert Manase Mkwavano an Accountant at Lutheran Junior Seminary Morogoro, and Emmanuel Landey, the Director of Morogoro Lutheran Junior Seminary.

Testifying as PW1, Mr. Robert Manase Mkwavano averred that the defendants were employed at the Lutheran Junior Seminary Morogoro but were terminated in July 2021 because of operational challenges that faced the School. To fortify his assertion, he submitted the contracts of employment for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, and 12th defendants which were admitted by the Court as **Exhibits PE1, PE2, PE3, PE4, PE5, PE6, PE7, PE9, and PE12**, respectively.

He testified further that all the defendants were living in the houses upon being employed by the School where they were deducted 5% of their salaries

in order to pay rent. He proceeded that the Defendants' employments were terminated in July 2021 and they were paid their respective terminal benefits as evidenced by payment vouchers which were tendered and admitted by the Court as **Exhibits PE1D, PE2D, PE3D, PE4D, PE5D, PE6D, PE7D, PE9D, P10D, P11D** and **PE12D**.

He said, even though the defendants were paid as such, the plaintiff's houses are still in occupation of the defendants occasioning loss of TZS 230,640,000 to the School for the defendants' occupation of the said houses. He finally prayed for the Court to order the Defendants to vacate the houses and pay the rent arrears and costs of the suit.

On cross examination, PW1 insisted that the defendants were paid their terminal benefits in July 2021 and therefore according to him, the payment meant that their employment were terminated although the defendants refused to receive both, the termination letters and the certificates of service. He stated further that, he was neither aware that there was a dispute that arose after the payment of the defendants' terminal benefits nor any meeting conducted in Dodoma between the plaintiff and the Labour Commissioner regarding the same.

On being re-examined, PW1 explained that the payment of terminal benefits was for the purpose of retrenching the employees. He told the Court that there was no separate contract for provision of the School's residential houses to the employees as the employment contracts covered the same by providing right to housing facilities to the employees.

Emmanuel Landey featuring as PW2 testified that the defendants are the former employees of the School whose employments were suspended but they are still occupying School's residential houses which are supposed to be used by the current employees of the School. He said, the defendants have been paid their terminal benefits and given the notice to vacate the houses but all efforts have been in vain. In the end, he prayed to the Court to order the defendants to vacate the School's houses as they are needed for School's use as well as for safety of students who are accommodated within the School's compound. He further prayed the Court to order the defendants to pay for losses that they have occasioned to the plaintiff.

On being cross examined, he explained that the employer of the employees of the School, including the defendants, is the Secretary of Evangelical Lutheran Church of Tanzania. He insisted that the defendants were served with both, the retrenchment letters and a notice to vacate the houses

although they have not been paid all their claims against Morogoro Lutheran Junior Seminary. He however pressed that the plaintiff has the right to sue the defendants for their continuing occupation of the houses. He went on stating that it is true that there are directives of the Labour Commissioner that the employees should not vacate the houses until their claims are paid but the order was not complied with as the church has objected to the said order in court.

On being re-examined, PW2 told the Court that the plaintiff's claim are the rental costs that the defendants have been occupying the houses from 2021 up to date. That marked the end of the plaintiff's case.

On the other side, the defence side fielded a total of 11 witnesses being the defendants themselves.

In support of the defence case, DW1, Sanjo Ngelyama testified that he is living in the house owned by Lutheran Junior Seminary Morogoro by virtue of Clause 11(a) of his contract of employment (Exhibit PE 12) which was yet to be terminated. He however told the court that on 1st July 2021, together with some employees in the present dispute they found themselves exempted from their normal work duties, the act which was proceeded with

the letter from the School administration requesting them to be patient while the employer was preparing to retrench the workers. The letter was admitted in evidence as **Exhibit D1A**. He said, aggrieved, they preferred their complaint to the office of the Labour Commissioner who wrote to the General Secretary of Evangelical Lutheran Church in Tanzania (ELCT) directing the employer to pay all debts due to the employees and follow the procedure of retrenchment in accordance with the law. To support his testimony, he tendered the letter from the Labour Commissioner dated 30/07/2021 and the same was admitted in evidence as **Exhibit D2**.

