

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT TABORA

CIVIL CASE NO. 1 OF 2021

ESTER PATRICK TILYA .....PLAINTIFF

VERSUS

1. TABORA MUNICIPAL COUNCIL

2. THE ATTORNEY GENERAL

} .....DEFENDANTS

RULING

*Date: 22.2.2023 & 10.3.2023*

**BAHATI SALEMA, J.:**

The plaintiff, **Esther Patrick Tilya**, filed a suit against the defendants, claiming, *inter alia*, for the payment of the sum of TZS 500,000,000/= being specific compensation for demolished improvement and development sourced from double allocation by the first defendant.

At the very beginning, the defendants raised three preliminary objections namely;

*i. That the suit is untenable for being time-barred;*

- ii. *That the suit is res-judicata*
- iii. *That the plaintiff does not have a cause of action against the defendants*

At the hearing of the preliminary objections, Mr. Jovin Robert Manyama, learned counsel, represented the plaintiff while the defendants were represented by Mr. Lameck Merumba, Senior State Attorney.

As it has been the practice of the court, before dealing with the case, I had to dispose of the preliminary objections raised. Therefore, the learned counsels were invited to address the court on the preliminary objection. With the leave of the court, the objections were argued by way of written submissions.

Submitting on the first limb of preliminary objection that the suit is untenable for being time-barred, Mr. Merumba for the defendants submitted that the plaintiff in her plaint claims specific compensation of TZS. 500,000,000/= being payments for demolished and development sourced from double allocation. He submitted that the time limit for a suit relating to compensation is one year. In terms of item 1 of part 1 of the Schedule to **the Law of Limitation Act, Cap. 89** [R.E. 2019], the period of limitation for the claim of compensation over land is one year. The plaintiff in her plaint does not state clearly when the alleged

development was demolished following the alleged double allocation, which contravenes Order VII Rule 1 (e) of **the Civil Procedure Code**, Cap 33 [R.E. 2019]. He went on that despite such anomaly still one can gather from the plaint that the cause of action arose between 2007 and 2009 and section 4 of **the Law of Limitation Act**, Cap.89 (*supra*), provides that time limitation commences immediately from the date when the right of **action accrues**. He submitted further that the instant suit was filed in 2021 which is beyond the time limit for the claim based on compensation. Amplifying his argument he cited the case of **Tanzania National Road Agency and Another Vs. Jonas Kinyagula**, Civil Appeal No. 471 of 2020 that;

*"Our starting point will be to restate that issues relating to compensate for doing or for omitting to do an act alleged to be in pursuance of any written law (land inclusive) are covered under item 1 of Part 1 to the schedule to the LLA which requires such claims to be lodged within one year."*

He, therefore, invited this Court to dismiss this suit in terms of section 3 (1) of **the Law of Limitation Act**, Cap. 89 (*supra*); **Barclays BANK Tanzania Limited Vs. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 at page 15; and **NBC Limited and Another VS Bruno Vitus Swalo**,

Civil Appeal No. 331 of 2019 (all unreported). In the last case, at page 9, the Court of Appeal state *inter alia*;

*"It is that courts are enjoined not to entertain matters which are time-barred. The limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which litigation period has expired."*

The second limb of the objection is that the suit is ***Res- Judicata***. He submitted that the concept of ***Res- Judicata*** is provided under section 9 of the **Civil Procedure Act**, Cap. 33 as well as in the case of **Sisi kwa Sisi Panel Beating and Enterprises Vs. Mandela Industrial Co-operative Society Limited**, Land Case No. 04 of 2019 defined *res- judicata* and its application.

He stated that the land in dispute which is the subject of this suit was decided by the District Land and Housing Tribunal for Tabora in Land Application No. 7 of 2010. The parties in Land Application No. 7 of 2010 were **Mussa Hussein Almasi Kwikima Vs Mrs. Ester Tilya and the Authorized Officer Land**. Land Application No. 7 of 2020 was heard on merit. The judgment was entered in favour of Mussa Hussein Alimasi Kwikima and the plaintiff who was the 1<sup>st</sup> respondent in DLHT was declared a trespasser. The plaintiff was further ordered to remove her buildings as the disputed land is the property of the applicant.

