IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 21 OF 2020

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE DECISION OF REGISTRAR GENERAL (REGISTRATION INSOLVENCY AND TRUSTEESHIP AGENCY) MADE ON 4TH OF AUGUST, 2020 AGAINST THE APPLICANTS

BETWEEN

1.	REV. JOHN MATHIAS CHAMBI	APPLICANTS
2.	MAGRETH E. MBUTA	
3.	DANI R. NDUMIZI	
4.	GERVASE JOHN KAMULI	
5.	WILLIAM E, MACKSON	
6.	WAKOLE G. MABILA	
7.	JENU P. MAHONGE	
8.	JOHN TOMAS MAGAWE	
9.	ABRAHIM CAGELE	
10.	PETER A. KAPAMA	
11.	ISAAC GIDEON MWITA	
12.	JACKSON MADUHA	
13.	RICHARD NYABU	
14.	SILAS MAYALA	
15.	SAMWEL EMMANUEL	
16.	PETRO LAZARO	
17.	PETRO LAMECK	
18.	TEREZA BUKWIMBA	
19.	YUSUFU ROBERT	
20.	ELIAS SITTA	
21.	THOMAS MANASE	

22. JACOBO LUFEGA
23. DANIEL ELIAS MASUMBUKO
24. MARIA KASHINJE
25. WILISON MASORWA
26. BERINA MAGIDA
27. ASMOS KWEJA
28. ZAKARIA BULUBA
29. REV. BARNABA SAGULA
30. TIMOTHEO BAGORE
31. JOSEPHATI MATUNTU
32. JULIANA PAULO
33. THOMAS SHILINDE
34. JOHN MAKELEMO
35. ISAKA ELIASI
36. DAUDI CHARLES
37. AYUBU SAMSON
38. RICHARD KWILEMYA LEONYA
39. MCH. YUSTA INYASI
40. MCH. FESTO SAMWEL
41. MCH. SAMWEL PASTOR
42. MCH. AMON OSWALD
43. ISAKA OTTO
44. MCH. PATRICK
45. MCH. CHARLES MICHAEL
46. MCH.RAMECK RUANGEA
47. MCH. MARCO PHILIP
48. MCH. EMMANUEL NTAICHA
49. MCH.YOHANA MILEKWA
50. AKGERO ANDREA
51. REV. SOSPETER GAULILA
52. DR. DEUS MOSES MAHIRI
53. PETER RUZIGE
54. ISAAKA MARCO
55. PIUS ZAKARIA
56. METHROD MARCO
57. KAMACHUMU CHABONGO
58. PHILIPO EILLISMU
59. TUMAINI CHARLES
60. FARAJA MARCO

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62. TASIANA BARIBATE
63. DANIEL MISALABA
64. REV. ELISHA MAYEKA
65. REV. JOASH M. WAMBOGO
66. REV. ALFRED DEMISAMI
67. REV. YABED DANIEL
68. REV. SILAS SEHANI
69. REV. MATHIAS SHITUNGALU
70. REV. JAMES KALOLE
71. REV. MEDARD BUNDALA
72. MCH. RENATUS ZIRAHEWA
73. MCH. YOHANA MILEKWA
74. MCH. ELIYA AMONI
75. MCH. RANARO BUFASH
76. THOBIAS EDWARD CHUBWA
77. JAMES NKALI
78. MARIA ABELI
79. MICHAEL J. NGELELE
80. EMMANUEL DAMINA
81. JACKSON BUJEGE
82. OBEDI ANDREAS
83. JACKSON ZILIBONERA
84. SIMON MALISELI
85. LUCAS LEO
86. DAUD SHIKOME
87. YUSUPH KAKALA
88. SIPRIAN JOSEPH
89. ELISHA JOHN
90. MCH. YOHANA MLEKWA
91. REV.EMANUEL ANDREA
92. REV. LAMECK S. KAKOBE
93. REV. ROBERT NGAI
94. MCH. IBRAHIM MALIMI
95. MCH. IBRAHIM HUSENI
96. MCH. SIMON ZEFANIA
97. MCH. NYUKILIA GEORGE
98. REV.LENATUS ZILAHENDA
99. MCH. AGENS NTUNDUWA

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101. REV. LUCAS ROBERT
102. REV. COSMAS CHARLES
103. REV. PAULO MAKOYE
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105. REV. JACKSON KALULU
106. REV. STEPHEN SANGIJA
107. MCH. MULU MAHANDE PETRO
108. MCH. LADISLAUS AUGUSTINE
109. REV. SYLIVESTER KAZILAHABI
110. MCH. SAVERA BONIPHACE
111. REV. AYUBU MALIWAKENDA
112. REV. JOSEPHINE KUBENA
113. REV. THOAMS NDALAHWA
114. REV. SIMON AKIBA
115. MCH. JOEL MASOME
116. MCH. AMOS KASWAHILI
117. MCH. DANIEL SIMON
118. REV. SIMON CHARLES
119. REV. ELIAS LUCAS SIMON
120. REV. ERASTO LUCAS
121. MCH. YUSUPH LUGOMALALA
122. MCH. FRANSISCO NG'WANHALE
123. MCH. LAZARO ELIAS
124. MCH. ELIKANA PAULO
125. ONESMO ANDREA
126. NDALAHWA MAGANGA
127. JAMES DEUS
128. EMMANUEL MGANGA
129. CHARLES LAURENT
130. MUSA JULIUS
131. NEWTON R. SAIMON
132. SULEIMAN D. SIMON
133. KADUME I. IDUME
134. DEUS DAUDI
135. JOSEPH MASATU
136. SAMWEL MASASILA
137. DAUD MASOLWA
138. NEEMAN MARICK

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139. BERTHA NYERERE MPONA
140. SOSPTER MOZES
141. KENERDI NDIGAHWA
142. DANIEL O. SAI
143. SOEPSETER LIPENDO
144. ELIYA ATHON
145. LAZARO CHARLES
146. YUSUPH N. KIPNUKE
147. MOSES KASWAHILI
148. ELLY KAGOMBA
149. AMOS CREDU CHELAGA
150. SUZANA CHANZA
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152. ISACK PENDEZA
153. MCH. SILYEVESTER DODO
154. MCH. ADAMU NTUMBA
155. VENANCE MSIKELA
156. MCH. YOHANA NATHAN
157. MCH. EZEKIEL KULONG'WA
158. MCH. PETER T. ISAWINGA
159. MCH. JAMES IBRAHIM
160. REV. YOHANA TYABA
161. REV. LUCAS ROBERT
162. REV. COSMAS CHARLES
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164. REV. NICOLAUS I. KIHILA
165. REV. JACKSON KALULU
166. REV. STEPHEN SANGIJA
167. MCH. MMULU MAHANDANE PETRO
168. MCH. LADISLAUS AGUSTINE
169. REV. SYLIVESTER KAZIRAHABI
170. MCH. SAVERA BONIPHACE
171. REV. AYUBU MALIWAKENDA
172. REV. JOSEPHINA KUBEMA
173. REV. THOMAS NDALAHWA
174. REV. SIMON AKIBA
175. MCH. JOEL MAROME
176. MCH. AMOS KASWAHILI
177. MCH. MCH. DANIEL SIMON

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185. SOSTHENES M. MIHAYO
186. DATUS DIONIS
187. MCH. THEDDEY W. KADEGE
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189. REV. NICOLAUS EDWARD
190. PASCHAL GERVAS MALUGU
191. REV. LUCAS SELEA
192. REV. EMMANUEL SALU
193. REV. JOHN JOSPEH
194. MCH. MATHAYO M. CHALYA
195. MCH. MARIAM JOHN
196. REV. EDWARD KAGEHU
197. MCH. ELIKANA KISENA
198. MCH. DAUD LUSINZA
199. MCH. PENDO MASAS
200. MCH. SAMWEL CLEMENT
201. MCHA. THOAMS MAYUNGA
202. MCH. RAHAB JOHN
203. MCH. YOHANA JAPHET
204. MCH. ROBERT ERASTO
205. MCH. VERONICA FRANCIS
206. MCH. JOPSEPH MAJUNGA
207. MCH. MAGRETH F. MINURO
208. EZEKIEL SHITUNGULU
209. DONARD MASALU
210. MAECO NYAKANGA
211. DEUS MEHADI
212. THOMAS CHARLES
213. PAULO SANGA
214. AMOS ISANGANGHA
215. ZABRON MANENO
216. BONIPHAS MILARY

