

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 130 OF 2022**

**GODLOVE RAPHAEL DEMBE.....PLAINTIFF**

**VERSUS**

**PHILIPO PAUL NDUNGURU.....1<sup>ST</sup> DEFENDANT**

**VIRGINIA FREDRICK RWEZAULA.....2<sup>ND</sup> DEFENDANT**

**JUSTINE HAMISI FOROKO (Necessary party).....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last Order: 34/03/2023*

*Date of Ruling: 05/04/2023*

**E.E. KAKOLAKI, J.**

Before this Court the plaintiff filed a suit against the above-named defendants claiming inter alia for declarations that, the 1<sup>st</sup> defendant is in breach of the terms of the MoU legally entered and executed between him and the plaintiff in respect of the purchase of Plot No. 161, Block 'C' Mbezi Beach area (hereinafter the **suit property**), that, the transaction leading to transfer of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was tainted with fraud and concealment on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants hence unlawful and nullity, that, the 2<sup>nd</sup> defendant is a trespasser to the suit property, issue of perpetual injunction against the defendants, their agents

or employees from entering the suit property and payment of general damages to be assessed by the Court and costs of the case. Further to that, he is praying for declaration against all defendants that, plaintiff is the lawful owner of the suit property after having legally purchased it from the 3<sup>rd</sup> defendant, a declaration that, the 2<sup>nd</sup> defendant is a trespasser to the suit property and perpetual injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents, employees, assignees or any person connected to them, from entering the suit property. In their Written Statement of Defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants resisted the plaintiff's claim stating that, he has no valid claim or cause of action against them hence averments in the plaint are frivolous, vexatious and baseless. And that, neither the plaintiff nor the 3<sup>rd</sup> defendant have ever owned Plot No. 161 Block 'C' Mbezi Beach with certificate of occupancy No. 58226 as alleged since the 2<sup>nd</sup> defendant is the lawful owner of the suit property being a bonafide purchaser for value, without notice of any third party encumbrance on the same and duly registered as new owner. Further to that, they raised a Notice of preliminary objection on three grounds. As to the 3<sup>rd</sup> defendant, he entered general denial to the plaintiff averments while taking note of some claims.

Parties were heard on the raised preliminary objections as it has always been the practice of this Court to dispose of first the preliminary objections and the ruling reserved to that effect. As the Court was in preparation of the said ruling noted and suo mottu raised an issue as to whether this Court sitting as normal civil court is seized with jurisdiction to entertain the present matter. It is on that basis on the 28<sup>th</sup> March 2023, parties were invited to address the Court on the propriety of the suit before this Court as the same is registered in the ordinary civil case register, as Civil Case No. 130 of 2022 and not in land register. Hearing of the raised issue was done viva voce, in which the plaintiff had representation of Mr. Geroqe Mwiga, while the 1<sup>st</sup> and 2<sup>nd</sup> defendants enjoyed legal services of Mr. Malik Hamza, both learned advocates as the 3<sup>rd</sup> defendant seemed not to be interested on the matter. Briefly the plaintiff in this matter is claiming that the 1<sup>st</sup> defendant who is the administrator of the estate of the late Ester Jacob Masatu, whose estate constituted the suit property in Plot No. 161, Block C Mbezi Beach and later on became the owner of the said property, entered into sale agreement with the 3<sup>rd</sup> defendant whom before transfer of the suit property title in his name, the said 3<sup>rd</sup> defendant sold the said land to the plaintiff. As to how transfer could be effected to the plaintiff, it was one of terms between the plaintiff

and 3<sup>rd</sup> defendant that, all obligations would be performed by the 1<sup>st</sup> defendant who allegedly fraudulently and in concealment of the existing obligations in favour of the plaintiff, sold the said plot of land to the 2<sup>nd</sup> defendant who proceeded to transfer it to his name. It is from that transaction the plaintiff is before this Court seeking for the declaration and orders above mentioned, the claims and reliefs which the 1<sup>st</sup> and 2<sup>nd</sup> defendants are strenuously resisting.

Submitting in response to the issue raised suo motu by the Court Mr. Mwiga was of the argument that, there is no law that defines civil case in exclusion of land matters as the High Court Registry Rules GN No. 96 of 2005 as amended by GN. No. 638 of 2021 under rule 5(e) of the Rules, does not give exclusive jurisdiction on land matters to the High Court Land Division. To him this Court has unlimited jurisdiction to entertain the matter at hand as the cause of action as pleaded in paragraph 5 of the plaint is premised on breach of MoU by the 1<sup>st</sup> defendant, fraud and concealment on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, trespass on the part of the 2<sup>nd</sup> defendant, perpetual injunction against defendants and payment of general damages, claims which are entertained by the ordinary civil court. He contended that save for the relief in paragraph (b) of the relief clause which reflect the issue

of ownership of the suit property the rest of the claims do not so reflect. He maintained that, the said relief (b) is in the relief clause does not form the basis of cause of action, but should the Court finds that it does then he prayed for the same to be ignored and the court proceed to determine the suit on merit or order for the word 'Civil' be replaced with 'Land' so that the suit reads '**Land case**' after invoking the principles of overriding objectives as provided under section 3A, 3B and section 96 of the CPC. On that submission he invited the Court to be inspired by its decision in the case of **Alliance One Tobacco Tanzania Limited and Another Vs. Mwajuma Hamis**, Misc. Civil Application No. 803 of 2018 (HC), where the Court invoked the principle of overriding objective and proceeded to cancel and insert the correct citation of the wrongly cited law by the applicant. He added taking that cause will not prejudice any party to the suit but rather promote the spirit of just, expeditious, proportionate and affordable resolution of civil disputes, as striking out the suit will serve no interest of justice instead delay the case.