On the basis of the judgment of DHLT, he submitted that the instant suit is *res-judicata*. The decision of DLHT is the **earlier decision** on the issue involved in the instant suit because the same has already **been decided**, secondly, the DHLT gave its final judgment by declaring the plaintiff herein a trespasser and such decision has never been **reversed**, and thirdly, the instant suit involved Tabora Municipal Council party privy to the Authorized Officer Land (2<sup>nd</sup> respondent in DHLT). Therefore, the issue of ownership of the land in dispute was decided on merit by DLHT this suit became *res-judicata*.

As to the third limb of objection, the plaintiff does not have a **cause of action** against the defendants. Citing the commentary in *Mulla on Civil Procedure*, 13<sup>th</sup> Edn quoted extensively at page 8 in the decision of this court in **Banny Maijo t/a Banny Technical and General Supply Vs. Medical Officer in Charge Geita Referral Hospital and 2 others**, Civil Case No. 12 of 2020 defined what a cause of action is;

*“A suit is always based on a cause of action. There can be no suit without a cause of action and such cause of action having accrued to the plaintiff.*

He advanced further the plaintiff in her plaint specifically paragraph 4 and reliefs sought are mainly based on **the allegation or demolished improvement and the development made on the disputed**

**land resulting from double allocation.** The plaintiff in the plaint does not state when the defendants herein demolished the alleged development or improvement made and no suggestion to whom the 1<sup>st</sup> defendant allocated the land in dispute apart from the plaintiff if at all she was allocated the disputed land, which is denied.

The plaintiff in paragraph 9 of the plaint states to have requested to be issued **with a Certificate of Occupancy**, and no response was ever received from the 1<sup>st</sup> defendant. The plaintiff in her plaint **does not state to whom** the 1<sup>st</sup> defendant allocated the land in dispute to justify the claim of double allocation.

In absence of facts that suggest the defendants did the acts complained of the plaintiff cannot surely claim against the defendants. The plaintiff alleged the acts but she does not say how the **defendants were involved in those acts, thus no cause of action can accrue, against the defendants.** He prayed to this court this suit be dismissed with costs.

Responding, the counsel for the applicant valiantly submitted that on the settled legal principle on what entails a preliminary objection. In the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Limited [1969] E. A 696** the court defined a preliminary objection.

He stated that it goes without saying that, a preliminary objection must meet all the conditions and have qualified of what is used to be a demurrer. The question that confronts or minds is whether the preliminary objections by the defendants conform to the above conditions and qualities.

He further submitted that it is the argument of Mr. Merumba when submitting on the first preliminary objection on point of law that the present **suit is time-barred** and therefore deserving to collapse. The applicant submitted that the said argument is misplaced and misconceived since in the plaintiff's plaint paragraph 4 of the plaint stated;

*"That the claim against the defendants is for payment of the sum of TZS 500,000,000/= (Say Tanzania Five Hundred Million only) being specific compensation for demolished improvement and development sourced from double allocation by the 1<sup>st</sup> defendant. Further, the plaintiff claims general damages to be assessed by the Court"*

It is a settled position of the law that parties are bound by pleadings. In the case of **Makori J.B Wassaga V Joshua Mwaikambo & Another** [1987] TLR 88.



He submitted that the principle of law, nevertheless the preliminary objections by the defendants swing against the cherished principles. From the plaint, the plaintiff **claims compensation** for the demolished development and not **double allocation**. Double allocation in the present suit is nothing but an act that is incidental to demolishing the plaintiff's development on which her claim is based. It can therefore be argued that the cause of action arose when demolish was executed and not in **2006 or 2007** as suggested by the learned Senior State Attorney. While agreeing that the suit as compensation has to be brought within one year, he was in disagreement with the learned counsel that the same suit was filed beyond the statutory time. He submitted that there is **no specific time** stated by the plaintiff in the plaint to back up the argument by the State Attorney that the suit time-barred.

He submitted that establishing when the demolition was executed in his view **needs evidence** and cannot succeed to be termed as a preliminary objection on point of law. It is in this circumstance the authorities cited are inapplicable.

As to the second objection, he submitted that the learned State Attorney has argued that the present suit is *Res- Judicata* in terms of Section 9 of the **Civil Procedure Code**, Cap. 33 [R.E. 2019] on the fact that



there had been a suit over the same land in dispute at the District Land and Housing Tribunal for Tabora vide **Land Application No. 7 of 2010** where the parties were **Musa Almasi Kwikima V Ester Patrick Tilya** (The plaintiff herein) and the authorized land officer. The application was decided on merit and to its final. He submitted that this preliminary objection is misplaced and without merit.

