

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LAND CASE NO. 21 OF 2021

**WINFRIDA MUHANGWA (Administratrix of the
Estate of Late LAZARO ZABRON MUHANGWA PLAINTIFF**

VERSUS

- 1. RYAGA YUDA RYAGA.....1ST DEFENDANT**
- 2. MAGAIGWA CHACHA KEBILE.....2ND DEFENDANT**
- 3. ROBERT MBELWA.....3RD DEFENDANT**
- 4. CHRISTINA KIYOMBO.....4TH DEFENDANT**
- 5. ILEMELA MUNICIPAL COUNCIL.....5TH DEFENDANT**
- 6. ATTORNEY GENERAL6TH DEFENDANT**
- 7. SOLICITOR GENERAL7TH DEFENDANT**

RULING

Date of last Order: 16/11/2021

Date of Ruling: 15/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection of three points of law held out by the 1st, 2nd, 3rd, and 4th Defendants. The 1st Defendant raised



a preliminary objection on point that this suit is incompetent for being time barred. The 2nd Defendant's objection is that the plaintiff has no *locus standi* to pursue this case since all the probate documents and the affidavit as to names indicate different persons from the Plaintiff; and the 3rd and 4th Defendants preliminary objection is on point that this suit is incompetent for being *res sub-judice* to Land Application No. 531 of the District Land and Housing Tribunal (DLHT) for Mwanza against the 3rd Defendant.

In this suit the Plaintiff, Winfrida Muhangwa (Administratrix of the Estate of Late Lazaro Zabron Muhangwa, is claiming for a declaratory order in respect of a suit premises on Plot No. 814 Block "M" Plot No. 79 Block "A" and Plot No. 818 Block "M" located at Green View Garden, Kiseke, hereafter referred to as "the suit land", belongs to the Estate of her Late Father Lazaro Zabron Muhangwa who passed on to his next eternal life on 16/03/2015. She is also claiming for an order for rectification of the Land Register by removing the names of the Defendant and for compensation. The contention by the Plaintiff is that the Defendants trespassed into the suit land. The 5th Defendant refutes the contention alleging that the suit land was dully surveyed and allocated to the 1st to 4th Defendants in accordance with the law.

At the hearing of the preliminary objection, the Plaintiff was represented by Mr. Godfrey Martine, learned Advocate acting on *pro bono*, on the other side all the Defendants were represented by learned Advocates as follows, the 1st Defendant was represented by Mr. Deya Outa, Mr. Kelvin Mtaitina represented the 2nd Defendant, the 3rd and 4th Defendants enjoyed the services of Mr. Khatib Hamza and the 5th, 6th and 7th Defendants were represented by Mr. Ludovick Ringia.

Mr. Outa started the arguments by submitting in support of his objection that the suit is time barred. He argued that by looking at the time when the cause of action arose the suit is time barred. He cited the case of **Msanga Ng'wandwa vs Chief Japhet Joseph Wanzagi and Others**, [2006] TLR 351. He contended that according to the averment in paragraphs 7, 10, 12 and 17, the cause of action arose in 1997 when the suit land was surveyed. The Counsel was of the views that the second relief in respect of restoration of the land to the Plaintiff, was required to be contested within 12 years as per Item 22 of the 1st Schedule to the Law of Limitation Act (LLA), [Cap. 89 R. E. 2019].

The Counsel argued further that another claim by the Plaintiff in this suit is for compensation, a claim which has to be made within a year because it is for performance or non-performance of a statutory duty. He was the



views that up to the filing date on 10/02/2021, the matter had surpassed the one-year time limit by 23 years.

He concluded that both reliefs are time barred, hence the suit is time barred the same be dismissed with costs.

