

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND CASE NO. 02 OF 2021

RIZIKI SAMUEL (as Administratrix of the Estate of
the Late Mama Rukia Hattasi) **PLAINTIFF**

Versus

MELCHIAD PETER KIMARO **1st DEFENDANT**

ABDUSAMAD SHARRIF ATTASSY..... **2nd DEFENDANT**

RULING

20/03/2023 & 29/03/2023

SIMFUKWE, J.

This is a ruling to determine as to whether the four points of preliminary objection raised by the 1st defendant herein should be sustained or not. The preliminary points of objection were that:

- 1. The suit is time barred*
- 2. The plaintiff has no cause of action against the 1st defendant*
- 3. That the suit is an abuse of the Court process as the plaintiff is using a land case to open a purported Probate Cause that never existed and even if it is existed ought to have been closed way back in 1994.*
- 4. That the suit is bad in law and a futile venture for failure to join the necessary parties.*

The court ordered that the preliminary objections to be argued by way of filing written submissions. Ms. Patricia Eric, learned counsel represented the plaintiff, Mr. Edward Chuwa learned counsel represented the 1st defendant while the 2nd defendant was represented by Mr. Issa Mavula, learned counsel.

On the first ground of objection which concerns time limitation, Mr. Chuwa was of the opinion that the Law of Limitation bars this suit on the reason that the plaintiff asserts that she is the administratrix of the Estate of the late Mama Rukia Hatassi since 1994 which to date is about 30 years. That, the fact that the disputed land belonged to the late Rukia was known by the plaintiff from the date of her appointment as per paragraph 7 of the amended plaint. That, the plaintiff admits that from 1994 (the year of her appointment) to 2010 she was overseas which is about 16 years. That, the plaintiff had never filed inventory in the probate cause if at all it exists as required under **section 107(1) of the Probate and Administration of Estates Act**. Mr. Chuwa also referred to **section 35 of the Law of Limitation Act** and argued that from the date of death to date it is 28 years which is time barred as the administratrix was supposed to file the case within 12 years from the date of death of the late Rukia as per **Item 1 of the Schedule to the Law of Limitation Act**.

On the second point of objection which is to the effect that the plaintiff has no cause of action against the 1st defendant, the learned counsel submitted that under paragraph 12 of the Plaint, the plaintiff alleged that the 2nd defendant who is her blood brother had obtained a long term right of occupancy and then sold the same to the 1st defendant. That, the 1st defendant had in the process been granted certificate of Title No. 32778, Plot No. 107 Block A Longuo B. That, the plaintiff did not state that she

reported the matter to the police to complain about forgery against the 2nd defendant since 2011 or against the 1st defendant.

The learned counsel referred the court to the procedures of registration and grant of right of occupancy as envisaged under **Part VI of the Land Act**, particularly **section 25, 26 and 29**. He argued that the plaintiff cannot have a cause of action against the defendants who have applied for the right of occupancy according to the law. That if there was any illegality in the procedures of granting the right of occupancy, the proper person to complain against is the Commissioner for Lands as enshrined under **section 29 of the Land Act**. Reference was made to the case of **Ngerengere Estate Company Limited vs Edna William Sitta, Civil Appeal No. 209 of 2016** which held that:

"In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the Registrar of Titles ought to have been joined as a party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal."

On the fourth ground of objection on failure to join a necessary party; it was Mr. Chuwa's argument that since the plaintiff is praying for rectification of the Land Register by nullifying the registration of the 1st defendant and entering the name of the plaintiff; again, and declaration

that the 1st defendant acted fraudulently in obtaining certificate of Title No. 32778; the same cannot be done without making the Commissioner for Lands and the Registrar of Tittles as necessary parties to the suit. That, failure to join them is fatal. To cement his argument, the learned counsel cited and quoted in length the case of **Leonard Peter vs Joseph Mabao and 2 Others, Land Case No. 4 of 2020** (HC) Mwanza.

In support of the third ground of objection of abuse of court process, Mr. Chuwa submitted that since under paragraph 11 of the Plaint the plaintiff averred that between 1994 (after her appointment) and 2010, she travelled overseas and she was thus not in the country. That means she did not take steps on the alleged probate cause. Thus, she did not file inventory and distribute the assets of the deceased to the heirs. Thus, the plaintiff is using this court in a normal suit to perfect what was not perfect in the probate cause. Mr. Chuwa was of the view that, it is abuse of court process which should not be tolerated. Reference was made to the case of **JV Tangerm Construction Co. Limited and Techno Combine Construction Limited (A joint Venture) vs Tanzania Ports Authority and Another, Commercial Case No. 117 of 2015** (HC) which elaborated the concept of abuse of court process.

