

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MOSHI

AT MOSHI

LAND CASE NO. 10 OF 2021

THADEUS PAUL KIMARIO.....PLAINTIFF

Versus

CHIEF EXECUTIVE OFFICER TAN-ROADS.....1ST DEFENDANT

MANAGER TAN-ROAD MOSHI, KILIMANJARO.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL3RD DEFENDANT

THE HONOURABLE SOLICITOR GENERAL.....4TH DEFENDANT

HUBERTANSELM MARO.....5TH DEFENDANT

Last Order: 06th July, 2022

Date of Ruling: 6th September, 2022

RULING

MWENEMPAZI, J:

The 1st, 2nd, 3rd and 4th Respondents raised a preliminary point of objection on points of law to the effect that;

- a) The 1st and 2nd Defendants are wrongly sued in this suit in contravention of section 3(6)(b) of the Executive Agencies Act (Cap 245 R.E 2002)



- b) The 4th Defendant is wrongly sued in this suit in contravention of section 6(3) of the Government Proceedings Act (Cap 5 R.E. 2019)
- c) That the suit is time barred as an order of the Minister extending time to file a suit is defective hence contravening section 44(1) of the Law of Limitation Act (Cap 89 R.E 2019)
- d) That the suit is premature for want of ninety days statutory notice.

The Plaintiff's counsel in reply contended that the said preliminary points of objection raised have no merit and that they are only intended to delay the matter and frustrate the Plaintiff.

Before embarking on the merits or otherwise of the objection here is a glimpse of the background to the matter. The plaintiff being the owner of the piece of land measuring 9.5 square Kilometers situated along side Rau Road Madukani Uru – Mawela – Njari area in Moshi Municipality, claims against the defendants jointly and severally for compensation amounting Tshs. 225,000,000/= for forceful entry and trespassing into his farmland.

He alleged that during the construction of Uru Mawela Nyari Road, the 1st and 2nd defendants apart from forcefully trespassing onto his farmland they destroyed various crops, trees and took huge amount of construction materials therein which damaged his property. The Plaintiff claimed that all this took place while he was seriously sick and hospitalized at KCMC Hospital ICU department therefore neither him nor his family was involved in any negotiations or agreements for the purchase of his farmland he thus regarded the acts by the defendants as illegal. For that reason, the

plaintiff also claims for general damages, declaratory orders, permanent and perpetual restraining orders, cost and other reliefs.

At the hearing of the preliminary objection the plaintiff was represented by Mr. Kassim Nyangarika learned Advocate while Mr. Yohana Marco and Mr. Gurisha Mwanga learned state attorneys appeared for the 1st, 2nd, 3rd and 4th defendants. At the hearing of the preliminary objection parties prayed to proceed by way of written submission and leave was granted. Submissions were timely filed and counsels for both parties submitted comprehensively and meticulously in support of their arguments with respect to the preliminary points of objection and the effort is hereby acknowledged.

Submitting in chief supporting the preliminary objection the learned counsels decided to abandon the first two points for the reason that the remedy thereof would not result into disposing of the suit rather order for amendment and thereby defeating the meaning of a preliminary objection. Thus, they decided to argue the remaining two points labelled as (c) and (d) respectively.

Submitting on the third point which stated that the suit was time barred as an order of the Minister extending time to file a suit was defective hence contravening section 44(1) of the Law of Limitations Act (Cap 89 R.E 2019). It was the learned counsels' submission that the minister no longer had powers to extend the time for instituting the suit because the allowable time to be extended had already elapsed. Arguing this point the learned counsel submitted that the claim of the plaintiff was for compensation as



reflected under paragraph 8 of the plaint and that according to Item 1 of Part I of the Schedule to **the Law of Limitations Act** [Cap. 89 R.E 2019], a suit for compensation is to be pursued within one year. Submitting further the learned counsel referred to the case of ***Rajabu Hassan Mfaume (The Administrator of the Estate of the Late HIJA OMARI KIPARA) vs Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children and 3 Others***, Civil Appeal No, 287 of 2019, Court of Appeal at Mtwara where it was held that:

