

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC. LAND CASE NO. 09 OF 2020

MAGWEIGA CHACHA MAGERE PLAINTIFF

VERSUS

MARTHA MANUMBU..... 1ST DEFENDANT

MANUMBU JOHN.....2ND DEFENDANT

CHANZU JOHN 3RD DEFENDANT

MPONDA JOHN 4TH DEFENDANT

ENOS JOHN 5TH DEFENDANT

EMMANUEL JOHN..... 6TH DEFENDANT

RAIDEN YAKOBO KINAGE @

ZAKAYO ATHANAS RAIMOND 7TH DEFENDANT

SILAS L ISANGI t/a COURT BROKER..... 8TH DEFENDANT

RULING

Date of last Order: 20/07/2021

Date of Ruling: 13/08/2021

F. K. MANYANDA, J.

This ruling is in respect of a preliminary objection raised by the 7th Defendant against the plaint. The Plaintiff is suing the Defendants for declaration of ownership of a landed property situated at Plot No. 31 Block "O" Unguja Street in Mwanza City. The preliminary objection contains four points of law as follows: -

- 1. The present suit is incompetent for suing the 1st Defendant who is deceased.*
- 2. The Complaint is bad in law for contravening Order VII Rule 1(i) of the Civil Procedure Code, [Cap. 33 R. E. 2019].*
- 3. The court has no jurisdiction to entertain the present suit.*
- 4. That the suit is abuse of court process in disobeying the Order of the High Court as per annexure MCM/110 of the complaint.*

At the hearing of the objection, the 7th Defendant was represented by Mr. Emmanuel John, learned Advocate, and the Plaintiff enjoyed the services of Mr. Mashaka Fadhili Tuguta, learned Advocate.

Mr. Emmanuel submitted in support of the first point of objection arguing that the suit is incompetent for suing the 1st Defendant who is deceased a behaviour which is prohibited by the law. He submitted that there is ample of evidence proving that the said 1st Defendant is dead. Basing on the summons served by the process server, shows that the 1st Defendant was reported dead. The said process server swore an affidavit which proves the death of the 1st Defendant. The Counsel went on arguing

under Rule 8 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017, process servers have been empowered to serve summonses to parties of a suit and their evidence through affidavits of serves is enough to prove availability or otherwise of the concerned party. He cited the famous case of **Yohana Matovu vs. The Katikiro** (1957) EA 648.

It was his views that legally a suit becomes incompetent for suing a deceased. He cited a case of **Selemani Ally Nyamalege and 2 Others vs Mwanza Engineering Works Ltd**, Civil Appeal No. 22 of 2014 (unreported).

In respect of the second and third points of objection Mr. Emmanuel argued that Order VII Rule1 the Civil Procedure Code, [Cap. 33 R. E. 2019], hereafter "the CPC", provides for particulars to be reflected in the plaint and it is couched in mandatory wording using the word "shall". Order VII Rule1(i) require the plaint to contain a statement of a value of subject matter of the suit for purposes of establishing the jurisdiction and facilitation of court fees assessment. He pointed out that the suit lacks such a requirement because the value of the subject matter is not known.

The Counsel submitted that Section 33 of the Land Disputes Courts Act [Cap. 216 R. E. 2019] hereafter the LDCA sets a pecuniary jurisdiction limit of Tshs. 300,000,000/=, then the jurisdiction of the High Court starts from Tshs. 300,000,000/=. He was of the views that since this a land dispute and the value of the subject matter is missing then this Court lacks jurisdiction to entertain this case as well. He also quickly pointed out that though the Plaintiff is prayed for a declaratory order, but in his opinion, the argument is not for declaratory only but also value of the property, therefore section 7(2) cannot save the suit because the Defendant is not objecting a declaratory order.

Then in his Submissions for the fourth point of objection stated that the suit violates an order of this Court by Hon. Rumanyika, J. dated 29/05/2020 in annexure MCM/10 to the plaint in which he advised the Plaintiff who was an applicant in that matter to sue only three (3) respondents who are the 1st, 2nd and 8th Defendants.

He prayed the plaint to be struck out in case point one and fourth are sustained and it be rejected if points 2 and 3 are sustained.

On his side Mr. Tuguta, for the Respondent, submitting in the same sequence, argued in opposition of the first point of objection that the same does not qualify as a preliminary objection. He was of the views that for a preliminary objection to qualify as such it must be on pure point of law which if successful can dispose of the matter. He cited the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Company Ltd**, [1969] EA 696.