He testified further that, the plaintiff did not comply with the directives as he neither issued the letters of retrenchment, nor pay the employees' claims, hence on 1st September 2021, another letter admitted by the Court as **Exhibit D3** was issued by the Labour Commissioner requiring the Secretary General of the Evangelical Lutheran Church in Tanzania to refer to the directives in the previous letter to pay the employees' claim which was also not complied with by the plaintiff. That the omission, prompted the issuance of compliance order compelling the plaintiff to pay arrears of all claims to the employees including the defendants. The compliance order was admitted in evidence as **Exhibit D4**.

DW1 informed the Court that upon receipt of the compliance order, the employer filed objection to the compliance order to the Labour Commissioner where the office of the Labour Commissioner wrote another compliance order dated 25th March 2022 to the employer which was admitted in evidence as **Exhibit D5**. That the plaintiff did not comply with the orders and instead, she changed the signing mode from manual to electronic which left out the defendants. He stated that the defendants informed the Labour Officer in Morogoro who wrote two letters to the employer directing him to explain the reasons thereof dated 14/02/2022 and 07/09/2022. To fortify his testimony, he tendered the letters which were admitted in evidence as **Exhibit D6A** and **D6B**.

Winding up his testimony, he told the Court that as there is no retrenchment letter served upon them until now and that the employees' claims articulated in the compliance order have not been paid to them, they have legally remained in the house of Lutheran Junior Seminary Morogoro. He prayed for dismissal of the plaintiff's suit with costs.

Responding to cross examination, DW1 stated that the plaintiff's claims for rental payment of the house in which he started to live in 2017 where 5%

of his salary that was deducted from his salary for rent payment. He agreed that he has no other proof that he applied and was given the house other than the contract of employment covering the same in clause 11. He told the Court that Exhibit D2, the letter from the Labour Commissioner dated 30/07/2021 was neither directed to the plaintiff nor mentioned the names of the employees so referred in the letter. He stated further that even Exhibit D3 and Exhibit D5 did not mention the names of the employees or claimants. He insisted that he has no letter terminating or retrenching him from the employment and agreed that he has been occupying the house without paying rent from deduction. He pressed to have proved his claims through the compliance order.

On his re-examination regarding contract of employment, and the validity of continuing to be employees of the School, DW1 clarified that if the contract is not terminated and no notice of non-renewal is given, the contract becomes valid. In that regard, he reiterated that the suit should be dismissed with costs.

The testimony of DW2, Mbaraka Ndelele was to the effect that he was employed by Lutheran Junior Seminary Morogoro on 1st November 2014 for

the first time until the year 2021 when the employment dispute arose between the employees and the employer, the Secretary General KKKT and Lutheran Junior Seminary Morogoro leading to his receipt of the letter titled "SITISHO LA KUPOKEA BARUA MUHIMU" dated 1st July 2021 which was admitted in evidence as **Exhibit D1B**. He said thereafter the dispute was tabled before the Labour Commissioner who after hearing both sides, wrote a letter dated 30th July 2021 (Exhibit D2) where in item 1, 3 and 4, the Commissioner directed that retrenchment should be done in compliance with the law and that the employees should remain at work until the retrenchment exercise is complete, and further that the retrenched employees should not be removed from the School houses until when their payments are completely paid, but the orders were not complied with.

He said thereafter the Labour Commissioner wrote a letter dated 1st September 2021 (Exhibit D3) to the employer directing him to comply with his directives in the letter dated 30th July 2021, which was followed by the letter dated 25th March 2022. He told the Court that upon the employer's default to comply with the order, the Labour Commissioner preferred Execution Case No. 37 of 2022 which was still ongoing in this Court. In that regard, he testified that the office of the Labour Commissioner and Labour

Office of Morogoro continued to recognize them as employees until now. He told the Court that, he is still an employee of the School as until now, he doesn't have any letter of retrenchment or termination or notice that he should vacate or hand over the house and that if the plaintiff wants them to vacate the house, she should comply with the directives issued by the government through the Labour Commissioner. On that basis, he prayed for the suit be dismissed with costs.

During cross examination, DW2 elaborated that he started to live in the house in 2014 up to now without entering into any written agreement with the Plaintiff to live in the house. He said, he was given the house to live where the employer deducted 5% of his salary for payment of rent. He stated that the last time he received salary was in July 2021 and hence he has not paid rent for 33 months as he has not been paid his salary.

On re-examination, DW2 stated that as there is a pending Execution Case No. 37 of 2022 relating to the employees' claims and various entitlement against the Lutheran Junior Seminary Morogoro, he prayed for the Court to dismiss the present suit.