*"By way of emphasis, wish to restate with approval, what the High Court held in **Selemani Mohamed Mtoni**(Supra) that the Minister had no power to extend the period of limitation prescribed by the Act for a suit where the allowable period of one half of the said period of limitation set by the Act has already elapsed..."*

The learned counsel went on submitting that under the circumstances, the present suit is hopelessly time barred not only because of the defective ministerial order but also because the Plaintiff himself did not act diligently and promptly hence allowing grass to grow at his feet. Citing the case of ***Barclays Bank Tanzania Ltd vs Phylisiah Hussein Mchemi***, Civil Appeal No. 19 of 2016, Court of Appeal at Dar es Salaam {unreported} the learned counsels were of the view that the Plaintiff has never been vigilant enough for his right's pursuit and of consequence the law cannot aid him given the fact that this is the Court of Law and not of Sympathy. The learned counsels concluded that the suit is time barred and the same should be dismissed with costs.

DURGAZ

Submitting on the fourth point that this suit is premature for want of ninety days statutory notice, the learned counsels submitted that the notice the Plaintiff purported to have issued, as seen under paragraph 17 of the plaint read together with annexure **TPK-3'** thereof, had a different claim from the one embodied in the current plaint. The learned counsel argued that the claim in the plaint varied from that embodied in the purported notice it was their considered view that the claims in the plaint were to be preceded by a new ninety-day statutory notice absence of which rendered the suit premature and vitiated.

Referring to section 6(2) of the Government Proceedings Act [Cap. 5 R.E 2019] the learned counsels submitted that the rationale of this legal provision is to enable the Government to see if it can settle the claims or have time to seek, obtain and analyse information relating to the claims without distorting day to day discharge of duty to the people. In the circumstance they argued that the claims in the plaint appeared to be new and the Government has not been given time to seek, obtain and analyse information relating the claims, thus they contended that the suit was premature.

Concluding their submission, the learned counsel stated that in the instant case where all the judicial avenues are not available a dismissal order is the only remedy. In the end they prayed for the suit to be dismissed entirely with cost for being hopelessly time bared.

Replying to the submission the Appellant's counsel submitted that an objection cannot be raised and applied blindly against parts of the plaint



and some annexure, which does not go to the very foundation of the case. He argued that the objection on this point had no basis because a plaint is not to be read in pieces or parts or twisted on the facts parts of not wholly pleaded but it is read as a whole together with all its annexures. The learned counsel faulted the counsels of the defendants for selecting some facts from the plaint which fits the objection raised so as to use them against the suit. He stated that the reliefs claimed under paragraphs 21 (i) – (x) of the plaint were not only based on compensation or damages for the farm land but claim in the suit was as well based on declaratory reliefs and restraining orders against the defendants. The learned counsel also submitted that just as held by Honourable Fikirini, J. in her ruling in Land Case No. 2 of 2014 between the same parties the present suit is similar regarding this particular issue he thus submitted that there was no reason why this court should lightly dissent from the opinion of Hon. Fikirini J. on the matter.

With respect to the issue of accounting for the time, the learned counsel submitted that from 3rd November 2011 when the cause of action arose until 20th June 2012 the Plaintiff was totally incapacitated and hospitalized in intensive care unit at KCMC as pleaded under paragraph 10 of his plaint. He argued therefore that the period from 3rd November, 2011 up to 20th June, 2012 is excluded in computation of limitation period based on the provision of section 15 of the Law of Limitation Act, Cap 89 R.E. 2019. He went on explaining that although the Plaintiff was discharged from hospital on 24th July, 2011, he was still under disability up to 20th June, 2012 when the disability ceased. So, the counsel was of the view that the limitation

period should be computed from when the Plaintiff ceased to be under disability.

Furthering his submission, the learned counsel stated that under item 23 of Part 1 to the Schedule of the Law of Limitation Act, Cap 89 R.E. 2019, a suit founded on land the limitation period is twelve years. Again, he submitted that under item 24 part I to the Schedule of the Law of Limitation Act, Cap 89 R.E. 2019, any suit which a limitation period is not otherwise provided for is six years.

