

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 69 OF 2019

**THE BOARD OF TRUSTEE OF GOOD NEIGHBORS
TANZANIA.....PLAINTIFF**

VRS

**DOREEN AUGUSTINE DOMINIC
T/A DAWSON'S WATER POINT DRILLING.....DEFENDANT**

RULING

B.K. PHILLIP, J

Upon being served with the plaint, the defendant's advocate, Mr Nobert Mlwale raised the following points of preliminary objection;

- i) That the plaintiff has no legal capacity to institute a suit in this court
- ii) That this suit is not maintainable in law for being brought against a wrong party.

This ruling is respect of the above mentioned points of preliminary objection. At the hearing of the aforementioned points of preliminary objection, the learned Advocates Burton Mayage and Gema Mrina appeared for the plaintiff. Both sides filed their skeleton arguments under

the provisions of section 64 of the High Court (Commercial Division) Procedure rules, 2012.

In his submission Mr. Mlwale started by adopting his skeleton arguments and proceeded to submit as follows; That the proper party with capacity to institute a case in this court is Good Neighbours Tanzania not the Board of Trustees of Good Neighbors Tanzania as it appears in the plaint. Mr. Mlwale's argument is based on the provisions of section 18 of the Non-Governmental Organizations Act, 2002 as amended by Written Laws (Miscellaneous Amendment) (N0.2) Act of 2005, (Henceforth " the NGO ACT") which provides as follows;

"(2) A registered Non-Governmental Organization shall, by virtue of registration under this Act, be a body corporate capable in its name of:-

- (a) suing and be sued;*
- (b) acquiring, purchasing or otherwise disposing of any property, movable or immovable;*
- (c) entering into contract; and*
- (d) doing or performing all acts which can be done by a body corporate and which are necessary for the proper performance of its duties and functions."*

It is the contention of Mr. Mlwale that pursuant to the above quoted provision of the law, Good Neighbors Tanzania is a legal entity, therefore

the proper body to institute this case is Good Neighbors Tanzania not the Board of Trustees of Good Neighbors Tanzania, since it is not a registered legal entity under the NGO Act ,thus cannot acquire any legal capacity to sue. To cement his arguments he cited the case between **Legal and Human rights Center and two others Vrs Attorney General (2006) T.L.R 240** in which this Court said the following on *locus standi*;

"Since locus standi is vested in every person in the capacity of individual be virtue of Articles 12-24 of the Constitution and in the capacity of a member of the community by virtue of Articles 25 to 28 of the Constitution, the petitioner being members of the community who have constituted themselves into body corporate for the purpose of carrying out human rights activities for the benefit of the community have locus standi in the petition they have filed"

Referring to the holding of this court quoted herein above, Mr. Mlwale was of the view that the power to sue or be sued is solely vested to natural persons or a legal person, that is a person incorporated under the laws of the land who has acquired legal personality capable of suing or being sued. Mr. Mlwale insisted that the plaintiff herein is not a registered legal entity under the NGO Act, thus lacks capacity to sue and has no *locus standi*.

As regards the 2nd point of Preliminary objection, Mr. Mlwale's arguments were as follows; That the pleadings suggest that the contract from which

the plaintiff purports to derive the cause of action was between Ms. Good Neighbors Tanzania and Ms Dawson's Water Point Drilling Company. He contended that it is only the parties to the contract who can claim or be sued under the contract. Furthermore, he contended that both the plaintiff and defendant in this case are not privy to the contract at issue since they are not parties to the same.

Mr. Mlwale was of the view that the plaintiff has no cause of action against the defendant for want of privity of contract. He invited this court to dismiss this case with costs.

In rebuttal, Mr. Burton conceded that pursuant to the amendment of the NGO Act, by the written laws [Miscellaneous Amendment] (No. 2) Act, 2005 a registered NGO can sue or be sued in its name. He contended that since NGOs are liable through their Boards of Trustees, it is not fatal for a NGO to sue through its Board of Trustees. Mr. Burton prayed for leave to amend the plaint so that he can change the name of the plaintiff from the current one, that is, Board of Trustee to Good Neighbors Tanzania to Good Neighbours Tanzania, since the plaintiff attached into the plaint a copy of the certificate of registration of Good Neighbours Tanzania. To cement his argument, he cited the case of **Ben Mwangachuchu Vrs Cooperative Des Artisansaux Miners Du Congo & 4 others, Commercial Case No 62 of 2018**(unreported), in which this court held that in order to establish a cause of action the court is duty bound to read the plaint as a whole together with its attachments. Other cases cited by the defendant's advocate are; **Githere Vrs Kimungu [1976-1985] 1**