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DW3, Emmanuel Pyuza testified that as per Exhibit PE4 his employment contract is between him and Lutheran Junior Seminary administered by the Secretary General and not between him and the Registered Trustees. He said on 1st July 2021, he received a letter from the headmaster of the School admitted by the Court as **Exhibit D 1C** halting the retrenchment processes that were ongoing. He said, unhappy with what was going on they referred their complaint to the Labour Commissioner who on 30th July 2021 wrote a letter that caused the employer to make some payments which however did not cover all their entitlements. He said, on 1st Septemeber 2021, the Commissioner wrote another letter reminding the employer to adhere to the procedures for retrenchment, however his efforts proved futile. DW3 informed the Court that the Labour office had to issue a compliance order dated 1st February2022 against the employer followed by a Labour Commisioner's order dated 25th March 2022 which confirmed the later, and the filing of Execution Case No. 37 of 2022 against the employer in order for the employer to comply with the orders.

According to his testimony, DW3 is of the strong belief that he is still the employee of the Lutheran Junior Seminary as he has not received any retrenchment or termination letter. He therefore prayed that the plaintiff

pays him compensation for disturbance in all those years and costs of the suit.

When cross examined, DW3 elaborated that his employment contract has been signed on behalf of the Evangelical Lutheran Church of Tanzania. According to him the Labour Commissioner's letter dated 1st September 2021 invalidated the payment as the directives were given after the payments were made. He said, the Commissioner's directives were that they should not vacate the houses until they are paid all their claims and upon being given letters of termination of employment and certificate of work. He explained that his signing of the receipt of the payment of some of his entitlements did not imply that he had entered into an agreement to terminate his employment contract.

In his re-examination, DW3 clarified that he will continue to be the employee until the employer gives him the letter of termination or retrenchment. He reiterated that the plaintiff should pay them general damages for disturbance.

Testifying as DW4, David Dunia stated that he started living in the School's residential houses in accordance with the contract of employment dated 5th

March 2021 which was admitted in evidence as **Exhibit D7**. He said it was until July 2021 when they were given the letters titled 'SITISHO LA KUPOKEA BARUA MUHIMU' admitted as **Exhibit D1D** and thereafter he was removed from the normal work procedure of teaching and supervising students. He said, the employee has not paid the defendants their entitlements in full in spite of directives and compliance order issued by the Labour Commissioner. As such, he informed the Court that he is still living in the house according to the contract of employment which gave him the right to live in the house together with the directives and compliance orders of the Labour Officer and Labour Commissioner.

When he was cross examined, DW4 testified that he has a contract of employment and the Labour Commissioner's compliance orders which entitles him to stay in the house. He disagreed that the letter dated 1st July 2021 (Exhibit D1D) temporarily halted the retrenchment exercise as there was no any other letter that was issued to retrench the employees. In his re-examination, DW3 insisted that he has neither been given a letter of retrenchment nor any notice from the employer, hence he occupies the house lawfully.



DW5, Joyce Hongoli, testified that it was through her employment contract dated 1st October 2006 that she was given a house. She testified further that on 1st July 2021, she received a letter titled 'SITISHO LA KUPOKEA BARUA MUHIMU'. To support her evidence, she tendered the letter which was admitted in evidence as **Exhibit D1E**. She told the Court that thereafter, the dispute arose in which different letters were written by the Labour Commissioner requiring the employer to conduct the retrenchment in accordance with the law, the directives which were not complied with by the employer.

When DW5 was cross examined regarding proof that she entered into contract with the School for provision of the house, DW5 stated that it is the contract of employment that provided for her entitlement to accommodation. On re-examination, DW5 stated that the defendants are still on employment as they do not have a letter terminating them from employment and notice to vacate the houses.

On his part, Perias Simtala who testified as DW6 narrated that in the contract of employment between him and the School on behalf of the Secretary General of the Church there was a clause that entitled him to be given the house. Testifying on the genesis of the present dispute, he stated that it was

sometime in July 2021 when the employer decided to retrench the employees whereby, she issued to him the letter titled 'SITISHO LA KUPOKEA BARUA MUHIMU' admitted as **Exhibit D 1F**. He stated further that the dispute escalated to the Labour Commissioner who at different times issued directives and compliance order requiring the employer to pay the employees their entitlements as required. According to him if the payments were correctly made to the defendants, the plaintiff would not have instituted the present case against them.