Buttressing his stance, he stated that ***Res- Judicata*** is governed by Section 9 of **the Civil Procedure Code** (*supra*) as argued by the learned State Attorney but is reluctant to believe that the same applies in the instant matter. Applying the principle above the argument expounded by the learned State Attorney would bring a negative result. He stated that there has been no suit before the Court of Tanzania between the plaintiff and the defendants over compensation for the demolished development.

While the matter referred to by the learned State Attorney is related to a land dispute, the instant matter relates to compensation. In his opinion, these are two distinct causes of action. The alleged Land Application No. 7 of 2010 at the District Land and Housing Tribunal for Tabora was between **Mussa Hussein Amasi Kwikima V Mrs. Ester Tilya & Authorised Officer Lands**. The same defendants herein were never parties to the said matter and the issue for determination was not

compensation as it is in the present matter. In the case of **Kamunye and others V The Pioneer General Assurance Society Limited** (1971) EA 263 the court stated;

*“The test whether or not a suit is barred by res judicata seems to be is plaintiff in the second suit trying to bring before the court, in another way and in the form of new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of re judicata applies only to points upon which the first court was required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time – **Grenhalgh Mallard**, (1947) 2 ALL ER 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply – **Jadva Karsan Harman Sing Bhogal** (1953), 20 EACA 74.*

He submitted that the matter at hand does not squarely fall within the principles echoed as such the instant suit cannot be qualified to be a *res- judicata*. Accordingly, the preliminary objection regarding *res judicata* not only in the present matter it does not qualify to be a point of law it is also without merit.

On the third objection, he stated that the opposite party argued that the plaintiff has failed to establish a cause of action. He submitted that a point of preliminary objection must be on a pure point of law. The established as to who did the act complained of in his opinion needs to adduce evidence that is contrary to the spirit of the preliminary objection.

He stated that the plaintiff has plainly in his plaint particularly paragraphs 4,7,9,13 stated the involvement of the 1<sup>st</sup> defendant in the loss on which the plaintiff's claims are based. The said paragraphs are sufficient to form a cause of action against the 1<sup>st</sup> defendant as such she can't escape answering the allegations. The determination of the truthfulness or otherwise of the said averment requires evidence, the stage which is yet to be reached. The 2<sup>nd</sup> defendant is joined in the present case as a necessary party according to the statutory instructive and mandatory requirement of Section 6 (5) of **the Government Proceedings Act**, Cap. 5 [R.E. 2019]. He submitted that in the said aspect, the preliminary objections are wanting and be dismissed with costs.

Having peeled off the contentious views of both parties, the main issue for determination by this Court is whether the objections raised are meritorious. The issue which I am called upon to resolve is *whether the concern raised by the respondent's counsel is valid*. Before I address the

preliminary objections on merit, I find it necessary to consider the validity of the preliminary objection since the applicant's counsel has contended that the points of objection do not disclose the points of law.

Supporting his submission, he cited the case of **Mukisa Biscuit** (supra). To address the applicant's counsel's view, let me revert to what the Court in **Mukisa Biscuit** (supra), The Court had this to say: -

*“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”.*

Based on the above authority, I conclude, without much hesitation, that some of the objections raised fall squarely within the scope of a preliminary objection. It is in view thereof that, I find the applicant's contention reasonable and meritorious.

On the first limb of preliminary objection on time-barred. It is undisputed that the parties are at one that the time limitation for claims over compensation as provided for under item 1 of Part to the Schedule to the **Law of Limitation Act**, Cap.89 [R.E 2019] is one year.

In this application, as argued by the plaintiff that he did not clearly state when the alleged development was demolished in his view **needs evidence** and cannot succeed to be termed as a preliminary objection on point of law since there is **no specific time** stated by the plaintiff in the

plaint to back up the argument by the specific time. The respondent was of the view that according to the plaint, the cause of action is said to arise in 2006 and 2007 which is almost a lapse 12 to 14 years until when the matter was filed before the Court on the 4<sup>th</sup> day of May 2021. The court having accurately traversed the plaintiff's plaint has noted paragraph 4 of the plaint that,

*"That the claim against the defendants is for payment of the sum of TZS 500,000,000/= (Say Tanzania Five Hundred Million only) being specific compensation for demolished improvement and development sourced from double allocation by the 1<sup>st</sup> defendant. Further, the plaintiff claims general damages to be assessed by the Court."*

As rightly submitted by the applicant, parties are bound by pleadings as echoed in the case of **Makori J.B Wassaga V Joshua Mwaikambo & Another**(*supra*). It is factual that the plaintiff **claims compensation** for the demolished development and not double allocation. It is my considered view to establishing when the demolition was executed needs evidence and accordingly cannot be succeeded to be termed as a preliminary objection on point of law. I find merit in this.