The learned counsel prayed that the preliminary objections be upheld and the suit be dismissed with costs.

In reply, Ms. Patricia on the outset explained that this is a land matter and not a probate one, therefore limitation of time to be applied is that for recovery of land which is 12 years and not 6 months or one year which applies on filing inventory and accounts of the estate in probate matters.

Also, the learned counsel noted that the points to be discussed should be pure points of law and not facts that need evidence.

Responding to the 1st ground of objection which concerns time limitation, Ms. Patricia submitted that the suit is not time barred because there were allegations of fraud which were pleaded under paragraph 12-18 of the plaintiff's plaint. That, the said fraud was discovered in 2020 and the suit was filed in 2021. She referred to **section 26 of the Law of Limitation Act** read together with **Order VII Rule 6 of the Civil Procedure Code**, Cap 33 R.E 2019 which requires the court to exclude all the time before a pleaded fraud was discovered.

It was further submitted that case laws have always pointed out that the plaintiff only needs to plead allegations of fraud in her plaint and not demonstrating or proving the alleged fraud. Thus, all facts pleaded by a party must be assumed to be correct and agreed. She cited the case of **Ms. Safia Ahmed Okash (As the Administratrix of the Estate of the late Ahmed OKash) vs Ms Sikudhani Amiri & 82 Others, Civil Appeal No. 138 of 2016** (Unreported) in which it was held that:

"The facts pleaded by the party against whom the objection has been raised must be assumed to be correct and agreed as they are prima facie presented in the pleadings on record..."

As per paragraph 14 of the plaint the plaintiff pleaded that she discovered that the 1st defendant had forged some documents of the plaintiff's deceased mother's title and obtained a long term right of occupancy, when executing her decree against the 2nd defendant on the disputed land. That, the judgment that the plaintiff is referring to was delivered on 06th November 2020 which means that the alleged fraud was discovered

sometimes after November 2020 and this case was filed in 2021. Thus, the matter is not time barred. She added that, time does not run against the suit where there are allegations of fraud until the said fraud is discovered. She opined that since this is a land matter, limitation of time to be considered is that of a suit to recover land which is 12 years and not time to file inventory or accounts of the estates which applies in probate matters.

It was explained further that even **section 35 of the Law of Limitation Act** which was cited by the learned counsel for the 1st defendant cannot be applied in this case. Ms. Patricia was of the view that it would have been applicable if there were no fraud allegations. She insisted that in the instant matter time started to run from 2021 when such fraud was discovered.

Responding to the second ground of objection on cause of action and the issue of reporting to the police; Ms. Patricia submitted that this is a civil matter and not criminal matter. Thus, the plaintiff was at liberty to report the alleged fraud to the police or institute a case against the defendants for fraudulently obtaining her mother's title. She elaborated further that there is no law which requires a person to choose a certain route when the issue arise. Thus, failure to report the fraud to the police cannot be entertained as a pure point of law since it needs evidence which cannot be discussed at this stage.

On the issue of obtaining right of occupancy, the learned counsel argued that the same cannot be discussed at this stage. That, the plaintiff claims that the suit land's title was obtained by fraud and therefore the whole grant process was *void ab initio*. She opined that having right of

occupancy alone is not a total proof that you are the owner. Ms Patricia concluded this issue by stating that the said fact would have to be proved by evidence and thus, it is not a pure point of law.

Responding to the third issue on whether the suit is abuse of court process, Ms. Patricia argued to the contrary. Though she conceded that the plaintiff was appointed in 1994, she was of the view that the issue of failure to file inventory or accounts of the estate cannot be discussed on this land matter but a probate one. Further, she stated that when the administrator fails to file inventory, the effect is not to dismiss a suit for being time barred but is for the beneficiaries to apply to court for nullification/revocation of the grant as per **section 49(1)(a)- (e) of the Probate and Administration of Estates Act, Cap 352 R.E 2019**. That, once the proceedings are instituted, the applicant must satisfy the court on that as per **section 49(2)** of the same Act.