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217. LUKA MANEMBA
218. YOHANA ONESMO
219. PETR0 MAFUELE
220. YOHANA JACOB
221. SADOCKI MASATU
222. DANIEL GEORGE
223. JOSEPHAT BAGOLE KAHABI
224. MUSA LUTOBEKA
225. GEROGE J. LUSANYA
226. FRANK MARCO
227. JOHN LUGAILA
228. MATHAYO LUKAS
229. JOHN MABULA
230. YOHANA LUKASI
231. YOHANA ZAKARIA
232. DEONAD SHINYANGA
233. MAGRETH I. MBILIZI
234. MASABA PETER
235. JACTOMI SIMONI
236. YOHANA ZAKARIA
237. YUSUFU VITO
238. GIDIONI MICHAEL MAJIJA
239. EVELIN COSTANTINI
240. YOHANA NYALOSI
241. DANIEL NYALALI
242. EMANUEL MUSA
243. YAKOBO JHONAS
244. STANSLAUS MCHOMVU
245. THOBIAS JAMES
246. IBRAHIM KILION
247. ELIAS KASIGA
248. MOLIS PETER
249. CHRISTANT B. MWANDUZI
250. SILAS LUGWISHA
251. REV. BATHLEMEYO DAVID
252. SHADRACK MATAGANE
253. MCH. SIRIVESTA KAFULA
254. MCH. ENRNEST KIPETA
255. PASTAR EMANUEL MGENI

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256. FULGENCE BANKORA
257. REV. JOSPEH S. KULOLLA
258. MCH. HOSWAD DAUD
259. MCH. PETER CHARLES
260. MCH. DOMITILA S. NDAKI
261. REV. JACKSON MNIKO
262. REV. MARKO MASHISHENGA
263. MCH. ALPHONSINA LUHIGUZA
264. MCH. ALPHRED OGUTI
265. MCH. JOHN MLANDA
266. MCH. EMA SAHANI
267. MCH.PAULO KWABI
268. REV. SIMON JOHN
269. MCH. ISSACK LAWI
270. MCH. OSWARD DAUD
271. MCH. JOHN SHAMU
272. MCH. DANIEL KULELA
273. MHC. JOHN MYANDA
274. REV. JULIAS MAKABE
275. REV. JOSEPH MONGA
276. RICHARD CHRISTOPHER
277. MATHIAS K. LUTTA
278. SILAS SALAMBA
279. ELIYA PETRO
280. BOAZ KAZEBA
281. REV. JOHN NYANDA
282. REV. SIMON MWASUNGULWA
283. REV. ERASTO SHIJA
284. REV. PETER MTOKAZI
285. OBADIA BUSUNA
286. ESTA CHILALA
287. RE. MOSES M. KASHINJE
288. REV. ANDREW MATEGWA
289. REV. WALTER BABU NYAIGA
290. REV. GEORGE ISHENGOMA
291. REV. FESTO TWARA
292. REV. ERENESTI KIPETA
293. MCH. GRACE JAMES
294. REV. ADREA CHACHA

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295. REV. MICHAEL MASHISHANGA
296. JOSEPH MUGAMBO
297. MCH. VICTOR MWAKILASA
298. MCH. AMOS NIKOLAUS
299. MCH. MERY MAKANZA
300. MCH. DORICAS MASAGA
301. YUSUFUELI DUMA
302. PAULO NKWABI
303. CHARLESI BUGALAMA
304. PAUL BUGALAMA
305. NAOMI SUNGA
306. MUSA LUPASHA
307. DAUDI KISHINA
308. STEPHANO NJUMBAN
309. IBRAHIM PAULO
310. BENARD LUTOBEKA
311. JAMES KALELEMA
312. LUKAS MAHUDU
313. MARTHA MANENO
314. PETER M. THOMAS
315. REV. IBRAHIM SASI
316. EMMANUEL J. MUNOKU
317. REV. PATRICE MSETI
318. MCH. SAIMON MANKO
319. MCH. DAUD NYAKIRANDI
320. MCH. ISAYA BHOKE
321. MCH. R. BITURO
322. MCH.WILLIAM M. SAMWEL
323. MCH. JOHN ING'ARE
324. ALBERT O. CAPIS
325. YOHANA KOYI
326. WILLIAM IGOGO
327. JOSEPH XAVERY
328. REV. JULIUS MBARAKA
329. REV. WILBARAKA
330. AGNES G. BRUNO
331. KENEDY RWAYA
332. DAUD ISABAYAYA
333. JAMES MSELUKA

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335. JOSEPH WANGOTO
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337. REV. IBRAHISI SASI
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345. JACKSON MADELEMO
346. GIDEON LEBEJO
347. ABEL MTALULA
348. YOTAMU NDIGOMO
349. ISAYA LESILWA
350. MUSA CHALINYE
351. EMMANUEL ASHERI
352. YARRED C. LESILWA
353. ROBERT C. MANGWELA
354. SAMSON MSASU
355. EZEKIEL MCHEMWA
356. STEPHANO MLIMBA
357. DAVID MITAMBANGA
358. IVAN CHIMWENDA
359. GIDEON J. MATENGI
360. LEONARD CHAMBI
361. DAUDI MSENGI
362. AZALIA MBENA
363. JOHN J. MSANJILA
364. DADI WAYA
365. LAZARO MADELEMO
366. SHIJA EMMANUEL
367. FESTO CHIBUGASI
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369. FESTO MGONHWA
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375. ELIYA MASHAKA
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377. GEOFREY A. MWAMASYULA
378. YONA K. DOTO
379. EGON M. ISRAEL
380. PETER CHARLES KASWIZA
381. EZEKIEL CHARLES
382. ELIAS MATANA
383. JOSHUA TUNGU MUSEMBE
384. EMMANUEAL MAGAKA
385. PAUL LUBINZA
386. PAUL CHARLES LUTIMIZI
387. JOHN MASANJA IGOGO
388. JOHN MAGEMBE
389. PHILIPO JOHN KUSENA
390. MANASE MALULU
391. JULIUS MATAYO
392. YUSUFU SHANI
393. NIKODEMO MAKALA
394. DAUD KRISTOFA KAGUSA
395. JULIUS KIBELENGE
396. DAUDI SALEHE
397. ADOLFU PAULO
398. BONIFACE SAIPIONI
399. JOHN SNANGIE
400. CHAZOS MWANDU
401. ELISHA MASUMBUKO
402. VENAS SENGA
403. MCH. AYUBU KAMBOSHA
404. MCH. NOBERT NARKO
405. MCH. SIMON KASHINDYE
406. MCH. JONATHAN PETRO
407. MCH. STEVEN AMOS
408. MCH.JOHN MADUKA
409. JOSEPH PHILIPO
410. MCH.ZEDEKI KASHINYA
411. MCH. MELIKIA SAMSON

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416. MCH. AMOS MAIGE
417. MCH. THOMAS LUFEGA
418. MCH. MATHIAS PETRO
419. MCH. YUSSUPH ILUMBA
420. MCH. PETRO KAMBEJA
421. MCH. SEPHANIA PASKALI
422. MCH. EMMANUEL S. KIMBULU
423. MCH. JAMES G. GOROBANI
424. MCH. CONSTANTINE BUDAGA
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426. MCH. FAUSTIN GEOFAS
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428. REV. PAUL BUSUNGU
429. MCH. SIGITRED P. SHIRIMA
430. MCH. JUSTINE KIHINGA — APPLICANTS
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438. MCH.YOHANA R. MHONZOLO
439. MCH. RICHARD LUHUSA
440. MOSES STEVEN KASONGYE
441. MCH. JOSEPHAT NKOLA
442. MCH. SELEMANI MAFULU
443. MCH.JOSEPH MATAIFA
444. MCH. SAMWEL BUNDALA
445. MCH. ARONI BANGILI
446. MCH. JOSEPH PHILIPO
447. MCH. MARKO SHINGWENGWE
448. MCH. DENIS SAMWEL
449. MCH. REVOCATUS THADEO
450. MCH. MATHAYO EDWARD

451. EMMANUEL LUSHUGEMBE
452. DAMIEL MADAHA
453. SAMSON MASELE
454. MATHAYO ILUMBA
455. LAMECK MWANDU
456. EZEKIEL MAHONA
457. AMOSI JILALA
458. PETER MWIGA
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460. EMMANUEL ELFRED
461. MRS. AGNES MPEMBA
462. PETWE NJILE
463. MTEULE MASUDI
464. ELISHA NCHALI
465. PETWE MASANJA
466. CHARLES MANAMBA
467. AUGUSTINE MLOKOZI
468. DANIEL MANGA
469. JACOB MADAHA
470. ANDREA SALU
471. EZEKIEL BUSENGWA
472. ALEX SEDEKIA
473. YOHANA SHIJA
474. JOSHUA DASON
475. STEVEN MAKONDO
476. PETWE KATAMBI
477. SOSPETER JOHN
478. NICODEMUS MHOJA
479. LUCAS LUDENDE NKUBA
480. JOSEPH MACHEMBA
481. MAIKO MSANGOWOLE
482. YOHANA M. KUSHILIMU
483. EMMANUEL KASHILIMU
484. SARA M. MILINILYU
485. MARIAM T. SAMBA
486. MARKO KOMANYA
487. FESTUS A. MUIMBWA
488. BARAKA KITA
489. DAUD SALAMBA

