

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

LAND CASE NO. 42 OF 2017

**JAMAL SAID.....1ST PLAINTIFF
SEIF MWANYANGE.....2ND PLAINTIFF
SHOMARI KIKWAMBA.....3RD PLAINTIFF
KASSIM NZOMOKE.....4TH PLAINTIFF**

VERSUS

KARMAL AZIZ MSUYA.....DEFENDANT

RULING

*Date of the last Order 14th December 2017
Date of Ruling 16th February 2018*

R. K. SAMEJI, J.

The plaintiffs herein have instituted a land suit on 5th July 2017 in this Court against the above defendant praying the Court to:-

*a) declare that the defendant wrongly demolished the
Madrassa building without any authority or order from
the authority;*

- b) declare that the said Madrassa was built on Wakfu land acquired from the real owner the late Abdul Halfan Chuma;*
- c) Condemn the defendant to rebuild the demolished Madrassa or in alternative to pay the like sum at the tune of Tshs, 70,000,000/= (Seventy Million only) being the compensation for materials and energy deployed thereon;*
- d) Order the defendant to pay furniture destroyed in demolition process as above mentioned worth Tshs. 5,000,000/= (Five Million only);*
- e) Condemn the defendant to pay general damages at the tune of Tshs. 30,000,000/= (Thirty Million only) due to inconvenience caused to the plaintiffs; and*
- f) any other relief that the Court will deem fit and just to grant.*

On the other side the defendant has filed Written Statement of Defence accompanied with points of Preliminary Objection couched in the following manner, that:-

- (a) the plaintiffs being neither a religious organization nor a charitable society have no locus standi to institute this suit against the defendant;*
- (b) the Plaint is incurably defective for non-joinder of necessary party;*
- (c) the Plaint is incurably defective for being accompanied by illegally defective Waqf document contrary to law requirement;*
- (d) the suit is bad in law and ought to be dismissed, for lack of paragraph which plead Court original jurisdiction, contrary to law requirement and that the monetary claim pleaded is based on general damages and this Court has no jurisdiction to entertain this Suit.*
- (e) the Court has no jurisdiction to entertain and conclusively determine the suit as it is res judicata;*

- (f) *the plaintiffs have no leave of the Court to file a representative suit from other Muslims from who they collected funds and charities to build the alleged centre and whom they called to pray demonic prayer against the defendant on the subject matter;*
- (g) *the plaintiffs being neither Attorneys nor the next friends of the alleged students have no locus standi to institute this suit in their personal names and capacities;*
- (h) *this suit is hopelessly time barred.*

At the hearing of the above points of Preliminary Objection, the plaintiffs are under services of Mr. Juma A. Mwakimatu, the learned Counsel, while the defendant is under the services of Ms. Delphiner Kimbori, the learned Counsel.

By consent of the parties, the points of preliminary objection were argued by way of written submissions. This was adequately done and I am grateful to all Counsel for the parties for the energy and industrious research involved in canvassing the issues. I have thoroughly considered the said written submissions by both parties

which are in the record and I do not need to reproduce the same herein.

It is important to point out at the outset that in the course of perusing the points of preliminary objection raised by the defendant, among others, I have observed that some of them and specifically point number four (d) seeks to question the jurisdiction of this Court to entertain the suit before me. Now, since jurisdiction is fundamental issue to the Court's authority to determine any matter, I shall begin with that issue.

The said fourth point of the preliminary objection is to the effect that the *suit is bad in law and ought to be dismissed for lack of paragraph in the Plaintiff which pleads Court's original jurisdiction, contrary to the requirement of the law and as such, this Court has no jurisdiction to entertain the matter. In other words the Plaintiff has been filed contrary to Order VII Rule 1 (i) of the Civil Procedure Code, [CAP 33 R.E 2002].*

Elaborating on this point, Ms. Kimbori noted that she has perused the plaintiffs' Plaintiff filed before the Court and there is no any paragraph

which pleads on the pecuniary or even territorial jurisdiction of the Court contrary to the requirement of the law. To support her position, Ms. Kimbori referred to Order VII Rule 1 (i) of the Civil Procedure Code, Cap. 33 [R.E.2002] and argued that, the Plaintiffs have not complied with this mandatory requirement of the law. She said, due to that omission the Court has not been properly moved to hear and determine the suit as it has no jurisdiction. To buttress her position she cited the case of **Fanuel Mantiri Ng'unda Vs Herman Mantiri Ng'unda** (1995) TLR 159 where it was held that:- "*It is, as I understand it, basic principle that, it is a risk for the court to proceed with the trial of a case while assuming its jurisdiction*"

Ms. Kimbori said, since plaintiffs have not complied with the legal requirement then the Plaint is defective and the only remedy is for the Court to dismiss it with costs.

