


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 118 OF 2020

1. HAMIS MAULID HASSAN
2. OBEDI DAMAS KITELANYA
3. HAMIDA HUSSEIN JUMA
4. OMBENI MSENGI



PLAINTIFFS

Versus

1. VAILET MARO
2. GEMACO AUCTION MART
INTERNATIONAL LIMITED



DEFENDANTS

RULING

20.10.2021 & 21.10.2021

F.H. Mtulya, J.:

Four persons, namely: Hamis Maulid Hassan, Obedi Damas Kitelanya, Hamida Hussein Juma and Ombeni Msengi (the plaintiffs) jointly and together preferred a suit in this court registered as **Land Case No. 118 of 2020** (the case). The case was scheduled for Final Pre-Trial Settlement and Scheduling Conference on 18th August 2021 for setting future events and steps which will bind or likely to arise in the conduct of the case, including framing of issues and the date of hearing of the case. However, before framing of issues, Mr. Florence Ernest, learned counsel for Vailet Maro (the First Respondent) raised

two points of preliminary objection (the objection) contending that the case is incompetent before this court. When Mr. Ernest was invited to take the floor and explain on his points of the objection, he briefly submitted that: first, the plaintiffs have filed Amended Plaintiff without leave of the court; and second, the Amended Plaintiff relates to representative suit of the plaintiffs and other one hundred (100) persons without abiding with the procedure in a representative suit.

In substantiating his points of objection, Mr. Ernest submitted that the laws regulating civil procedure require amendments of plaintiffs to have support of court orders whereas the filing of the Amended Plaintiff in this case has no any authority of the court order. With the second objection, Mr. Ernest stated that the law in Order I Rule 8 of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code) and precedent in **Christopher Gasper & Others v. Tanzania Harbours Authority** [1997] TLR 301 require notice of the institution of the representative suit to be given to all persons having an interest in the suit. Mr. Ernest contended further that the practice of this court demands the notice to be published in gazette and the proof of the same be attached in the plaintiff.

The submission received a prayer of adjournment from Mr. Juael Omega, learned counsel for the plaintiffs. The reasons of the prayer,

as registered by Mr. Omega, were two (2), *viz.* first, he was fresh in the case, and second, he needed time to consult his clients. This court considered the reasons to have merit, and considering the right to be heard, it set a replying date on 24th August 2021, but it was not heard for various reasons until yesterday evening.

Yesterday evening, Mr. Omega instructed Mr. Denis Mugyabuso, learned counsel, to hold brief, proceed and reply the points of objection. In his submission, Mr. Mugyabuso briefly stated that the points of objection were raised as afterthought contrary to the court orders during First Pre-Trial Settlement and Scheduling Conference and requirement of the law in Order VIII B Rule 21 of the Code.

In explaining the submission, Mr. Mugyabuso contended that during the Conference, the Respondents stated to have no any further objections, and in later stages of the proceedings they have registered the objection, which is contrary to the court orders. To his opinion, the Defendants have registered the points of objection without leave of the court to vacate its previous orders as per law in Order VIII B Rule 21 of the Code. In rejoining the submission, the First Respondent invited the legal services of Mr. Makubi Kunju to argue the matter. According to Mr. Kunju, Mr. Mugyabuso has totally declined to give explanations on the raised issues to assist this court

in arriving to justice hence he admitted the points of objection. With regard to disobedience of court's orders, Mr. Kunju contended that Rule 21 of Order VIII B of the Code is misplaced in the present dispute as there is no any orders which were disobeyed by the Respondents, and in any case the raised issues are points of law related to procedures in bringing suits in any court of law. In the opinion of Mr. Kunju, issues of law may be brought to court at any stage of the proceedings and that officers of this court are not restricted to raise them when are aware of the issues.

In this dispute, the court is specifically invited to determine an issue: *whether the case is properly before this court*. It is unfortunate that this court missed tests of the plaintiffs' counsel on the raised points of objection. Mr. Mugyabuso totally declined to reply whether the Amended Plaintiff was filed without leave of this court and whether it failed to abide with the law in Order I Rule 8 of the Code and precedent in **Christopher Gasper & Others v. Tanzania Harbours Authority** (supra).

