

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM SUB-REGISTRY**

**CIVIL CASE NO.1 OF 2023**

**HAMZA SEIF .....1<sup>ST</sup> PLAINTIFF  
AUSTIN MWOGHA.....2<sup>ND</sup> PLAINTIFF**

**VRS**

**TANZANIA CIGARETTE COMPANY LIMITED, PLC...1<sup>ST</sup> DEFENDANT  
GODSON KILIZA.....2<sup>ND</sup> DEFENDANT  
JOSHUA FOLKERTHI.....3<sup>RD</sup> DEFENDANT  
SIMON MPONJI.....4<sup>TH</sup> DEFENDANT**

**RULING**

*Date of Last Order: 22-2-2024*

*Date of Ruling: 28-3-2024*

**B.K.PHILLIP, J.**

This ruling is in respect of the points of preliminary objections raised by the defendants' advocates, to wit;

- i) That Breakthrough Attorneys are conflicted and therefore should not have drafted or initiated these proceedings, represent and prosecute the case on behalf of the plaintiffs and former employees of the 1<sup>st</sup> defendant.
- ii) That the Plaintiffs and other employees represented in the suit being Ex-employees of the 1<sup>st</sup> defendant at the time of revocation of the trust, have no *locus standi* to institute this suit against the defendants..

As indicated in the 1<sup>st</sup> point of preliminary objection, the plaintiffs are represented by learned advocates from Breakthrough Attorneys ( Law Firm). The defendants are represented by learned advocates from Asyla Attorneys ( Law Firm)

Before going into the arguments made by the learned Advocates for and against the aforementioned points of preliminary objection, a brief background to this case is necessary to understand the coming discussion.

First of all, this is a representative suit. It has been filed by the plaintiffs on behalf of 301 others upon seeking and obtaining leave from this court to file a representative suit vide Misc. Civil application No.205 of 2022. All plaintiffs are ex-employees of the 1<sup>st</sup> defendant and were members of the Registered Trustee of Tanzania Cigarette Company Limited, (Henceforth " the Trust"). It is the plaintiff's case that on 26<sup>th</sup> September 2000, the Trust was registered to facilitate the purchase of shares of the 1<sup>st</sup> defendant for its beneficiaries including the plaintiffs who were the 1<sup>st</sup> defendant's employee by then. The purposes of the Trust were; One, to acquire shares of Tanzania Cigarette Company Limited (Henceforth "TCC") on behalf of the beneficiaries of the Trust. Two, to provide incentives to all workers, including senior selected managers. The Trust borrowed a sum of Tshs.820,000,000/= from TCC and a total of 2,000,000 shares were purchased and acquired by the Trust. The aforesaid shares were granted and acquired by the Trust from TCC under the same terms and conditions as those which were sold to the public. The Trust established a share option scheme. The 1<sup>st</sup> one was called the Employee's Share Option Scheme or ESOS in which all employees who were employed by TCC on the date of listing were granted through the Trust

share option equivalent to 25% of their annual basic salaries. The 2<sup>nd</sup> one was called the Managers' Share Option Scheme which was intended for the selected employees who held managerial positions. The options given to the beneficiaries of the Trust were locked for three years. The beneficiaries were allowed to exercise their options up to one-third of their options after every twelve months. Upon exercise of their option, the Trust sold equivalent shares to the Dar es Salaam Stock Exchange. Thereafter, the Trust would hand over the proceeds of the said option to the beneficiaries less a certain amount that was deducted by the Trust and directed towards the loan repayment. Out of the 2,000,000 purchased shares issued to the beneficiaries, a total of 241,070 shares remained unallotted until October 2019 when the Trust was revoked, following the request made by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants being members of the Board of Trustees. The said 241,070 unallocated shares earned a total of Tshs. 1,744,623,590/= from the initial period when the shares were purchased to time of revocation of the Trust. The plaintiffs being beneficiaries and other not parties in this case paid for the entire 2,000,000/=. Different from the plaintiffs herein, other beneficiaries (former employees) of TCC were fully paid by the Trust for all their entitlements accordingly.

