

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND CASE NO. 4 OF 2021

ZAKAYO MEPUKORI OLE LEIDA..... PLAINTIFF

VERSUS

LOPOLUN VILLAGE COUNCIL.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

AGALANDUS KURTUTU.....3RD DEFENDANT

EMMANUEL KILEL.....4TH DEFENDANT

MAATI SEKI.....5TH DEFENDANT

MALES ORPUSNGAINA.....6TH DEFENDANT

SITAYA TAIWAP.....7TH DEFENDANT

SANDYA KILEI.....8TH DEFENDANT

LEARAM SEKI.....9TH DEFENDANT

SAINGULU MBALELE.....10TH DEFENDANT

NAISIRIRI SEKI.....11TH DEFENDANT

SAITAKWET PANTO.....12TH DEFENDANT

ISAYA SEKI.....13TH DEFENDANT

NDIPAPA KILEI.....14TH DEFENDANT

LAANYONI KOIPITATI SEKI.....15TH DEFENDANT

RULING

1/10/2021 & 20/12/2021

ROBERT, J:-

In this suit, the plaintiff, Zakayo Mepukori Ole Leida, claims against the above named defendants for, among others, an order for exclusive and unimpeded right of possession and occupation of a piece of land measuring twenty-nine (29) acres situated at Lopolun Village, Loliondo District in Arusha region, a declaration that the defendants wrongfully trespassed into his landed property, special damages and general damages.

The plaintiff's case is to the effect that, the hamlet chairman assisted by other leaders of the first defendant together with the 3rd to 15th defendants wrongfully trespassed into his landed property on 24th April, 2019 and caused destruction of the fence on it thereby occasioning loss to his landed property. The matter was reported to police station and the suspects including the 3rd to 15th Defendants were arrested for trespassing into the property and causing destruction to the property. However, the 1st defendant approached the plaintiff and the matter was settled amicably. Surprisingly, on 9th April, 2020 the plaintiff was summoned and attended a meeting where ownership of the suit land was discussed and the suit land was measured. At the end, the 1st

defendant promised to make a decision on ownership of the suit land. On 15th April, 2020, the plaintiff received a call from the 1st defendant (Village authority) that they will visit the suit land and the same will be divided to the villagers. Eventually, the suit land was allegedly divided to the 3rd to 15th defendants herein.

The plaintiff decided to report the matter to Ngorongoro District Executive Director (DED) who called the 1st defendant's authority and asked them to stop trespassing into the suit land pending the determination of the looming dispute. However, his call and directives were not honoured. Hence, the plaintiff preferred this suit.

The suit was resisted by the defendants who filed their Written Statement of Defence (WSD) and raised preliminary points of objection against the plaintiff's suit.

As a matter of practice, prior to the hearing of the matter, the court invited parties to address the Court on the points of objection raised by the defendants. The 1st and 2nd defendants raised three points of preliminary objection, to wit;

- 1. That, the suit is bad in law for non-join (sic) of District Executive Director as a necessary party contrary to section 26 of the Local Government (District Authorities) Act, Cap. 287 as amended by*

section 30 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020.

- 2. That, the suit is bad in law for not describe (sic) the boundaries of the suit property contrary to Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019.*
- 3. That, the suit is bad in law and incompetent for being drawn and signed by unqualified Advocate who has no practice (sic) certificate.*

Further to that, the 3rd to 15th defendants also raised two points of preliminary objections, to wit;

- 1. This suit is bad in law as the 1st and 2nd defendants were not served with ninety days' notice.*
- 2. The suit is bad in law for being prepared, signed and filed by the Advocate who is not allowed to practice.*

At the hearing of the preliminary objections, Mr. Mohamed N. Mhina, learned advocate appeared for the plaintiff whereas Mr. Mkama Msalama, learned state Attorney appeared on behalf of the 1st and 2nd defendants while Mr. Salvatory Moshia, learned counsel appeared for the 3rd to 15th defendants.

Submitting on the first point of objection raised by the first and second defendants, Mr. Msalama submitted that, Section 26 of the Local Government (District Authorities) Act, Cap 287 as amended by section 30 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020, requires in mandatory terms that the District Executive Director (DED)

be joined as a party in any suit or matter instituted against the village council. However, in the present suit, the plaintiff did not join the District Executive Director (DED) as a party. Thus, he maintained that the failure to do so makes the suit incompetent and the remedy is for the suit to be struck out.

Opposing this ground, Mr. Mhina submitted that, the learned counsel for the 1st and 2nd defendants overlooked and wrongly interpreted the cited provision. He maintained that, the provision imposes a duty to the Village Council (1st defendant) to notify the District Executive Director (DED) regarding the impending suit and he may apply before the court to join him as one of the parties to the suit. The said duty was never imposed to the plaintiff and there is no requirement for the plaintiff to join the DED as one of the parties to the suit. Thus, he regarded this point as a mere academic exercise which lacks merit.