The Counsel stated that from the affidavit of Ramadhani Juma, the Process Server, it is revealed that the 1st Defendant was served through her son Nestory Manumbu John on 09/11/2020. Neither the said Nestory nor the Process Server said the 1st Defendant was dead. Moreover, there is no death certificate, therefore death is subject to proof. He concluded that the contention require proof by evidence, hence do not qualify as a preliminary objection. He cited the case of **Esto Ntagalinda vs. Tanzania Fish Process Ltd**, Civil Application No. 08/2011 where the Court of Appeal of Tanzania set up standards for a preliminary point of objection. He distinguished the **Yohana Matovu's case (supra)** where death of the Defendant was well known before institution of the suit while in the instant death was not known before instituting this suit. He also stated that the

principle of law in the case of **Selemani Ally Nyamarage (supra)** is inapplicable in the circumstances of this case.

As regard to the second and third points in the objection, Mr. Tuguta submitted that this Court has jurisdiction to entertain this suit. He conceded on the gist of Order VII Rule 1 for stating value of the subject matter that it is to enable the Court assess its jurisdiction and added further under section 13 of the CPC that every suit to be instituted in a lowest court competent to try it. However, he pointed that there is a proviso which legalizes this Court to determine matters which concern declarations, this suit is exonerated from the conditions in Order VII Rule 1 as it has prayers for declaration. He cited the case of **Ivanna Felix Teri vs. MIC (T) PLC**, Civil Case No. 5 of 2019 where it was said that the proviso to section 13 of the CPC preserves the jurisdiction of this Court regardless of the value of the subject matter.

In respect of the fourth point of objection that the suit violates the order of this Court, Mr. Tuguta argued that there is no annexure MCM/110 but MCM/10. Moreover, he stated that the said order uses a phrase “among others”, it does not use “only” which means it does not strictly

limit the Plaintiff from suing other persons than the advised. He prayed the objection be overruled with costs.

Those were the submissions by the Counsel for both parties. The issue for determination by this Court is whether the preliminary objection is sustainable. I say so because the intention of a preliminary objection is to act as a demurrer to the suit. **Sir Charles Newbold, President** said in **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd [1969] EA 296** at page 701 that: -

"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."

In the same case, the Court considered what constitutes a preliminary objection, it said, at page 700

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

an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Our Court of Appeal of Tanzania has restated this position of law in many cases some of which include the cases of **Betty Kassiri vs. Eastern and Southern African Management Institute (ESAMI) [2001] TLR 478** where it said: -

"The preliminary point raised by the defendant is a point of law. A point of law, like this one, touching on the lack of jurisdiction by the court, which may have the effect of disposing of the suit or proceedings without involving a trial or full hearing, if successfully argued, should be raised as soon as it becomes apparent either from the pleadings or from statutory (be it parent or subsidiary) law which, if upheld, might dispose of the case."

In another case, the Court of Appeal of Tanzania restated the parameters from which a "preliminary objection" is deductible in the case of **COTWO (T) OTTU & Another vs. Honourable Iddi Samba-Minister of Industries and Trade & Others [2002] TLR 88** that: -

"A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing of the case;

On this point, there is also the case of **Musanga Ng'andwa vs. Chief Japhet Wanzagi and Eight Others 2006 TLR 351** where the Court of Appeal of Tanzania had this to say: -

"The expression preliminary objection has been used in our jurisdiction to refer to objection to the jurisdiction of the Court, a plea of limitation and the like; it contains a point of law which, if argued as a preliminary point, may dispose of the suit; a preliminary objection cannot be raised if any fact has to be ascertained, that is, it cannot be based on unascertained factual matters."

From the authorities above, I agree with the Counsel for the Plaintiff that, it is settled law in our jurisdiction that a preliminary objection must be a pure point of law based on facts not to be ascertained from evidence and the same should be capable of disposing of the matter.

Now let me start by determining the second and third points of objection jointly as they question the jurisdiction of this Court to entertain this suit. It is settled law that whenever a suit is made before a court of law, the initial issue is to decide whether the court has jurisdiction to deal with it. The East African Court of Appeal in **Shyam Thanki and Others vs. New Palace Hotel** [1971]1 EA 199 held *inter alia* that;

"The Courts in Tanzania are created by Statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot consent to give a court jurisdiction while it does not possess"

Another case is **Fanuel Mantiri Ng'unda versus Herman Mantiri Ng'unda** [1995] TLR 159 where the Court held that,

"The jurisdiction of any Court is basic; it goes to very root of the authority of the court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial."

In the instant matter it was argued for the 7th Defendant that the Plaintiff offends the mandatory provisions of Order VII Rule 1(i) of the CPC

which require the plaint to contain a statement of a value of subject matter of the suit for purposes of establishing the jurisdiction and facilitation of court fees assessment.

The Counsel for the Plaintiff argued that there is a proviso which legalizes this Court to determine matters which concern declarations like this suit which has prayers for declaration. He cited the case of **Ivanna Felix Teri vs. MIC (T) PLC**, Civil Case No. 5 of 2019 where it was said that the proviso to section 13 of the CPC preserves the jurisdiction of this Court regardless of the value of the subject matter.