Further, the plaintiffs allege that to their dismay, they discovered that without their consent or official mandate vested to them, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in collaboration with the 1<sup>st</sup> defendant (TCC) and without any legal justification distributed the proceeds of the unallotted shares under the scheme to its current employees. The plaintiffs claim that the defendants'

aforesaid act was illegal, constituted fraud, and breached the terms and conditions provided in the Trust Deed.

In this case, the plaintiffs pray for the following reliefs;

- i) A declaration that the plaintiffs were the lawful beneficiaries of the unallotted 241,070/= shares.
- ii) A declaration that the defendants' decision to distribute illegally the proceeds and dividend of the unallotted shares to persons other than the lawful beneficiaries of the Trust ( the plaintiffs herein) violated the Trust Deed.
- iii) A declaration that the defendants designed and operated the scheme/ Trust illegally to defraud the plaintiffs.
- iv) The defendants be ordered to make payment of Tshs. 4,098,190,000/= being proceeds realized after disposition of unallotted shares.
- v) The defendant is ordered to make a payment of Tshs.1,744,623,590/- being dividends accrued from unallotted shares.
- vi) The defendants be ordered to make payments of general damages to be determined by the court.
- vii) The defendants be ordered to pay interests on items (iv), (v) and (vi) at a commercial rate of 25 % per annum from the date of the cause of action arose to the date of judgment.
- viii) The defendant be ordered to pay interests on items (iv), ( v), and (vi) at the Court's rate of 12% per annum from the date of judgment till the date of payment in full.

- ix) The defendant be ordered to pay for the costs of this case.
- x) Any other relief as this Honourable court may deem proper and just to grant.

The defendants filed their joint written statement of defence in which they denied all of the plaintiffs' claims and raised two points of preliminary objections reproduced at the beginning of this ruling.

The points of preliminary objections have been disposed of by way of written submissions. The learned Advocate Senen Mponda of Asyla Attorney filed the submission in support of the point of preliminary objection. Starting with the 1<sup>st</sup> point of preliminary objection, Mr. Mponda's arguments were as follows; Breakthrough Attorneys, (Law Firm), representing the plaintiffs is engulfed with a conflict of interests thereby contravening the provisions of Regulation 30,31(1),(2),33,35 (1),45 (1),52 (1),55,82,92,103 and 106 of the Advocates (Professional conduct and etiquette) Regulations, 2018, (Henceforth "Advocates etiquette") on the following grounds;

One, Mr. Vintan Mbiro, a lead partner at Breakthrough Attorneys was the 1<sup>st</sup> defendant's Director of legal affairs and Company Secretary of the Defunct Trust until 2015 when he retired. Two, Ms. Lucy Mandara, Senior Associate at Breakthrough Attorneys was the 1<sup>st</sup> defendant's Legal Manager until 2016 as well as secretary of the Defunct Trust and in this case, she is among the 301 ex-employees of the 1<sup>st</sup> defendant who are represented in this suit by the plaintiffs. The action Counsel, Mr. Reginald Martin is a partner at Breakthrough Attorneys. Three, Mr. Vintan Mbiro and Ms. Lucy Mandara were members of the management team of the 1<sup>st</sup> defendant, the settlor of

the Defunct Trust from the Directorate of Legal Affairs and the office of the Company Secretary. They played key roles in the management of the defunct Trust. To substantiate his contentions aforesaid, Mr. Mponda referred this court to the following documents annexed to the defendants' written statement of defence;

