

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF DAR-ES-SALAAM)

AT DAR-ES-SALAAM

CIVIL CASE NO. 28 OF 2022

JUNG HWAN KIM 1st PLAINTIFF

SANG OK NAM 2nd PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF TANZANIA

PRESBYTERIAN CHURCH (TPC) DEFENDANT

JUDGMENT

05/09/2023 & 05/02/2024

NKWABI, J.:

This suit is an utter proof that religious institutions are not spared from the turmoil of modern life. To put it into clear terms is that religious institutions are not unsusceptible to clashes of interests the world witnesses in other spheres of modern life. Both parties to this suit belong to a religious denomination of the Tanzania Presbyterian Church. Their main dispute is as to who owns the school which is registered under Tanzania Presbyterian Church (TPC) which culminates into the following reliefs that are sought by the plaintiffs:

1. The defendant be permanently restrained by injunctions from taking the Rainbow Nursery and Primary School and its assets/properties without compensating the plaintiffs.

2. Payment of specific damages to the tune of T.shs 1,417,152,600/= [Tanzania Shillings one billion four seventeen million one hundred fifty two six hundred].
3. Interest on (b) above at commercial rate of 25% from the date of judgment to the day of payment in full.
4. Payment of general damages in the tune of T.shs 300,000,000/= [Tanzania shillings three hundred million only].
5. Costs of this suit be borne by the defendant.
6. Any other relief(s) this Honourable Court may deem fit and just to grant.

The defendant has a counter-claim in which she claims against the plaintiffs in the plaint for the reliefs I emulate below:

1. A declaration that the assets and properties in Rainbow Nursery and Primary School and all other assets in the name of the plaintiff belong to the plaintiff (in the counter-claim).
2. A judgment and decree against the defendants to surrender the management in Rainbow Nursery and Primary School and all assets of the plaintiff to the plaintiff (in the counter-claim).

3. Judgment in favour of the Plaintiff against the defendants jointly and severally for payment of the sum of T.shs 250,000,000/= being accrued income from Rainbow Nursery and Primary School.
4. Interest on the aforesaid amount accruing at the plaintiff's default interest rate of 20% per annum from the date of institution of this suit until judgment or sooner payment.
5. Interest as above on the decretal sum post-judgment.
6. Such further orders or reliefs this Hon. Court deems just, equitable and convenient.
7. The defendants jointly and severally ordered to pay the costs of and incidental to this suit.

The issues that were framed by the Court are as listed below:

1. Whether the plaintiffs are founders, owners and finances of Rainbow Nursery and Primary School.
2. Whether Rainbow Nursery and Primary School is the plaintiffs' project under the umbrella of Tanzania Presbyterian Church.
3. If the first and second issues are answered in the affirmative, whether the defendant terminated the plaintiffs' membership to Tanzania Presbyterian Church in order to take over the school.
4. What reliefs are parties entitled to.

On the counter-claim, the issues are thus:

1. Whether the plaintiff is the lawful owner of all assets of Rainbow Nursery and Primary School.
2. Whether the defendants have engaged in the fraudulent transaction and misappropriated the plaintiff' assets and to what extent.
3. What reliefs are parties entitled to.

I will consider one issue after the other. I start with the 1st one which cuts across the main claim and the counter-claim which is whether the plaintiffs are the owners of Rainbow Nursery and Primary School. The plaintiffs and their counsel state wholeheartedly that the issue should be answered in the affirmative. It is stated that the school is owned by the plaintiffs under the umbrella of Tanzania Presbyterian Church, whereby they purchased a piece of land which is described as Plot No. 228 Block 2 at Toangoma area in Kigamboni District under the same umbrella which umbrella is, however, strange because Tanzania Presbyterian Church has no any legal personality, it is unclear which umbrella is being talked about. They purported to draw that from the constitution of the church. That constitution, unfortunately cannot be considered because, it was not tendered in evidence and it is only referred to in the submissions as Annexure JK 4 of the plaint. It should be noted that the constitution of

the defendant is not one that this Court can take judicial notice, thus, it needs to be proved. I find buck up on my position by the decision in **Emmanuel Senyagwa v Republic**, Criminal appeal no 22/2004 (CAT) at Dar-es-Salaam (Unreported) at P. 7 where it was held that:

"We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not there was really sexual intercourse. If no, then there was no rape."

It is inconceivable that though the plaintiffs state that the receipts are not in their names rather are in the name of the school, they want to be compensated by the defendant T.shs 1,417,152,600/= with no proof whatsoever, save for mere words of the mouth. The plaintiffs' counsel criticizes the defendant for failure to prove by receipts its defence. The demand of the plaintiffs' counsel is not backed by the law especially in respect of the plaint because the law requires the one who alleges has to prove, that are the plaintiffs. For an authority for that position of the law, see **East African Road Services Ltd v. J.S. Davis & Co. Ltd.** [1965] E.A. 676

"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."

The plaintiffs cannot shift the burden of proof to the defendant.

It is claimed that the plaintiffs used their own funds and assistance from their friends and relatives in building and establishing the school without the assistance from the defendants. But the certificate of registration of the school (exhibit P. 7) indicates the owner is Tanzania Presbyterian Church while the manager of the school is the 1st plaintiff. Further, the taxpayer Identification Number (TIN) for the school is in the name of Tanzania Presbyterian Church (TPC). In addition, the Certificate of Occupancy where the school is built, which is part of exhibit D.6, is in the name of Tanzania Presbyterian Church. There are certificates of donation of properties (exhibit D. 9) and a letter from District Commissioner – Temeke requesting The Tanzania Revenue Authority for tax exemption for a motor vehicle intended to be used by Tanzania Presbyterian Church which is dated 21st December 2009 (exhibit D. 9). That proves sufficiently that the defendant is the owner of the school by virtue of its mission. The plaintiffs have failed dismally to prove that they own the school.