I take one position with the Counsel for both sides as far as the purposes of Order VII Rule 1(i) that it is a requirement that the statement of value of the subject matter is made so as to enable the court determine its jurisdiction and assess the requisite filing fees. In the case of **Doctore Malesa and Others vs. The Permanent Secretary Ministry of Lands, Housing and Settlement and 3 Others**, Land, Case No. 18 of 2019 (unreported) this Court (Hon. Tiganga, J.) cited a case of the defunct Court of Appeal for East Africa namely, **Assanand and Sons (Uganda)**

Limited vs. East African Records Limited, Civil Appeal No.10 of 1959

where it was stated that: -

"The facts showing that the court has jurisdiction is a matter of great importance because if the court proceed without assurance that it has jurisdiction, and it is later proved that it had not, any judgment which it gives is a nullity."

Also, it is trite law that it is a requirement under the provisions of section 13 of the CPC that every suit to be instituted in a lowest court competent to try it.

However, this case concerns a pure land suit, jurisdiction of courts in land cases is categorized basing on value of the subject matter. The jurisdiction of Ward Tribunal is provided under section 15 of the Land Disputes Courts Act, [Cap. 216 R.E 2019] (LDCA) whereas the upper limit value provided is Tshs. 3,000,000/=. Under Section 33(2)(a) of the same Act, the upper limit for the District Land and Housing Tribunal (DLHT) is Tshs. 300,000,000/= and section 37(1) of the same Act provides for the pecuniary jurisdiction of the High Court in the following words: -

37(1) Subject to the provisions of this Act, the High Court shall have and exercise original jurisdiction-

a) in proceedings for the recovery of possession of immovable property in which the value of the property exceeds three hundred million shillings;

b) in other proceedings where the subject matter capable of being estimated at a money value in which the value of the subject matter exceeds two hundred million shillings; (Emphasis added)

As it can be gleaned from the law cited above, in suits for recovery of possession of immovable property, this Court has jurisdiction where the value of the landed property exceeds Tshs. 300,000,000/= . This means, for any value below this threshold, the jurisdiction is vested in the DLHT and, this is what is known in law as pecuniary jurisdiction of the court. The reliefs in this case includes recovery of the land in dispute.

A question is how do the court come to know about this pecuniary jurisdiction?

The answer is in the provisions of Order VII Rule 1(i) of the CPC. Land suits in this Court are instituted by way of filing of a plaint in court.

The said Order VII Rule 1(i) mandatorily require that a plaint must contain facts disclosing that the court has jurisdiction.

In the instant case, the question of pecuniary jurisdiction is a point of law and it arises out of the pleadings. The Plaintiff's prayers, among others, include recovery of possession of immovable property which is a house situated on a surveyed Plot No. 31 Block "O" Unguja Street in Mwanza City. Does the plaint state the value of the said property? The answer is in negative. It is on this reason that makes this Court agree with the Counsel for the 7th Defendant that the plaint is flawed for failure of disclosing pecuniary jurisdiction. Such a failure to disclose the value of the house in issue puts this Court in dilemma as it makes uncertain as to which court between the High Court and the DLHT can entertain the suit.

This Court is not ready to take the risky as it was warned in the case of **Fanuel Mantiri Ng'unda versus Herman Mantiri Ng'unda (supra)** where it was stated inter alia that: -

It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case"

Moreover, not only the wording in both, sections 33(2)(a) and 37(1) of the LDCA is couched using the word "**shall**" but also Order VII Rule 1(i) of the CPC, is couched in the same mandatory terms using the word "**shall**" which mean the act must be done. This Court (Hon. R. K. Sameji, J. as then was) stressed on mandatorily nature of Order VII Rule 1(i) of the CPC in the case of **Jamal Said and Three Others vs Karmal Aziz Msuya**, Land Case No. 42 of 2017 (unreported), by stating as follows: -

*"Order VII Rule 1(i) wording 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.*

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 mandatory required under Order VII Rule 1(1) (sic) of the Civil Procedure Code, 1966, [CAP.33 R. E. 2002]"

In the upshot, and for reasons stated above, this Court finds that the objection in points two and three in the preliminary objection has merit and the same is sustained.

Now, since the points of objection determined above are based on the jurisdiction of this Court to handle this matter and the same have been sustained, I am constrained to conclude that this Court has no jurisdiction to determine this suit. As a result, I will not proceed on, to deliberate on other points of the preliminary objection as my hands are tied.

As to the way forward, I follow the route taken by this Court in **Jamal Said and Three Others vs Karmal Aziz Msuya (supra)** and

proceed on rejecting the plaint 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 mandatory required under Order VII Rule 1(i) of the CPC. Costs will be borne by the Plaintiff. It is so ordered.




F. K. MANYANDA
JUDGE
13/08/2021