- i) The Trust Deed made on 4<sup>th</sup> September 2000 and the rules made there under witnessed by senior Advocate Vintan Mbiro, annexed to the written statement of defence as annexure SD-1
- ii) 1<sup>st</sup> defendant's minutes of the 21<sup>st</sup> Board of Directors' meeting held at the registered office of the Company duly signed by senior Advocate Vintan Mbiro in his capacity as the secretary, listed in the list of documents to be relied upon by the defendants. ( Document No. 1).
- iii) 1<sup>st</sup> defendant's extract resolution from the minutes of the Board of Directors of the Company held at the registered office of the Company on 27<sup>th</sup> June 2002 duly signed by senior Advocate Mbiro in his capacity as the secretary listed in the list of the documents to be relied upon by the defendants (Document No.2).
- iv) Extract resolution of the defunct Board of Trustee of the TCC's Share Option Scheme dated 23<sup>rd</sup> January 2006 duly signed by senior Advocate Mbiro in his capacity as the secretary to the said board. (Annexure SD-2)
- v) Notice of the meeting of the board of trustees of the TCC's Employees' Share Option Scheme which was scheduled to take place on the 24<sup>th</sup> May 2016 duly signed by senior Advocate Lucy

Mandara in her capacity as secretary of the said board (document - 3).

Mr. Mponda contended that he will call the above-mentioned senior advocates of Breakthrough Attorneys to appear in court as witnesses in case the case proceeds to trial. He implored this court to strike out this case with costs since it has been filed by a law firm that is disqualified on account of a conflict of interests. He cited the case of **Magweiga Munanka Samo, Said Kheri, and Benedict Peter Massawe Vs Aloyce Kisenga Kimbori, Ramadhan Kitenge (As administrator of the estate of the late Hamida Ramadhani Manara), Land case No.80 of 2017, and UAP Insurance Tanzania Limited Vs Akiba Commercial BankPlc, Civil Appeal No. 135 of 2022** (Both unreported).

In rebuttal, Mr. Mbiro argued that the 1<sup>st</sup> point of preliminary objection is not a pure point of law since in substantiating his arguments Mr. Mponda had to refer this court to the annextures /documents listed by the defendants in the list of documents to be relied upon filed in court. He contended that according to the arguments raised by Mr. Mponda, this court has to scrutinize the documents /annextures filed by the defendants in their defence in contravention of the principles lied down in the case of **Mukisa Biscuits Manufacturing Company Vs West Ends Distributors EA(1969) EA 696**. He went on to argue that an issue which involves a mixture of matters of law and fact, cannot be entertained as a point of preliminary objection. To support his arguments he cited the case of **Eusto Ntagalinda Vs Tanzania Fish Process Ltd, Civil Application No. 8 of 2011** and **Shose Sinare Vs Stanbic Bank Tanzania Limited, Civil Appeal No.89**

**of 2020.**( Both unreported). Thus, he urged this court to dismiss the 1<sup>st</sup> point of preliminary objection.

In the alternative, on the merit of the point of preliminary objection, Mr. Mbiro argued that the issue of conflict of interests is misconceived because the 1<sup>st</sup> defendant is sued due to his decision to illegally distribute proceeds of the unallotted shares to people other than the beneficiaries along with designing and operating the trust scheme illegally to defraud the plaintiffs. He contended that the 1<sup>st</sup> defendant has been sued due to the role vested to her in all matters relating to the operation and administration of the Trust as provided in Article 10 of the Trust Deed. He insisted that TCC was represented by its Directors and the Trustees, and were the ones who decided the issues, the subject of the case in hand. He contended that he did not participate in decision making of the issues complained of by the plaintiffs in this case.

Further, Mr. Mbiro argued that the fact that Ms. Mandara and himself were employees of TCC does not automatically establish that they represented TCC as their clients to the extent of raising an issue of conflict of interests. He maintained that Mr. Mponda has not established that Ms. Mandara and himself ( Mr. Mbiro) acted as Advocates for TCC. Further, he argued that even an advocate who witnesses a contract he is not automatically barred from acting as an advocate to the parties to the contract he witnessed unless it is established that she is going to be called as a witness in a matter involving the contract he witnessed. Mr. Mbiro was of the view that Mr. Mponda's contention that Advocates from Breakthrough Attorneys have



conflict of interests in this case contravenes Regulation 96 (2) of the Advocates Etiquette which provides as follows;