During cross examination by Advocate Benjamin Jones, DW6 narrated that he still lives in the School's residential house because of the letter and the compliance order issued by the Labour Commissioner. In his re-examination, DW6 told the Court that the payment of rent was done through deduction from their salaries and that he received the payment voucher as he was in need of the money.

Testifying in support of the defence side as DW7, Japhet Mnguruta stated that he legally entered into the School's residential house after he was given the contract of employment on 1st January 1997 that provided for his accommodation entitlement as well. He stated that sometimes in 2021 he received a letter titled 'SITISHO LA KUPOKEA BARUA MAALUM' admitted as

Exhibit D1G. He said, in resolving the dispute, the Labour Commissioner to whom the dispute was referred to by the defendants, directed the employer through different letters and the compliance order to comply with the procedure of retrenching employees, issue retrenchment letters, permit the employees to continue working and pay their entitlements such as salary arrears, allowances and NSSF contributions. According to his testimony, none of the directives were complied with by the employer. He told the Court that they have continued to live in the houses as there was neither any document to remove them from the houses nor letters of retrenchment which were issued to them. He pressed that they are still living in the houses in accordance with the directives of the government which recognizes them as employees of the Lutheran Junior Seminary.

When cross examined, DW7 averred that there was an order given by the government through its letter dated 30th July 2021 and 1st September 2021 that allowed the defendants to occupy the school's residential houses. In his re-examination, he insisted that he did not receive any notice to vacate the house.

Symphorian Mutayoba, testifying as DW8 stated that after receiving the letter dated 1st July 2021 admitted as **Exhibit D1H**, he waited for the letter

of retrenchment from employment and notice to vacate the house in vain. He testified further that the plaintiff does not have any claim against him and that he has not occasioned any loss to his employer and that he is still in occupation of the School's residential houses as there was a directive from the Labour Commissioner that the employees should not be removed from the houses until their entitlements are paid in full. Nonetheless he prayed for the suit be dismissed with costs as according to him the plaintiff is not their employer.

When cross examined, DW8 explained that the last time he received his salary was on 31st July 2021 but when the employer paid him, she deducted the rental amount prior to paying him his salary arrears and further that to date, he has not been given a letter of termination or suspension of the contract. In re-examination, DW8 insisted that his employer is the Secretary General of the Evangelical Lutheran Church in Tanzania (ELCT) and that it is not true that he owe the employee rent from July 2021 as the employer deducted rent for the month of July 2021 as shown in the payment voucher. He insisted that he has the right to continue staying in the house until the employee pays him all his entitlements.



In her testimony in chief, DW9, Hellena Moses testified that, like other defendants, she was also issued with the letter dated 1st July 2021 admitted as **Exhibit D11**, but she has not received any letter of retrenchment or notice to vacate the house or certificate of service. In that regard, she pressed that she is legally living in the house as she is still an employee until when she will be given a retrenchment letter and a notice to vacate the house.

On being cross examined, DW9 admitted that she signed her employment contract on 30th April 2019 and that the same would have ended on 30th August 2021 but insisted that she will leave the house upon being notified to vacate the house and after being given both the retrenchment letter and certificate of service as required by law. In her re-examination, she stressed that she is still leaving in the house legally as she has not been given retrenchment letter or notice to vacate the house.

On her part, Flora Faustin Chuma, PW10 testified that she also received a letter dated 1st July 2021 admitted as **Exhibit D1J**. She said while awaiting to be given the letter promised in the said exhibit, a notice to vacate the house as well as the certificate of service, she was summoned to appear before the Court on the claim that she owes the plaintiff rental payment.

In cross examination, she informed the Court that she will leave the house if she is given a retrenchment letter, notice to vacate the house, certificate of service and all her entitlements. She stated that, the contract of employment was fixed for one year and that she doesn't have a document showing that after 24th August 2021, her employment contract was renewed. In re-examination, she clarified that she was waiting for the letter of retrenchment, notice to vacate the house, certificate of service and all her entitlements so as to vacate the house.

