

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MOROGORO SUB REGISTRY)**

**AT MOROGORO**

**LAND CASE NO. 11 OF 2021**

**THE REGISTERED TRUSTEES OF CAPUCHIN**

**FRIARS MINOR PROVINCE OF TANZANIA ..... PLAINTIFF**

**VERSUS**

**JOSEPH MAHALA AND 17 OTHERS ..... DEFENDANTS**

**RULING**

**27<sup>th</sup> Oct, & 19<sup>th</sup> Dec, 2022**

**CHABA, J.**

On 2<sup>nd</sup> day of December, 2021, the Plaintiff herein, instituted this suit against the Defendants seeking five reliefs as follows: -

- i. A declaration that the plaintiff is the lawful owner of the disputed acreage of the landed property;
- ii. Permanent injunction against the defendants, their agents and or workmen restraining them from interfering or dealing with disputed land in any manner whatsoever;

- iii. That, the Defendants be jointly and severally ordered to pay the Plaintiff TZS. 100,000,000 (One Hundred Million only) as specific damages as per paragraph (4) herein;
- iv. General damages; and
- v. Any other relief(s) as the Honourable Court may deem fit and just to grant.

At first, the matter was assigned before my brother in bench Kalunde, J., and later on, it was re-assigned to me on 25<sup>th</sup> day of July, 2022 so that could continue with the hearing of the same as the trial Judge was transferred to another duty station.

After being served with the Plaint, the Defendants in a joint Written Statement of Defence raised preliminary objection on points of law to the effect that: -

- 1. That, the suit is incompetent for non joinder of the necessary party-Ihanga Village Council;*
- 2. The Plaint offends provisions of Order VII, Rule 1 (e) of the Civil Procedure Code [Cap. 33 R. E, 2019] for not disclosing when the cause of action arose. Alternatively; and*
- 3. That, the suit is untenable for being hopelessly time barred.*

As a matter of practice, once a point or points of preliminary objection is / are raised by either party, the same shall be determined first before dealing with the merits or demerits of the case.

During hearing of the preliminary objection, the Plaintiff was represented by Mr. Pendo Ngowi, learned counsel, whereas the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> enlisted the legal service of Mr. Bagen Elijah, learned counsel and the 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 12<sup>th</sup> Defendants did not show up.

By the parties' consensus, the afore listed points of law on preliminary objections were argued by way of written submissions. The counsel for the defendants saves for the 4<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 12<sup>th</sup> defendants, argued the points of preliminary objection seriatim. In response to the submission advanced by the defendants, the counsel for the plaintiff also argued in pattern.

I have gone through Mr. Bageni's written submission in respect of the above preliminary objections on points of law together with the response thereto from the plaintiff herein. I am not going to reproduce the written submissions in wholesome, but I must state that I real appreciate the arguments advanced for and against the raised points of law in respect of preliminary objections. On the strength of a solitary

reason that when I took pain to go through the records and submissions of both sides, my attention was at once drawn to the second point of preliminary objection. I have found it necessary that I first determine this point of objection because in isolation, it may suffice to dispose of the matter at hand. The said point of law is to the effect that; **the plaint offends provisions of Order VII, Rule 1 (e) of the Civil Procedure Code [Cap. 33 R. E, 2019] (the CPC) for not disclosing when the cause of action arose.**

Submitting in support of the above limb of objection, the learned counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> defendants briefly averred that the plaintiff has failed to specifically pleads in the Plaint when the cause of action arose. He added that, the disclosure of time when the cause of action arose is mandatory as per Order VII, Rule 1 (e) of the Civil Procedure Code (Supra) so that the court can be in a position to know whether or not the suit is time barred.

He highlighted that under paragraph 19 of the Plaint, it is pleaded that the defendants have invaded the suit land for more than 11 years ago. According to him, this implies that the invasion could be even for more than 12 years without the plaintiff taking any necessary legal action

against them, and thus making the present suit to be hopelessly time barred liable to dismissal.

Responding to the second point of objection, the counsel for Plaintiff argued that, it is clearly shown in the Plaint that as indicated in paragraphs 11, 12, and 13 respectively, the cause of action accrued when the Plaintiffs filed a case in 2013 against Ihanga Village Council and during the pendency of the said case, few ill motivated members of Ihanga Village invaded the suit premises and destroyed the properties of the Plaintiff and turned other properties to their use.

According to the counsel, as the acts of trespass commenced in 2013 and limitation of recovery of landed property is twelve years, the Plaint has given particulars regarding cause of action and when the same arose, hence the suit is within the time prescribed by the law.

Based on the the above submission, the learned counsel prayed the second point of preliminary objection be dismissed with costs.

To rejoin, Mr. Bageni submitted that after going through the Plaintiff's submission in reply to the defendants' written submission in chief, it appears that the Plaintiff has admitted the point of law raised as preliminary objection. But she is now looking and or seeking for a sympathy from this court to invoke overriding objective principle to do

away with the cited anomaly and order amendment of the Plaintiff. According to him, up to this moment there is nothing to amend in the Plaintiff. He added that, a Plaintiff disclosing no time when the cause of action arose should be rejected outrightly. On the strength of the above submission, the learned counsels for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> defendants beckoned upon this court to dismiss the suit with costs.