Mr. Kelvin Mutaitina, submitted in support of the 2nd Defendants objection that the plaintiff has no *locus standi* to pursue this case. He argued that all the documents concerning the probate indicate a different person called Winfrida Lazaro Zabron. Mr. Kelvin contended that a document claimed to entitle the Plaintiff to bring this suit is annexed to the plaint as Probate Form IV labelled "WM 2" bears a name of a person called **Winfrida Lazaro Zabron** not **Winfrida Muhangwa**. He went on arguing that the affidavit as to names also bears different names from those of the Plaintiff, it states that the affiant interchangeably uses two different names of **Winfrida Lazaro Mhangwa** and **Winifrida Lazaro Muhangwa** but the names of the Plaintiff are **Winfrida Muhangwa**. The Counsel was of the views that since the Plaintiff, **Winfrida Muhangwa**, is neither the same as **Winfrida Lazaro Mhangwa**, **Winifrida Lazaro Muhangwa** nor **Winfrida Lazaro Zabron**, then, the said **Winfrida Muhangwa** has no *locus standi* to pursue this matter. He cited the case of **Suzana S. Waryoba vs. Shija Dalawa**, Civil Appeal

No. 44 of 2017 decided by the Court of Appeal of Tanzania at Mwanza.

Then, he prayed the same to be struck out with costs.

On his side, Mr. Hamza for the 3rd and 4th Defendant submitted in support of his objection that the suit is incompetent for being *res sub-judice* to Land Application No. 531 of the DLHT for Mwanza as against the 3rd Defendant. He argued that if all the pleadings are looked at as held in **Betty Kasiri vs. ESSAMI**, [2001] TLR 478, the suit is *res sub-judice*. The Counsel argued that the purpose of the doctrine is to bar multiplicity of suits on the same cause of action and prevent conflicting decisions.

The Counsel drew attention to the Court about annexure BEA 7 to the Written Statement of Defence of the 3rd Defendant that indicates that he is litigating a suit with the Plaintiff over a Plot No. 818 Block "M" Green View, Kiseke Area. The Counsel stated that the suit land, Plot No. 818 Block "M" Green View, Kiseke Area, in this suit is the same Plot the Plaintiff is contesting with the 3rd Defendant in Land Application No. 531 of 2018 before the DLHT for Mwanza now pending determination. He prayed the suit to be struck out against the 3rd Defendant with costs.

Replying to the arguments above, Mr. Martine submitted conceding on the position of the law that the time limit for recovery of land is twelve



(12) months as set out under Item 22 of the First Schedule to the Law of Limitation Act (LLA). However, the Counsel's concern was on reckoning of time. He argued that in probate matters, time starts to run from death of the estate owner. He cited the case of **Yusufu Same and Another vs. Khadija Yusufu** [1996] TLR 347.

The Counsel also referred this Court to the provisions of section 9(1) of the LLA which provides that accrual of cause action is upon death. Moreover, the Counsel pointed out that it is trite law that right of action for land recovery does not accrue unless the land is in the hands of a person an adverse occupier. He cited the case of **Mshamu Said (Administrator of the Estate of Late Said Mbwana vs. Kisarawe District Council and 4 Others**, Land Appeal No. 177 of 2019 (unreported). The Counsel stated that from the pleadings, Late Lazaro Zabron Mhangwa passed away in 2015 and trespass was carried out in 2016, therefore, the suit has been preferred well in time.

The Counsel also conceded on the position of the law as regard to one year time limit. However, he argued that the suit has been preferred within that time. He explained that the suit was filed 11 months after death but it was filed in a court which lacked jurisdiction, the Ilemela Ward Tribunal, proceedings of which were nullified on appeal by the Ilemela

District Land and Housing Tribunal (DLHT) and retrial ordered. The Counsel argued further that the facts averred in paragraphs 14 and 15 of the plaint set out exemption from time limit in land claims. He referred this Court to Order VII Rule 6 of the Civil Procedure Code (CPC), [Cap. 33 R. E. 2019], and prayed the first objection to be overruled.