Ms. Patricia continued to elaborate the concept of abuse of court process. She said that a matter will be regarded as abuse of court process when the same is instituted with *mala fide* and with an intention to harass the other party and make him incur costs. That, such suits are usually frivolous, repetitive and contrary to legal rules of its use. The learned counsel gave an example of two parallel suits with an intention of achieving the same goal via different routes such as appeal and revision or multiple similar suits with an intention of doing forum shopping, which may be termed as riding two horses at the same time.

Referring to this case, the learned counsel argued that the plaintiff has serious triable issues and had no multiple suits regarding the same matter. That, the *casus belli* of the plaintiff against both defendants are fraudulent

actions against her deceased mother's title which she is administering and has produced reasonable evidence in her pleadings.

Moreover, Ms. Patricia argued that to determine such issue the court will have to call in evidence and hear the parties on merit. Thus, it is not pure point of law as it goes against all odds of principles of a preliminary objection.

She added that courts have on numerous counts discouraged disposing suits on matters that do not raise pure points of law. She made reference to the cases of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) EA 696**, page 700D and 701B, **Uganda vs Commissioner of Prisons, Ex parte Matovu (1966) 1 EA** at page **514** and the case of **Ms. Safia Ahmed Okash (As the Administratrix of the Estate of the Late Ahmed Okash)** (supra). The learned counsel cemented her authorities with a recent Court of Appeal decision in the case of **Jackline Hamson Ghikas vs Mllatie Richie Assey, Civil Application No. 656/01 of 2021** at page 7 (unreported) in which three conditions of a preliminary objection were stated to be that:

- *The point of law raised must either be pleaded or must arise as clear implication from the proceedings;*
- *It must be a pure point of law which does not require close examination or scrutiny of the affidavit and counter affidavit and;*
- *The determination of such a point of law in issue must not depend on the court's discretion.*

In the instant matter, Ms. Patricia emphasized that for this court to determine the raised preliminary objections, it will need to call evidence,

scrutinize it and apply its discretion, which do not fit any of the above categories of preliminary objections.

On the ground that the suit is bad in law for failure to join the necessary party, the plaintiff's counsel referred to **Order 1 Rule 9 of the Civil Procedure Code** (supra) which states that the suit cannot be defeated by reason of misjoinder or non-joinder of parties. She also made reference to **Order 1 Rule 10(1) and (2)** of the same Act which requires the court at any stage of the proceedings to direct a necessary party to be added as a party where it discovers that a necessary party has not been joined or has wrongly been joined in a suit in order to enable it to effectually determine all questions involved in a suit. Reference was made to the case of **CRDB Bank Public Company Limited vs UAP Insurance Company Limited, Civil Appeal No. 32 of 2020** in which the Court of Appeal quoted the case of **Farida Mbaraka and Farid Ahmed Mbaraka vs Domina Kagaruki, Civil Appeal No. 136 of 2006** and re-affirmed the above position.

Ms. Patricia highlighted that in terms of **Order 1 Rule 9 of the CPC**, a suit cannot be defeated by non-joinder of a party or parties but every case must be decided according to the circumstances prevailing in that particular case. The learned counsel was equally mindful of the peremptory principle of law that, **where the court discovers that a necessary party has not been joined in the suit and neither the plaintiff nor the defendant is willing and ready to apply to have such party added, the court is duty bound to direct that such a party be added.** Emphasis was added.

From the above cited provisions and case law, Ms Patricia was of the opinion that a suit cannot be defeated at this stage by non-joinder or misjoinder of parties since that can be done any time before judgment. In addition, she explained that failure to avail the party right to be heard as submitted by Mr. Chuwa in his submission can only be fatal after the proceedings are done and such party has not been availed time to defend himself.

In her detailed conclusion, the learned counsel submitted that all the raised points of objections are not pure points of law and cannot be determined at this stage. She reiterated her earlier submission and prayed the preliminary objections to be dismissed with costs. She also implored the court to be guided by the overriding objective principle and determine this matter on merit and within reasonable time as justice delayed is justice denied.

In his rejoinder, the learned counsel for the 1st respondent on the first point of Preliminary objection, insisted that since the plaintiff as administratrix of the estate had never closed the administration of estate since 1994 from unknown probate case, the plaintiff is therefore litigating on the land which is still tied with probate thus the rules of limitation of actions in probate on recovery of land cannot be severed.