This Court observed that, section 26 of the Local Government (District Authorities) Act, Cap. 287 as amended by section 30 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 provides that;

"The principal Act is amended in section 26, by adding immediately after subsection (2) the following:

"(3) Notwithstanding subsection (2), the District Executive Director shall have the right to be joined as a party in any suit or matter instituted by or against the Village Council, and for that purpose the Village Council shall have a duty to notify the District Executive Director of any impending suit or intention to institute a suit or matter against the Village Council."

It is apparent from the cited provision that, the law gives the District Executive Director the right to be joined as a party in suits or matters involving the village council. However, for the DED to exercise that right, the law imposes a duty to the village council to notify the DED of any impending suit against the village council. Having been so notified, the DED can choose to exercise his right to be joined as a party in such suits. Thus, this Court agrees with the plaintiff that the duty to notify the DED is placed on the village council and it cannot shift to the plaintiff. I therefore find no merit on this point of objection and it is hereby overruled.

Coming to the second ground of preliminary objection, Mr. Msalama submitted that, since the suit land is not surveyed the plaintiff

was required to give a proper description of the suit land which can enable the court to make executable orders and help the court to determine the controversy between the two sides based on the boundaries of the suit land or any other permanent features surrounding it. He faulted paragraph 18 of the plaintiff's plaint for mentioning the size of the suit land as 29 acres without describing the boundaries of the suit land as per Order VII Rule 3 of the Civil Procedure Code.

He made reference to the case of **Daniel Dagala Kanuda (As administrator of the Estate of the Late Mbalu Kashasha Baluda) vs Masaka Ibeho and 4 Others**, Land Appeal No. 26 off 2015, HC at Tabora (unreported) where the Court discussed in detail the importance of giving a proper description of immovable property in the plaint. Thus, he maintained that the plaint in this suit is incompetent for failure to describe the boundaries of the suit land properly and prayed that it should be struck out.

Responding to this ground, Mr. Mhina stated that, this point does not qualify to be raised as a point of preliminary objection considering the circumstances of the case. He submitted that, the suit land is surveyed though it is not yet registered (See Annexure ZK-1). Thus, the cited case of **Daniel Dagala Kanuda** (supra) is distinguishable from

the present case as in the said case the land was unsurveyed and the applicable law was the Land Disputes Court (District Land and Housing Tribunal) Regulation of 2003, G.N. No.174/2004 while in the present case the land is surveyed and law applicable is Civil procedure Code Cap. 33 (R.E 2019).

He maintained that the suit land is properly and sufficiently described under paragraph 18 and 20 of the plaint by specifying its size, location and all the demarcations. He submitted further that there is an attachment specifically pleaded in the plaint describing the suit land (annexure ZK – 1). He cited the case of **Hamis Salum Kizenga vs Moses Malaki Sewando & 18 Others**, Land Appeal No. 51 of 2019 (unreported) to make an argument that annexures form part of pleadings. Thus, he submitted that this point of objection also lacks in merit.

With regards to the question of description of property, the essence of Order VII Rule 3 of the Civil Procedure Code needs no emphasis. It helps the court in establishing the territorial jurisdiction and most importantly, assists in issuing executable orders. The relevant provision reads;

"Where the subject matter of the suit is immovable property, the plaintiff 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 plaintiff shall specify such title number."

In the case of **Mohamed Salehe vs Fatuma Ally Mohamed**, Land Appeal No. 182 of 2018 (unreported) DSM H.C Land Division, the omission to clearly and sufficiently describe the suit property was held to be violative of the mandatory requirements of order VII rule 3 of the Procedure Code, Cap. 33, R.E. 2019..."

In the present case, as rightly argued by the counsel for the plaintiff, paragraph 18 and 20 together with annexure ZK-1 contains sufficient description of the suit property to enable its identification from other landed properties. Thus, I will not waste much time on this point of objection. Accordingly, I overrule this ground of objection for want of merit.

On the third ground, Mr. Msalama submitted that, at the time of drafting the plaintiff, counsel for the plaintiff had no valid licence to practice as an advocate. He maintained that, section 39 (1)(b) and 41 (1) of the Advocates Act, (Cap. 341 R.E 2019) prohibits an advocate

who has not renewed his practicing certificate to practice. He informed the Court that, according to the Tanzania Advocates Management System (TAMS) report, by March, 2021 when the learned counsel for the plaintiff filed his plaint, he had not yet renewed his practicing certificate. He referred the Court to the case of **Edson Oswald Mbogoro vs Dr. Emmanuel John Nchimbi and Another**, Civil Appeal No. 140 of 2006, CAT (unreported) where the Court decided that pleadings drafted and filed by an advocate who has no valid practicing certificate has no legal effect.