As regard to the second objection, Mr. Martine argued that the Plaintiff has *locus standi* because the names Winfrida Lazaro Muhangwa and Winfrida Lazaro Zabron are used interchangeably by the Plaintiff. The Counsel pointed out that the affidavit annexed to the plaint contain some typographical error of repeating the names differently. He was of the views that the omission is curable by amendment of the plaint because the purpose of the affidavit was to inform the Defendants about her names. He referred this Court to Order 1 Rule 10(1) of the CPC which provides for rectification of names in the plaint as deemed fit by the court.

As regard to the objection on *res sub-judice*, Mr. Martine submitted that there were two cases filed in court both touching the subject matter, a Plot No. 818 Block "M" Green View, Kiseke Area. The first case was Land Revision No. 74B of 2018 of the DLHT for Mwanza and the second was Land Application No. 531 of 2018 of the same DLHT. He argued that the Plaintiff was aware of the existence of the first case but not with the

second case. About the first case, the Counsel submitted that the proceedings were nullified and retrial ordered. However, as there was no fresh case refiled, the Plaintiff came with the instant case in which by impleading the Registrar of Titles, a competent court became the High Court. As regard to the second case the Counsel argued that the same cannot render this suit *sub-judice* because the existence of the Registrar of Titles as a necessary party, renders the DLHT incompetent. He referred this Court to the provisions of section 8 of the CPC where the words "any other court having jurisdiction" are used. The Counsel was of the opinion that the suit is not sub-judice.

Mr. Outa rejoined arguing that the time for the cause of action elapsed before Lazaro Zabron Muhagwa passed on and that death of the said Lazaro Zabron Muhagwa; did neither resurrect the cause of action nor extend the time to sue. He distinguished the cases of **Yusufu Same and Another vs. Khadija Yusufu (supra)** and **Mshamu Said (Administrator of the Estate of Late Said Mbwana vs. Kisarawe District Council and 4 Others, (supra)** cited by the Counsel for the Plaintiff in that those cases dealt with non-surveyed land while in the instant case, the cause of action arose when the land was surveyed in 1997.

Moreover, the Counsel argued that the Late Lazaro Zabron Muhagwa could not in law be said to be in possession of the suit land because, after been surveyed, it need permit to use it.

Also, the Counsel argued that in Land Application No. 74B of the DLHT the plaintiff was held to have no *locus standi* therefore, in law, it is as good as she did not file any case capable of exclusion of time because in law, it did not exist at all. The Counsel declined the prayer for costs exemption arguing that even if the plaintiff is a pauper, still costs may be charged from the estate of Late Lazaro Zabron Muhagwa, which she is administering.

Mr. Kelvin Mutaitina had nothing to rejoin rather than reiterating his submissions in chief which he said was conceded to by the Counsel for the Plaintiff.

Mr. Hamza rejoined reiterating his submissions in chief and added that the law requires the subsequent case to be stayed not the previous one.

Those were the submissions by the Counsel, I must appreciate their well-researched works which have eased the work of this Court in determining the controversial legal issues contested herein. Moreover, I sincerely

register my apology for late delivery of this ruling, the causes of delay were out of my control.

In determining these legal controversies, I will be guided by the case law on preliminary objections. It is trite law that a preliminary objection must consist of 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. This was the holding in the famous case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd [1969] EA 696** where the then East Africa Court of Appeal 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.**"* (Emphasis added).

And further down at page 701 **Sir Charles Newbold**, President, said as follows: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises as 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 our jurisdiction the term "preliminary objection" was defined in the case of **Musanga Ng'andwa vs. Chief Japhet Wanzagi and Eight Others**, [2006] TLR 351, where the Court of Appeal of Tanzania stated as follows: -

"The expression 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."

I may add that arguable or contentious issues cannot be disposed by way of preliminary objection. This position was a clarification by the Court of Appeal of Tanzania in **Musanga Ng'andwa's case (supra)** where it stated that: -

"whether the allegations are sufficient to prove the claim or not is not the issue now and can only be known at the trial and whether the Notice under the provisions of the Government Proceedings Act was defective or not was an arguable issue; and so it was not one to be disposed of by way of preliminary objection."