Testifying as DW11, Benard Aloyce Chibinda testified that on 1st July 2021, he found the letter at his home titled "SITISHO LA KUPOKEA BARUA MUHIMU" admitted in evidence as **Exhibit D1K**. He said, on waiting for the other letter, he was summoned to appear before this Court. He stated that the claims in this suit are baseless as he is not indebted to the plaintiff and that he has not received the letter terminating his employment, and certificate of service and that on the contrary, he is the one who claims his entitlements against the employer.

On being cross examined, DW11 elaborated that it is the letter dated 1st July 2021 that allows him to stay in the school's residential house as the letter required him to wait for retrenchment letter which has not been given to him

to date. As such, he said that he is living in the house legally and that it is only when the employee will pay him his entitlements that he will leave the house. He insisted that he is still an employee of the School as he has not been retrenched and that he was given the letter dated 1st July 2021 which recognized him as the employee.

In his re-examination, DW11 told the Court that according to Exhibit D1K, the defendants were required to wait until they were given retrenchment letters for them to be retrenched but up to date, they have not been given the same. He pressed that he is not living illegally in the house and that the plaintiff's suit is baseless as he has neither been paid his entitlements nor retrenched. To that end, the defence case was closed.

The conclusion of the parties' testimonies and documentary evidence justify the Court's determination of the present suit according to the three issues agreed by the parties.

I should point out at the onset that the summary of evidence of the witnesses of both the prosecution and defence has considered material facts that support or oppose the suit before me. It should be noted that this Court has not sat as a Labour Court to determine an employment dispute. The dispute

as to the whether the defendants are or are not employees of the Lutheran Junior Seminary, or the validity of termination or retrenchment, if any, should have been referred to the Commission for Mediation and Arbitration before finding its way to the Court.

Although the suit and the evidence adduced in Court, both oral and documentary, directly touch matters relating to employment and labour relationship between the plaintiff or the Evangelical Lutheran Church in Tanzania (ELCT) or its Secretary General or the Lutheran Junior Seminary Morogoro on one party, and the defendants on the other, such matters will assist the Court only to the extent that the dispute arose after the alleged failure by the defendants to pay rent and the alleged unlawful occupation of the houses in which they were entitled to stay by virtue of their employment relationship with the employer, the ELCT.

I will now turn to determine the first issue as to whether the Defendants are illegally occupying or staying in the Plaintiff's houses from July 2021, onwards. In determining the issue, and due to the nature of the present suit, it is important to highlight, albeit briefly, the relationship between the Registered Trustees of the Evangelical Lutheran Church in Tanzania, the plaintiff herein; the Evangelical Lutheran Church in Tanzania (ELCT) or in

Swahili, Kanisa la Kiinjili la Kilutheri Tanzania (KKKT), also referred to in the proceedings as the Church; and the Lutheran Junior Seminary Morogoro which has been referred in the proceedings as the School.

The basis of deliberating on the issue, is two folds. The first is the plaintiff's allegation that they were not involved or unaware of the dispute after termination of the defendants' employment and payment of their entitlements, and/or they were not involved in the dispute but the ELCT. The second is the defendants' allegation that they do not know or unaware of the plaintiff because their employer was the Secretary General, ELCT/KKKT and/or Lutheran Junior Seminary Morogoro.

In paragraphs 1 and 4 of the plaint, the plaintiff averred that she is a body corporate with mandate to administer and protect all properties of the ELCT, and to sue and be sued on behalf of the ELCT. In paragraph 5 of the plaint, the plaintiff averred that the Lutheran Junior Seminary Morogoro together with the residential houses for the staff of the School are among the properties of the ELCT. The averments were proven by clause 1 of the contracts of employment admitted as Exhibits PE1, PE2, PE3, PE4, PE5, PE6, PE7, PE9, and PE12 that the contracts were entered between KKKT Lutheran

Junior Seminary Morogoro (LJS) on behalf of KKKT which is ELCT on one hand, and the defendants on the other.