Ms. Kimbori argued further that, the plaintiffs have alleged that the value of the disputed property is Tshs 70,000,000/= which contradicts with the attached photographs. She further argued that the value of the subject matter cannot be ascertained on a mere speculation without the support of the valuation report done by a

registered valuer. She said, a mere allegation of the value based on the exhausted improvement of the suit land cannot be used to determine the value of the subject matter or the pecuniary jurisdiction of the Court. She referred to the case of **John Malombola Vs Remmy Kwayu**, Msc. Land Appeal No. 91 of 2009 High Court Land Division (Unreported), where it was held that:-

*“The **value of the land must be ascertained by a valuer taking into consideration the current market value of the land and its improvement at the time the suit was instituted**”. [Emphasis supplied].*

Kimbori emphasized that since in this case the Plaintiff does not contain a statement on the value of the suit property and the same cannot be ascertained without support of the valuation Report done by a registered valuer, the suit is incompetent and should be dismissed with costs.

Responding on this point Mr. Mwakimatu contended that, the said objection is unfounded because the value of the subject matter and its geographical location are clearly indicated under paragraph 3 of

the Plaintiff and other monetary prayers clearly stipulated thereafter. Therefore, according to Mr. Mwakimatu the pecuniary and territorial jurisdiction of the Court is openly established and he thus prayed the said point of preliminary objection raised to be overruled and the Court to allow the matter to be determined on merit.

In rejoinder submission Ms. Kimbori reiterated what she submitted in chief and added that, the plaintiffs claims are based on general damages, which she said, cannot be used to ascertain the jurisdiction of the Court. Kimbori further challenged paragraphs 3 and 15(c) of the Plaintiff relied by Mr. Mwakimatu that the same are on the refund of Tshs. 70,000,000/= the amount alleged to be the costs used to build the madrassa. She said, the said claim has not been supported by invoices or receipts to establish how the said amount was obtained and arrived at. Kimbori insisted that, the said amount being claimed as compensation cannot be used to ascertain and determine the value of the property or even the pecuniary jurisdiction of the Court.

Having digested the parties' submissions and the pleadings therein on point four (d) of the preliminary objection raised by the

defendant, I am settled that before I address other points of objection, the main and the first issue to be determined by this Court is *whether this Court has pecuniary jurisdiction to entertain the suit*.

I should start by emphasizing that, the issue of jurisdiction is fundamental and a root of the case. If the court will proceed and determine the matter without the required jurisdiction the entire proceedings will be declared, "*null and void ab initio*".

It is on record that, the suit at hand is purely *a land case*, whereby the filing of which is governed by both Order VII Rule 1 (i) of the Civil Procedure Code (supra) and Section 37 (a) of the Land Disputes Courts Act, Cap. 216 [R.E 2002]. For the sake of clarity, Order VII Rule 1 (i) of the Civil Procedure Code, (supra) provides that:-

"The Complaint shall contain the following particulars:-

(j)A statement of the value of the subject matter for the suit for the purposes of jurisdiction and of court fees, so far as the case admits". [Emphasis supplied].

Furthermore, Section 37 (a) of the Land Disputes Courts Act, provides *inter alia* that "*the High Court shall have and exercise*

*original jurisdiction in proceedings for the recovery of possession of immovable property in which **the value of the property exceeds Fifty Million Tanzania shillings (Tshs 50,000,000/=)**. Moreover, Pecuniary jurisdiction of the High Court in immovable properties is **One Hundred and Fifty Hundred Million (Tshs 150,000,000/=)** and above'.*

As it was clearly stated by Ms. Kimbori, it is a mandatory requirement under Order VII Rule 1 (j) of the Civil Procedure Code (supra), that *a plaint should contain a statement on the monetary value of the subject matter*. This is not only for the purposes of determining courts' pecuniary jurisdiction, but also for assessing **the court fees**.

As it is indicated above, the word used under Order VII Rule 1 (i) is "*shall*" as opposed to "*may*". Courts in different occasions have interpreted the word **shall**. For instance, in the case of **Shabani Iddi Jololo and three (3) Others V. Republic**, Criminal Appeal No. 200 of 2006, Court of Appeal of Tanzania at Dodoma observed that:-

*"In this context, section 53 (2) of the Interpretation of Laws Act [CAP 1 R.E. 2002] is important. It provides that where in a written law the word "**shall**" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

Therefore, the use of the word **shall** in Order VII Rule 1 of the Civil Procedure Code (supra) denote mandatory compliance with that requirement. If the Plaintiff could have dutiful and obediently complied with the requirement of Order VII Rule 1 of the Code (supra), it could have been helpful in determining and properly assess the **appropriate Court fees**. Therefore, it is doubtful that, even the amount paid by the Plaintiffs, when filing this case, may have been over or under estimated. In the case of **Arusha International Conference Centre v. Dr. Edward Clemens** [1989] TLR 154 (CA) the Court stated, *"It should be noted here that the proper filing of the suit is accompanied by the proper payments of the court fees. In this case the plaintiff was not properly assessed in terms of court fees the plaintiff was either under charged or overcharged"*.