*"96 (2) An advocate shall not undertake a matter when it is probable that the advocate or a partner or associate of the advocate will be required to give evidence: Provided that if the engagement is accepted and the improbable occurs, the advocate has a duty to withdraw and the matter should be entrusted to an advocate outside of the original advocate's firm".*

He insisted that from the above-quoted provision of the laws, an advocate who witnesses a contract becomes disqualified to handle the case involving the contract in question if he/she is called as a witness in that case, and if that happens then he/she can withdraw from handling the case. Expounding on that point, he pointed out that the issue of an advocate being called as a witness should not be based on speculations. To cement his arguments he cited the case of **Sibonike Anyingsiye Mwasalamba Vs Teofile Kisanji University, Misc. Civil application No.2 of 2020**, (unreported).

Moreover, Mr. Mbiro submitted that to have a conflict of interests, there must be conflicting interests that may affect the Advocate's duty towards his/her client. To cement his argument he referred this court to Regulation 45(1) of the Advocates Etiquette which provides as follows;

*Regulation 45 (1): "A conflict of interest is one that would be likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client".*

Mr. Mbiro was emphatic that to establish the existence of a conflict of interests there must be an advocate-client relationship. He maintained that in this case there was no Advocate-client relationship between TCC, Ms.

Mandara and him. Ms. Mandara and him ( Mr. Mbiro ) were mere employees of TCC and being advocates was just one of the qualifications required under their employment. Expounding further his argument, Mr. Mbiro argued that Ms. Mandara and him (Mr. Mbiro) signed the documents mentioned by Mr. Mponda in his submission in their capacity as company secretaries of TCC, not as Advocates of either TCC or the Trust. In conclusion, Mr. Mbiro implored this court to dismiss the 1<sup>st</sup> point of preliminary objection.

In rejoinder, Mr. Mponda reiterated his submission in chief and argued that the 1<sup>st</sup> point of preliminary objection does not contravene the principles enunciated in the case of **Mukisa Biscuits** ( supra). He contended that this court is not estopped by law from scrutinizing the documents filed in court by the parties to establish the propriety of the case before it. To cement his argument he referred this court to the case of **Textron Financial Corporation versus Qualify Group Limited, Commercial Case No. 26 of 2019** (unreported), in which this court held that it is duty-bound to look and scrutinize documents annexed to the plaint to establish the propriety of a case before it. He was of the view that the position of the law stated in the case of **Textron** ( supra) can be stretched to the extent that this court can scrutinize documents filed by the defendant in his defence if the same are relevant. Mr. Mponda also cited the case **Mexons Energy Limited versus NMB Bank PLC (Unreported), Commercial Case No. 102 of 2021**, (unreported) in which the court disqualified an Advocate for contravening Section 7 of the Notary Public and Commissioner for Oaths Act [Cap 12 R.E.

2019] and Regulation 45 of the Advocates Etiquette because he attested a security document referred in a counterclaim. The court held as follows;

*"The legislature in that provision addressed the risk of the embarrassment of the Advocate, Reading that provision, the legislature wisely guided the court not to wait until the advocate is called to testify and declare him to be conflicted. To wait until the problem materializes will be a waste of resources especially court precious time as the pleadings drawn by such unscrupulous advocates will be ignored or expunged from the court records".*

In the same vein, Mr. Mponda was emphatic that the Plaintiffs' Advocates in this case raised arguments aimed at ignoring the clear conflict of interest he demonstrated in the documents mentioned in the notice of preliminary objection which at the end of the day will lead to wastage of the court's precious time.