On his side Mr. Hamza resisted the submission by Mr. Mwigwa submitting that, parties are bound by their pleadings. He contended glancing at the plaint from paragraph 1 to 26 and the reliefs sought one will quickly note that,

plaintiff's claims are premised on ownership of suit premises. He referred to the paragraph 5 of the plaint in which the claims are for declaration that, the 2<sup>nd</sup> defendant is a trespasser to the suit land and perpetual injunction against the defendants. He further referred to the reliefs sought more particularly paragraph (b) to (g) and submitted that, the plaintiff simply seeks to be declared as lawful owner of the suit land and for the 2<sup>nd</sup> defendant to be declared a trespasser in the suit property as well as perpetual injunction against all defendants. It was Mr. Hamza's submission that, the whole claims revolve around land matter in which under section 167(1) of Land Act read together with S. 3(1) of the Land Disputes Courts Act, special forums for land disputes settlement are established. In this matter he argued, since the suit at hand involves land dispute and was instituted in the normal civil registry and not land registry which could have been lodged in the High Court Land Division then the same is improperly before this Court and deserve to be struck out with costs.

Regarding the plaintiff's prayer for application of the principles of overriding objectives it was Mr. Hamza's response that, this Court cannot blindly invoke the same even on matters which go to the root of the case like the present one. He relied on the case of **Mondorosi Village Council and 2 Others**

**Vs. Tanzania Breweries Limited and 2 Others**, Civil Appeal No. 66 of 2017 (CAT-unreported) as cited in the case of **Fatuma Mohamed Chamwewe (As Administratrix of the estate of the late Mohamed Chamwewe) Vs. Salum Mkoga and Another**, Misc. Land Application No. 548 of 2021 (HC). He distinguished the case of **Alliance One Tobacco** (supra) to the present matter in that in the former, the issue was wrong citation of the law while in this matter the issue is cause of action touching court's jurisdiction in which the principle of overriding objectives cannot be invoked. On the prayer for insertion of the word **Land** instead of **Civil** in the title of the plaint Mr. Hamza responded that, the prayer is untenable as the same does not cure the mischief that the case has been filed in the wrong registry hence incompetent before this Court. On the strength of the above submission he prayed the Court to strike out this suit with costs for being incompetent.

In a brief rejoinder Mr. Mwiga negated the submission that, the whole suit represents land matters claims arguing that, the same is premised on fraud transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendants save for the relief in paragraph (b) as other reliefs such as injunction can be sought in normal suit. As to the mechanisms for dispute resolution on land matters he said,

the Land Act and Land Disputes Courts Act simply refer to the forum as High Court and not High Court Land Division hence this Court as High Court retains a jurisdiction to entertain this Matter. As to the assertion that this suit is filed in the wrong registry he responded the submission is misplaced hence should be disregarded by upholding the principle of overriding objectives as it was in the case of **Alliance One Tobacco** (supra). And lastly on the resistance to amend the title he said this Court has requisite jurisdiction to so do and invited it to so act and reiterated his prayers for this Court to find the suit before it is competent and proceed to its determine the same on merit.

I have dispassionately considered the rivalry submissions by the parties and taken time to revisit the pleadings herein as it is the settled principle of law as demonstrated by Mr. Hamza that, parties are bound by them. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 and **Astepro Investment Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (CAT-unreported). From the above submissions the main issue for determination before me is whether this Court sitting as normal civil court is seized with jurisdiction to entertain the present matter.



It is Mr. Hamza's submission that, this is a land matter. And that, since it is filed in ordinary civil case register and not as Land register then, the same is incompetent as the Court sitting as normal civil Court which does not have jurisdiction over land matters as per section 167(1) of Land Act read together with section 3(1) of the Land Disputes Courts Act, providing exclusive jurisdiction of land matters to land courts, while on the other side Mr. Mwiga is of the contrary view that, the suit does not contain land disputes with exclusion of paragraph (b) of the prayers clause, since the same is premised on claims of existence of fraudulent transaction between 1<sup>st</sup> and 2<sup>nd</sup> defendants and breach of MoU between 1<sup>st</sup> defendant and plaintiff. To him the Court is seized with jurisdiction as the relief in paragraph (b) of the reliefs sought, does not constitute cause of action hence should be ignored, since the High Court Registry Rules GN No. 96 of 2005 as amended by GN. No. 638 of 2021 under rule 5(e) do not confer exclusive jurisdiction to the High Court Land Division to entertain land matters.