As to the second limb of the objection, the suit is ***Res- Judicata*** in terms of Section 9 of **the Civil Procedure Code**, Cap.33 [R.E.2019], the

respondent stated that there had been a suit over the same land in dispute at the District Land and Housing Tribunal for Tabora vide **Land Application No. 7 of 2010** where the parties were **Musa Almasi Kwikima V Ester Patrick Tilya** (The plaintiff herein) and the authorized land officer which was decided on merit and to its finality.

It must be understood that the law under section 9 of **the Civil Procedure Code**, Cap. 33 [R.E. 2019] prohibits reinstitution of a suit that has already been tried under the same part and the same subject matter and be determined and finalized.

As submitted by the applicant's counsel there has been no suit between the plaintiff and the defendants over compensation for the demolished development as claimed by the respondent. However, I discovered that the matter referred to by the defendant was related to land dispute of the same subject matter. The applicant has also admitted that the instant matter relates to compensation and not to land dispute which are two distinct causes of action. This reveals that it is the same subject matter. With due respect to the foregoing counsel's view, I find that the two cases herein are sufficiently interwoven. I have reason for this since the alleged Land Application No. 7 of 2010 at the District Land and Housing Tribunal for Tabora was between **Mussa Hussein Amasi**



**Kwikima V Mrs. Ester Tilya & Authorised Officer Lands** and the plaintiff was ordered to remove her buildings.

The court **Kamunye and others V The Pioneer General Assurance Society Limited** (1971) EA 263 and **Jadva Karsan Harman Sing Bhogal** (1953), 20 EACA 74 held that the subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply. I find this matter at hand falls directly within the principles since the instant suit has already been decided, and its final judgment by declaring the plaintiff a trespasser and such decision has never been reversed and the plaintiff appreciates that the instant matter relates to compensation. In my view, I find that the issue of ownership of the land in dispute was decided on merit by DLHT thus it becomes *res-judicata*.

As to the last limb of objection that the plaintiff does not have a cause of action against the defendant on the account that the plaintiff has specifically failed to establish as to whether the act complained of was executed by the defendants.

The substantive argument raised by Mr. Merumba is that the plaintiff does not state when the defendants herein demolished the alleged development or improvement made and also no suggestion to whom the first defendant allocated the land. He also submitted that under para 9 the plaintiff states to have requested to be issued with the certificate of



occupancy but nothing alleging demolished improvement was made by the 1<sup>st</sup> defendant.

It is settled law under O.VII R. 11 (a) of the **Civil Procedure Code, Cap.33** where the plaint discloses no cause of action the court is to reject it and not dismiss it.

On the other hand, the applicant opposed that since the said paragraphs 4,7,9, and 13 narrated the involvement of the 1<sup>st</sup> defendant in the loss on which the plaintiffs' claim is based.


Having read the arguments by the parties, attempts have been made from **Mulla's Code of Civil Procedure (13<sup>th</sup> Edn)** to define the term "**cause of action**" to mean a fact or facts committed or attributed to one person which gives rise to a claim by another. It follows, therefore, that such other person must state those facts and attribute them to the defendant to disclose a cause of action against the defendant.

Upon perusal of the plaint, I find the cause of action has not been revealed. The act or conduct complained of by the plaintiff is a fundamental cornerstone of the suit as stated in paragraphs 4, 7, 9, 13. According to this paragraph, the material facts are not clear. Since the plaintiff has failed to clearly state the cause of action against the defendant to establish whether the act complained of was executed by the defendant. I am also aware that the cause of action as defined above

must be found in the plaint and attached annexures if any. Therefore, I find merit in this.

All said and done, I hold that failure to comply with the law requirement, as it is in this case renders the suit incompetent before the court, and I thus proceed struck out. In the circumstances of this suit, I order each party to bear its own costs.