See also the cases of **Tanzania Telecommunications Co. Ltd vs. Vedasto Ngashwa and four others**, Civil Application No. 67 of 2009 (unreported), **Hezron Nyachiya vs. Tanzania Union of Industrial and Commercial Workers and Others**, Civil Application No. 79 of 2001 (unreported). **Attorney General vs. The Board of Trustees of the Cashewnut Industry Development Trust Fund and Another**, Civil Application No. 72 of 2015 (unreported)

In the latter case, the Court of Appeal of Tanzania stated the tests for a preliminary objection as follows: -

"It is settled principle that, a preliminary objection should raise a pure point of law based on ascertained facts from the pleadings or by necessary implication, not on facts which have not been ascertained; and even if ascertained if argued, a preliminary objection should be capable of disposing of the case. A preliminary objection cannot also be raised if what is sought is the exercise of judicial discretion."

I will start with the first point of objection. It is the contention of Mr. Outa, the Counsel for the 1st Defendant, that the suit is time barred. He contended that based on the averment in paragraphs 7, 10, 12 and 17, the cause of action arose in 1997 when the suit land was surveyed, therefore the relief of restoration of the land to the Plaintiff, was required to be contested within 12 years. This is a period when Lazaro Zabron was still alive. The Counsel for the Plaintiff Mr. Martine conceded on the 12 years' time limitation but argued that reckoning of time starts to run from death of the estate owner and that there was no adverse occupation of the suit land because the deceased was in continuous occupation of the land. In rejoinder Mr. Outa argued that in the circumstances of this matter, time elapsed before death of the estate owner, hence his death could not resurrect or extend the time and that since the land was surveyed, the same could not be used by the deceased without permit from the Ilemela District Authorities. Mr. Outa was telling this Court that lack of development permit means the suit land was not in occupation of the deceased.

I agree with the learned Counsel for both sides that it is a position of the law that the time limit for claims of ownership of land is 12 years. This is provided under Item 22 of the 1st Schedule to the Law of Limitation Act.



However, the issues of reckoning of the time in my considered opinion are contentious in nature because they need proof from the evidence for ascertainment as to whether or not the suit land was in adverse occupation from the time of survey in 1997. I say so because, mere survey of the land does not amount into deprivation of the same by the land authorities. It is my understanding of the law that issues of adverse occupation of a given land is a matter of evidence which must be proved by adduction of evidence.

Moreover, I have read paragraphs 7, 10, 12 and 17 of the plaint which are relied upon by Mr. Outa, and found that the same state that the deceased was aware about the survey, but was not aware about allocation of the same to the Defendants and public use; he used the same suit land for agricultural activities. This makes it clearly that the issue of time limit is subject to arguments on facts obtainable from evidence. Having found that the issue of reckoning of time is ascertainable from the evidential facts, then I need not to go on discussing the issue of accrual of cause of action before or after death of the estate owner.

I also agree with Mr. Outa in his argument, which was also conceded to by Mr. Martine for the Plaintiff, that a claim for compensation, being a specie of performance or non-performance of a statutory duty must be

made within a year, it is a correct position of the law. However, Mr. Martine argued that the claim was made on the 11th month from death of the owner of the estate by filing an application at Ilemela Ward Tribunal, proceedings of which were nullified on appeal by the Ilemela District Land and Housing Tribunal (DLHT) and retrial ordered, hence this matter.

I have visited the facts averred in paragraphs 14 and 15 of the plaint and found that the averments state that the suit land was occupied after death of the estate owner. These facts are denied by the 1st Defendant, hence making the same arguable. The plaint, as correctly submitted by Mr. Martine, sets out grounds upon which exemption from time limit in land claims is obtainable, as provided under Order VII Rule 6 of the CPC. The grounds cannot be determined in a preliminary objection, they are subject to proof by evidence. Therefore, the objections raised by Mr. Outa concern issues to be ascertained from the evidence, which fails the test for a preliminary objection as expounded in the authorities cited above.