Moreover, Mr. Mponda argued that Mr. Vintan Mbiro attested the Trust Deed made on the 4<sup>th</sup> of September 2000 and the Rules made thereunder as an Advocate, Notary Public and Commissioner for Oaths. He contended that even assuming that Advocates, Vintan Mbiro and Lucy Mandara were mere employees when they signed documents he referred to in his submission in chief, still by doing so a fiduciary relationship between them and the 1<sup>st</sup> Defendant, the Trust and Trustees had been established. By signing the resolutions made for the management of the Trust they became part and parcel of decision makers of the Trust. They acquired confidential information regarding the operation of the Trust as signified by the minutes and resolutions they signed. He maintained that Breakthrough Attorneys,

their partners, and/or their associates, by the decisions of this he cited in his submission in chief and confirmed by the decision of the Court of Appeal of Tanzania, should not have initiated these proceedings, and prosecute the suit on behalf of the plaintiffs. Mr. Mponda reiterated his prayer that this case should be struck out.

Having dispassionately analyzed the rival arguments made by the learned Advocates, I am compelled to start by dealing with the concern raised by Mr. Mbiro that this point of preliminary objection is not a pure point of law on the reason that to determine it this court needs to scrutinize the documents annexed to the written statement of defence or filed in court in the list of documents to be relied upon by the defendants. First and foremost, it is worth noting that both learned Advocates are not in dispute of the principles laid down in the case of **Mukisa Biscuits** (supra) that a point of preliminary objection has to be a pure point of law and no evidence should be required to establish it.

Having said the above, I wish to point out that I agree with Mr. Mponda that the position of law is that in establishing the court's jurisdiction / the competency of the suit / whether the advocates /law firm representing the plaintiff/ applicant in court is not conflicted, this court cannot avoid scrutinizing the plaint/ application together with the documents annexed thereto, for a straight forward reason, that parties are bound by their pleadings. And that is the holding in the case of **Textron** (supra). With due respect to Mr. Mponda, I do not agree with his view that this court can cross the line and scrutinize the documents filed in court by the opposite party, since doing so will be tantamount to making findings in the case prematurely

based on documents from the adverse party which have not been admitted in court as exhibits whereas it is obvious that the plaintiff /applicant is not bound by the pleading/documents filed by the adverse party. When a point of preliminary objection requires this court to scrutinize the documents filed by the adverse party ceases to be a pure point of law as it requires the court to examine the evidence/documents filed by both sides and the competing arguments from both sides. It is worth noting that a point of preliminary objection has to be argued based on the assumption that what is pleaded by the plaintiff /applicant is correct and not otherwise.

Back to the point of preliminary objection, in support of the 1<sup>st</sup> point of preliminary objection, Mr. Mponda raised two major arguments. One, Mr. Mbiro and Mandara signed /witnessed several documents concerning the establishment of the Trust and its management, such as The Trust Deed made on 4<sup>th</sup> September 2000 and the rules made thereunder, and other documents mentioned at the beginning of this Ruling which I do not need to reproduce the same here again. Those documents were either annexed to the written statement of defence or in the list of additional documents to be relied upon filed in court by the defendants. With due respect to Mr. Mponda, his aforesaid argument cannot be entertained by this court since, as I have elaborated earlier in this ruling, the same requires this court to scrutinize the documents relied upon by the defendants in their defence, thus falls short of valid arguments in support of a point of preliminary objection. Thus, I agree with Mr. Mbiro that Mr. Mponda's arguments aforesaid contravenes the principles laid down in the case of **Mukisa Biscuits** (supra). Therefore, I cannot determine it at this stage as point of preliminary objection.

The second argument raised by Mr. Mponda in convincing this court that Breakthrough Attorneys have a conflict of interests in this case since Ms. Lucy Mandara is among the 301 plaintiffs represented in this suit. In other words, she is a party in this case. This fact was not disputed by Mr. Mbiro. I have also taken judicial notice of the ruling of this Court in Misc. Civil Application No. 205 of 2022 in which the plaintiff herein was given leave to file this suit as representatives suit on their behalf and behalf of 301 others, and the court's record reveals that Ms. Mandara is among the 301 others. I have noted that Mr. Mponda did not dwell much on this point. His submission was mainly based on the first argument which I have discarded it. However, the pertinent question here is; Does the fact that Ms. Mandara is one of the plaintiffs create a conflict of interest against her and hence Breakthrough Attorneys? What is conflict of interests; Apart from Regulation 45 (1) of the Advocate's Etiquettes which I have quoted earlier in this Ruling, Regulation 45 (3) of the Advocate's Etiquettes defines conflict of interests as follows;