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491. DANIEL MAKENZI
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493. ELIYA SIMBAO
494. CHARLES MAGANGA
495. DANIEL LIKISATA
496. DAUD NDIMISWA
497. JACKSON BULENGE
498. DAUDI JACOB KAYUNI
499. KENETH MTAMBO
500. GABRIEL MWAKALONGE
501. JAPHET MBWETE
502. RICHARD MWAKANYAMALE
503. REV. JAKOBO MIZENGO
504. REV. EMMANUEL SALAWA
505. REV. YOHANA MAGANYA
506. REV. HENERY LISAMBO
507. REV. ALOIS LINUS
508. REV. CHALES MAGANGA
509. REV. DANILI KUKWAJA
510. REV. ELIA SIMBA
511. MCH. DAUDI NDIMISWAS
512. MCH. DANIEL MAKENZI
513. MCH. LUCY MAKENZI
514. SIMON Z. MATEMI
515. ISSA A. MWAIKOLE
516. MOSES NYENYEMBE
517. SAMWEL KIJALA
518. ASHARI KYAMBA
519. OBADIA MWAMBWALULU
520. ASED MWAMBETE
521. STEPHANO HALINGA
522. ELIA SHIBANDA
523. EMMANUEL KAMANGA
524. JOHN MWASHILIMBE
525. SUBIRA MWAMPASHI
526. ATUBWENE MWAISABILA
527. ADAM MSWELO
528. LAZARO MWAKATAGE

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529. MUSA E. MWENGA
530. GODLUCK SIWALE
531. LACKSON SIAME
532. SHADRAKA MKINGA
533. FLANGSON NDIMWA
534. JOSEPH SIAME
535. JACKSON MIDUHA
536. RICHARD NYABU
537. SILAS MAYALA
538. SAMWEL EMMANUEL
539. PETRO LAZARO
540. PETRO LAMECK
541. TELEZA BUKWIMBA
542. YUSUFU ROBERT
543. ELIAS SITTA
544. THOMAS MANANE
545. JACKOBO LUFEGA
546. DANIEL ELIAS MASHINDIKA
547. MARIA KASHINJE
548. WILSON MASOLWA
549. BERINA MAGIDA

APPLICANTS

VERSUS

REGISTRAR GENERAL
(Registration Insolvency and Trusteeship). .....1ST RESPONDENT
HON. ATTORNEY GENERAL.....2ND RESPONDENT

REV. JOSHUA B. WAWA .....3RD RESPONDENT

REV. CHRISTOMOO ISACK NGOWI .....4TH RESPONDENT

REV. KENEDY KASUNGA.....5TH RESPONDENT

REV. PETER MADAHA.....6TH RESPONDENT

RULING

Date of last Order: *13/04/2021*
Date of Ruling: *04/06/2021*

MLYAMBINA J.

One of the technical issues in this application is; whether the Court should apply "*the doctrine of finger litigation*" or "the principle of misnomer" by allowing the Applicants to amend their pleading even after the preliminary objection on points of law has been raised. The Latin maxim is couched in the wording ***Nihil facit error nominis, cum de corpora constat*** meaning: An error as to a name is nothing when there is certainty as to the person. For the better understanding, I will start giving its brief meaning. *The doctrine of finger litigation* is the doctrine under the law of misnomer, which means missing names, or correcting names. The principle was first developed by English Court of Appeal in the case of **Davies v. Eslby Brothers. Ltd**.[1] Lord Delvin at page 676 came up with litigation finger test as follows:

> *Did the statement of claim point the litigation finger at the right Defendant, such that they would know it was meant for them despite the naming error ...would need to make other inquiries then the mistake is more than a misnomer and would be mis description.*

In UK, ever since then, the doctrine of finger litigation is used in the situations where the Defendant is improperly named in the statement of claim. The Court upon being asked to correct the name, must determine whether a reasonable Defendant in looking at the document as a whole and in all the circumstances, would conclude that they were, in fact, the Defendants. If the answer is in the affirmative, then the misspelling is known as a misnomer. If on the other hand the conclusion reached is that

[1] [1960] 3 All ER 672

the Defendant would not reasonably be able to conclude it was meant for them and would need to make other inquiries then the mistake is more than a misnomer and would be a mis description.

The Litigation finger test may assist the Plaintiff in such case if the test is satisfied, then the Plaintiff will be permitted to correct the mistake as misnomer, by amending statement of claim. The effect would be to substitute the proper Defendant's name in place of the incorrect named Defendant. If the test is not satisfied then the amendment will not be permitted as the error would be considered a misdescription.

With the afore general brief, I will now proceed with the background of the matter, analysis of the submissions, and decision thereof.

The Applicants in this case filed Chamber Summons supported by an Affidavit of John Mathias Chambi, sworn on his behalf and on behalf of the rest of the Applicants. The application was made under *Section 17 (2) and Section 19 (3) of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act*[2] *and Rule 8 (1) (a) (b) (2), (3), and (5) of the Law Reforms (Fatal Accident and miscellaneous Provisions) (Judicial Review Procedures and Fees).*[3] The Applicants sought for this Court to order:

(i) That, the proceedings and decision of the Registrar General (Registration Insolvency and Trusteeship Agency) dated 4th August, 2020 registering and recognizing the 3rd ,4th 5th and 6thRespondent as Trustees of the Evangelical Assembles of God Tanzania (EAGT) be removed to the High Court.

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[2] Cap 310 [R.E.2019]
[3] Rules of 2014 made under Section 19 of Cap 310 [R.E.2019]

(ii) That, the Proceedings and the decision of the Registrar General (Registration Insolvency and Trusteeship Agency) dated 4th August 2020 registering and recognizing the 3rd,4th ,5th, and 6thRespondents as Trustees of the EAGT be quashed forthwith on their removal in the High Court.

(iii) That, the 1stRespondent be compelled by the order of Mandamus to remove the names of the 3rd,4th,5th and 6th, Respondents from the Register of Trustees of Evangelical Assemblies of God Tanzania (EAGT).

(iv) That, the 3rd, 4th, 5th, and 6thRespondents be prohibited from exercising their power and functions as Trustees of the EAGT.

(v) Costs of and incidental to this application be provided for.

(vi) That, the Honourable Court be pleased to make any other order as may necessary be made.

The Applicants were competently been represented by learned Counsel Robert Rutaihwa. The first and second Respondents were judiciously represented by learned State Attorneys Xavery Ndalahwa and Cosmas Samwel Mtabazi, while the third to sixth Respondents were enjoying the service of learned Counsel Didance Kanyambo.

When filling Counter affidavit in opposition to the application, the first and second Respondents raised a *plea in limine litis* namely that; *the application is bad in Law for suing non existing party.* The third to sixth Respondents also raised another set of *plea in limine litis* to the effect that; *the third to sixth Respondents in this case have no locus standi since they are Registered Trustees but they have been sued in their personal names.* Admittedly, the later *plea in limine litis,* meant that the Applicants

have no cause of action against the third to sixth Respondents. Both limbs of objection were orally litigated before the Court.

On the first limb of objection, learned State Attorney Xavery Ndalahwa submitted that the first Respondent is the Registrar General (Registration Insolvency &Trusteeship Agency). He submitted that, Executive Agency (Registration Insolvency and Trusteeship Agency) RITA was established in 2005.[4] It performs the duties that were performed by the Administrator General's Office in the Attorney General Chambers.

In view of learned State Attorney Ndalahwa, basing on the relief sought by the Applicant, the 1st Respondent ought to be RITA and not otherwise as done by the Applicant. So, the application cannot stand. He cited the case of **National Oil v. Aloyce Hobokela,**[5] where the issue was; *whether National Oil was the same with National oil Tanzania Ltd.* The Court ruled that, those were two different companies. Henceforth, the application was dismissed.

Learned State Attorney Ndalahwa, also cited the case of **The Registered Trustees of Chama cha Mapinduzi v. Mohamed Ibrahim.**[6] In the latter case, the issue was; *whether the Registered Trustees of Chama cha Mapinduzi and Naibu Katibu Mkuu CCM was the same party.* The Court ruled out that those were two different parties. In the circumstances, the Court of Appeal set aside the High Court Judgment. State Counsel

[4] Established under Government Notice No. 397 published on 2nd day of December, 2005, under the Executive Agencies Act Cap 394
[5] Misc. Labour Application No 212 of 2013, High Court of Tanzania Labour Division at Dar es Salaam, (unreported)
[6] Civil Appeal No. 16 of 2008 Court of Appeal of Tanzania at Zanzibar (unreported)

Ndalahwa winded up his submission by arguing that the matter is improper before the Court and it should be strike out with costs.