In my considered view, as long as the dispute before me relate to the defendants' continuing occupation of the houses, which the plaintiff is mandated to administer and protect, the plaintiff had legal entitlement to sue the defendants. Expounding on the board of trustees' legal personality entitling the same to sue or be sued as the overseers of the properties of a corporate body, the Court of Appeal in **Ilela Village Council v. Ansaar Muslim Youth Center Another , Civil Appeal 317 of 2019) 2021 TZCA 181 (7 May 2021)** on page 11 of its judgment referred its holding in the case of **the Registered Trustees of Chama Cha Mapinduzi v. Mohamed Ibrahim Versi and Sons and Another, Civil Appeal No. 16 of 2008 (unreported)**, where it was held:-

*"Naibu Katibu Mkuu C.C.M is neither a corporate body possessed of the power to sue or be sued nor are the properties of C.C.M vested in him. If anything, he or she is a different person from the Board of Trustees of C.C.M., **an incorporated on body on whom is vested the power to manage the properties or any business or investment of C.C.M....The effect of incorporation of the Board of Trustees of C.C.M under the***

Trustees Incorporation Act, renders it a body corporate by that name with powers to sue and be sued in that corporate name (see sections 8 (1) and 6).....”[Emphasis added].

Again, there is direct relationship between the School, the ELCT/KKKT and the plaintiff. As long as the employment contract was between the ELCT/KKKT through the School, it means that the employer of the defendants was the ELCT/KKKT. As it is the plaintiff who has legal capacity to sue or being sued on behalf of the ELCT/KKKT as hinted above, it was correct for the plaintiff to sue the defendants.

Turning to the first issue, the plaintiff pleaded in paragraphs 10 and 11 of the Plea that the defendants illegally occupy the Seminary houses. She contended that the defendants continued to occupy the houses of the Seminary while their employments were terminated through retrenchment and upon payment of all their entitlements. On the other hand, the defendants’ pleaded in the written statement of defence that they are legally staying in the Seminary houses as they had not been paid their entitlements in full. They further relied on the order of the Labour Commissioner that prohibited their removal from the houses until they are paid in full.

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Clause 11(a) of Exhibits PE1, PE2, PE3, PE4, PE5, PE6, PE7, PE9, and PE12, common to all contracts of employment provides that the employee or a teacher shall apply and be given a house of the Seminary if available, for him/her to live and will pay rent in accordance with the procedure decided by the Board of the Lutheran Junior Seminary. It provides further that upon completion of the employment contract, the employee shall hand over the house to the Seminary.

It is crucial to state at the onset that the defendants did not complete their employment contracts according to the evidence adduced by both the prosecution and defence evidence that would entitle them to hand over the houses to the Seminary/the ELCT. To the contrary, it is the employer who engaged in the process of retrenching the defendants on operation requirements.

The plaintiff's evidence through Mr. Robert Mkwavano, the Accountant for Lutheran Junior Seminary Morogoro who testified as PW1, was that the defendants were paid their terminal benefits in July 2021 which meant that their employments were terminated. He informed the Court that he was not aware of any dispute that arose after payment of the defendants' terminal

benefits or any meeting conducted in Dodoma between the plaintiff and the Labour Commissioner on the dispute.

But the version of evidence of the Director of Morogoro Lutheran Junior Seminary, Emmanuel Landey who testified as PW2, regarding payment of the defendants' entitlements is different from that of PW1. Although in his evidence in chief, PW2 informed the Court that the defendants were paid their terminal benefits and given the notice to vacate the houses but when cross examined, his testimony revealed that the employees were not paid all their claims though he insisted that the plaintiff is entitled to sue the defendants for their continuing occupation of the houses.

Not only that the evidence of PW2 prove that the employees were not paid all their claims but also, the testimonies of all witnesses for the defendants and the payment vouchers admitted in evidence as Exhibits PE1D, PE2D, PE3D, PE4D, PE5D, PE6D, PE7D, PE9D, P10D, P11D and PE12D. Apart from other claims that the defendants' witnesses testified, including gratuity, salary arrears, transport, allowances, and failure by the plaintiff to submit NSSF contributions as testified by PW1, all payment vouchers reveal the plaintiff's deduction of 10% from the total payment to each employee which the plaintiff and her witnesses failed to provide its basis at all.

