

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

**IRINGA SUB-REGISTRY**

**AT IRINGA**

**CIVIL APPEAL CASE NO. 28267 OF 2023**

(Originating from the decision of the District Court of Iringa  
at Iringa in Civil Case No. 09 of 2023)

**SUN ACADEMY PRE-PRIMARY AND**

**SECONDARY SCHOOL ..... APPELLANT**

**VERSUS**

**TY ENGLISH MEDIUM**

**COMMUNITY PRIMARY SCHOOL.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 09/05/2024*  
*Date of Judgement: 30/05/2024*

**LALTAIKA, J.**

The Appellant herein **SUN ACADEMY PRE-PRIMARY AND SECONDARY SCHOOL** is dissatisfied with the decision of the District Court of Iringa at Iringa in Civil Case No. 09 of 2023. She has appealed to this Court by way of a Memorandum of Appeal containing the following grounds:

1. *That, the trial magistrate error in law and facts by holding that the applicant had no cause of action against the respondents.*
2. *That, the trial magistrate error in law by determining the issue of cause of action as matter point of law while it's the matter of facts.*
3. *That, the trial magistrate error in law and facts by failure to interpret on what amount to cause of action.*
4. *That, the trial magistrate erred in law and facts by dismissing the case based on ground of the Appellant having no course of action against the Respondent.*

A brief factual and contextual backdrop to the matter is considered important to make it easy to connect the dots. The parties herein are educational institutions located within Iringa Municipality. In the language common in competition law parlance, the duo operates in the same market in the sense that their customers are parents with children in school-going age. They also provide the same services namely Primary education based on Tanzania's National curriculum.

Sometimes in 2023, the Appellant discovered that some students who had been registered in her school transferred to the Respondent allegedly without following procedures and with outstanding fee. She unsuccessfully the Respondent to recover the outstanding fee to the tune of TZS 12,088,200

and general damages to the tune of TZS 300,000,000/= Counsel for the Defendant successfully put a preliminary objection on lack of a cause of action leading to dismissal of the suit with cost hence this appeal.

When the appeal was called on for hearing on the 4<sup>th</sup> of April 2024, **Emmanuel Chengula** and **Asifiwe Mwanjala**, learned Advocates appeared for the Appellant and Respondent respectively. Parties prayed to proceed with hearing by way of written submissions. With a note of approval from this court, the following schedule was ordered: Filing of Appellants written submission: 18/4/2024, Filing of Respondent's Reply 2/5/2024, Filing of Appellant's rejoinder if any 9/4/2024, Mention for necessary orders to fix the date of judgement 9/5/2024.

I hereby register my commendations for the learned Advocates for spotlessly complying with the court order paving the way for this judgement, equally as scheduled. The next part is a summary of submissions by both parties.

Mr. Chengula, Counsel for the Appellant, submitted that he would consolidate grounds 1 and 3 to be argued together, while grounds 2 and 4, renumbered as 2 and 3, would be argued independently. The learned

Advocate contended that the trial Magistrate failed to interpret what constitutes a cause of action based on the lodged Plaintiff, wrongly concluding that the Appellant had no cause of action against the Respondent despite the Appellant demonstrating the Respondent's professional negligence.

He argued that the trial court incorrectly shifted the burden to the student's parents, erroneously implying a breach of contract due to unpaid school fees, when in fact the issue was the unlawful transfer of students by the Respondent.

Citing **MULLA ON CIVIL PROCEDURE, 13TH EDITION**, Mr. Chengula defined a cause of action as every fact necessary for the plaintiff to prove to support his right to a judgment. He emphasized that the cause of action in this case arose from professional negligence, not contract breach, as the Respondent failed to perform duties related to the transfer of the student.

The learned Counsel for the Appellant emphasized that a suit is always based on a cause of action, which means every fact that, if traversed, would need to be proven by the plaintiff to support his right to relief. It includes all the material facts on which it is founded and must involve some act done by

the defendant. In this case, Mr. Chengula reasoned, the Respondent's failure to follow proper procedures in transferring students constituted such an act.