The fact that the receipts and other documents are in the name of Rainbow Pre- and Primary School renders an uphill task of proving that undoubtedly the plaintiffs used their money and that of their friends and relatives to build the school and for themselves instead of the defendant. The fact that the school is registered in the name of the mission of the defendant that is proof that the defendant is the owner of the school just as submitted by the counsel for the defendant.

It is fascinating how the counsel for the plaintiffs swerved to discuss the issue of ownership which is at stake and was stuck discussing the irrelevant issue of whether the plaintiffs were the founders of the school. By all means, the testimonies of PW1 and PW2 (the wife of the 1st plaintiff) together with the rest of the plaintiffs' witnesses (PW3 Julieth, PW4 Anthony and PW5 Peter) appear to have a grudge against the defendant because they were dismissed from the employment at Philadelphia Pre- and Primary school which is also under the defendant. That is not all, what ought to be proved by documentary evidence, cannot be proved by oral evidence. That was stated in **Alfred Fundi v. Geled Mango & Two Others** [2019] T.L.R. 42 where, in the latter case, it was stated that:

"In the instant case, the Appellant had not produced any documentary evidence to substantiate and justify the

claim. As such therefore, there was no verifiable evidence to prove that the appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court.”

One can see where the grudge comes from, in the submission by the counsel for the plaintiffs at page 6 where he states that:

*“It is the contention by the Plaintiffs together with PW3, PW4 and PW5 that they were chased from Philadelphia School and the plaintiffs moved to their land at Toangoma where they used their personal efforts until they established their own school known as RAINBOW PRE - & PRIMARY SCHOOL which was registered in the year 2011.
...”*

The main issue is, in the circumstances, answered in the negative.

Since I have already held that the school in dispute is not owned by the plaintiffs rather by the defendant, it follows therefore that, the school was not the property of the plaintiffs, therefore it cannot be the project of the plaintiffs. The counsel of the plaintiff seems to attempt to drag the Court to hold that the school is a project of the plaintiff under the umbrella of the defendant as seen at page 6 of the submission drawn and filed by the counsel for the plaintiff. I decline to be pulled to that angle. Thus, I hold that the 2nd issue which is whether has to be answered in the negative.

There is also a queer issue raised by the plaintiffs' counsel during the submissions which is whether the defendant participated in development of the school. It is queer because, the defendant is the owner of the school.

It is trite law that an illegal agreement (contract) is unenforceable. If the plaintiffs circumvented the law of the land where missionaries are required to perform their missionary services under the Registered Trusteeship, but dodged it and pretended to render services in disguise, they acted on their peril. This Court cannot come into their assistance.

The 3rd issue depended on the 1st and 2nd issues being answered in the affirmative. Since the 1st and 2nd issues have been answered in the

negative, the 3rd issue naturally collapses. For avoidance of doubt, I answer it in the negative.

In respect of the 4th issue, I answer that issue that the parties are entitled to the relief that the plaintiffs' suit is dismissed with costs.

I will be very brief in discussing the counter-claim. I will state straight forward that the first issue in the counter claim has already been discussed when I was discussing the claim in the plaint. For purposes of clarity, the plaintiffs in the counter-claim are owners of all the assets of Rainbow Nursery and Primary School. This issue is answered in the affirmative.

Concerning the issue that whether the defendants in the counterclaim have engaged in fraudulent transaction and misappropriated the plaintiffs. There is nothing to prove that claim. For instance, there is no any proof that the defendants misappropriated either funds or any other properties. If that were the case, the plaintiff in the counter-claim ought to have proved by documentary exhibits. Truly, there is exhibit D.8, the financial statement in respect of the school in question, which was prepared on 31st December, 2015 by Adolph Associates. No expert (the maker) in audit from Adolph Associates came to testify in respect of exhibit D.8 to avail the defendants in the counter-claim to cross-examine the maker of the

report. As a consequence, exhibit D.8 has very little evidential value, it is disregarded. To reach at that conclusion, I rely on **DPP Vs Shida Manyama @ Seleman Mabuba**, Criminal Appeal No 285 of 2012 which quoted with approval **Davie v. Edinburgh Magistrates**, 1953 SC. 34 at page 40, the duty of such experts is:

"... to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusion so as to enable the court."

I may add on the anomaly by drawing adverse inference for failure to call a material witness as held in **Mujuni Joseph Kataria v. Samwel Ntambala Luangisa & Another** [1986] T.L.R. 62 CAT where it was stated that:

"Failure to call material witness, the court may draw adverse inference to form its own independent judgment by the application of these criteria to the facts proven in evidence."


Lastly, I consider the last issue which is what reliefs are parties entitled to. I declare that the assets and properties in Rainbow Nursery and Primary School and all other assets in the name of Tanzania Presbyterian Church (TPC) belong to the plaintiff (in the counter-claim). I order that

the defendants in the counter-claim to surrender the management of Rainbow Nursery (Pre and Primary School and all its assets to the plaintiff in the counter-claim. Each party to the counter-claim shall bear their own costs because the counter-claim was incited by the plaintiffs' plaint.

It is so ordered.

DATED at **KIGOMA** this 5th day of February 2024.




J. F. NKWABI
JUDGE

Mr. Hamis A. Mbangwa, advocate drew submissions for the plaintiffs.

Mr. Paschal Kamala, advocate drew submissions for the defendant.