In the result for reasons stated above, the first point of preliminary objection raised by the 1st Defendant fails.

As regard to the second point of preliminary objection raised by the 2nd Defendant's Counsel, Mr. Kelvin Mutaitina, that the plaintiff has no *locus*

standi to pursue this case basically was conceded to by the Plaintiff's Counsel Mr. Martine. However, he took refuge onto Order 1 Rule 10(1) of the CPC praying for rectification of the names in the plaint because the defect is mere a typographical error of writing the names wrongly.

I have read the affidavit and the letter of administration and found that the name of the Plaintiff in this case is not borne out by these vital documents. The letter of administration which is a document entitling the Plaintiff to bring this suit, annexure "WM 2" bears a name of a person called **Winfrida Lazaro Zabron** not the Plaintiff **Winfrida Muhangwa**.

The affidavit as to names states that the names **Winfrida Lazaro Mhangwa** and **Winifrida Lazaro Muhangwa** are used by the affiant **Winifrida Lazaro Muhangwa** interchangeably but the names of the Plaintiff are **Winfrida Muhangwa**.

I agree with Mr. Kelvin Mtaitina argument that since the Plaintiff, **Winfrida Muhangwa**, is neither the same as **Winfrida Lazaro Mhangwa**, **Winifrida Lazaro Muhangwa** nor **Winfrida Lazaro Zabron**, then, the said **Winfrida Muhangwa** has no *locus standi* to pursue this matter.

Mr. Kelvin Mutaitina referred this Court to the case of **Suzana S. Waryoba vs. Shija Dalawa (supra)**, where the name of the Plaintiff did not include in the title that she was suing in her capacity as administratrix, the Court of Appeal of Tanzania stated as follows: -

"Before we pen off we wish to address one little disquieting aspect. This is that the appellant sued as administratrix of the estate of the late Stansalus Waryoba. However, that aspect did not reflect in the title of the case. We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case."

In that case the Court found that the defect was minor because the evidence revealed that she was suing in her capacity as administratrix.

In my opinion that case is quite distinguishable with the instant case. In that case, the name of the appellant in the appeal was the same as that in the letters of administration which appointed her administratrix. In the instant case, the names of the Plaintiff is quite different from the names of a person appointed administratrix of the estate of late Lazaro Zabron Muhangwa. In other words, the Plaintiff is not the one entitled to bring the suit, hence she is a stranger with no *locus standi*. The effect of a

plaintiff suing without been seized of with *locus standi*, I may rely on the authority in the case of **Lujuna Shubi Balonzi, Senir vs. Registered Trustee of Chama Cha Mapinduzi** (1996) TLR 203 where it was held as follows;

"In this county, locus standi is governed by the common law, according to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court"

Also in the case of **Hall Bakery Supply Company vs. Frederick Muigai Wangoe** [1959] EA 474, it was held that the effect of the decision in a suit by a non-existent person is a nullity and a nullity cannot be amended even by substitution.

In the circumstances, the plaint is a nullity, it stands to be strike out. There is merit in this point of preliminary objection.

Having sustained the preliminary objection raised by Mr. Kelvin Mutaitina that the suit been filed by a person without *locus standi*, hence it is a nullity, I find no need of dealing with the arguments in the third point of objection raised by Mr. Hamza that this suit is res sub-judice.



The last issue is on costs. Each Counsel asked for costs even if the Plaintiff is suing as a pauper because costs may be charged from the estate she is administering. In my opinion, this is not correct because apart from the Tanganyika Law Society, through the Coordinator, Mwanza Chapter, evidencing that she is a pauper, hence represented *pro bono*, so far, there is no evidence that there is such property in the estate.

From the above premise, I find the preliminary objection meritorious to the extent explained above. Consequently, I do hereby sustain the same and strike out the plaint. No order as to costs on reasons explained above.

It is so ordered.




F. K. MANYANDA

JUDGE

15/03/2022