

**IN THE HIGH COURT OF TANZANIA
AT IRINGA**

LAND CASE NO. 07 OF 2015

WIDMEL MUSHI PLAINTIFF

VERSUS

AUGUSTINO MASONDA DEFENDANT

RULING

26th July, 2016 & 14th December, 2016

KIHWILO, J.

The Plaintiff Widmel Mushi has filed a land case against the Defendant herein claiming for permanent injunction restraining the Defendant or his agents from interfering whatsoever with the suit premises pending determination of this suit *inter parte*.

The Defendant who appeared in person and fended for himself filed the Written Statement of Defence and in addition to that he filed a notice of preliminary point of objection to the effect that;

1) The suit is res subjudice and partly resjudicata.

2) The suit is frivolous and vexatious as instituted against a wrong person.

3) The suit is vague and bad in law as paragraph 7 constitutes facts which are illegal in nature.

Since the Plaintiff did not concede to the raised points of preliminary objections the court fixed a hearing date to which parties dutifully complied and made their respective submissions.

The Defendant opted to abandon the first point of preliminary objection but submitted in respect of the rest. Arguing in support of the second point of preliminary point of objection the Defendant contended that the Plaintiff has sued the wrong party as the Defendant is not the legal personal representative of Peter Masonda, the original owner of the suit premises. He further elected to adopt the third point of preliminary objection as it was.

In reply Mr. Mwamgiga strenuously argued that the second point of preliminary objection is not an objection since a preliminary objection cannot be based on unascertainable factual matters. To support his argument he cited a case of **Mussanga Ng'wang'wa V Chifu Japhet Wanzagi and 8 others** [2006] TLR 351 and argued further that, to determine whether the Defendant was properly sued or not will depend upon the evidence to be produced but not at this premature stage of the proceedings. He also submitted on the third point of preliminary objection and admittedly argued that the Plaintiff inadvertently referred to permanent injunction at paragraph 7 of the Plaint instead of temporary injunction and prayed that if it pleases the court may allow the Plaintiff to amend the Plaint so as to reflect temporary injunction instead of permanent injunction. To buttress his argument he cited the case of **The Hon. AG & 2 others Vs V.G Chavda**, Civil Application No.122 of 2004 (unreported). He finally prayed that the Preliminary Objections should be dismissed with costs.

Having gone through the submissions and the notice of preliminary objections I have found that the central issue for determination is short and narrow whether or not the preliminary objections are meritorious.

Surely a preliminary objection has been well articulated in numerous decisions of this Court and the Court of Appeal of Tanzania and in essence it has to be on a matter of law and the ultimate result have to be termination of the case and not otherwise. One of the landmark decision in this respect is the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** (1969) EA 696 in which the court defined a preliminary objection to mean;

"consist of a point of law which has been pleaded or arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit".

It was also stated in that case, that a preliminary objection:

"raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion".

In my respect opinion the preliminary points of objection raised by the Defendant does not have the effect of finally disposing the case before this court.

Consequently, the preliminary objection is hereby dismissed. Costs to be in the cause.

Ordered accordingly.




P.F. KIHWELO

JUDGE

12/12/2016

Ruling to be delivered by the Deputy Registrar on 14th December, 2016.




P.F. KIHWELO

JUDGE

12/12/2016