EA 101 (CAK) in which the court held that where there has been a bonafide mistake and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut from being heard and **Ramadhani Nyoni Vrs Haule & Co.Advocates (1996) TLR 72.**

As regards the second point of preliminary objection, Mr Burton submitted that the defendant in this case accepted the summons for this case and filed the defence, therefore she knows that she is a party to the case. The contract subject of the decision of this court in this case was signed by the plaintiff and Doreen Augustine T/A Dowson's Water Point Drilling, and by that time Water Point Drilling was not yet incorporated as a Limited Company, contended Mr Burton. Furthermore, in his skeleton arguments Mr. Burton pointed out that the documents that have been attached to the plaint shows that the defendant is trading using her business name not as a Limited Liability Company. Moreover, Mr Burton, contended that since the contract was between the plaintiff and the defendant, there is nothing wrong with the names of the parties to the contract and in case of any concern on the names of the parties to the contract in question, then the remedy is to sign an addendum to the contract. Mr Burton invited this court to dismiss the point of preliminary objection with costs.

In rejoinder, Mr. Mlwale, contended that the advocate for the plaintiff has conceded to the 1st point of preliminary objection that the plaintiff has no legal capacity to institute this case. He objected to the prayer for

amendment of the plaint on the ground that the same cannot be entertained after the defendant has successfully raised his Point of Preliminary objection. He invited this court to struck out this suit with costs.

Having analyzed the submissions made by the learned advocates appearing herein, it is evident that Mr. Burton conceded to the 1st point of preliminary objection. I have perused the provisions of section 18 of the NGO ACT and noted that Mr. Mlwale's argument is correct, since the law states clearly that a registered NGO by virtue of its registration under the NGO Act shall be a body corporate capable of suing and being sued in its name. In this case the plaintiff is the Board of Trustee of Good Neighbors Tanzania instead of Good Neighbor Tanzania which has been registered under the NGO Act and its certificate of registration is attached to the plaint.

From the foregoing, it is the finding of this court that the plaintiff has no capacity to institute this case in this court. The case is supposed to be instituted by a body corporate registered under the NGO ACT, as amended by Written Laws Miscellaneous (amendment) (No.2) Act 2005 as amended by Written Laws (Miscellaneous Amendment), that is Good Neighbor Tanzania.

As regards the prayer to amend the plaint, I wish to point out on the onset that the prayer for amendment of the plaint made by Mr. Burton after conceding to the 1st point of preliminary objection is untenable, since its purpose is to pre-empty the preliminary objection that has been

raised by the defendant's advocate. The position of law is very clear on this, that is a prayer/application aimed at pre-empting a preliminary objection already raised is not acceptable. [see the case of **Mary John Mitchell (Legal representative of Isabella John) Vrs Sylvester Magembe Cheyo and others, Civil Application No161 of 2008** (unreported)]. In the case of **Method Kimomogoro Vrs Board of Trustee Tanapa, Civil Application No.1 of 2005 (CA)** (unreported) the court said the following

" this court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empty a preliminary objection either by raising another objection or trying to rectify the error complained of .."

As regards the second point of preliminary objection, it is my settled view that the same is not a pure point of law since it requires evidence to prove it. That can be easily noticed even in the submissions of the counsels, as both counsels were making their arguments by relying on their analysis of the contents of the contract. Thus, this court needs evidence to establish whether at the time of signing the contract at issue the defendant was already incorporated as a Limited Company or not? The position of law on preliminary objections is well known that a point of preliminary objection has to be a pure point of law which do not require any evidence to prove it (see the case of **Mukisa Biscuits Co. Limited Vrs West End Distributors Ltd (1960) E.A**). Thus, the second point of preliminary objection is hereby dismissed.

Since I have upheld the 1st point of preliminary objection, I hereby strike out this case with costs.

Dated at Dar es Salaam this 27th day of March 2020.



B.K. PHILLIP

JUDGE