

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

LAND CASE NO.16 OF 2022

**YUSTINA BONIFAS ANDREA (As the Administratrix
of the late BONIFAS ANDREA MADAHA PLAINTIFF**

VERSUS

**MISUNGWI DISTRICT COUNCIL.....1st DEFENDANT
THE REGISTRAR OF TITLES.....2nd DEFENDANT
THE ATTORNEY GENERAL.....3rd DEFENDANT
ERASTO WEREMA MAGOTI.....4th DEFENDANT
PAULO MWITA KYANGI.....5th DEFENDANT
PETER MATHIAS NYANDA.....6th DEFENDANT
JAVAN ANGERO ANDIKA.....7th DEFENDANT
PAUL MWITA KYANGWI.....8th DEFENDANT
ELIAS SIMON NDAJI.....9th DEFENDANT
JULIANA LEONARD KINGU.....10th DEFENDANT
NUHU KATABAZI HARUNA.....11th DEFENDANT
ALLY HARUNA SILAHA.....12th DEFENDANT
MONICA WILLIAM NEVI.....13th DEFENDANT
SELEMAN KIBASA.....14th DEFENDANT
SERIKALI YA KITONGOJI CHA NYAMWANA.....15th DEFENDANT**

RULING

Last Order: 17.02.2023

Ruling Date: 21.02.2023

M. MNYUKWA, J.

When the plaintiff served the defendants with a copy of the plaint which was filed in this court on 24th June 2022, the defendants filed their



respective written statements of defence along with the notice of preliminary objections. While the 1st, 2nd and 3rd defendants alleged that the suit is bad in law for being time-barred and that the suit is unmaintainable for contravening the mandatory requirement of section 6(2) of the Government Proceedings Act, Cap. 5 R.E 2019, the 4th to 14th defendants raised a preliminary objection to the effect that, the instant suit is untenable in law for non-joinder of a necessary party (Merisiana Andrea) or her Administrator of the Estate as a party to this suit, hence shall move the court to struck it the suit with costs.


As a matter of practice, the court scheduled the preliminary objections to be heard and the hearing was done by way of oral submissions. During the hearing, the plaintiff was represented by Arsen Molland, learned counsel, the 1st, 2nd, 3rd and 15th defendants were represented by Subira Mwandambo, the learned state attorney, while the 4th up to 14th defendants afforded the legal services of Venance Kibulika, learned advocate.

The brief background of the matter is best captured by reproducing relevant paragraphs in the plaint as follows;-

- 3 (a) *That, on 23^d August 2017 before Mahakama ya Mwanzo Mkuyuni in "Shauri la Mirathi No 68 la 2017" the plaintiff was*

appointed as the administratrix to administer the estate of her late beloved father going by the name of BONIFACE ANDREA MADAHA, who demised way back in 18th March 1998 – a copy of the death certificate, Probate Form No 5 and the subsequent judgement are herein collectively attached,....Annexure A-1

- (b) That the said deceased before her demise left behind the Estate known as seven acres of squatter land located at Nyang'omango, Misungwi District in Mwanza, the place which currently is known to be Nyamwana area*
- (c) That the suit land was immediately after the demise of the late BONIFAS ANDREA MADAHA, her sister MERISIANA ANDEA SWEKE @ MERISIANA ANDREA @ MELISIANA ANDREA was assigned to take care of the suit land pending appointment of an administrator, being the guardian of the deceased landed property handed the suit land to the administrator immediately after the appointment – Copy of the handing letter is herein attached ... Annexure 2*
- (d) That in the year 2018 the plaintiff after being appointed, she instituted the Land Application No 201/2018 at the District Land and Housing Tribunal for Mwnza against Merisiana Andrea and LUMBA JOHN claiming back the land, while the other trespasser's names were unknown, the Land Application which was stricken out for non-joinder of the necessities parties.*



The reason is execution cannot be carried out for people who had not been joined to the case and thus it was ordered all interested persons be joined, with the leave of the court to re-file- Copy of the Land Application and Judgement are hereby attached collectively Annexure A-3

- (e) That, in the cause of investigating the name of the intended respondents/ defendants in December 2021 the plaintiff managed to discover that the said land has been surveyed and demarcated by the Misungwi District Council surveyors and the sum of twenty-nine (29) plots came out of the land – Copy of the sketch map attached as Annexure A-4*
- (f) That it was further orally informed to the plaintiff that the Registrar of Titles and Misungwi District Council has already unlawfully issued title deeds of the fifteen plot....*
- (g)*
- (h) That it was further discovered that the 13th and 14th defendants unlawfully sold the suit land to the defendants.*
- (i) That the late BPNIPHACE ANDREA MADAHHA is the lawful owner of the land he used the same since the year 1970 until 18th March 1998 and later on was handled to MERISIANA ANDREA SWEKE@MERISIANA ANDREA (The deceased's sister) only for supervision and is the one who used the suit land for cultivation.*