Additionally, in the case of **Hertz International Ltd and another v. Leisure Tours & Holidays Limited and 3 others**, Commercial Case No. 74 of 2008, High Court of Tanzania, and Commercial Division at Dar es Salaam (unreported) Makaramba J., stated that:-

"...failure to make a statement in the plaint of the value of the subject matter of the suit has an effect on the jurisdiction of this court...In the upshot and for the foregoing reasons the plaint is hereby rejected by this court due to the omission by the plaintiff to state the value of the subject matter of the suit for purposes of jurisdiction of this Court as mandatorily required under Order VII Rule 1(1) (sic) of the Civil Procedure Code, 1966, [CAP.33 R.E. 2002]"

Therefore, the failure by the Plaintiffs to indicate in the Plaint a statement of the value of the subject matter of the suit has an effect on both the jurisdiction and the Court Fees.

Furthermore, pursuant to Section 37 (a) of the Land Disputes Courts Act, the pecuniary jurisdiction of the High Court on matters relating to immovable properties is limited to those matters with the value that exceeds fifty million shillings (Tshs 50,000,000/=). I have since perused the Complaint lodged herein and as it was argued by Ms. Kimbori there is no any paragraph which specifically provides for the value of the subject matter. I am however alive to the fact that, in his submission Mr. Mwakimatu had since argued that, the Complaint and specifically on paragraphs 3 and 15 have clearly and openly disclosed the value of the subject matter together with its geographical location. To portray the truth of the matter, I have endeavored to reproduce the said paragraphs of the Complaint herein:-

Paragraph 3 *"That, the plaintiffs claim against the defendant **compensation of Tshs. 70,000,000/= (Seventy Million)** being the **value of the structure demolished** by the defendant, being himself or his agent on the piece of land The value termed as waqfu land at Tabata Dampo area, Ilala District, Dar es Salaam City". [Emphasis added].*

Paragraph 15 (c) *"To condemn the defendant to rebuild the **demolished Madrassa** or in alternative **to pay** the like sum at the tune of **Tshs. 70,000,000/=** (Seventy Million) **being the compensation of materials and energy deployed thereon**" [Emphasis added].*

From the above paragraphs it is clear that the claim by Mr. Mwakimatu that the same disclose the value of the subject matter is misconceived and misleading. The two paragraphs portray that, the amount of Tshs. 70,000,000/= is, as eloquently submitted by Ms. Kimbori, for **compensation of materials used to construct the madrassa and for the energy deployed** therein. With due respect, I am unable to agree with Mr. Mwakimatu that the said amount is on the value of the subject matter. This is not reflected in the Plaint and as clearly argued by Kimbori the amount of money used to purchase building materials to construct the madrassa cannot be used to determine the value of the subject matter and the pecuniary jurisdiction of this Court.

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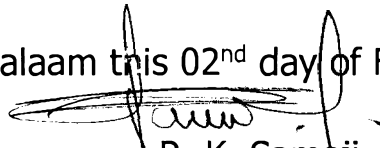
It is therefore my respectful view that, there is considerable merit in Ms. Kimbori's submission in that, the plaintiffs' Complaint does not contain particulars pertaining to a statement of the value of the subject matter of the suit for the purposes of ascertaining both the ***pecuniary jurisdiction*** and ***court fees*** as required by Order VII Rule 1 (i) of the Civil Procedure Code (*supra*) and also section 37 (a) of the Land Disputes Courts Act, (*supra*). I do hereby subscribe to all the authorities she had since cited herein.

Now, since the point highlighted above touches on the jurisdiction of this Court to handle this matter, I am constrained to conclude that, belated as it might be, upon determining that, this Court has no jurisdiction, I will not proceed on, to deliberate on other points of the preliminary objection as my hands are tied. This is a reminder to Mr. Mwakitalu and all of us servants of the law to always be on the lookout on the issue of jurisdiction, on deciding to institute a suit or once a suit is filed. It should be a primary duty of every player to satisfy that, the court in which the matter is filed is vested with the requisite jurisdiction.

In conclusion and based on the above findings, I am of the settled view that, the Preliminary Objection raised by the learned Counsel for the defendant is laudable. The suit is incompetent before this Court. I accordingly proceed to strike out the Plaint with costs from the record of this Court. The plaintiffs are at liberty to file a fresh suit in a competent court with the necessary jurisdiction, subject to the law of limitation.

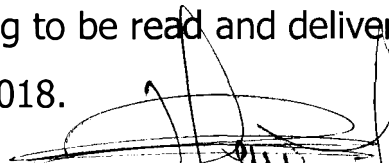
It is so ordered.

DATED at Dar es Salaam this 02nd day of February 2018.



R. K. Sameji.
JUDGE

COURT – the Ruling to be read and delivered by the Deputy Registrar on 16th February 2018.



R. K. Sameji
JUDGE

02/02/2018