Mr. Chuwa added that one of the legal functions of the administrator of an estate is to distribute the estate of the deceased to the heirs and file inventory and statements of accounts within six months. That, it is mandatory the same to be done within the prescribed time otherwise the administrator lacks jurisdiction to assert that the property belongs to the deceased. The learned counsel made reference to the case of **Beatrice**

Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga, Civil Revision No. 13 of 2020 (HC) to support his arguments.

Mr. Chuwa conceded that this is a land matter. However, he averred that it is a claim of land which belongs to a deceased person, Rukia Hattasi.

Concerning **section 26 of the Law of Limitation**, the learned counsel was of the view that the same cannot assist the plaintiff since no fraud per se has been pleaded. That, the mention of the word fraud is not the same as pleading it, there must be a bundle of facts which suggests the fraud. Mr. Chuwa made reference to the proviso of **section 26 of the Law of Limitation Act** which exempts a party who was not party to the fraud.

From paragraph 12 of the plaint, Mr. Chuwa suggested that the plaintiff admits that the 1st defendant is a purchaser for valuable consideration in 2011 and there are no facts which suggests that the 1st defendant was not a *bona fide* purchaser for value or participated in the alleged forgery committed by the plaintiff's brother.

It was also alleged that paragraph 17 of the plaint contradicts with paragraph 12. It was insisted that the plaintiff cannot rely on fraud to avoid the limitation of time.

Regarding the case of **Ms. Safia Ahmed Okash** (supra), the learned counsel was of the view that the same is irrelevant on this matter as the objection raised is based on limitation of time which is pure point of law. He insisted that the 1st defendant is a *bona fide* purchaser and the allegations of fraud cannot waive the law of limitation.

On the allegations that the said fraud was discovered in November 2020, it was Mr. Chuwa's rejoinder that the same is misleading since the judgment of Land Case No. 19 of 2014 is clear that the plaintiff was aware of the alleged fraud to have been committed by her brother and there is no allegation of fraud against the 1st defendant.

Responding to Ms. Patricia's reply in respect of non-joinder of necessary parties, that the parties may be joined at any stage before judgment under the provision of **Order I Rule 10 (2) of the CPC**, or even by the order of the court *suo moto*; Mr. Chuwa stated that the Commissioner for Lands, Registrar of Titles and the Attorney General cannot be joined unless the pleader obtains locus after issuing 90 days' Notice of intention to sue under **section 6 of the Government Proceedings Act**. Thus, unless the plaintiff issues the notice, the court cannot have jurisdiction to order them to be joined in contravention of the mandatory provisions of the law and in so doing, the court will be turned into an agent of the parties.

It was emphasized that\, since the plaintiff is aggrieved by the act of Registrar of Titles by her action of registering the Certificate of Title No. 32778 in the name of the 1st defendant, then the same should be by way of an appeal pursuant to **section 102(1) of the Land Registration Act**.

Responding to Ms. Patricia's prayer of invoking the Oxygen Principle, Mr. Chuwa stated that the said principle cannot be invoked to outlaw the mandatory procedural rules. That, the same could be available to the plaintiff if the preliminary objection was not raised as discussed in the case of **Njake Enterprises Limited vs Blue Rock Limited and**

Another, Civil Appeal No. 69 of 2017, CAT (Unreported), in which it was held that:

"We are further in agreement with Mr. Kamara that, the said option was available to the appellant before the preliminary objection was raised by the respondents. Also, the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act."

Having summarized the above submissions and considered the pleadings, the issue for determination is *whether the four preliminary objections raised by the 1st defendant have merits*. I will determine the raised points of objections in the order adopted by Mr. Chuwa for the 1st defendant.

On the first ground of objection, Mr. Chuwa for the 1st defendant submitted that since the plaintiff is administratrix of the deceased's estate since 1994 to date, the suit is time barred as she knew the fact that the land belonged to the deceased as pleaded under paragraph 7 of the plaint.

On the other hand, Ms. Patricia replied that the suit was not time barred as there is allegation of fraud as pleaded under paragraph 12 to 18 of the plaint. That, such allegation was discovered in 2020 and the suit was filed in 2021. She contended that **section 26 of the Law of Limitation Act** and **Order VII Rule 6 of the Civil Procedure Code** exclude all the time before a pleaded fraud was discovered.