Mr. Chengula further argued that the trial court misled itself by not thoroughly assessing the Plaintiff, which disclosed facts constituting professional negligence as clearly stated in numerous paragraphs. He pointed out that the trial court's ruling failed to consider the detailed facts laid out in paragraphs 4 through 18 of the Plaintiff, which clearly demonstrated the Respondent's professional misconduct. He referenced the case of **JOHN M. BYOMBALIRWA V. AGENCY MARITIME INTERNATIONALE (T) LTD** [1983] TLR 1 to support the argument that the content of the Plaintiff should determine if a cause of action is disclosed. He emphasized that the Byombalirwa case established that the determination of whether a Plaintiff discloses a cause of action is based on its content and accompanying documents, not on extraneous factors.

Moreover, Mr. Chengula highlighted that the trial court admitted students were unprocedurally received by the Respondent, yet it failed to recognize this as a cause of action. He criticized the trial court for inventing new issues outside the Plaintiff by focusing on a non-existent breach of contract, rather than addressing the tort of professional negligence. The

Respondent's failure to adhere to proper transfer procedures amounted to professional negligence, referencing cases like **IDD BABU VS GRACE SILLO WAWA & OTHERS** (Civil Appeal 79 of 2016) [2018] TZHC 2724 and **MUGANGA LUSAMBO VERSUS TICTS** [2011] TLR 256 to reinforce his argument.

Mr. Chengula elaborated that the trial court's decision was flawed as it demanded the Appellant cite specific laws or rules regarding student transfers while simultaneously admitting the Respondent failed to follow transfer procedures. This inconsistency, Mr. Chengula reasoned, highlighted the trial court's misunderstanding of the issue, which was not about a contractual breach but about professional negligence. He cited the principles established in the famous case of **DONOGHUE VERSUS STEVENSON** (1932) AC 532, where negligence was defined as failing to take reasonable care to avoid acts or omissions that one could foresee would likely injure one's neighbor. The Respondent in this context, Mr. Chengula averred, failed to exercise due care in the transfer process, resulting in damages to the Appellant.

Transitioning to the second ground of appeal, Mr. Chengula contended that the trial court erred in determining the issue of cause of action as a

point of law, arguing that it should be treated as a matter of fact requiring evidence. He referenced **MULLA, ON CIVIL PROCEDURE, 13TH EDITION**, and the case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD** [1969] 1. EA 696 to argue that a pure point of law does not arise if there are contentious facts that need to be ascertained by evidence. Mr. Chengula argued that determining the cause of action in this case required examining the facts surrounding the Respondent's conduct and its impact on the Appellant, which could not be done at the preliminary objection stage.

Furthermore, he cited the case of **IBRAHIM ABDALLAH (Administrator of the Estate of the late Hamisi Mwalimu) versus SELEMANI HAMISI (The Administrator of the Estate of the late Hamisi Abdallah)** Civil Appeal No 314 of 2020 CAT at Arusha, which supported the view that issues involving facts that need to be proven are not pure points of law and should not be decided on preliminary objections. Mr. Chengula strongly believes that the trial court prematurely dismissed the case without allowing for a full examination of the evidence.

For the third ground of appeal, Mr. Chengula argued that the trial court's dismissal of the case based on the preliminary objection of cause of

action was unlawful and unprocedural. He cited **ANTHONY LEONARD MSANZE AND ANOTHER VS. JULIANA ELIAS MSANZE AND 2 OTHERS** (Civil Appeal No. 76 of 2012) and Order VII Rule 11 (a) of the Civil Procedure Code Cap 33 R.E 2019, which state that a Plaintiff should be rejected, not dismissed, if it does not disclose a cause of action. The proper procedure, as established by these authorities, is to reject the Plaintiff to allow for amendment, rather than outright dismissal, which denies the plaintiff the opportunity to correct any deficiencies.