In response, learned Counsel Robert Rutaihwa for the Applicants submitted that *the plea in limine litis* was raised as a matter of fashion. To him, this being an application for Judicial Review, it is governed by *the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*.[7] In particular *Rule 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees Rules,*[8] which directs on which practice and procedure should be applicable in case the rules are silent.

According to Counsel Robert Rutaihwa, where the name of a party has been wrongly cited, the Rules and the Act are silent but Rule 17 directs that the practice and procedure applicable in the High Court shall apply. He cited *Order I Rules 9 and 10 (1) of the Civil Procedure*[9] which provides:

> *No suit shall be defeated for non-joinder or misjoinder of parties. The remedy is to substitute or add the party who has not been properly cited.*

Counsel Rutaihwa submitted that, when filing this application, they relied under *Section 14 of the Trustees Incorporation Act*.[10] It refereed to the Registrar General. They were not aware of the amendments. So, to the Applicants, it was a bonafide mistake. Finally, the Applicants prayed the Court to allow them amend their pleading. He cited the Court of Appeal

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[7] Cap 310 (R.E. 2019)
[8] *Ibid*
[9] Code Cap 33 [R.E. 2019]
[10] Cap 318 [R.E. 2019]

of Tanzania decision in the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd.**[11]

Of interest to this ruling, Counsel Rutaihwa invited this Court to apply the *finger litigation doctrine*. He cited a MIMEO (unpublished Article): **It Had to Be You: A Primer on the law of Misnomer** in which the author points out that:

> Under *Rule 26.01 of the Ontario Rules of Procedure of 1994*,[12] the Court is mandated to grant leave to amend a pleading on such terms as are just, *unless prejudice would result that could not be compensated for by costs or an adjournment*. Under Rule 5.04 (2) of the Ontario Rules of Procedure,[13] the Court is permitted to "add, delete or substitute a party" or "correct the name of a party incorrectly named," under the same terms.[14]

The author goes on to observe the first step of the two-step test for misnomer in determining who the "litigation finger" is pointed at as follows:

> How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "of course it must mean me, but they have got my name wrong". Then there is a case of mere misnomer. If, on the

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[11] Misc. Civil Application No. 113 of 2011, Court of Appeal of Tanzania at Dar es Salaam, page 4 – 5
[12] RPO 1990, Reg 194
[13] *Ibid*
[14] *Ibid*

other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer.[7]

According to Peter Heinen, a Plaintiff's pleading will be viewed as reflecting a correctible "misnomer" in respect of a Defendant where it is apparent: *One*, that the Plaintiff intended to name the Defendant; and *two*, that the intended Defendant knew it was the intended Defendant in relation to the Plaintiff's claim.

If it is a case of misnomer, the second question to answer is; *whether the Court should use its discretion under Rule 5.04 (2) of the Ontario Rules of Procedure.*[15]

Basing on the above principle on the doctrine of finger litigation, Counsel Rutaihwa was of the view that, in as much as the pleading before the Court are very categorical referring to the Administrator General but wrongly referring in as Registrar General, under the *Litigation Finger Doctrine,* the remedy is to amend the pleading by substituting the mere name of Administrator General from the Registrar General.

When probed by the Court on the importance of the *doctrine of finger litigation*, Counsel Rutaihwa mentioned the following advantages: *One*, is to do away with technicalities. *Two*, it enhances the principle of overriding objective, meaning that, rather than dismissing or striking out the pleadings before the Court, to let the parties start afresh as the case may be, which may involve a prolonged procedure, resources to both parties

[15] RPO 1990, Reg 194

and the Court. *Three*, such other purposes of which the overriding objective were brought in place.

Counsel Rutaihwa, however, distinguished **the case of National Oil** on account of: *First*, the decision is not binding. It is merely a persuasive authority. *Second*, the decision when made did not take into account the decision of **Christina Mrimi.** *Third*, under the doctrine of *stare decis,* and **the Christina Mrimi decision** is binding to the High Court. *Fourth*, in **the National Oil case** the provision of *Order 1 Rules 9 and 10 (1)*[16] were not put into place. Therefore, in view of Counsel Rutaihwa, taking the test in **Christina Mrimi,** the **National Oil** decision remains redundant.

In rejoinder, learned State Attorney Xavery Ndalahwa submitted that, since the Applicants have admitted that they wrongly joined the 1stRespondent, the remedy is to struck out the application with costs. He distinguished the case of **Christina Mrimi** with this case by submitting that, in that case, the application to correct name was made while there was no any preliminary objection raised. Consequently, the **Christina Mrimi** authority does not help.

Having gone through the pleadings and both Counsel's submissions, I find it authoritative and agree with learned Counsel Robert Rutaihwa for the Applicants on three facts: *One*, this is an application for Judicial Review governed by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act. In particular *Rule 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees Rules*[17] whose Rule 17 mandates the practice and procedure applicable in the

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[16] Cap 33 [R.E.2019]
[17] Cap 310 [R.E.2019]

High Court to be applied. Two, *Order I and Rule 9 of the Civil Procedure*[18] mandatorily prohibits defeat of suit on account of misjoinder and non-joinder of parties. Three, Order I Rule *10 (1) of the Civil Procedure Code*[19] allows substitution of wrong Plaintiff in the suit or adding another Plaintiff.

I further agree with Counsel Robert Rutaihwa that **the case of National Oil** is not binding to me. It is merely a persuasive authority. However, we are reminded by the Court of Appeal of Tanzania in the case of **Ally Linus and 11 Others v. Tanzania Harbours Authority and Temeke**[20] that it is a duty of a Judge not to dissent lightly. Their Lordships held:

> *(ii) it is not the matter of the courtesy but a matter of duty to act judiciously that requires a Judge not lightly to dissent from the considered opinion of his brethren.*

I find Counsel Robert Rutaihwa has not given good reasons as to why the Court should dissent from its decision given in **National Oil case**. I further find that the objection raised is not a fashion. It is a pure point of law because neither *Rule 9* nor *Rule 10 of the Civil Procedure Code*[21] does allow a Plaintiff to sue a wrong party. Therefore, the objection raised is a pure point of law in the light of the daily cited famous case of **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd,**[22] in which preliminary objection was defined to mean that:

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[18] Code Cap 33 [R.E. 2019]
[19] Cap 33 [R.E. 2019]
[20] District (1998) TLR at page 6
[21] Cap 33 [R.E. 2019]
[22] [1969] 1 EA 696

is in the nature of what is used to be a demurrer. It is a pure point of Law which is argued on the assumption that all the facts pieaded by the other side are correct.

In another case of **Bank of Tanzania Ltd v. Devran P. Valambia,**[23] the Court observed on the rationale of a preliminary objection as follows:

The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of the appiication because there is a point of iaw that will dispose of the matter summarily.

It is abominable that the law imposes a duty to the Plaintiff to sue a proper party. In the case of **Coseke Tanzania Limited v. Public Service Social Security Fund (Formally known as LAPF),**[24] it was expressed that:

In common knowledge the Plaintiff is expected that, prior instituting a suit in Court, she was required to make inquires or search to determine the correct entity to sue Failure to do so renders the whole procedure incompetent.

In the same **Coseke case,**[25] the Court quoted with approval the case of **Thomas Ngawaiya v. The Attorney General & 3 Others,**[26] in which it was held that:

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[23] Civil Application No 15 of 2002 Court of Appeal of Tanzania (unreported)
[24] Commercial Case No. 143 of 2019, High Court of Tanzania at Dar es Salaam Registry
[25] *Ibid*
[26] Civil Case No 177 of 2013, High Court of Tanzania at Dar es Salaam Registry

Wrongful institution of proceedings in Court renders the whole application incompetent.

Learned Counsel Rutaihwa for the Applicants prayed to this Court to adopt *"Litigation Finger Doctrine"* to rectify the situation because he was not aware of the amendments. I should observe that ignorance of the law has never been a good defence in this jurisdiction. It is even much worse when it is pleaded so by a sophisticated Counsel like of the Applicants.

I do entirely agree with the stated advantages of applying the doctrine of finger litigation and enrich the following benefits: *One*, amendment of pleadings safeguards Court to conduct litigation not on a false hypothesis of facts hence reach in a just and correct decision not based on errors. This can be observed in the case of **Ochieng & Others v. First National Bank of Chicago,**[27] as cited with approval in **St Patrick's Hill School Ltd v. Bank of Africa Kenya Ltd** [28] the Court of Appeal of Kenya on setting up principles governing the amendment of pleading held that:

The power of Court to allow amendments is intended to determine the true substantive merits of the case.