*" A conflict of interests includes the duties and loyalties of the advocate to any other client, whether involved in the particular transaction or not, including the obligation to communicate information"*

Whereas Regulation 3 of the Advocates Etiquettes defines conflict of interests as follows;

*" includes a situation that has the potential of undermining the impartiality of an Advocate because of the possibility of a clash between the advocate's self -interests and the public interests".*

And the defines the term "client" as follows;

*"client" means a person on whose behalf an advocate renders or undertakes to render professional services and includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, expressed or implied, to retain or employ, and retains or employs or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs;*

From the foregoing, I am of the settled view that plaintiffs in this case, apart from Ms. Mandara, are clients of Breakthrough Attorneys. Thus, are also clients of Ms. Mandara since she is a partner in Breakthrough Attorneys. Since Ms. Mandara is also a plaintiff in the case, she shares the same interests with the remaining plaintiffs in the case. Thus, I do not see any potential of undermining the impartiality of Ms. Mandara personally or Breakthrough Attorneys as there is no possibility of a crash between the self-interests of either Ms. Mandara or Breakthrough Attorneys. Similarly, I do not see any potential likelihood that the duties and loyalties of Breakthrough Attorneys toward the plaintiffs will be affected. No wonder Mr. Mponda did not dwell much on this point to support the point of preliminary objection. The case of **UAP Insurance Tanzania Limited** (supra) relied upon by Mr. Mponda in his submission is distinguishable from the case in hand since in that case, it was pleaded in the plaint that Legal Link Attorneys which was representing UAP insurance Tanzania Limited, the defendant in that case was among the defaulters in repayment of the loan which was guaranteed by the UAP Insurance Tanzania Limited (the defendant). In its decision, the Court of Appeal ruled out that Legal Link Attorneys had a conflict of interests since they were among the defaulters in repayment of the loan and it was not possible for Legal Link Attorneys to act on the client's interests and at the same time for its benefits without violating the Advocates

Etiquettes. What should be noted here is that the aforesaid findings of the Court of Appeal were based on what was pleaded in the plaint not the written statement of defence. Similarly, in the case of **Magweiga Munanka Samo**, (supra) the findings of this court on the existence of a conflict of interests were based on undisputed fact founded on the court's records that the learned Advocate Leonard Manyama who was declared to have a conflict of interests in the case represented the plaintiffs in other cases at the Land and Housing Tribunal and in the subsequent appeal which was filed in this court, and later on filed a case against his previous clients in a matter related to the previous one which he represented them. In this case Mr. Mponda tried to substantiate his stance of conflict interests relying on allegations stated in the defendants' written statement of defence but disputed by the plaintiff, thus necessitates evidence to be adduced in court in order to determine the merit of the allegations made by each side. Mr. Mponda's second argument also lacks merit.

Additionally, on the strength of the case of **Sibonike Anyingisye Mwasalamba** (supra) and the provisions of section 96(2) of the Advocates Etiquette, Mr. Mpondas's contention that if the case proceeds for hearing he will summon Mr. Mbiro and Ms. Mandara as witnesses in the case cannot be a valid reason for moving this court to make findings that the dual have conflict of interests in this case and disqualify them from handling this case.