He concluded that the trial Magistrate should have allowed the Appellant to amend the Plaintiff instead of dismissing the suit, as per the overriding objective principle aimed at timely adjudication of disputes. He referenced the case of **ROSE ROEZER AND 3 OTHERS VERSUS NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED AND ANOTHER** (Civil Appeal No. 291 of 2020) to support this argument.

In view of the submissions and cited authorities, Mr. Chengula prayed that the Honorable Court agree with their submissions, allow the appeal, and quash the entire ruling with costs. The overarching argument was that the trial court erred both procedurally and substantively in dismissing the



Appellant's suit without properly considering the detailed facts and legal principles surrounding the cause of action for professional negligence.

**Mr. Mwanjala responding to Mr. Chengula's submission**

asserted that it was evident the appellant had no cause of action against the respondent, and the trial magistrate correctly upheld the respondent's objection. He noted that the appellant had sued the respondent for professional negligence and specific damages related to unpaid school fees, which were caused by the parents of the transferred students. He argued that it would be unreasonable for the court to order the respondent to pay debts incurred by another party, emphasizing that the appellant's plaint, which claimed specific damages caused by someone other than the defendant, did not establish a cause of action against the respondent.

Mr. Mwanjala referenced the trial magistrate's accurate definition of "cause of action" from page 3 of the typed ruling, which was based on the case of **Iddi Salum Babu v. Grace Sillo Wawa and Others**, Civil Appeal No. 79 of 2016 (Unreported). He argued that the appellant failed to grasp the concept of professional negligence, which occurs when a professional fails to perform their duties to the required standard. He explained that claims of professional negligence might arise from breaches of contractual

terms, duty of care, judiciary duty, or statutory duty, none of which were breached by the defendant according to the appellant's plaint.

He elaborated that professional negligence involves causing loss to another person through carelessness, recklessness, or substandard service that directly results in damage. He provided an example of poor financial advice leading to unexpected tax bills and penalties as an illustration of professional negligence. He further invited the court to consider the case of **Professional Paint Centre Limited vs. Azania Bank Limited, Commercial Case No. 53 of 2021** at the High Court of Tanzania in Dar es Salaam. He highlighted that, according to this case, a claim of professional negligence requires a contractual relationship between the plaintiff and the defendant and referenced specific pages of the judgment to outline the three essential elements to establish negligence: the presence of a legal duty to exercise due care, breach of that duty, and consequential damage resulting from it.

Mr. Mwanjala pointed out that nowhere in the appellant's plaint was there an indication of a contractual relationship with the defendant that could have led to professional negligence causing the plaintiff's loss. He cited paragraph 18 of the plaint, which attributed the claimed loss to unpaid school

fees caused by the parents of the students. Therefore, he argued, the plaintiff was legally flawed, and the trial court's decision to dismiss it was correct. He concluded by requesting the honorable court to uphold the trial court's decision and dismiss the appeal with costs.

Mr. Mwanjala emphasized the importance of understanding the legal concept of "cause of action," which is fundamental in determining whether a lawsuit can proceed. He pointed out that the trial magistrate had appropriately defined this term and applied it correctly in dismissing the appellant's case.

Mr. Mwanjala also delved into the specifics of professional negligence, explaining that it involves a professional's failure to meet the standards expected in their field, resulting in harm or loss to another party. He clarified that such negligence must be directly attributable to the professional's actions or omissions, and not to external factors beyond their control. By illustrating with an example of poor financial advice, he aimed to make it clear that the appellant's case did not meet the criteria for professional negligence.

Furthermore, Mr. Mwanjala noted that for a claim of professional negligence to be valid, there must be a contractual relationship between the plaintiff and the defendant, which was absent in the appellant's case. This, he argued, was not a matter of professional negligence but rather an issue unrelated to the respondent's duties and actions.

In conclusion, Mr. Mwanjala maintained that the trial court had acted correctly in dismissing the appellant's case, and he urged the honorable court to uphold this decision. He requested that the appeal be dismissed with costs, as the appellant had failed to establish any valid grounds for their claims against the respondent.