Again, the evidence adduced before this Court through letters of the Labour Commissioner dated 30th July 2021 and 1st September 2021, admitted in evidence as Exhibits D2 and D3, respectively and Compliance Orders dated 1st February 2022 and 25th March 2022 admitted as Exhibits D4 and D5, respectively reveal that the defendants referred the dispute to the Labour Commissioner where ELCT participated in the various meetings. Before the plaintiff's payment of the defendants' dues in Exhibits PE1D, PE2D, PE3D, PE4D, PE5D, PE6D, PE7D, PE9D, P10D, P11D and PE12D, the Labour Commissioner under paragraph 2(ii) of Exhibit D2 put in writing his orders made in the meeting held on 19th July 2021 that the ELCT should pay all claims of the employees intended to be retrenched within 90 days from the date of the meeting. He further ordered the ELCT not to remove the employees intended to be retrenched from the School's house until completion of their payments under paragraph 2(iv) of Exhibit D2. The defendants were among the employees that were intended to be retrenched. Even after payment of the defendants' dues, in the meeting held on 31st August 2021 between representative of the ELCT, representatives of the defendants and the Labour Commissioner, the Labour Commissioner ordered ELCT as evidenced by paragraph 3(a) of Exhibit D3 to comply with all its

orders made in the meeting dated 19th July 2021 which were reduced in Exhibit D2, which included the order that the employees intended to be retrenched should not be removed from the School's houses until they are paid their dues. The Labour Commissioner ordered further in paragraph 3(c) and (g) that:

(c) Wafanyakazi wanaopunguzwa kazini wapewe barua za kupunguzwa kazini kabla ya tarehe ya kuachishwa kazi.

(g) Baada ya taratibu za malipo kukamilika upande ambao utakuwa haujaridhika na malipo au hatua zilizochukuliwa unaweza kuwasilisha shauri katika Tume ya Usuluhishi na Uamuzi (CMA) au Mahakamani ili haki iweze kupatikana.

Apparently, the ELCT or through the School neither paid any amount nor took any action after the Commissioner's orders issued in the meeting on 31st August 2021 reiterated in Exhibit D3 that would prompt the defendants to prefer their dissatisfaction, if any.

Not only the ELCT or through its School failed to comply with the Commissioner's orders as observed above, but also failed to comply with the compliance orders admitted in evidence as Exhibit D4 and subsequently, Exhibit D5 until today. Although ELCT objected to the compliance order admitted as Exhibit D4 but the same was confirmed by the Labour Officer

through Exhibit D5. Exhibit D5 clearly articulated the claims of the employees including the defendants herein. Whether the claims were correct or not, it has not been established by the plaintiff before this Court if the ELCT appealed to the Labour Court against the order of the Labour Officer within 30 days from the date of the compliance order as required under section 48 (1) of the Labour Institutions Act, Cap. 300 R.E. 2019 [See also the case of **Ws Risk and Protection Services Limited v. Labour Commissioner (Misc Labour Application 16 of 2021) 2022 TZHC 3114 (1 April 2022)**]. It means that the defendants' claims that were part of the compliance order were neither challenged nor satisfied by the ELCT who was the employer of the defendants through the School. In **Amina Ramadhani v. Athumani Hinga and another (Misc Land Revision No. 26947 of 2023) 2024 TZHC 909 (18 March 2024)**, this Court made a well-established observation as to the legal effect of an unchallenged decision which I fully subscribe to. The Court on page 8 stated: _

"I am of the view that the dispute was determined to finality because neither of the parties to the proceedings before the High Court took any action to challenge that decision of the High Court in any manner. It implies that parties were satisfied that such order was proper and appropriate and not otherwise. Such

unchallenged decision must be implemented by anyone responsible to ensure its implementation. In that respect, an entitled party has a right to execute such unchallenged decision of the Court."

In addition to the above omissions, the plaintiff failed to produce documentary evidence to support the oral testimonies of PW1 and PW2 that they issued retrenchment letters and notices to vacate the houses to the defendants. The law places such an obligation on whoever asserts the existence of a fact to prove that the same exist [See section 110 of the Evidence Act, Cap 6 R.E. 2022]. The Court of Appeal applied the provision in its deliberation in the case of **Tryphone Elias Ryphone Elias Another vs Majaliwa Daudi Mayaya, Civil Appeal No 125 of 2020** 2023 TZCA 18014 (21 December 2023) where it held:-

"According to section 110 (1) of the Evidence Act, whoever alleges must prove. Also, section 110 (2) of the same Act places the onus of proof on a person who alleges the existence of a certain fact. In this case, it would appear that it was the respondent who carried the burden of proof for his claims and assertions going by the above provisions and more so when taking into account he was the one who sued the appellants..."