Two, amendment of pleadings, saves time of the Court, prevents delay in dispensation of justice and avoid multiplicity of suits. As a result, it helps the court to evade huge backlog of cases. Requiring the party to start the case afresh, involves a prolonged procedure, and resources to both parties and to the Court. This was clearly stated in Ugandan case of

[27] Civil Appeal No. 147 of 1991, Court of Appeal of Kenya at Nairobi (unreported)
[28] Civil Case No. 7 of 2017[2018] KLR

Buffalo Youngster Inc. v. SGS Uganda Ltd[29] where the Court stated that:

> *Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.*

Three, amendment of pleading should be allowed because it is a mandatory right provided for under *Order VI Rule 17 of the Civil Procedure Code.*[30]

Four, through the overriding principle, parties should be allowed to amend pleadings because the Court is guided by Civil Procedure Rules to deal with cases justly and at a proportionate cost. In the case of **Magoiga Gicherev. Peninah Yusuph,**[31] it was stated that;

> *with the advent of principle of overriding objective brought by the Written Laws (Miscellaneous Amendments)*[32] *which now requires the Court to deal with cases justly and to have regard to substantial justice.*

Five, Amendment of pleadings should be allowed for the interest of justice, since it defends the right of an innocent litigant.

Six, amendment of pleadings helps parties to correct their mistakes in the pleadings because the objective against pleading is to protect the right of parties and not to punish them for the mistake made by them in the pleadings.

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[29] HCMA, No. 6 of 2012
[30] Cap 33 [R.E. 2019]
[31] Civil Appeal No 55 of 2017[2018] TZCA 222
[32] (No.3) Act No 8 of 2018]

However, amendment of pleadings is discouraged on account of the following reasons: *First*, it is a hindrance to speedy disposal of the matter. *Second*, it has more possibilities and chances of violation of legal rights of other side. *Third*, sometimes it is difficult to find the real question of controversy between parties. *Fourth*, the controversy between amendment of proceedings and the limitation is still not settled. *Fifth*, any Applicant with the mala fide intention are filing the application for amendment. It is not easy for the Civil Court to establish *mala fide* intention of the parties.

Regardless of the disadvantages, generally, it is the findings of this Court that amendment of pleadings is much beneficial than its disadvantages. However, in Tanzania, the law as it stands today does not allow pre-empting a raised preliminary objection. In the case of **Job Mlama and 2 Others v. Republic**,[33] the Respondent raised a preliminary objection, and the Applicant admitted but prayed to withdraw the Application so that they may refile afresh. The Court had this to say:

> *On the basis of the above stated reasons, we uphold the preliminary objection and find the application incompetent. The Applicants had prayed to withdraw their application with the view to refile a competent one. The prayer is not tenable. It is now trite law that, a prayer which has the intention of rectifying a defect in matter cannot be sustained after a preliminary objection has been raised. This is so because, to do so would amount to pre-empting the raised objection.*

[33] Criminal Application No 18 of 2013, Court of Appeal of Tanzania at Mwanza (unreported)

In **Godfrey Enock Mkocha v. Twiga Paper Products Ltd and 2 Others,**[34] had this to say:

> *We have considered the rival arguments by the learned counsel for the parties from their submission, it is apparent that they agree that it is fairly settled law in this jurisdiction that, once a preliminary objection has been lodged any course of action that would amount to its being pre-empted would not be allowed.*

Similar view was reached by the Court of Appeal of Tanzania in the case of **Thabit Ramadhan Maziku & Another v. Amina Khamis Tyela** & Another.[35] In that case, the Court held that:

> Once an objection is raised one cannot apply to amend, otherwise it will amount to pre-empting Respondents preliminary objection already raised. *It is a trite law that, under Order VI Rule 17 of the Civil Procedure Code,*[36] *the Applicant had a right to amend pleadings at any stage of the suit. However, that right ceased when the preliminary objection was taken against her by the Respondent.*
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> Once a preliminary objection is raised, the same must be disposed first before the case or Application continues. It is stated at Order XIV Rule 2 of the Civil Procedure Code. (Emphasis applied)

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[34] Civil Application No. 193 of 2013, Court of Appeal of Tanzania at Dar es Salaam (unreported)
[35] Civil Appeal No 98 of 2011, Court of Appeal of Tanzania at Zanzibar (unreported)
[36] Cap 33 [R.E. 2019]

The statutory position of the law is worded under *Order XIV Rule 2 of the Civil Procedure Code*[37] which provides that:

> *Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.*

Needless the afore position of the law, in order to deepen one's understanding, I will expound *the doctrine of finger litigation* or *misnomer* by making a survey on how it is applied in various jurisdictions.

1. Applications of the doctrine of finger litigation/misnomer in Canada

Finger Litigation test has been adopted by Ontario Canada and it has been summarized by the Court of Appeal in **Ormerod v. Strathroy Middlesex General Hospital**[38] as follows:

> *The Law amply supports the preposition that where there is a coincidence between the Plaintiff intention to name a party and the intended party knowledge that, it was the intended Defendant an amendment may be made, despite the passage of the limitation period to correct the misdescription or misnomer.*

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[37] Cap 33 [R.E 2019]
[38] (2009) 97 OR (3d)321 at para 11 (CA)

In Ontario Canada, the litigation finger test has been expanded to the extent that, the Court is not limited to consider what the receiving Defendant would know, but may, in addition consider the knowledge of the intended party's representatives, including the knowledge or powers of their insurer, their lawyer and their superiors when they received and reviewed the statement of claim.

However, in cases where pseudonyms (false names) are used or where there is doubt about the correct identity of Defendants, Plaintiff should ensure in order to meet the litigation finger test, that the allegation in the statement of claim are as particularized as possible so that the intended Defendants or their representatives would know, when reading the claim that the "*Litigation finger*" is pointing at them.

The Court can exercise its residual discretion to refuse the correction of a misnomer under *Rule 5.04 (2) of the Ontario Rules of Procedure,*[39] if the intended Defendant can demonstrate prejudice or if allowing the correction would lead to an unfair result. Rule 5.04 (2)[40] provides:

> *At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.*

It is accepted that to err is human and Plaintiffs sometimes do not have all the necessary information at the beginning of the case to properly identify all the Defendants. As such, finger litigation doctrine applies to

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[39] RPO 1990, Reg 194
[40] *Ibid*

ensure fairness. The Court of Appeal for Ontario in the case of **Lyooyd v. Clark**[41] held:

> *Where there is a coincidence between the Plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made despite of the passage of the limitation period to the misdescription or misnomer.*

The position through the case of **Kamboj v Sidhu,**[42] is that a party seeking a correction after the limitation period has expired must satisfy the Court that the err is truly a misnomer rather than a substituting of a new party into the existing proceeding.

Generally, the doctrine of finger litigation or misnomer is applied by the discretion of the court upon satisfaction that the err was human and there is no prejudice to the other party. If there is prejudice, it must be capable of being compensated by costs. At any rate, the Court retains residual discretion to refuse application of misnomer.

2. Applications of the doctrine of finger litigation/misnomer in Nigeria

The Doctrine of Finger litigation is also used in Nigeria as the Law of misnomer or correcting names. In the case of **Access Bank Plc v. Agege Local Governement And Another**[43] the Respondents instituted a suit by way of writ of summons and other originating

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[41] 2008 ONCA 343 at para 4
[42] 2013 ONSC 2478 (Master) at para 2)
[43] (CA/L/649/2014) [2016] NGCA 35 (17 MAY 2016) (CA/L/649/2014) [2016] NGCA 35 (16 MAY 2016)

processes against the Appellant in the name of Agege Local Government and Chairman, Agege Local Government seeking several relief (s) against the Appellant. The Appellant filed a notice of preliminary objection before the trial Court and prayed for: *One*, an order dismissing or striking out in its entirety for want of jurisdiction on the ground that the claimants as constituted on the face of the Originating processes are unknown to law, not being a juristic person. *Two*, an order dismissing or striking out the suit in its entirety for want of jurisdiction on ground that the claimants as constituted on the face of the originating processes lack the requisite *locus standi* to institute and maintain the suit.