In his prayer, the plaintiff prays for this court to grant the following reliefs:



- (a) *The Court to find that the suit land belongs to the deceased BONIFAS ANDREA MADAHA;*
- (b) *The Court to find that the defendants are trespassers over the suit land;*
- (c) *The Court to order that the names of the defendants be removed from the land register so that to prove the way for the probate cause No 68/2017 by Mkuyuni Court be executed against the deceased estate;*
- (d) *An order for vacant possession against the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, and 15th defendants;*
- (e) *An order for payment of mesne profit of five hundred million (Tsh 500,000,000) against the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th defendants*
- (f) *Costs of the suit;*
- (g) *Any other relief(s) deem just to be granted.*

The learned state attorney who represented the 1st, 2nd, 3rd and 15th defendants kicked the ball rolling by quickly dropping the second point of preliminary objection that the suit is unmaintainable for contravening section 6(2) of the Government Proceedings Act, Cap. 5 R.E 2019. She, therefore, argued only on the objection that the suit is bad in law for being time-barred.

Arguing in support of the suit being time-barred Ms. Subira Mwandambo submitted that; the present suit was filed on 29/06/2022 where the plaintiff seeks for an order for this Court to declare the

deceased, Boniphace Andrea Madaha as the lawful owner of the disputed land and that the defendants are trespassers. She enlightens that, as reflected on paragraph 3(a) of the Plaint, the deceased died on 19th March 1999, and the plaintiff was appointed as the administratrix of the deceased estate on 25th August 2017.

She further submitted that, as per the Law of Limitation, Act, Cap. 89 R.E, 2019 for the plaintiff to recover the deceased land, she was required to bring the claim within 12 years from 1998 and as of now, when this matter is instituted, it is almost 22 years lapsed. She added that, from 1998 to 2017 when the plaintiff was appointed as the administratrix of the deceased estate, 7 years passed as the time limitation to bring this kind of a suit is 12 years. She went on that, from 1998 to 2022 when the plaintiff instituted the suit, is almost 24 years passed as the plaintiff is required to bring the suit within 12 years. She remarks that the delay is for almost 12 years.

Ms Mwandambo argued that, filling of the probate case and this suit by the plaintiff is an afterthought because the plaintiff had ample time to file the present suit if the disputed property really belonged to the deceased. Ms. Mwandambo claimed that, when demanding her right, the plaintiff was duty-bound to abide with the law which gives a time limit for

a suit like the present one to be brought in court. She refers to section 9(1) of the Law of Limitation Act, Cap 89 R.E 2019 which requires the person who wants to recover the deceased landed property to establish the claim from the date of the death of the deceased.

She added that, the law also requires the plaintiff to show that the deceased was the last person entitled to be in possession of the land. She claimed that this fact is not shown in the plaint and instead the plaintiff annex the death certificate and the letter showing her appointment as the administratrix of the deceased estate. She remarked that, in determining the preliminary objection the court is required to consider what is attached to the plaint and in this case, it is not shown if the deceased was in possession of the disputed land.

Ms Mwandambo was of the view that, as the defendants were in possession of the disputed land, the plaintiff was required to institute her case within the prescribed time provided by the law. She averred that, the 15th defendant gave land to the 9th defendant for social service purposes, this means that, the leadership of the village council of Nyamwana, who is the 15th defendant, controlled and possessed the disputed land at that time.



She finalized by stating that, as the suit is time-barred, the same deserved to be dismissed as per the requirement of section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2019 as the suit was instituted after 12 years. She refers to the case of **Stephen Wasira Masato v Joseph Sinde Wariona and the Attorney General**, 1997 TLR 205, She, therefore, pays the suit to be dismissed with costs.

On the other preliminary objection raised by Mr. Venance Kibulika, it was his submission that, the suit is untenable in law for non-joinder of the necessary party, Merisiana Andrea or her administrator as a party to the suit. Referring to the reliefs prayed by the plaintiff and paragraph 3 (c) of the Pliant, he submitted that, the plaintiff claimed that the property was owned by Boniphace Andrea Madaha before his death and that after his death, his sister Merisiana Andrea was appointed to take care of the disputed property before she was appointed as the administratrix of the deceased estate and that the disputed land was handled over to her on 19th December 2017.