**I have dispassionately considered the rival submissions** in the light of the grounds of appeal. I have also spent some considerable time examining the pleadings and I must say outrightly that my decision is partly influenced by the content of the plaint of the appellant, then plaintiff. Upon such a careful consideration my analysis will be confined to two issues namely Cause of Action and Professional Negligence.

The concept of a "cause of action" is crucial in determining the validity of a lawsuit. According to the decision in **Iddi Salum Babu v. Grace Sillo**

**Wawa and Others (supra)**, a cause of action arises when a party has a right to sue for a remedy due to a wrongful act by another party.

As for professional negligence, I subscribe to Mr. Mwanjala's argument that professional negligence occurs when a professional fails to perform their duties to the required standard, resulting in harm to another party. A professional is always a natural person, not an entity.

My next question is whether it was proper for the learned trial Magistrate to dismiss the suit. I agree with Mr. Chengula that the position in our jurisdiction as stated in **ANTHONY LEONARD MSANZE AND ANOTHER VS. JULIANA ELIAS MSANZE AND 2 OTHERS** (supra) and Order VII Rule 11 (a) of the Civil Procedure Code (supra) is that a Plaintiff should be rejected, not dismissed, if it does not disclose a cause of action. However, the beauty of the common law is that each case is decided on its own merit.

As stated earlier, parties herein are competitors in trade in educational services. It does not take much thought to realize that the decision of customers to leave the appellant for services of the Respondent, leading to institution of several lawsuits has had financial implications. Entertaining

such suits while it is obvious that they lack merit is tantamount to adding salt into injury. Unfortunately, such costs when ordered by courts, are not paid by Counsel. The bill goes to the Appellant.

In academic circles, a paper may be accepted unconditionally, accepted with minor corrections, or rejected outrightly. In the matter at hand, the learned trial Magistrate chose the last option and I support her decision, albeit for a different reason: the overriding objective principle. Sometimes litigation is unnecessary.

This brings to my mind the timeless wisdom of Lord **Denning MR in Packer v. Packer** [1953] EWCA Civ J0511-3 thus:

*"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both." (Emphasis added)*

I know that in other jurisdictions, courts of law are moving from the old-fashioned impassivity also known as blind justice to actively intervene, albeit cautiously to spare litigants from chasing the wind. A Kenyan learned author Steve Ouma ***A Commentary on Civil Procedure Act***, 2<sup>nd</sup> Ed. (Law Africa: 2015) provides as follows on developments in that common law jurisdiction:

*"Certainly, the above cannot be true post 2010 Kenyan Judicial System. A judge in the Kenyan system is to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him." (Emphasis added)*

In her impressive analysis, the learned trial Magistrate found that the appellant had failed to establish a cause of action against the respondent. As stated earlier, the plaint itself leaves a lot to be desired. Ordering the same to be amended would, in my opinion, would do very little to bring the case closer to what is expected of a civil controversy. Unless the learned Counsel commits himself to pay the cost associated with the same, I am impressed by the boldness of the learned trial magistrate. She chose not to be blind to justice. Again, Lord Denning MR in **Jones v. National Coal Board** [1957] 2 QB 55 stated:

*"It is very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth..."*

I do not have any iota of doubt that the decision of the trial Magistrate is based on the need for our courts to attaining "timely disposal of the proceedings at a cost affordable by the respective parties." See s. 3B(1)(c) of the **Civil Procedure Code** (Supra).

In the upshot, the appeal is hereby dismissed with costs.

It is so ordered.



Handwritten signature of E.I. Laltaika in blue ink.

**E.I. LALTAIKA  
JUDGE  
30.05.2024**

**Court**

Judgement delivered under my hand and the seal of this Court this 30<sup>th</sup> day of May 2024 in the presence of Bazila Olomi for the Appellant and Mr. Asifiwe Mwanjala, learned Advocates who appeared for the Appellant and Respondent respectively.



Handwritten signature of E.I. Laltaika in blue ink.

**E.I. LALTAIKA  
JUDGE  
30.05.2024**



Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.



*E.I. Laltaika*

**E.I. LALTAIKA  
JUDGE  
30.05.2024**