Further, although the plaintiff argued that Exhibits PE1D, PE2D, PE3D, PE4D, PE5D, PE6D, PE7D, PE9D, P10D, P11D and PE12D were retrenchment agreements, but in my considered position, the same were neither retrenchment agreements nor retrenchment letters but rather the payment vouchers signifying payment by the ELCT/School and receipt by the defendants of the payments upon the intended termination of their employment. There is no proof in the record of this Court that the payments were preceded or followed by termination letters based on operation requirements or retrenchment agreement. In my understanding of labour laws and practice, a retrenchment agreement is reached after a notice is issued and consultations are made and an agreement reached with the employees intended to be retrenched as provided for under section 38 of the Employment and Labour Relations Act Cap. 366 R.E 2019 read together with Rule 23(4) of the Employment and Labour Relations Act (Code of Good Practices) G.N. 42 of 2007.

As intimated above, even after payment of the employees' dues, the defendants registered their claims with the Labour Office which formed part of the compliance orders issued by the Labour Officer subsequently.



From the above observations, I agree with the defendants that they are justified to occupy the employer's houses based on the grounds that there is no evidence of their termination of the employments or retrenchment from their employments; that they still have claims against the ELCT on whose behalf the plaintiff has sued the defendants; and that the ELCT or the School neither complied nor appealed against the compliance orders that required her to pay the employees their claims articulated in the orders.

The above entitles the defendants to occupy the houses not only that the retrenchment exercise has not been completed but also by virtue of the Labour Commissioner's orders in paragraph 2(iv) and 3(a) of Exhibits D2 and D3, respectively. The first issue is therefore answered in the negative to the extent that the defendants are not illegally occupying or staying in the Plaintiff's houses from July 2021 onwards.

I now turn to determine the second issue as to whether the plaintiff has suffered damages or loss arising from the Defendants' illegal occupation of the houses in the plaintiff's houses. The plaintiff has alleged that as the defendants are no longer the employees of the School their occupation of the houses should have been coupled with payment of rent for period from July 2021 onwards. The evidence adduced by both the plaintiff's and the

defendants' witnesses satisfied this Court that the defendants are still occupying the houses. It is therefore clear that the defendants' continuing occupation of the houses has prevented other employees of the ELCT/School to occupy the houses, and the plaintiff's earnings from rental payments.

However, it has also been established through paragraph 8 of the plaintiff's plaint, the evidence of PW1, and the testimonies of the defendant's witnesses that the houses were given to the defendants by virtue of their employment as per clause 11(a) of the employment contracts, Exhibits PE1, PE2, PE3, PE4, PE5, PE6, PE7, PE9, and PE12. It was also established that certain percent of money was deducted from their salaries for rent payment. This means that if no salaries are paid, rent cannot be paid by the employees.

I have found in respect of the first issue that the defendants continuing occupation of the houses is based on the dues which they still claim for the alleged termination of their employments by operational requirements. The same is yet to be completed upon the existence of the compliance orders which were neither appealed nor complied with by the ELCT. There is also execution proceedings in respect of the compliance order, Execution Case No. 32 of 2022 which is still ongoing before this Court against the ELCT. The order of the Labour Commissioner to the ELCT not to remove the defendants

from the houses until they are paid all their claims has not been challenged by ELCT or the plaintiff as managers of the ELCT properties including the houses.

Based on the above findings and my holding in the first issue that the defendants are not illegally occupying the plaintiff's houses, it follows that the loss or damages sustained by the plaintiff, if any, has not been occasioned and does not arise from the defendants' occupation of the houses. If there is any loss or damage suffered by the defendants, the same is occasioned by the plaintiff and/ or through the ELCT by its failure to pay the defendants' claims; or to take necessary and required legal action to challenge the orders of the Labour Officer and that of the Labour Commissioner; or to comply with the required legal procedures in retrenching the defendants based on operation requirements.

The second issue is answered in the negative that the defendants are not illegally occupying the plaintiff's houses, and if there is any loss or damages suffered by the plaintiff the same is not occasioned by the defendants' continuing occupation of the plaintiff's houses.

b

As to the reliefs each party is entitled, the plaintiff's suit fails to the extent of my demonstration in respect of the first and the second issues above. As the defendants are not illegally occupying the houses alleged to be owned by the plaintiff, the plaintiff is not entitled to all the reliefs sought in the plaint and prayed for by PW1 in his testimony.

In the final analysis, I dismiss the present suit for lack of merit. Costs of the present suit shall follow the course.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 29th day of May 2024.


H. A. KINYAKA

JUDGE

29/05/2024