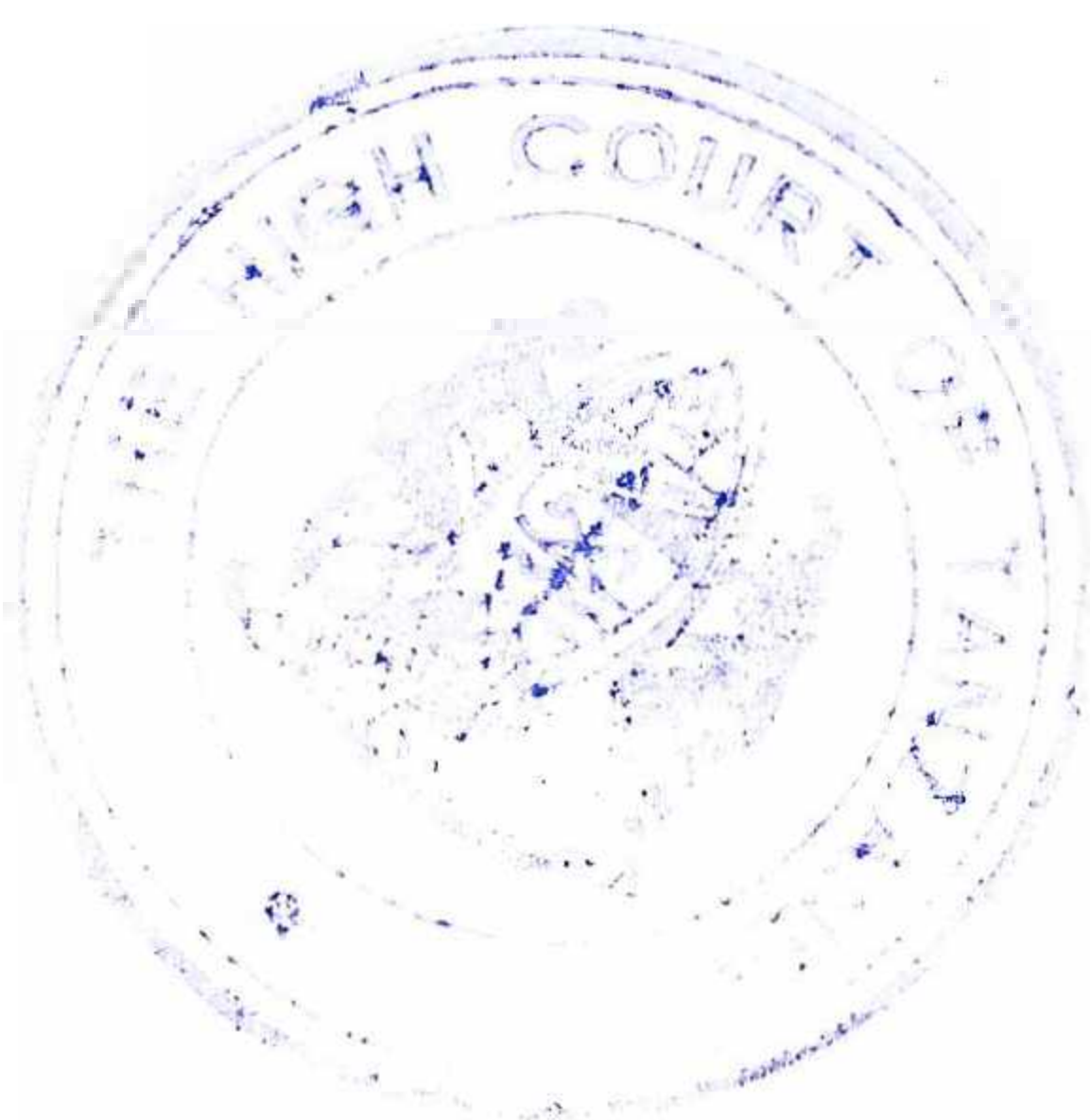
Order accordingly.

  
**A. BAHATI SALEMA**  
**JUDGE**  
**10/3/2023**

**Court:** Ruling delivered in presence of both parties.

  
**A. BAHATI SALEMA**  
**JUDGE**  
**10/3/2023**

Right of Appeal fully explained.



  
**A. BAHATI SALEMA**  
**JUDGE**  
**10/3/2023**