He went on that, as reflected on paragraph 3(d) of the Pliant, the administratrix filed the suit against Merisiana Andrea claiming the said Merisiana Andrea to return back the disputed land to her. He added that, the suit was filed in the District Land and Housing Tribunal for Mwanza as



Application No 201 of 2018 claiming the disputed land from Merisiana Andrea who is alleged to be the owner of the disputed land. He remarked that, as paragraph 3(d) of the plaint shows that the plaintiff was claiming disputed land to one Merisiana Andrea, failure to join her as a party to the suit render the suit to be untenable and therefore, deserved to be struck out.

The counsel further submitted that, as the plaintiff averred in paragraph 3(e) that, in the course of her investigation, in 2021, she discovered that the land was surveyed and demarcated to Misungwi District Council and that the same was allocated to 24 persons. He was of the view that, perhaps the survey that was done by Misungwi District Council involved Merisiana as the owner of the property.

He added that, in paragraph 3(i) the plaintiff claimed that her deceased father was owning the disputed land from 1970 to 1998 when the same is handled over to Merisiana Andrea, the said Merisiana Andrea must be joined as a necessary party since in one way or another, she was in actual possession of the disputed land since the plaintiff also once instituted the suit against Merisiana to recover the disputed land.

He retires his submission arguing that, joining Merisiana Andrea as a necessary party is imperative as it is possible for Merisiana to have been

involved to sell the disputed land to defendants and that in order to avoid multiplicity of suits and for the court to pass an effective decree for execution, Merisiana Andrea has to be joined as a necessary party. He supported his argument by referring to the case of **Leonard Peter v Joseph Mabawa & 2 others**, Land Case No. 4 of 2020. He, therefore, prays the suit to be struck out with costs.

Contesting, Mr. Arsen Molland, the counsel for the plaintiff submitted that, the present suit is filed within time because the time starts to run if one is in occupation of the disputed property and in actual possession of the land. He went on that, the Law of Limitation Act, Cap. 89 R.E 2019 states as to when the time accrues. He strongly disputed that the time cannot accrue from the point the deceased died because at that time there might be no course of action against the defendants.

He further submitted that section 9 of the Law of Limitation Act, Cap. 89 R.E 2019 is applicable subject to the provision of section 33(1) of the same law as the section emphasizes on the right to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run. He added that, counting the period starts when the defendants are in occupation not from the time of death of the owner. He remarked that the essence of section 9 (1) of the Law of



Limitation Act, Cap. 89 R.E 2019 is the relation back principle means that the administrator date back grant. He refers to the case of **Martin Godfrey (as legal representative of Godfrey Ole Martin-deceased vs Fanuel Loishoki Noah**, Civil Application No. 1 of 2019 where the relation back principle is well explained and the property of the deceased cannot be claimed if the administrator is yet to be appointed.

Insisting that the suit is not time-barred, the counsel for the plaintiff averred that, section 9 of the Law of Limitation Act, Cap 89 R.E 2019 does not require the possession of the disputed land by the deceased at the time of his death. He added that, since the determination of preliminary objection does not need evidence, proof of possession is a matter of evidence which cannot be entertained at this stage.

In relation as to when the time accrues, the counsel refers to the decision of the Court of Appeal in **Bhoke Kitang'itta v Makuru Mahemba**, Civil Appeal No 222 o 2017 which discussed on the adverse possession. He further stated that, the issue of the leadership of Nyamwana village council giving land to the 9th defendant, need evidence and therefore cannot be entertained at this juncture of determining the preliminary objection. He finalized by stating that the case of **Stephen**



Wassira (supra) is distinguishable from our case at hand since the administration of the estate was not part of the case.

Responding to the preliminary objection raised by Mr. Venance Kibulika on joining Merisiana Andrea as a necessary party, the plaintiff's counsel submitted that, if the defendant thought that the said person is a necessary party, then he can join her as it was provided for under Order 1 Rule 10(2)(d) of the Civil Procedure Code, Cap 33 R.E 2019. He refers to the case of **Abdulatif Mohamed Hamisi v Mehboob Yusuf Osman and Another**, Civil Revision No 6 of 2017 where the Court of Appeal gives the test of who is a necessary party and the case of **Abdi M Kipoto v Chief Arthur Mtoi**, Civil Appeal No 75 of 2017 as to who is a necessary party.

