

TANZANIA / JUDGMENT

11

COURT
TANZLIIDECIDED
15 April 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CIVIL CASE NO. 13 OF 2022 ILULA ORPHAN
PROGRAM.....PLAINTIFF VERSUS M/S NENSALE GENERAL
TRADERS.....1ST DEFENDANT ZANZIBAR INSURANCE CORPORATION..... 2ND
DEFENDANT

RULING

Date: 15 April 2024 & 3 May 2024 SINDA, J.: In this matter, the plaintiff sued the defendants for breach of the insurance contract which was entered between the first and second defendants covering any damage which would arise in the construction of Sunflower Montessori Primary School. The construction was being done by the first defendant. It is alleged that the construction was below the work specification. Hence, the filing of this suit for compensation as per the performance bond policy. 1 The plaintiff prayed for, among other prayers, against the defendants for the judgement that the second defendant to pay the plaintiff the sum of Tanzanian Shillings Ninety Three Million, Three Hundred Five Thousand, Eight Hundred Thirty Five and Five Cents (TZS 93,305,835.5/=) being insurance cover, general damages in respect of refusal to indemnify the plaintiff with insurance cover and breach of contract by the defendants of TZS 150,000,000/=, costs of the suit and such further orders as deemed appropriate by this court. In reply, the first and second defendants each lodged a written statement of defense strongly disputing the plaintiff's claims. The first defendant further separately filed a counterclaim praying for, among other reliefs, payment of TZS 71,182,260.43, the outstanding sum from the contract price, payment of TZS 100,000,000, general damages for the breach of contract, interests to the tune of 12% from the date of the decree to the date of full satisfaction thereof, costs of the counterclaim, and any other reliefs that this court deems fit. In the plaint, the matter commenced between Ilula Orphan Program, M/S Nensale General Traders, and Zanzibar Insurance Corporation. However, in 2 the counterclaim, the matter was between M/S Nensale General Traders as the “plaintiff” and the Orphan Program as the “defendant”. The plaintiff filed his reply to the counterclaim and raised a notice of Preliminary Objection (P.O.) with only one ground to the effect that:-

- a. The plaintiff in the counterclaim has sued a wrong party and/or non- existing entity. It is thus upon this court to determine the P.O. put forth in relation to the counterclaim. The hearing was conducted by way of written submissions. The plaintiff was represented by Mr.

Jassey Mwamgiga, Learned Counsel and the first defendant was represented by Mr. Felix Kapinga, Learned Counsel. Submitting on the P.O., Mr. Mwamgiga argued that the first defendant sued a different entity from the one which initially commenced the proceedings by way of a plaint. He added that the records show that Civil Case No. 13 of 2022 was instituted by Ilula Orphan Program. He further stated that when the matter came for a counterclaim, the first defendant, sued Orphan Program, a different name not in existence. He added that a suit against a defendant who lacks legal personality cannot be maintained and thus must be struck out. He cited the case of Geoffrey Mgaya versus NBC Limited Songea Branch & 2 Others, Land Case No. 1 of 2019 (Unreported), to support his argument. He further argued that an irregularity on the wrong party to be sued cannot even be cured by the principle of overriding objective. He further stated that Ilula Orphan Program is a non-governmental organization registered under Section 11(1) and 7(2) of the Non-Governmental Organizations Act, No. 24 of 2002 with a certificate of Registration No. 000374. Therefore, the first defendant sued Orphan Program as the wrong party. He stated the reason why the abnormality of this nature cannot be cured by the principle of overriding objectives is that no executable orders can be made against such a non-existent person. He also cited the case of Jung Hwan Kim & Another versus Tanzania Presbyterian Church, Civil Case No. 98 of 2019 (Unreported) (HC at Dar es Salaam). He summed up by stating that there are many orphan programs that are not related to the plaintiff, so referring to the Orphan Program as the Ilula Orphan Program cannot be said to mean one and the same person. 4 In his reply to the submission, Mr. Kapinga referred to Order I Rule 10 (1) of the Civil Procedure Code, Cap 33 RE 2019 (the CPC). He produced a Latin Maxim 'Nihil in Factis Error Nomimis Cum De Corpora Constant' meaning an error as to a name is nothing when there is certainty as to the person. He added that the defect can be curable by amendment as provided under Order I Rule 10 of the CPC. He referred to the case of Adamu Wamunza (As administrator of the estate of the late Paul James vs. Kinondoni Municipal Council & Raymond Peter Mbilinyi, Civil Appeal No. 424 of 2020 (CAT at Dar es Salaam). He added that based on the authorities provided then, the P.O. cannot stand since the error is curable through amendment and the plaintiff has a real matter against the defendant to be determined by this court. He summarized by stating that the anomalies do not follow the principle of overriding objective. However, they are statutory creatures that can be cured by way of amendment, as elaborated by the Court of Appeal. There was no rejoinder submission. I have considered the objections and submissions by both parties and the law. To determine the matter, I will refer to Order VIII Rule 9 of the CPC, which states that: 5 9.- (1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence the defendant may, in his written statement of defence, state particulars of the claim made or relief or remedy sought by him: Provided that, a written statement of defence shall not state-

- (a) Any particulars of claim where the suit is brought for the recovery of taxes, duties or penalties;

- (b) Particulars of any claim to repayment in respect of any taxes, duties or penalties.
- (2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint. The above provision provides a manner in which a counterclaim should be raised. It is clear that a counterclaim must be included in the written statement of defence and not filed as a separate suit. 6 In this instance, the first defendant instituted the counterclaim as a separate suit. In the counterclaim, the matter was between M/S Nensale General Traders as the 'plaintiff' and the Orphan Program as the 'defendant'. A counterclaim can be determined separately from the main suit only under Order VIII Rule 12 of the CPC if there is any reason for the court to separate the suit and the counterclaim and try them independently of each other. This is clearly stated in the case of Twiga Feeds Limited & Another vs. National Investment PLC, Civil Appeal No. 295 of 2021 (CAT at Dar es Salaam). Order VIII Rule 12 of the CPC specifically states that: Where a defendant has set up a counterclaim the court may, if it is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of by a separate suit, order the counterclaim to be struck out or order it to be tried separately or make such other order as may be expedient. In this matter, there is no court order for the counterclaim to be determined separately from the main suit. Therefore, I struck out the counterclaim and maintain the first defendant's written statement of defence. 7 There is no order as to costs. It is so ordered. Dated at Mbeya on this 3 day of May 2024. A. A. SINDA JUDGE The Ruling is delivered on this 3 day of May 2024 in the presence of Mr. Lazaro Hukumu, learned advocate for the plaintiff and Mr. Ignus Ngumbi, learned advocate for the 2nd Defendant. A. A. SINDA JUDGE 8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/311347/source_file/11_ILULA_ORPHAN_PROGRAM.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/ilula-orphan-program-counterclaimprocedure-tanzlii-2024--6a3ea5233b1caa912981966f>

Prepared on 13 October 2026 · Esheria