

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

AT DAR ES SALAAM

LAND CASE NO.21 OF 2020

BETWEEN

JAMES WINGIA KIMARO.....1ST PLAINTIFF

GASTON RAPHAEL GIKARO.....2ND PLAINTIFF

ALOYCE A. NGOWI.....3RD PLAINTIFF

ELIZABETH BAHATI LUKAZA.....4TH PLAINTIFF

ROSE MICHAEL KYANDO.....5TH PLAINTIFF

VERSUS

MARTHA JOSEPH KATEMBA.....DEFENDANT

RULING

Date of last Order: 03/03/2021

Date of Ruling: 07/05/2021

MLYAMBINA, J.

Upon being served with the Plaint which was filed by the Plaintiffs, Defendant filed her Written Statement of Defence (WSD) together with preliminary objections to the effects that:

- (1) The Plaintiffs' suit is incurably defective for containing defective verification clause.
- (2) The Plaintiffs' claim is an abuse of Court process for being untenable in law.
- (3) Plaintiff has no cause of action against the Defendant as the alleged suit land is Plot No. 2106 Block E while the Defendant's land is Plot No.130 Block E.

- (4) The Plaintiffs' suit is defective for want of proper and sufficient description of the suit land contrary to *Order VII Rule 3 of the Civil Procedure Code Cap 33 (R.E 2019)*.

The Plaintiffs were represented by Advocate Good Chance Lyimo while the Defendant was represented by Advocate Adam Mwambene.

The Preliminary Objection was disposed by way of Written Submissions. In his submission, the Defendant' Advocate decided to abandon the first ground, remaining with three grounds only. Submitting for the second ground, he stated that, there is none joinder of "Necessary Party as Defendants". It was submitted that the Plaintiff has sued Defendant alone but in paragraph 4 of their plaint and item 3 of their relief sought, the Plaintiff alleges that certain individuals sold to them their pieces of lands. Also, the Defendant did illegally solicit and deceive Land Authorities in order to procure the alluded Letter of Offer of Plot No.130 Block 'E' Salasala. Hence, whoever sold the piece of Land to the Plaintiff and whatever the Land Authorities referred to have been deceived, are all Necessary Parties. Thus, failure to bring these people, before the Court is serious non joinder of necessary parties as Defendants. He cited the case of **Hamisi Salum Kizenga v.**

Mosses Malaki Sewando and 18 Others, Land Appeal No 51 of 2019, which expressed that mis-joinder or non-joinder of parties do not prevent the cause of justice to the parties to prevail. He prayed that the case be struck out.

In reply, the Plaintiff's Advocate submitted that the Plaintiffs' right has been violated by the Defendant whom she claims rival ownership and it is on that basis the Plaintiff sued the Defendant for the relief contained in the plaint, which if granted, the order/decreed may be enforced against the said Defendant. He was of the view that; the Plaintiffs have no cause of action against the seller or land authorities as the suit is not for claim of recovery of land. Since cause of action is the fundamental root upon which the claim is based against the violator, it is on that basis the Plaintiffs' formed an opinion and decided as to who is to be impleaded in a suit and thus cannot be forced to sue on the person whom they do not wish to sue.

To cement his argument, the Plaintiffs' Advocate cited different cases and *Order 1 Rule 9 Cap 33 of the Civil Procedure Code (R.E 2019)* which requires that suits should not be defeated on ground of misjoinder or non-joinder of parties.

In rejoinder, it was submitted by Defendants' Advocate that, the provision of *Order 1, Rule 9 of the Civil Procedure Code, Cap 33 (R.E. 2019)* and the maxim of *Dominus litis* does not apply where there is misjoinder of necessary party as in present case.

I think this issue need not detain this Court. Reading from the plaint, the Plaintiff prays for a declaration that he is the lawful owner of the property and that the Defendant is a trespasser.

Further *Order I Rule 3 of the Civil Procedure Code Cap 33 (R.E. 2019)*, provides for who can be joined as the Defendant in a case. It states that:

All persons may be joined as Defendants against whom any *right to relief* in respect of or series of acts or transactions is *alleged to exist*, whether jointly, severally or in alternative where, if separate suits were brought against such persons, any common question of law or fact would arise. Emphasis added.