Submitting further the learned counsel stated that when computing limitation period the time when the Plaintiff filed in court the Land Case No. 2 of 2014 and being prosecuted up to 25th July 2016 when the ruling was delivered should also be excluded based on the provision of section 21(1) of the Law of Limitation Act, Cap 89 R.E 2019. It was his submission therefore that the limitation period started to run as from 25th July 2016 for the reliefs claimed by the Plaintiff under paragraph 21 of the plaint which fall under Items 23 or 24 of Part I to the Schedule of the Law of Limitation Act, Cap 89 R.E 2019. He thus argued that the period of six years or 12 years as the case may be would have ended on 24th July 2022 or 24th July 2028 respectively. He contended that the period is within the limitation period and therefore there is nothing wrong with the order of the minister issued on 8th July 2019 as suggested the learned state attorneys. He said that the cited cases by the learned state attorneys in support of the objection are distinguished from the facts and circumstances of this case and therefore do not apply.



Responding to the Respondent's submission that the Ministerial order granting extension of time the Plaintiff was defective, the learned counsel submitted that the argument has no basis because the Order being challenged has their hand. Arguing this point the learned counsel stated that under section 44(1) of the Law of Limitation Act, Cap 89 R.E. 2019, the order for extension of time is only granted by the minister after consultation with the Hon. Attorney General. He further contended that the learned state attorneys are the legal trained mind under the office of the Hon. Attorney General who normally advise the Attorney General and draft the order for signature of the Minister. It was his considered view therefore that ~~that~~ if the Attorney General wants to challenge the order signed by the Minister after consultation with the Attorney General for whatever ground he can do so by a separate suit not by way of an objection in this suit as he is part and parcel of the Ministerial Order.

With respect to the second limb of objection that the suit is time barred not only because of the defective ministerial order but also because the Plaintiff himself did not act diligently and promptly the counsel for the plaintiff submitted that the argument has no basis and is misplaced. He submitted further that the objection had no substance in view of the time excluded by the law under section 15 and 21(1) of the Law of Limitation Act, Cap 89 R.E 2019 as well as the fact that relief of Compensation is not the only relief claimed by the Plaintiff in his plaint.

On the last objection where the defendants' counsel submitted that the suit is premature for want of ninety days statutory notice due to the variance

on the amount of the claim in the Notice which was 100,000,000/= and the amount claimed in the plaint which is 225,000,000/=. The Plaintiff's counsel responded by submitting that the statutory notice was written on 25/7/2013 and the suit filed by the Plaintiff is in respect of trespass onto his farmland. He argued that the value of the farmland keeps on increasing every day that is why land is termed as real property. He contended that the value claimed cannot therefore remain the same when the suit was filed on 22/12/2021. He also argued that there was no law that demands for a new statutory notice of the value claimed to be issued whenever the value of land increases by elapse of time. He was of the view that the statutory notice as received by the Government through the 1st, 2nd, 3rd and 4th defendants in 2013 up to the time when the suit was filed which is more than 8 years is enough time for the Government to seek, obtain and analyze all information relating to the Plaintiff's claims well as the increase on the value of the farm land and make an informed decision on the matter. He thus concluded that the allegation by the State Attorneys that the suit is premature had no bearing in the circumstance of this case.

Finally, as regard the submission that the dismissal order is the only remedy available in the instant case because no other judicial avenues are available the Plaintiff's counsel submitted that the allegation was uncalled for because that sounds that access to justice in court of law for redress for illegal acts committed by Government officials is illusionary in our constitution. He concluded that the prayer for dismissal was unjustified in the circumstance of this case. He then prayed for the preliminary objection to be overruled with cost.



In the rejoinder submission the learned state attorney reiterated his submission in chief and added that all the reply submission by the Plaintiff with respect to the preliminary objection are not founded in law hence made the whole submission unmeritorious. He argued that when it comes to the question of limitation of time what should be looked at is the cause of action and not the relief sought as the plaintiff would want this court to do. He argued so because the nature of relief depends upon the cause of action and the reliefs cannot outlive the cause of action.

Regarding exclusion of time in respect of legal disability the learned state attorney submitted that the fact relied upon by the plaintiff was not pleaded in the plaint like when he said that he was still incapacitated up to 20th June, 2012 when the disability ceased. Also, he submitted that the plaintiff's disability is not that which is recognized under the Law of Limitation Act, Cap 89 R.E. 2019 under section 2(b) which defined disability. He argued that based on that provision the legal disability that suspends the running of time is being a minor or of unsound mind.