Coming to the 2<sup>nd</sup> point of preliminary objection, it was Mr. Mponda's arguments that a review of the articles of the Trust Deed and Rules made thereunder reveal that the suit is not supported by the articles of the Trust



Deed which would have given the plaintiffs the right of action. To support his arguments he cited some of the articles in the Trust Deed, including Article 5 which provides on the funding of the Trust. He submitted that the same stipulates that Tshs. 820 Million free of interest loan was offered to the Trust not TCC employees including the plaintiffs herein and 301 others. Article 6 of the Trust provides that the beneficiaries of the Trust are TCC employees. Mr. Mponda contended that Article 6 has to be read together with Article 1 which defines TCC employee as contemplated under Article 6 of the Trust Deed as a person who is a full-time employee or manager or executive Director of TCC. He further pointed out that in paragraph 17 of the plaint, the plaintiffs stated that the proceeds of the sale of unallotted shares were distributed to current employees and no Article in the Trust Deed extended the benefits to employees after cessation of their employment. Mr. Mponda cited Article 8, 11 and 29 of the Trust Deed which provides for share options, payment of the loan, and Miscellaneous provisions respectively. Also, he cited rule 8 and 13.1 made under the Trust Deed which provide for the rights of employees, dismissal and consequences thereof respectively. In short, Mr. Mponda's arguments were to the effect that the plaintiffs themselves admit that when the proceeds of the Trust were distributed to the current employees of TTC the plaintiffs were not rightful beneficiaries as alleged in the plaint and do not have *locus standi* to institute a suit against the defendants herein because they are strangers to the Trust Deed having left the employment of the TCC at the time the Trust was liquidated. He implored this court to strike out this case with costs.

In rebuttal, Mr. Mbiro contended that this point of preliminary objection is not a pure point of law since, in his view, it needs evidence to establish it. He was of the view that this point of preliminary objection is a mixture of issues of law and facts. In short, Mr. Mbiro repeated the arguments he raised in the first point of preliminary objection concerning his contention that evidence is needed to ascertain the assertions made by the defendants' advocate. He urged this court not to entertain this point of preliminary objection.

In the alternative, submitting on the merit of the 2<sup>nd</sup> point of preliminary objection, Mr. Mbiro submitted that *locus standi* refers to the right or legal capacity of an individual to initiate legal proceedings in court or be heard in court. Expounding on this point Mr. Mbiro pointed out that to attain a right to sue or be heard in a court of law one must have a direct connection to the cause of action or be involved in the matter in question. To cement his arguments he cited the case of **Lujuna Shubi Ballonzi vs. the Registered Trustees of Chama Chama Cha Mapinduzi ( 1996) TLR 203** and **Chama Cha Wafanyakazi Wa Mahoteli na Mikahawa ( Horau )Vrs Kaimu Mrajis was Chama Cha Wafanyakazi na Waajiri Zanzibar, Civil Appeal No.300 of 2019** ( unreported).

Further, Mr. Mbiro argued that to establish the plaintiffs' right to institute this case, it is imperative to understand what is " a Trust". Relying on the provisions of section 1A of the Trustee Incorporation Act, Mr. Mbiro submitted that a Trust means "*a legal relationship created by personal relationship by an order of the court or operation of the law when specified property or interests are placed under the control and management of a*

*trustee or trustees for the benefit another or parties called beneficiary or beneficiaries*". He contended that in this case the settlor transferred a financial facility to the Registered Trustees of the TCC Employees Share Option Scheme, that would be utilized to purchase shares in TCC during the floatation of its shares to implement a share option scheme for TCC employees who were the beneficiaries. Mr. Mbiro was of the view that the basis of the plaintiffs' claims does not arise out of the employer-employee relationship but rather a contractual relationship as beneficiaries of that Trust which was breached by the defendants by disposition of the Trust assets and dividends to current employees of the TCC while aware that the plaintiffs are the rightfully entitled to benefit as they were subjected to deductions that made possible the repayment of the loan to TCC.

Moreover, Mr. Mbiro argued that under section 13 of the Trustee Incorporation Act, Cap 318, the plaintiffs being beneficiaries of the Trust have the right to sue the trustees for their Acts/conducts or neglect or defaults. The above provision of the law remains intact and enforceable. Neither the changes to the cash option scheme made in 2006 nor the dissolution that occurred in 2019 affect the plaintiffs' rights, contended Mr. Mbiro. He refuted Mr. Mponda's assertion that Article 8.3 of the Trust Deed prohibits the plaintiffs from suing the defendants. He argued that Article 8.3 of the Trust Deed relied upon by Mr. Mponda in his submission contravenes the provision of section 13 of the Trustee Incorporation Act which prevails over the Articles of the Trust Deed.