Reading from the wording of the afore Rule, the Plaintiff had the right to sue the Defendant only since their rights to relief (s) allege to exist from her. That being said, the second preliminary objection has no merit, henceforth it is dismissed.

With regard to the third Preliminary Objection, it was submitted by the Defendant's Advocate that, there is mandatory provision,

in *Order VII Rule 3 of the Civil Procedure Code, Cap. 33 (R.E 2019)* which requires as it provides that:

Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by a tittle number under the Land Registration Act, the plaint shall specify such tittle number.

He submitted further that, in order to ensure focused execution of a suit land there should be proper identification, in case of surveyed one, plot number and title number, and un surveyed one, permanent boundaries, size and location or features of the property in order to distinguish it from other piece of land in the same area.

He insisted that, in the present suit, the Plaintiff has cited un-surveyed land without size description, boundaries and permanent features of the same differentiating it from other land in that area. To cement this argument, he cited the case of **Hamis Salum Kizenga v. Mosses Malaki Sewando and 18 Others** (*supra*) which insist on sufficient description of the property in terms of size, location address and or boundaries for the purpose of its proper identification.

It was further submitted by the Defendant's Advocate that, for surveyed land the Plaintiff has referred to Plot No. 2106 Block E

which lamentably does not exist at all and there is nothing in the plaint which demonstrate its existence. The case of **Victoria Kokubana (As an Attorney of Angelina Mimbazi Byarugaba) v. Wilson Gervas & Anirod Oromi**, Land Case No 70 of 2010 where it was held:

...I have asked myself, should the matter be decided in favor of the Plaintiff, what is it that she will execute against the Defendant? How will the execution order ascertain to what extent are the Defendants to be evicted? On the other hand, if the Defendant is declared the lawful owner of the suit property, what is the size and description of that he is declared an owner of?... All these questions necessitated the legislature to enact the provision of Order VII Rule 3 so as to circumscribe the Court Orders and Execution thereof to only that which is described in the plaint and proved by the parties.

In rebuttal, it was submitted by the Plaintiffs' Advocate that, the land was properly described in paragraph 3 of the plaint in obedience of *Order VII Rule 3 of Cap 33 (supra)*. Further, the Plaintiff has attached sale agreement which helps to elaborate what has been stated in the plaint. To cement this point, he cited the case of **Hamisi Salumu Kizenga v. Moses Malaki Sewando and 18 Others** (*supra*) which insists that, annexures

forms part of the pleadings since they assist in elaborating the material facts pleaded in the pleadings.

He further submitted that, even if the version of non-description is true, the same does not hold water entitling striking out the plaint as the said shortfall is curable during hearing of evidence.

In rejoinder it was submitted by Defendant's Advocate that, what the Plaintiff have described their suit of land does not par with the provisions of *Order VII Rule 3 of the Civil Procedure Code Cap 33 (R.E 2019)*.

Having considered the afore submissions, it is my view that the raised preliminary objection can be solved by looking at the provisions of *Order VII Rule 3 of the Civil Procedure Code Cap 33 (R.E. 2019)* which states that:

Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property *sufficient to identify it* and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number.

Further from the case of **Hamisi Salum Kizenga v. Mosses Malaki Sewando and 18 Others** (*supra*) which was cited much by Advocates for both sides in their submissions; The Court had this to say;

*in my view the description in this suit suffices to identify the Land in question as it contains the size of the Land and location. It suffices to identify the suit land by **either** stating its size, location, address and **or** boundaries if any. Emphasis added.*

Having in mind of the above authority and Looking at paragraph 3 of the plaint, it is my humble opinion that the land was well described by the Plaintiffs, the surveyed one was described by plot and title number and un-surveyed one was described in terms of location. This suffices description needed. I am of the view that, this preliminary objection also lacks merit.