Having considered the rival submissions from both parties, and upon painstakingly read the parties pleadings, unfortunately I have failed to find and come across with the facts that constituting the cause of action and when it arose. As gleaned from the Plaintiff's Plaintiff, paragraph 19 of the Plaintiff provides that:

***"THAT** the Defendants have been in wrongful occupation of the disputed property for over 11 years now subjecting the Plaintiff to immense economic losses and despite repeated demands by the Plaintiff to the Defendants the Defendants have been adamant and reluctant to hand over the disputed property to the Plaintiff.*

So, what I have gathered from paragraph 19 of the Plaintiff is that the same discloses the cause of action to have arisen from acts and conducts of

defendants to encroach and occupy the disputed land wrongfully for over eleven (11) years. In my considered opinion, the above paragraph indeed does not clearly and specifically disclose the facts establishing when the cause of action arose. I agree with Mr. Bageni's averments that the phrase "over 11 years" could mean that, the suit was instituted in the court more than twelve years out of time prescribed by the law.

On reviewing the parties' pleadings, I have found that although the Plaintiff admitted to have instituted a suit in court in 2013, but she categorically submitted that the suit was instituted in the court against the Ihanga Village Council and not against the Defendants in the present suit. Again, the fact that there was a suit that was instituted in 2013, in my considered view, such a fact cannot or does not necessarily mean that the cause of action arose in the same year.

I wish to point out here that, disclosing the facts establishing when the cause of action arose in the Plaintiff is one of the most important things to consider during preparation and drawing of a Plaintiff. Particulars as to when the cause of action arose must be clearly and specifically pleaded in the Plaintiff. The importance of this is that from the date given, or even a year for that matter, the court will have an opportunity to know whether the suit is barred by the Law of Limitation or otherwise. As correctly

submitted by the learned counsel for the defendants, it is the legal requirement that the Plaint must contain the necessary facts constituting the cause of action. Order VII, Rule 1 (e) of the Civil Procedure Code [Cap. 33 R. E, 2019] provides that:

*"The Plaint shall contain the following particulars:*

*(a - d) NA.*

*(e) the facts constituting the cause of action and when it arose.*

*(f - i) NA".*

From the wording of the above provision of the law, it follows therefore that the consequences of failure to demonstrate and show in the Plaint the real facts constituting the cause of action and when it arose, the effect thereof is to cause the court totally fail to know and understand exactly if the suit has been filed within the prescribed period of time or the same is out of time so as to confer and warrant the court powers to determine whether it has clothed with jurisdiction to entertain the matter / suit or not.

From the foregoing discussion, it is my holding that compliance with the requirements of the law provided under Order VII, Rule (1) (e) of the CPC (Supra) is mandatory and failure to comply with the same it renders



the whole proceedings a nullity. In **Gozbert Cleoplace and Another v. Valerian Moses Bandungi** (Land Case Appeal No. 60 of 2020) [2020] TZHC 4751; (30 July, 2020) extracted from TANZLII my brother J. S. Mgetta, J.) was faced with a similar issue. Citing the case of **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia and Chiara Malavasi** [2002] TLR 217 he was of the view that failure to comply with the requirement provided under Order VII, Rule 1 (e) of the CPC vitiates the entire proceedings initiated in court. In another case of **Anna Joseph Luvanda v. Swaibu Salimu Hoza & 2 Other**, [2014] TLR 73, the Court observed that, the Plaint was fatally defective for non-disclosure as to when the cause of action arose.

The test whether the second point of law carries weight to dispose of this suit in its entirety or not, can be extracted in the famous case of **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd** [1969] EA 696, the words of Law, J.A. are very clear;

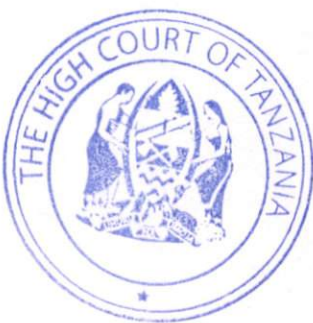
*"... So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point, may dispose of the suit".*

In other words, a preliminary objection is in the nature of what used to be a demur. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

Therefore, in the light of all what I have endeavoured to discuss and demonstrate hereinabove, the second objection on a point of law is meritorious. Suffice to say that this point alone is sufficient to dispose of the entire matter before this court. Having so found, I see no need to labour on the other two points of law as by so doing it won't change my findings.

Consequently, the plaintiff's plaint or suit is hereby struck out for being fatally defective. The costs to follow the event. **It is so ordered.**

**DATED at MOROGORO** this 19<sup>th</sup> day of December, 2022.



  
**M. J. CHABA**

**JUDGE**

**19/12/2022**