Based on the reasons submitted herein, the learned counsel prayed for the entire suit to be struck out for being incompetent.

Replying to the third point of objection, Mr. Mhina argued that, the point raised by the learned counsel calls for evidence in substantiating to prove the raised allegation. Therefore, it does not qualify to stand as a point of preliminary objection. He referred the Court to the case of **Soitsambu Village Council vs Tanzania Breweries Limited and Another**, Civil Appeal No. 105 of 2011, CAT, (unreported) where the Court of Appeal decided that, a preliminary point of objection needs to be free from facts calling for proof or requiring evidence to be adduced for its verification. He urged the Court to expunge the attached

document from TAMS since production of evidence is not allowed at this stage. (see **Bish International B. V and Another vs Charles Yaw Sarkodie and Another**, Land Case No. 9 of 2006. He prayed for this ground to be dismissed for lack of merit.

It is apparent under section 34(1) of the Advocates Act, Cap. 341 R.E. 2019, that any practicing advocate is mandatorily required to be issued with a practicing certificate upon fulfilling the conditions contained in section 35 of the Act. The certificate issued by the Registrar of the High Court authorizes the advocate named therein to practice as an advocate.

Before I decide on whether the point raised by the learned counsel qualifies to be a point of preliminary objection, I find it convenient to determine whether documents drawn and filed by an advocate who did not have a practicing certificate at the time of doing so are invalid.

The position in various jurisdictions around us on this subject has favored invalidation of acts done by an advocate who had no practicing certificate at the time. In a Kenyan case of **Delphis Bank Ltd v. Behal and Others** (2003) 2EA 412(CCK), the Court held;

“The plaint was signed by an Advocate who had no Practicing Certificate at that time. He was therefore unqualified under Section 99

and 39 (1) (e) of the Advocates Act (Chapter 16) and not entitled to appear to conduct any proceeding in Court. The Plaintiff was incompetent and had to be struck out”

In another Ugandan case of **Huq v. Islamic University in Uganda** [1995-1998] 2 EA 117 (SCU), the majority decision of the Supreme Court in this case was that:-

“An Advocate who practiced without a valid Practicing Certificate after a grace period, practised illegally and that all proceeding taken by such Advocate and documents signed by him were invalid because to say otherwise would amount to a perpetuation of an illegality.

The position of law in this country is made clear under sections 39(1)(b) and 41 (1) of the Advocates Act, Cap. 341 (R.E.2019) that persons without practising certificate in force and unqualified persons are prohibited to act as advocates. In the case of **Edson Osward Mbogoro vs Dr. Emmanuel John Nchimbi and Another**, cited by the learned counsel for the first and second defendants, the Court of Appeal decided held at page 12 and 13 that:-

“if an advocate in this country practices as an advocate without having a current practising certificate, not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We have also taken the

liberty to say that to hold otherwise would be tantamount to condoning illegality. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this court by Dr. Wambali purporting to act as an advocate of the appellant were of no legal effect"

It is clear, from the decisions referred to, that courts regard an act of practising as an advocate without a valid certificate as an act of illegality and they are not ready to condone or encourage illegality.

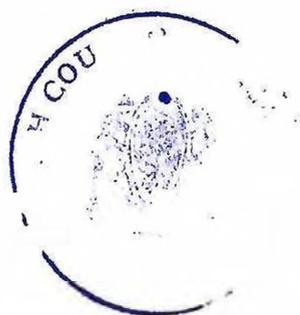
I agree with Mr. Mhinda on the principle that, a preliminary objection cannot be raised on matters that require evidence to substantiate. However, it is clear from his submissions that he did not dispute that at the time of filing this suit on 5th March, 2021 a person named Mohamed N. Mhinda who drafted and filed the plaint had no practicing certificate in force for the year 2021 as required under section 39(1)(b) and 41(1) of the Advocates Act. As decided by this Court in the case of **Wellworth Hotels and Lodges Limited vs East African Canvans Ltd and 4 others, Commercial Case No. 5 of 2020**, High Court of Tanzania, Commercial Division at Dar es salaam (unreported), this is not an issue that needs one to call for evidence since no one needs to prove that which is obvious. That fact is clear according to www.tams.judiciary.go.tz website.

That said, I find the point raised by the learned counsel to qualify as a point of preliminary objection and since Mr. Mhinda who prepared the plaint in this case had no practicing certificate in force at the time of doing so, I find him to have acted illegally and the plaint prepared by him in that capacity has no legal validity and deserves to be struck out for being incompetent.

That said, I find no pressing need to deliberate on the two remaining points of objection raised by the counsel for the 3rd to 15th defendants, one of which is similar to the ones decided herein.

In the end, this suit is hereby struck out with costs for being incompetent.

It is so ordered



Handwritten signature of K.N. Robert

K.N.ROBERT
JUDGE
20/12/2021