With due respect to Mr. Chuwa, the plaintiff is the lawful administratrix until her appointment is revoked by the court which appointed her. The

probate laws are quite different with land laws in so far as time limitation is concerned.

I have perused the plaintiff's amended plaint; from paragraph 17 of the said Plaint, the plaintiff had impleaded fraud. That, the disputed land was fraudulently registered in the name of the 1st defendant. Thus, since there is allegation of fraud, then in line of **section 26 of the Law of Limitation Act**, time start to run from the date of discovery of forgery. As a matter of reference, section 26 reads:

"26. Where in the case of any proceeding for which a period of limitation is prescribed-

(a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the proceeding is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered it..."

Emphasis added

To determine the said fraud and when the same was discovered is a matter of fact which have to be ascertained through evidence. Therefore, since this issue is a mixture of law and fact, then it lacks the criteria of being a preliminary objection as stated in the case of **Shose Sinare vs**

Stanbic Bank Tanzania Ltd & Another, Civil Appeal No. 89 of 2020

CAT at Dar es Salaam at page 12 that:

""A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as preliminary objection on a point of law.""

Therefore, the first point of preliminary objection has no merit.

In respect of the second ground of objection, it has been submitted that the plaintiff has no cause of action against the 1st defendant since the 1st defendant had applied for the Right of Occupancy according to the law. That, if there is illegality in the procedure of granting right of Occupancy, the person to be complained against is the Commissioner for Lands as per **section 29(3)** (supra).

The learned counsel for the plaintiff had different opinions. She argued that the plaintiff's claim is that, the title was obtained by fraud and thus the whole process was *void ab initio*. She added that, having the Right of Occupancy is not a total proof that someone is the owner. Nevertheless, Ms. Patricia explained that these are matters of facts to be proved thus the same do not deserve to be preliminary objections.

What is gathered from the amended plaint under paragraph 15, 16 and 17 is that there is allegation that the said title was obtained fraudulently by the 1st defendant. I am of considered opinion that those paragraphs *ipso facto* establish *prima facie* case against the 1st defendant.

The fourth point of objection is in respect of failure to join necessary parties to wit; Registrar of Titles since the plaintiff is praying for

rectification of Land Register by nullifying the registration of the 1st defendant; and Commissioner for Lands on the reason that the plaintiff is praying for declaration that the 1st defendant acted fraudulently in obtaining a Certificate of Title.

On the other hand, the learned counsel for the plaintiff made reference to **Order I Rule 9 of the Civil Procedure Code** and argued that the suit cannot be defeated by reason of non-joinder or misjoinder of parties. She added that under **Order 1 Rule 10(1)(2) of the CPC**, the court may direct a necessary party to be added. She made reference to the case of **CRDB Bank PLC vs UAP** (supra).

As per the amended plaint particularly the reliefs which the plaintiff prayed under paragraph (d) where the plaintiff prayed for rectification of Land Register, I do agree with Mr. Chuwa for the 1st defendant that the Registrar of Titles as well as Commissioner for Lands should be joined as necessary parties to the suit.

I concur with the learned counsel for the plaintiff in respect of the provisions of the laws. Much as I agree with her, I do differ with applicability of the cited laws to the circumstances of this case. The case of **CRDB Bank** (supra) which was cited by the learned counsel explicitly elaborates that:

*"We are also aware that the terms of Order I Rule 9 of the CPC a suit cannot be defeated for the reason of non joinder of a party or parties **but every case must be decided according to the circumstances prevailing in that particular case.**"*

The bolded words are my emphasis. That, every case must be decided based on its circumstances. As per the circumstances of this case and based on the nature of the parties who ought to be joined, I am afraid to invoke the Oxygen principle or to invoke the cited provisions as prayed by Ms. Patricia for one reason. In order to join the Registrar of Titles or Commissioner for Lands, there is a mandatory legal requirement of issuing a 90 days' notice prior to joining them, which this court cannot dispense with.

I therefore find the fourth point of preliminary objection raised by the 1st defendant has merit and I sustain it accordingly with costs. Consequently, I strike out this matter.

It is so ordered.

Dated and delivered at Moshi this 29th day of March, 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

29/03/2023