He added that, the plaintiff does not claim any relief to Merisiana Andrea and that the plaintiff did not state in her plaint if Merisiana was the owner of the disputed property. He, therefore, prays for the objection to be overruled.

Re-joining, Ms. Mwamdambo mainly reiterates what she had submitted in chief. She insisted that the requirement of the last person to be in possession of land is not a matter of fact. She attacked the submission of the counsel for the plaintiff on the applicability of section

A handwritten signature in blue ink, appearing to be 'N. Kibulika', is located at the bottom right of the page.

33 of the Law of Limitation Act, Cap 89 R.E 2019 as the same is not applicable on the land owned by the village council since it is a public office. She distinguished the case cited by the counsel for the plaintiff as the matter in question is not about the administration of the deceased estate. She insists that the suit deserves to be dismissed as the same is filed out of time. On his part, Mr. Venance Kibulika reiterates what he had submitted in chief.

Having carefully analysed the submissions of both parties in support for and against the preliminary objections, the issue is whether the preliminary objections raised by the defendants are merited.

My take-off point in determining the preliminary points of objection raised by the counsels for defendants is on the issue of whether the present suit is time-barred as raised by the counsel of the 1st , 2nd , 3rd and 15th defendants. I am compelled to start with the above issue as it touches the issue of jurisdiction of this Court. Thus, the second objection will be determined subject to the findings of the first preliminary objection. While the learned state attorney representing the 1st , 2nd , 3rd and 15th defendants argued that the suit is time-barred, the plaintiff counsel strongly disputed that assertion and argued that, the present suit is filed



within the prescribed time provided by the Law of Limitation Act, Cap 89 R.E 2019.

It was Ms. Mwandambo's contention that as per the provision of section 9(1) of the Law of Limitation Act, Cap 89 R.E 2019, the plaintiff who wants to recover the deceased's landed property is duty-bound to establish the claim from the date when the deceased died. She also insisted that the plaintiff is also duty bound to show that the deceased was the last person to be in possession of the land.

In opposing the view taken by Ms, Mwandambo.the counsel for the plaintiff Mr. Arsen Molland was of the view that, time does not start to run when the deceased died but when one is in actual possession of the disputed land. He insisted that, the time cannot accrue at the time of death of the deceased as at that time there might be no cause of action against the defendants. He strongly argued that, the provision of section 9(1) of the Law of Limitation Act, Cap 89 R.E 2019, must be read together with the provision of section 33 of the Law of Limitation Act, Cap 89 R.E 2019.

Upon going through the plaint, the Plaintiff pleaded that, the suit land was owned by his late father until 1998 when he demised. She also pleaded that, the suit land was in actual possession of one Merisiana

Andrea who was the sister of the deceased as she was appointed by the family member as the guardian to take care of the suit land until the appointment of the administrator of the deceased. It is also revealed in the plaint that, the said Merisiana Andrea was using the suit land for cultivation from 1998 when she was given as a guardian and caretaker until 2017 when she handed over the same to the administrator of the deceased estate.

The same plaint is silent as to when the defendants were in actual occupation of the suit land and the plaintiff claimed that, it came to her knowledge that the suit land was demarcated and surveyed by Misungwi District Council in the year 2021 and that some of the defendants were given the title deed in respect of the suit land. This fact is somehow defeated by the same plaint which shows that, in the year 2018, the plaintiff sued Merisana Andrea in the District and Land Housing Tribunal for Mwanza, for unlawful allocation of the suit land to other persons without the authorization of the family. At any rate, the plaint suggests that, the plaintiff came to know about some of the defendants occupying or being in actual possession of land in 2018 which is a few months after the disputed land was handed over to her by Merisiana Andrea. I say so



because it is on the same year 2018 when the plaintiff instituted a suit against Merisisana Andrea.

As it was rightly observed by the counsel of the plaintiff, section 9(1) of the Law of Limitation Act, Cap 89 R.E 2019 must be read together with section 33(1) of the Law of Limitation Act, Cap. 89 R.E 2019.

Section 9(1) reads: -

Section 9(1)

Where a person institutes a suit to recover the Land of a deceased person whether under a will or intestacy and a deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of land, the right of action shall be deemed to have accrued on the date of death.

Again, section 33(1) reads as follows: -

"A right of action to recover land shall not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as "adverse possession") and, where on the date on which the right of action to recover any land accrues and no person is in adverse possession of the land, a right of

action shall not accrue unless and until some person takes adverse possession of the land”.