The Appellant stated that the proper entity to be sued is Agege Local Government Council not Agege Local Government. The Respondent based on the law of misnomer that the Court can readily cure upon application for amendments. The Court considered whether the non-inclusion of the word 'council' to the names of the Respondents was a misnomer and whether the High Court was justified in dismissing the appellant's preliminary objection. The Supreme Court held that:

> *The non-inclusion of the word 'council' was indeed a misnomer which stood to be amended with the Court's discretion. Once amended, it gave the High Court the right to dismiss the appellant's preliminary objection. There is no other entity be it a human being or a legal entity that bears a name similar to Agege Local Government that it can be said to be a mistaken identity. It was not shown that there is in existence any such similar entity so the issue of mistaken identity cannot arise.*

The Court relied on legislation establishing the Respondents in order to identify their correct names and the Court stated that no other names could have been intended than those put forward by the Respondents.

Generally, in Nigeria, their law is settled that a misnomer occurs when the correct person is brought to the Court under a wrong name. The doctrine of misnomer is used only when there is a mistake as to the *name* and not as to the *identity* of the particular party to the litigation. In this situation, the Court allows application for leave to amend regardless of preliminary objection being raised.

3. Applications of the doctrine of finger litigation/misnomer in India

In India the law of misnomer is also used in corrections of names of parties when there is misdescription. In the case of **Alexander Montain & Co. v. Rumere Ltd**[44] it was held that:

> *On the facts here before me, I have no doubt in me that it is the clearest possible case of misnomer or misdescription of the Defendant. There can, in my opinion, be no difference on this account between a case of misnomer or misdescription of the Plaintiff and a case of misnomer or misdescription of the Defendant. I can discover no principle by which the Court will have no power to amend a misdescription of the Plaintiff but will have powers to amend a misdescription of the Defendant.*

[44] [1948] 2 All ER 482

The Defendant was sued as a company and a person who are contending to appear in pursue to the writ state in the written statement that the Company is defunct band have come forward to oppose this Application. There is therefore no doubt about the Defendant the Plaintiff intends to mean or indicate. It was therefore a case of misdescription or misnomer of the Defendant.

I consider that the express and clear language of Order I rule 10 (2) of Civil Procedure Code[45] *gives power to the Court to amend any misdescription of the Defendant. Under that sub rule the name of a Defendant improperly joined as a Defendant or whose presence before the Court is necessary to enable the Court effectually and completely adjudicated upon and settle all questions involved in a suit, can be added by the Court...*

I find that, it is only a case of misnomer or misdescription of the Defendant and I am satisfied that, it is one of those special cases were amendment can be allowed inspite of limitation.

Therefore, in India, the Law of misnomer Applies with respect to *Order 1 Rule 10 (2)* as well as *Order 6 Rule 17 of Civil Procedure Code of India.*

4. Applications of the doctrine of finger litigation/misnomer in Australia

[45] Act No. 5 of 1908

In Australia, mis-description by the addition or omission of a word of party's name, or as a result of a typographical error may be treated by Courts as 'misnomers' which are capable of correction (as a matter of contractual construction) without the need for rectification. In the case of **New South Wales Land and Housing Corporation v. Australia and New Zealand Banking Group Limited**,[46] the mis-description of a party's name in a contract was able to be corrected in this manner. NSW Land and Housing concerned a guarantee for indemnity issued by the Australia and New Zealand Banking Group Limited at the request of Nebax Constructions Australia Pty Ltd (In Liquidation). The New South Wales Land and Housing Corporation (ABN 24 960 729 253) claimed that it was the intended beneficiary under the guarantee despite the beneficiary being described in the guarantee as "New South Wales Land & Housing Department trading as Housing NSW ABN 43 754 121 940", an entity which, as described, did not exist.

In finding that such an error constituted a misnomer, Kunc J cited the following passage from **Kingstream Steel Ltd v. Stemcor UK Ltd**[47] with approval:

> *In our view the misdescription of the guarantor in the first two documents is simply that, and an error of that kind is not fatal to the validity of the guarantee.*_ Counsel for the Applicant argued that because of the misdescription in the first and second guarantees, those guarantees were executed by a non-existent company. He relied primarily

[46] [2015] NSWSC 176
[47] [2001] WASCA 138

on **Black v Smallwood.**[48] That case concerned a proposed company that had not been incorporated at the date of execution of a document for the sale of land. The document was executed by the signatories in the belief that the company had been incorporated and that they were directors of it. The question that arose in that case was whether the signatories were personally liable in those circumstances. (Emphasis added)

Kunc J went on to express the test for a misnomer which can be corrected by construction as:

> *Whether the misnomer was the product of a mistake made in circumstances in which it would have been plain to all who are concerned with the relevant document as to who the party was that was referred to in the document.*

According to Kunc J, the Court will also look to avoiding absurdity in determining whether a misnomer can be corrected by contractual construction. Kunc J in *NSW Land and Housing* affirmed the statement of principles as expressed by Leeming JA in **National Australia Bank Ltd v Clowes**[49] (McColl and Macfarlan JJA agreeing) as follows:

> In my view, the Bank's submission should be accepted because of the Bank's first point. In my opinion this is a clear case where the literal meaning of the contractual words is an absurdity, and it is self evident what the

[48] [1966] HCA 2; (1966) 117 CLR 52
[49] [2013] NSWCA 179

> objective intention is to be taken to have been. Where both those elements are present, as here, ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning. As this Court observed in **Westpac Banking Corporation v Tanzone Pty Ltd**,[50] the principle is premised upon absurdity, not ambiguity, and is available even where, as here, the language is unambiguous.

In general terms, Kunc J found that the process of correction of an error, including a misnomer, is still an exercise in interpretation. The application of the principle requires an assessment of what the objective intention is to be taken to have been. The subjective intention is irrelevant. As such, there is no need to call the drafter of or signatories to the contract to give evidence, and a Court can resolve the issue by reference to an objective assessment founded upon principles of contractual construction. Matters that may be relevant include:

> *One*, whether there existed, at the time of execution of the contract, a party with the name in question (if not, it would be an absurdity to suggest that the parties intended a non-existent party to be a party to the contract);
>
> *Two*, any other information by which the party in question can be identified, such as a unique ACN or ABN, or a unique address;

[50] [2000] NSWCA 25; (2000) 9 BPR 17,521 at [21]

Three, the subsequent conduct of the parties in performing the contract (such as delivery of goods or services to the correct entity who has been mis-described in the contract.

In Aon Risk Services Australia Ltd v. Australian National University,[51] the High Court considered the factors relevant to a trial Judge's discretion to grant leave to file amended pleadings. The general guidance on the application for amendment can be discerned from paragraphs [97]-[103] of the joint judgment. The encapsulated relevant factors include:

One, the nature and importance of the amendment to the party applying. These factors are to be weighed against the extent of the delay that may be caused and the costs associated with it, as well as the prejudice which might reasonably be assumed to follow.

Two, the point the litigation has reached relative to a trial. The Court should consider whether a party has had sufficient accedes to applications made without adequate explanation or justification Having regard to all of the relevant factors, the amendment application should have been refused.

In **J Robertson & Co Ltd (in liq) v. Ferguson Transformers Pty Ltd,**[52] the Defendant was named as "Phillips Electrical Pty Ltd (formerly Phillips Electrical Industries Pty Ltd)". The Plaintiff had dealings with a company of the latter name, but that company's name had been changed to "Phillips Industries Pty Ltd". Phillips Electrical Pty Ltd was a separate

[51] (2009) 83 ALJR 951; [2009] HCA 27
[52] (1970) 44 ALJR 441

company with whom the Plaintiff had had no relevant dealings. Walsh J held:

> *There had been a mere misnomer and allowed the amendment of the Defendant's name, notwithstanding the expiry of the statute of limitations.*

In Bridge Shipping Pty Ltd v. Grand Shipping SA,[53] Dawson J said (at 238-239) of such cases that:

> The correction of a *misnomer or misdescription* does not involve the substitution of a new party except in a technical or formal sense, *since the party after the correction is the same person as was misnamed or misdescribed.* In such a case, at least as a matter of theory, no question of defeating a statute of limitations arises. (Emphasis added)

5. Applications of the doctrine of finger litigation/misnomer in Uganda

In Uganda, just like in other Counterpart Eastern African Countries, the doctrine of finger litigation or misnomer is not in use of common parlance. However, amendment of pleadings in Uganda is covered under *Order VI Rule 19, 20 and 21 of the Civil Procedure Act of Uganda.*[54] *Order VI (supra)* provides for the amendment of pleadings by either party to a suit. Amendment of pleadings is to enable a party to alter their pleadings so as to ensure that litigation between them is conducted not a false hypothesis of facts. It can either be done with leave of Court or without leave.

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[53] (1991) HCA 45-173 CLR 231

[54] The Civil Procedure Rules made under Cap 65 of 1964, Revision Section 85

Amendment without leave from the Court is supposed to be done within 21 days from the date of issue of summons. If it is being done by the Defendant, it is done 14 days from the date of filing the written statement of defence. This is provided for under *Order VI rule 20. Order VI rule 21*[55] further provides for 28 days after the filing of a counter claim.