With reference to the invocation of section 21 of the Law of Limitation Act, Cap 89 R.E. 2019 in relation to institution of Land Case No. 2 of 2014 he submitted that this cannot be entertained because the said land case was instituted after the expiry of the allowed period. He thus reiterated his earlier submission that the plaintiff was to claim for compensation within one year from 3rd November, 2011 to 2nd November, 2012.

Finally, regarding the order of the Minister, the learned counsel rejoined that it is the Plaintiff himself who misled the Minister because the Minister



acts on the content of the letter that requests for extension of time copy of which unfortunately was not attached to the plaint. The counsel doubted the cause of action that was communicated by the plaintiff to the minister in his letter since the order was centered on the general tort. It was his considered view that the Plaintiff may have withheld the fact that his claim was on compensation hence misled the Minister. In the end the learned state attorney reiterated their prayers made in the submission in chief.

I have given due consideration to the submission by both parties with respect to the preliminary objection raised. In determining this matter, I will go through the points of objection as raised. The first point of objection was that;

"The suit is time barred as an order of the Minister extending time to file a suit is defective hence contravening section 44(1) of the law of Limitation Act, Cap 89 R.E. 2019".

The issue for determination of the above objection is whether the order of the Minister extending time for filing the present suit is defective. The argument by the learned state attorney was based on the idea that the present suit is for compensation and as such the time limitation for institution of the same is one year. This was however contradicted by the learned counsel of the Plaintiff who argued that the suit was not only for compensation rather there are other claims as pleaded by the plaintiff on paragraph 21 of his plaint. This point should not detain me much as both parties have already spent enough time arguing about what exactly this suit is about. What I have grasped from the submission of the learned



state attorney is the fact that he insists that the cause of action in this suit is compensation something which the counsel for the Plaintiff is disputing. I do agree that when it comes to the question of limitation of time for a particular proceeding what should be looked at is a cause of action because this is what determines the plaintiff's right of claim. According to the **Law Dictionary, 2nd Edition**, the phrase cause of action has been defined to mean; Matter for which an action may be brought. **The ground on which an action may be sustained.** The right to bring a suit. Cause of action is properly the ground on which an action can be maintained; as when we say that such a person has no cause of action. But the phrase is often used to signify the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable. (Emphasis added)

In the present matter as rightly submitted by the state attorney in his rejoinder submission when he cited the case of **Rajendra Bajoria and Others vs. Hemant Kumar Jalan and Others** (supra) where it was held that, "the reliefs claimed in a plaint flow from the cause of action pleaded in the plaint. The cause of action pleaded and the prayers made in the plaint are inextricably intertwined..." I do agree with this interpretation and in light of that I am inclined to hold that the cause of action in the present suit is in relation to the farm land belonging to the plaintiff. This is because the farm land is the one that gives the plaintiff right of action. Therefore, all the reliefs sought by the plaintiff in this suit are in relation to the farm land in question. That includes compensation and other declaratory orders claimed under paragraph 21 of the plaint.



It follows therefore that for a suit like the present one to recover land the time limitation provided by the law is twelve (12) years as prescribed under Item 22 Part I of the Law of the schedule in the **Law of Limitation Act**, Cap 89 R.E 2019. For this reason, the question as to whether the order of the minister extending time was defective gets a negative response. In turn the objection that the suit is time barred on that point is not sustainable.

Finally on the second point of objection which states that, "The suit is premature for want of ninety (90) days statutory notice". This point should not detain me much because I completely agree with the submission by the Plaintiff's learned counsel. The Plaintiff had already given the notice and the same does not expire or become unworthy because of the change in the amount claimed. Given the nature of the suit which is based on land, it is a common knowledge that the same appreciate value with time. Therefore, the allegation by the learned state attorney that a new notice was required is unjustifiable.

In light of the above I find no merit in the preliminary objection raised. The preliminary objection is therefore dismissed with cost. It is so ordered.

Dated and signed at Moshi this 6th SEPTEMBER, 2022.



T. MwenempaZI
T. MWENEMPAZI

JUDGE