In an endeavor to show that the plaintiff has a cause of action against the defendants, Mr. Mbiro further argued that there is a fiduciary relationship

between the plaintiff and the defendants arising out of the trustee–beneficiary relationship. Consequently the same gives rise to fiduciary duties to the Trustees which include acting in good faith, candor, and fairness while dealing with the Trust property short of which will be subjected to scrutiny by the court of law.

In conclusion of his submission, Mr. Mbiro maintained that Mr. Mponda failed to substantiate the 2<sup>nd</sup> point of preliminary objection. He prayed the same to be dismissed with costs.

In rejoinder, about the concern raised by Mbiro that this point of preliminary objection is not a pure point of law, Mr. Mponda reiterated his submission made in the 1<sup>st</sup> point of preliminary objection in respect of this same concern. About the merit of the 2<sup>nd</sup> point of preliminary objection, Mr. Mponda argued that the Plaintiffs have sought refuge to section 13 of the Trustees Incorporation Act (Cap. 3181) and did not address the specific issues he raised in his submission in chief. He was of the view that the plaintiffs exercised their one-off share option as provided under Article 8 of the Trust Deed and thereafter left employment, thus they have no *locus standi* to sue the defendants because they admit in their plaint that they are not employees of the 1st Defendant.

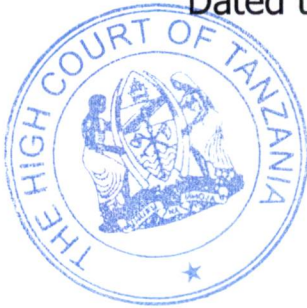
Moreover, Mr. Mponda was of the view that section 13 of the Trustees Incorporation Act (*supra*) is irrelevant and does not confer to the plaintiffs a right to institute this case. Their rights if any would have started with the Trust Deed and the Rules made thereunder. He contended that the Plaintiffs have not pleaded any breach of the Plaintiffs' rights under the Trust Deed or

Rules made thereunder to give them a *locus standi*. He maintained that the terms of the Trust state clearly that the Trust is for the benefit of employees of the 1<sup>st</sup> Defendant only. He insisted that the plaintiffs were strangers.

Again, I need to start with the concern raised by Mr. Mbiro that this point of preliminary objection is not a pure point of law on the reason that it requires this court to scrutinize the documents filed by the defendants in particular the Trust Deed and Rules made thereunder. As I alluded earlier in this Ruling when I was dealing with the first point of preliminary objection, in determination of a point of preliminary objection this court has to examine the plaint and the documents annexed thereto because parties are bound by their pleadings. In substantiating this point of preliminary objection Mr. Mponda relied on the Trust Deed and Rules made there under. He quoted some of the Articles in the Trust Deed and the Rules made there under. His interpretation of the same was to the effect that the plaintiffs' being ex-employees of TCC have no right to sue under the Trust Deed and the Rules made there under whereas, Mr. Mbiro maintained that the Articles in the Trust Deed and Rules made there under cannot be applied to deny the plaintiffs their right to sue the defendants and that the provisions of the Trustee Incorporation which provides for the rights of the beneficiaries to take legal action against the faults or neglects committed by the trustees prevails. With the brief narration of the rival arguments between Mr. Mponda and Mr. Mbiro I have given herein above, it is obvious that the determination of this point of preliminary objection requires this court to examine the documents filed in court and relied upon by each side in supporting its stance. I agree with Mr. Mbiro that this point of preliminary objection is not

a pure point of law. Thus, I cannot determine it at this stage as a point of preliminary objection. In the upshot, both points of preliminary objections are not pure points of law. The same are hereby dismissed. Costs will be in course.

Dated this 28<sup>th</sup> day of March 2024



  
**B.K.PHILLIP**

**JUDGE.**