Amendment can also be done with leave of Court. There are certain conditions that must be fulfilled for leave to be granted. *Order VI Rule 19*[56] provides that the amendment should be just and necessary. Order VI Rule 19, 20 and 21[57] provides as hereunder:

> *19. The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*
> *20. A plaintiff may, without leave, amend his or her plaint once at any time within twenty-one days from the date of issue of the summons to the defendant or, where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements.*
> *21. A defendant who has set up any counterclaim or setoff may without leave amend the counterclaim or*

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[55] *Ibid*
[56] *Ibid*
[57] *Ibid*

setoff at any time within twenty-eight days of the filing of the counterclaim or setoff, or, where the plaintiff files a written statement in reply to the counterclaim or setoff, then within fourteen days from the filing of the written statement in reply.

Also, *Order I Rules 9 and 10 of the Civil Procedure Rules* of Uganda[58] is *in pari materia* with *Order 1 Rule 9 and 10 of the Tanzania Civil Procedure Code.*[59] Rule 9 prohibits defeat of a suit on misjoinder and non joinder of parties while Rule 10 (1) (2), (3), (4) and (5) allows amendment or substitution of wrongly joined Plaintiff or Defendant. The Ugandan case of **Gaso Transport (Bus) Services Ltd v. Obere,**[60] discusses the principles guiding the amendment of pleadings as follows:

The amendments should not cause injustice to the other party. An injury that cannot be compensated by the award of costs is treated as an injustice.

In Buffalo Youngster Inc. v. SGS Uganda Ltd HCMA,[61] the amendment was being sought in bad faith to defeat the defence. The Court was of *inter alia* findings that: *One*, multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed. *Two*, an application that is made mala fide should not be granted. *Three*, no amendment should be allowed where it's expressly or impliedly prohibited by any law. Amendment should not

[58] Ibid

[59] Cap 33 [R.E. 2019]

[60] EA 88 1990 SCCA No.4

[61] No 6 of 2012

change cause of action. In **Lubowa Gyavira & others v. Makerere University,**[62] it was held that a Court will not exercise its discretion to allow an amendment which substitutes a distinctive cause of action for another to change by means of amendment.

Further, *Order XV Rule 2 of the Civil Procedure Rules of Uganda*[63] is in *pari materia* with *Order XIV Rule 2 of the Civil Procedure Code of Tanzania.*[64] That means, if there is a point of law and point of facts, the point of law must be determined first.

Therefore, it is clear that the law is flexible enough to allow parties to rectify errors in their pleadings. However, it is also strict to avoid the manipulation of the process by the litigants. In event there is a preliminary objection, it has to be determined prior points of facts.

6. Applications of the doctrine of finger litigation/misnomer in Kenya

In Kenya, just like in Uganda, the doctrine of finger litigation or misnomer is not in use of common phrasing. However, amendment of pleadings is provided for under *Order 1 Rule 9 and 10 of the Civil Procedure Rules* of Kenya[65] which provides:

> *9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

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[62] HCMA 471 of 2009
[63] The Civil Procedure Rules made under Cap 65 of 1964, Revision Section 85
[64] Cap 33 [R.E. 2019]
[65] Made under Section 81 of Cap 21 [R.E. 2010] (Legal Notice 151 of 2010, Legal Notice 22 of 2020)

10. (1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a Plaintiff suing without a next friend or as the next friend of a Plaintiff under any disability without his consent in writing thereto.

(4) Where a Defendant is added or substituted, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new

Defendant and, if the Court thinks fit, on the original Defendants.

Further, *Order 8 Rules 3 and 5 (1) of the Civil Procedure Ruies*[66] allows amendment as follows:

(3) (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."
3 (5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
5 (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

In **Ochieng & Others v. First National Bank of Chicago,**[67] as cited with approval in **St Patrick's Hill School Ltd v. Bank of Africa Kenya**

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[66] *Ibid*
[67] Civil Appeal No. 147 of 1991 Court of Appeal of Kenya at Nairobi (unreported)

Ltd[68] the Court of Appeal set out the principles governing the amendment of pleadings as follows:

> *a) The power of the Court to allow amendments is intended to determine the true substantive merits of the case.*
> *b) The amendments should be timeously applied for;*
> *c) Power to amend can be exercised by the Court at any stage of the proceedings.*
> *d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.*
> *e) The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the Court to still allow and amendment notwithstanding the expiry of current period of limitation.*

In **Harrison C. Kariuki v. Blue Shield Insurance Company Ltd**[69] the Court referred to the Court of Appeal decision in **Central Kenya Ltd v Trust Bank Ltd**[70] and held that:

> *The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for*

[68] [2018] KLR
[69] [2006] KLR
[70] [2000] EALR 365

any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sough be permitted in order that the real question in controversy between the parties be determined.

In that case, the Plaintiff listed the following reasons/grounds in support of its application for leave to amend plaint:

i. The need to implead how the use of the word 'Country Clock' has led to confusion with the Plaintiff's mark.

ii. The need to include specific details relating to the Plaintiff's advertising units.

iii. The need to particularize the claim relating to confidential information.

iv. The need to have the Court effectively determine the real questions/issues in controversy.

On their part, the Defendants listed the following grounds for opposing the application: -

a) That the application has been brought late in the day and is an afterthought.

b) That there is an appeal that has been filed against the decision by the Tribunal which the Plaintiff seeks to rely upon.

c) That the Plaintiff seeks to introduce a claim relating to an employment dispute.

d) That the application is not brought in good faith.

While noting true that the application has been brought at least 4 years after the filing of the suit, the Court found that the delay could not be wholly attributed to the fault of the Plaintiff because a perusal of the Court file shows that the parties herein at some point attempted mediation process as a way of resolving the dispute. It was inter alia clear that it was not until 23rd October 2019 that the Court was informed of the failure in mediation and the matter thereafter listed before the Deputy Registrar for Case Management. In its decision, the Court found that the proposed amendment of the plaint will not prejudice the Defendant's case as they will still have the chance to amend their pleadings should they deem it necessary.

7. Applications of the doctrine of finger litigation/misnomer in Tanzania

In Tanzania, as a general rule, the doctrine of finger litigation or misnomer is not applied in its strict sense. However, amendment of pleadings is allowed by avoiding technicalities and vagaries of pleadings through *Order I Rules 9 and 10 of the Civil Procedure Code*,[71] which is *in pari materia with order 1 Rules 9 and 10 of the Kenya Civil Procedure Rules,*[72] *and Order I rule 10 (2) of the Indian Code of Civil Procedure.*[73] *Order I* Rule 10 (1) of the Civil Procedure Code[74] provides as follows:

> 10.-(1) *Where a suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful whether it*

[71] Cap 33 R.E 2019
[72] Made under Section 81 of Cap 21 [R.E. 2010] [Legal Notice 151 of 2010, Legal Notice 22 of 2020]
[73] Act No. 5 of 1908
[74] Cap 33 [R.E. 2019]

has been instituted in the name of the right Plaintiff the Court may at any stage of the suit, if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks just.

(2) *The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.*

Tanzania's Courts have been dealing with cases of corrections of names, where an existing entity is being sued in a wrong name. This can be observed in the case of **National Bank of Commerce Limited v. Alfred Mwita,**[75] in which the Court had this to say:

In our considered view, the complaint on missing middle name of the Respondent in the Notice of Motion militates against him. We say so because he was not prevented from filing the affidavit in reply, the written submissions and entering

[75] Civil Application No 172 of 2015 Court of Appeal of Tanzania at Dar es Salaam

appearance in Court. As such, we agree with Mr. Nyika that, the Respondent was not prejudiced by the missing middle name. The case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Limited,**[76] cited by Mr. Mgare, is no longer good law. Therein, the names of Respondent were interchangeably referred to as "Coca Cola Kwanza Bottles" and Coca Cola Kwanza Bottlers": The Court initially struck out the appeal having declined to accept that those names referred to one and same entity. However, in **Christina Mrimi v. Coca Cola Kwanza Bottlers Limited;**[77] the Court reviewed and reversed earlier decision having accepted that after all there was no confusion over names because Coca Cola Kwanza was the only company in Tanzania which manufactured sprite, the drink that was subject of the tortious suit. Thus, the Court said: "We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers to Coca Cola Kwanza Ltd in the decision of the Court dated 19th February 2009 in **Civil Appeal No 112 of 2008.**[78] The review is accordingly allowed.