The law in Order I Rule 8 provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue on behalf of all persons so interested. However, the court is required to give

notice of the institution of the suit to all such other persons either by personal service or by public advertisement. The Rule had already received judicial consideration in this court in the precedent of **Christopher Gasper & Others v. Tanzania Harbours Authority** (supra) and it held that failure to comply with Rule 8 in Order I is fatal. The reasoning of precedent is found at page 304 of the decision that:

The essence of this rule is therefore that the identities of the other persons interested in the claim must be known to the court, although a representative suit is instituted on their behalf. It is necessary because the court is under duty to give notice of the institution of the suit to all such persons and secondly, the doctrine of res judicata applies all such persons.

I have had time to peruse the record of this case. I found out that on 10th July 2020, the Plaint was registered in this court by the plaintiffs. It had facts of the four (4) plaintiffs only and duly signed by them in person. However, without leave of this court in filing an amended plaint or public notice to all interested parties, the plaintiffs added more other hundred (100) persons in the Amended Plaint and filed in this court on 25th September 2020. This case, therefore, was

filed in this court without complying with Order I Rule 8 of the Code, which is enacted in mandatory terms. I have therefore decided to uphold the two points of the objection raised by the First Defendant's learned counsel. In the event, if the plaintiffs are still interested to pursue the claim in this court, they must abide with the law in Order I Rule 8 of the Code without any reservations. This suit is hereby struck out with costs awarded to the First Defendant.

Before I pen down, I must state that, the plaintiffs' counsel's failure to state anything on the complained matters may imply acceptance of the truthfulness of the points of objection raised. The Court of Appeal has, times without number, issued directives on the subject and there is a bundle of precedents justifying the position (see: **William Getari Kagege v. Equity Bank & Ultimate Auction Mart**, Civil Application No. 24/08 of 2019, **Finn Von Wurden Petersen & Milimani Farmers Limited v. Arusha District Council**, Civil Application No. 562/17 of 2017, **Shadrack Balinago v. Fikiri Mohamed v. Tanzania National Roads Agency (TANROADS) & Attorney General**, Civil Appeal No. 223 of 2017, **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, **Yokobeti Simon Sanga v. Yohana Sanga**, Civil Application No. 1 of 2001, **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016, **Cyprian Athanas Kibogoy v. Republic**, Criminal Appeal No. 88 of

1992, **Sprianus Angelo & Six Others v. Republic**, Criminal Appeal No. 481 of 2019, and **Fabian Dumila v. Republic**, Criminal Appeal No. 136 of 2014).

I understand Mr. Mugyabuso complained that the points of objection were raised after First Pre-Trial Settlement and Scheduling Conference. However, my understanding tells me that it is certain and settled that points of law challenging the jurisdiction of the court can be raised at any stage of proceedings and it has to be determined first before determination of the substantive matters (see: **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 and **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai**, Civil Appeal No. 179 of 2016).

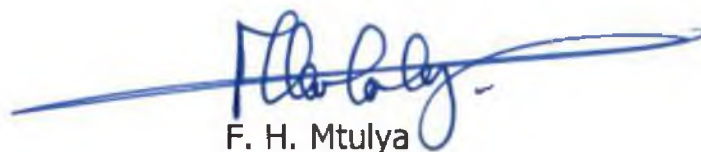
The reasoning of our superior court on the subject is found at page 12 in the precedent of and **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai** (supra) that:

...the jurisdiction to adjudicate any matter is a creature of statute. An objection in that regard is a point of law and it can be raised at any stage. It was not offensive on part of the respondents to raise it in the final submissions which was after the close of the hearing.

However, the only condition which is put forward by the Court of Appeal is that before determining the matters on the raised points of law, the parties must be accorded the right to heard (see: **Transport Equipment v. Devram Valambhia** [1998] TLR 89, **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina Mwakyoma** [2003] TLR 253 and **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002).

It is unfortunate that when Mr. Mugyabuso was granted leave to enjoy the right to be heard as part of natural and constitutional right, he fully declined to assist this court on the raised points of the objection. Under the circumstances, the directives and conditions set out by our superior court in judicial hierarchy are considered to have fully complied and there are no reasons why this case should not be struck out for want of jurisdiction of this court, as I have already stated in this Ruling.

Ordered accordingly.



F. H. Mtulya

Judge

21.10.2021

This Ruling is delivered in Chambers under the seal of this court in the presence of the Second and Fourth plaintiffs, Mr. Obedi Damas Kitelanya and Mr. Ombeni Msengi respectively, and their learned counsel Mr. Juael Omega and in the presence of the learned counsel Mr. Makubi Kunju for the First Defendant.



F. H. Mtulya
Judge
21.10.2021