This Court in the case of **Mshamu Saidi (Administrator of the Estate of Saidi Mbwana) vs Kisarawe District Council and 4 Others**, Civil Appeal No. 177 of 2019, HC Land Division at Dar es Salaam, Hon Maige, J (as he then was) pointed out that:

".... For the purpose of determining the actual right of action, section 9(1) should always be read together with section 33(1) so that, the course of action does not accrue on the date of the death of the deceased until the defendant or his predecessor in the title is in adverse possession of the suit property.

It is equally significant to observe that, an action for recovery of land is technically based on the tort of trespass to the land which is nothing else other than unjustifiable intrusion by one person in land in possession to another.

He went on in observing that: -

"Therefore, for the respondents to be entitled a defence of time limitation, they must establish adverse possession of the suit property twelve years after the death of the deceased. They cannot, without adverse possession, place

reliance on the non-use of the land subsequent as to the death of the deceased...”

Subscribing to the above stand, it is my considered view that; as the plaint does not show when exactly the defendants were in actual possession of the disputed land, it is my firm view the suit is filed within time since it is from 2018 when the plaintiff instituted the suit against Merisiana Andrea as she came to realize that the suit land is owned by other persons as it was just handled over to her in 2017.

It is my further opinion that the nature of the dispute at hand needs some factual information in order to ascertain the truth, therefore, it is very difficult at this juncture to ascertain as to when the defendants were in actual possession for the suit to be time bared the preliminary objection.

For that reason, it is very premature for now to hold that the suit is time-barred. Therefore, I find the first preliminary objection is devoid of merit and therefore, I dismiss it.

On the second preliminary objection, it was submitted by Mr. Venance Kibulika that the suit is untenable for non-joinder of a necessary party who is Merisiana Andrea or her administrator of the estate as a party to this suit and hence the court should struck out the suit with costs. It



was Mr. Arsen Molland's contention that, as they don't have any claim against Meriana Andrea, she cannot be a necessary party.

Upon carefully scrutinising the plaint filed by the plaintiff, it is imperative to state that, my mind is settled that Merisiana Andrea is a necessary party to be joined in this suit. The plaint bears testimony that, in the unknown time, Merisiana Andrea unlawfully allocated the disputed land to other people and that the suit was instituted against her in the District Land and Housing Tribunal for Mwanza in Land Application No. 201 of 2018 which was struck out for non-joinder of the other defendants who were alleged to be the necessary party.

Again, the fact that Merisisna Andrea was in actual possession of the suit land from 1998 to 2017 when the suit was handed over to the administratrix of the estate, she ought to be joined as a nessesary party to the suit as the case filed against her in 2018 shows that, she might have been the one who allocated the suit premises to some of the defendants. Therefore, joining her as a necessary party is inevitable as it will help the court to determine the controversy at hand as to whether the defendants were the trespasser or not. This case cannot be effectively determined without joining Merisiana Andrea as a party to the case.



Under Order I Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] on who may be joined as a defendant. The rule provide: -

"A persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."

In ascertaining whether a party is a necessary party or not in the context of Order I Rule 10(2) of the CPC, Cap. 33 R.E 2022 in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), the Court stated that;

"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as plaintiff or defendant and is not joined so; or (ii) when, without his presence, the questions in the suit cannot be completely decided".

See also; **Claude Roman Shikonyi v. Estomy A. Baraka and Four Others**, Civil Revision No. 4 of 2012 and **Abdilatif Mohamed Hamis v. Mehboob Yusuf Osman**, Civil Revision No. 6 of 2017

Based on the circumstances that Merisiana Andrea had several involvements of the disputed land, she is a necessary party for this matter to be properly determined. As it stands, the plaintiff has that unfettered

prerogative and freedom not to join a party it does not feel like joining, but if a party not joined is a necessary party, for resolving all issues raised by the pleadings, then the solution is provided by Order I Rule 10(2) of the CPC, which provides that: -

"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

(see also **Tang Gas Distributors Ltd v. Mohamed Salim Said and Two Others**, Civil Revision No. 6 of 2011)

Based on my analysis above, I accordingly find merit in the second preliminary objection and it is therefore sustained. In the final analysis, I hereby struck out Land Case No 16 of 2022 for non-joinder of a necessary party. I make no order as to costs .

It is so ordered.




M.MNYUKWA
JUDGE
22/02/2023

Court: Ruling delivered on 22nd February 2023 in the presence of both parties' learned counsel.

A handwritten signature in blue ink, appearing to read 'M. Mnyukwa', is written over a light blue rectangular background.

M.MNYUKWA
JUDGE
22/02/2023