In the light of the above stated authorities and position of the law, as observed earlier in the instance case, the doctrine of finger litigation or misnomer is not used in its legal parlance in Tanzania. Although amendments are allowed at any stage, case law with the aid *of Order XIV*

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[76] Civil Application No.113 of 2011Court of Appeal of Tanzania at Dar es Salaam (unreported)

[77] *Ibid*

[78] Court of Appeal of Tanzania at Dar es Salaam

Rule 2 of the Civil Procedure Code,[79] have established that amendment cannot be entertained after the preliminary objection has been raised.

It is the humble view of the Court that, with the advent of overriding objective principle, the doctrine of finger litigation or misnomer can safely be cherished in Tanzania upon amendment of the law or upon getting a new guidance by the Court of Appeal. The law should allow amendment of the pleadings on misnomer even if there are preliminary objection raised especially in circumstances where the amendment will serve the six advantages stated at page 26 and 27 of this ruling.

In any aspect, as the law stands today, it is clear that, allowing the prayer to use the doctrine of finger litigation at this stage will be to pre empty the preliminary objection.

On the part of the 3rd to 6thRespondents, the learned Counsel Didace Kinyambo submitted that, 3rd up to 6thRespondents were appointed to be the Member of Trustees on 28th June, 2019 for the Evangelical Assemblies of God of Tanzania. They were formerly or officially registered in the Administrator General's Office on 4th August, 2020. That was in compliance with *Section 2 of the Incorporation Act*[80] as revised, after the incorporation, they formed a Body Corporate known as the Registered Trustees of the Evangelistic Assemblies of God Tanzania as required under, *Section 6 (2) of the Incorporation Act*.[81] So, they have the power to sue or be sued in their corporate names. He submitted that 3rd to

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[79] Cap 33 [R.E. 2019]
[80] Cap 318
[81] *Ibid*

6thRespondents were not supposed to be sued by their names. So, he prayed this matter to be struck out.

In reply, learned Counsel Robert Rutaihwa for the Applicants was of submission that, the question whether a party has *locus standi* or not is not supposed to be raised as preliminary objection in view of the decision in **Mechmar Corporation (Malaysia) Benchard (in Liquidation) v. VIP Engineering and Marketing Ltd and 3 Others.**[82] Thus, he submitted that, the 2nd preliminary objection is not a pure point of objection because ordinarily the Applicant is the one who should be called to have no *locus standi* but here it is the Defendant who is purporting to have no *locus standi* to be sued. He was of the view that the preliminary objection was supposed to be on the point that the Applicant has *no cause of action* against the Respondents.

He finally prayed the Court to overrule the objections, and then, the Applicant be allowed to substitute the names of the 1stRespondent, and costs at the discretion of the Court.

From the afore submissions, the issue as regards the second preliminary objection is; whether the 3rd to 6thRespondents had locus standi. It has to be noted that *locus Standi* is a common law principle which requires that a person bringing a matter to Court should be able to show that his right or interest has been interfered with. On this point, the Court wishes to cite *Section 8 (1) (b) of Trustee Incorporation Act*[83] which provides for capacity to sue and be sued. It expressly states that:

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[82] Consolidated Civil Applications No. 190 and 206 of 2013 Court of Appeal of Tanzania at Dar es Salaam pp 10-13.
[83] Cap 318

8. (1) *Upon the grant of a certificate under subSection 1, of Section 5, the Trustee or trustees shall become a body corporate by name described in the certificate and shall have*

(a) NA

(b) Power to sue and be sued.

Further in the case of **Lujuna Balozi, Senior v. Registered Trustees of Chama cha Mapinduzi,**[84] This case expressed that:

> *Locus standi is governed by common Law according to which a person bringing a matter to Court should be able to show that his right or interest has been breached or interfered.*

In another case of **Kanisa la Anglikana Ujiji v. Abel Samson Heguye,**[85] it was stated that:

> *In law there are two types of persons who can sue or be sued. These are the natural and legal (artificial) persons. The artificial persons include Companies and the Registered Trustees. They can also be referred to as incorporated bodies.*

It was further stated that:

> *Legal persons are incorporated under different laws. In case of Trustees, their incorporation is governed by the Trustees'*

[84] [1996] TLR 203 HC

[85] Labour Revision No. 5 of 2019 High Court of Tanzania at Labour Division

Incorporation Act.[86] *The requirement for incorporation as a body corporate is stipulated under Section 2 (1) of the Act while the capacity to sue or be sued is provided for under Section 8 (1) (b) of the same Act.*[87]

In Nigerian case of **Fawehinmi v. Nigeria Bar Association,**[88] it was stated that:

As a general rule, only natural persons, that is to say human beings and juristic or artificial persons such as bodies corporate are competent to sue and be sued before any law Court. In other words, no action can be brought by or against any party other than a natural person or persons unless such a party has been given by the statute expressly or impliedly or by common law either a legal personality under the name by which it is sued or it sued or a right to sue by that name.

Similar situation was observed in another Nigerian case of **Agbonmagbe Bank v. General Manager G. B Olivant Ltd and Another,**[89] in which it was held:

This is the law because the suit is in essence, the determination of legal rights and obligations in any given situation. Therefore, only such natural / juristic persons in whom the rights and obligations can be vested are capable of being proper parties to law suits before Courts of law.

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[86] [Cap. 318 R.E. 2002]
[87] *Ibid*
[88] (No.2) (1989) 2 NWLR (PT. 105) 558 at 595
[89] (1961) ALL NLR 116; (1961) 2 SCNLR 317

Following this general rule, where either of the parties is not a legal person capable of exercising legal rights and obligations under the law, the other party may raise this fact as a preliminary objection which if upheld, normally leads in the action being struck out.

In Tanzanian case of **Kanisa la Anglikana Ujiji v. Abel Samson Heguye Labour Revision** (*supra*) the Court made the findings that:

> The Applicant is a religious institution. Religious organization is required by law to be registered as societies under the Societies Act.[90] The requirement is under *Section 12 (1) of the said Act*.[91] The procedure is well described under *the Societies (Application for Registration) Rules*,[92] upon being issued with a certificate of registration, the organization are required under *Section 2 of the Trustees*
>
> *Incorporation Act*[93] to be incorporated and be issued with a certificate of incorporation stipulating its name which under *Section 5 of the same Act* shall include the words *"Registered Trustees"* Once the certificate is issued; the religious organization or association is deemed to have been incorporated, therefore, can sue or be sued in its incorporation *name only.*
>
> At the end it was pronounced that, "the Anglican Church or its Branch cannot be sued in its registered name as the

[90] [Cap.337 R.E. 2002]
[91] [Cap. 318 R.E. 2002]
[92] GN. 119 of 1958
[93] [Cap 318 R.E. 2002]

registered name Cannot give *it a legal personality, so the* Respondent *sued a legally non-existent entity.* (Emphasis added).

In present case, the Applicants sued the 3rd to 6thRespondent in their personal capacity while they had knowledge that, those Respondents are registered entities. This is evidenced in their affidavit in paragraph 14, they discovered that, On 4th Day August 2020 first Respondent acknowledged 3rd to 6th Respondents as **Registered Trustees of EAGT**, hence legal entity, and per *Section 8 (1) (b) of Trustee Incorporation Act*,[94] they can be sued in their Legal capacity only.

It was clearly stated in the case of **Access Bank PLC v. Agege Local Government and Another** (*supra*):

> *Simply put, a non juristic person cannot sue nor be sued. It is also agreed that the naming of a non-juristic person as a claimant in a suit makes the suit out rightly incompetent.*

Therefore, basing on *Section 8 (1) (b) of Incorporation Act*,[95] and the authorities above, this Court comes to the conclusion that Applicants sued the non-existing entities. The issue of misjoinder and non-joinder only cater for parties who existed Legally but not made party of the suit or wrongly made part of the suit, **Coeseke Tanzania Limited v. Public Service Social Security Fund** (*supra*).

In the end, the ratio that emerges out of the legal survey on the Doctrine of Finger Litigation or Misnomer is that it applies at any stage of the

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[94] Cap 318
[95] *Ibid*

proceedings regardless of preliminary objection being raised or being time barred. However, as the law stands today, it cannot apply in Tanzania till when the call I make is welcomed. The countervailing considerations of applying the doctrine of finger litigation in our jurisdiction is based on its benefits. Consequently, both limbs of objection are sustained. The application stands struck out. Considering the legal input enhanced by Counsel Robert Rutaihwa for the Applicants in developing our jurisprudence, I find it significant to waive costs.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

04/06/2021

Ruling delivered and dated 4th June, 2021 in the presence of learned Counsel Robert Rutaihwa for the Applicants, learned State Attorney Xavery Ndalahwa for 1st and 2nd Respondent and learned Counsel Didace Kanyambo for the 3rd to 6th Respondents.

Y. J. MLYAMBINA

JUDGE

04/06/2021