Coming to the last preliminary objection, the Defendant's Advocate was of the view that, the Plaintiff has no cause of action against the Defendant since they are suing on Plot No. 2106 Block E but there is nowhere in the plaint they have established how the Defendant is associated with the alleged plot, and the Plaintiff have not established how they associate with Plot No. 130 Block E. To cement his allegation, the case of **Stanbic Finance Tanzania LTD v. Giuseppe Trupia and Chiara Malavasi** (2002) TLR page 217 was cited.

The Plaintiff's Advocate responded this issue by submitting that there is cause of action against the Defendant since the Defendant with a bunch of unknown surveyors made an

amendment of the survey drawing of Plot No.130 Block E Salasala Kilima hewa in Kinondoni Municipality-Dar es Salaam which had encroached the 4th Plaintiff surveyed Plot No. 2106 Block E located in the same area as averred under paragraph 15 (6) and 16 of the plaints. Hence the objection is of no substance.

After passing through submissions for and against the last point, I will start to treat this preliminary objection by citing the landmark case of **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania)** LTD TCA 13 [1983] TLR Where it was held that:

an expression cause of action is not defined under the code but it may be taken to mean essentially facts which is necessary for the Plaintiff to prove before he can succeed in the suit. In the same case at page 4 the Court held that;

for purpose of deciding whether or not the plaint discloses cause of action *the plaint and not the reply* to the written statement of defence raised in the written statement of defence *should be looked at*, the reply merely serving to show that the Plaintiff joins issues with the Defendant on the special defence. Emphasis added.

The Cause of action was also explained in the case of **Liberatus Laurent Mwang'ombe v. The Attorney General and 2 Others**, Civil Appeal No 45 of 2016 where the Court of Appeal cited with approval *the legal-dictionary.thefreedictionary.com* which defines cause of action as follows:

The fact or combination of facts that gives a person the right to seek judicial redress or relief against another. Also, the legal theory forming the basis of lawsuit. The cause of action is the heart of the complaint which is the pleading that initiate lawsuit.

With the above authorities it is crystal clear that at the stage of pleadings parties need only to inform the Court about the nature of their case by identifying the areas of controversy between them and area upon which the verdict of the Court is sought. What is important in considering whether the cause of action is revealed by pleadings is the question to what right has been violated

Ordinarily, disclosure or no- disclosure of cause of action raises a pure point of law, when this is raised, the Court is basically invited to look at the content of the plaint and its annexures to see their compliance with the provisions of *Order VII Rule 1 (e) of Civil Procedure Code (supra)*. If upon assessment of the two, the Court is satisfied no cause of action have been advanced,

the matter will be rendered incompetent and consequently be rejected.

In the instance case, as can be seen from the plaint, the Plaintiff's right has been violated by the Defendant whom she claims rival ownership of their property, hence the Plaintiff sued the Defendant for the relief contained in the plaint which, if granted, the order/decreed may be enforced against the Defendant.

With due respect, I tend to differ with Defendant's Advocate on his argument that the Plaintiffs claim based on Plot 2106 Block E has nothing to do with Defendant since Defendant's area is Plot 130 Block E, the matter in issue here is ownership and trespass. Matters of which plot belongs to who, is the matter to be determined in the main suit. Thus, with the light of the authorities above, it is crystal clear that the Plaintiff has a cause of action against the Defendant and to strike out the Plaint Without Hearing the Case on this averment is denying them the right to be heard. I will conclude by citing the case of **Karata Ernest and Others v. Attorney General** Civil Revision No. 10 of 2010 where the Court of Appeal quoted with approval the case of **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A.** The latter had this to say:

A preliminary objection is in the nature of what used to be a demurrer. It 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 if what is sought is the exercise of judicial discretion*. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.

Having said so, this Court is of the findings that the objections raised by the Defendant have no merit and are hereby dismissed. Costs shall follow events. It is so ordered.



Y. J. MLYAMBINA

JUDGE

07/05/2021

Ruling delivered and dated 7th May, 2021 in the absence of the Plaintiff and in the presence of Learned Counsel Saudia Kabola holding brief of Counsel Adam Mwambene for the Defendants.



Y. J. MLYAMBINA

JUDGE

07/05/2021