It is true and I agree with Mr. Mwiga that, the above cited rule does not confer exclusive jurisdiction to the High Court Land Division apart from merely establishing the same. However, as rightly submitted by Mr. Hamza the submission which I embrace the provisions of section 167(1) and (2) of

the Land Act, [Cap. 113 R.E 2019] and section 3(1) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] (the LDCA), provide for exclusive jurisdiction of land courts to hear and determine all land related matters. For avoidance of doubts I quote the said provisions. Section 167(1) and (2) of the Land Act reads:

*167-(1) The following **courts are hereby vested with exclusive jurisdiction**, subject to the provisions of this Part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say-*

- (a) the Court of Appeal;*
- (b) the High Court;*
- (c) The District Land and Housing Tribunal;*
- (d) Ward Tribunals;*
- (e) Village Land Council. (Emphasis supplied)*

And section 3(1) of the LDCA provides:

*3.-(1) Subject to section 167 of the Land Act and section 62 of the Village Land Act, **every dispute or complaint concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area.***

*(2) The Courts of jurisdiction under subsection (1) include-*

- (a) the Village Land Council;*
- (b) the Ward Tribunal;*
- (c) the District Land and Housing Tribunal;*
- (d) the High Court; or*

*(e) the Court of Appeal of Tanzania. (Emphasis supplied)*

From the above provisions it is apparent to me that land courts are the ones vested with exclusive jurisdiction to entertain land disputes. The Court of Appeal when interpreting the above cited provisions of the law in the case of **Bagamoyo District Council Vs. A/S NOREMCO Construction and Another**, Civil Appeal No. 106 of 2008 (CAT-unreported) nailed the last nail on the bald head when said and I quote:

*"The wording of the above cited laws is very clear that the task of interpretation can hardly be said to arise. **The totality of the above is that special courts have been established specifically to deal with disputes or complaints concerning land matters only.** And it is those courts and not others which have exclusive jurisdiction on matters pertaining to land hence a latin maxim – **Expressio unius, exclusio alterius est** i.e. Expression of one thing excludes the other. Hence, **ordinary courts have no jurisdiction on matters which have nothing to do with land.**" (Emphasis supplied)*

With the above explanation it is clear to this Court that, ordinary courts have no jurisdiction to hear and determine land matters. I am alive to the fact that this Court though not High Court Land Division is vested with powers to hear and determine land matters but only when the same are instituted as

Land case in the land register but not as normal civil case in civil case register. Now next the question is what tests are applicable in determination whether the claim is a land dispute/matter or not. This Court speaking through Mziray, J (as he then was) in the case **Exim Bank (T) Limited Vs. Agro Impex (T) and Other**, Land Case Appeal No. 29 of 2008 (HC) remarked thus:

*"Two matters have to be looked upon before deciding whether the court is clothes with jurisdiction. **One**, you look at the pleaded facts that may constitute a cause of action. **Two**, you look at reliefs claimed and see as to whether the Court has power to grant them and whether they correlate with the cause of action."*

In this matter looking at the facts pleaded in the plaint as cause of action which is derived from paragraph 5 of the plaint, among other claims the plaintiff is claiming for a declaration that, the 2<sup>nd</sup> defendant is a trespasser to the suit property, the claim which is also reflected in the relief clause as paragraph (f). In their WSD the 1<sup>st</sup> and 2<sup>nd</sup> defendants disputes the claims by the plaintiff deposing in paragraph 4 (a) and (d) that, the plaintiff and 3<sup>rd</sup> defendants have never owned the suit property as the registered owner is the 2<sup>nd</sup> defendant who emerged as a bonafide purchaser for value without notice of any third party encumbrances on the same. In my humble view the

claim and relief by the plaintiff seeking to declare the 2<sup>nd</sup> defendant as trespasser in the disputed land though claimed to be founded on tort, cannot be entertained and determined without touching and resolving the issue of ownership of the suit property which is in exclusive jurisdiction of land Court as the 2<sup>nd</sup> defendant is also claiming ownership over the same land. As if that is not enough, the plaintiff as rightly submitted by Mr. Hamza and admitted by Mr. Mwega in paragraph (b) of the reliefs sought is seeking to be declared as a lawful owner of Plot No. 161, Block 'C' Mbezi Beach area, which prayer is purely a land matter. Having looked at the facts and reliefs sought by the plaintiff, I am convinced and therefore agree with Mr. Hamza that, this suit is purely a land matter.

It is not disputed by both parties that, the plaint in this suit was registered as a normal civil case No. 13 of 2022 in a Civil Case register of the High Court of Tanzania Dar es salaam Sub-District Registry and not in land register which is also maintained within the same registry. It is also uncontroverted fact that, for the case to be treated as land case so as to convert this Court into Land Court the same must possess a Land Case number obtained from the land cases register. By filing this suit as a normal civil suit while is the land matter the plaintiff opted to deprive the Court of its jurisdiction to

entertain the same when sitting as the Land Court. It is from those premises I hold the plaint before this Court is incompetent. Hence the issue raised by the Court suo motu is answered in affirmative that, this Court lacks jurisdiction to entertain the suit before it.

The remaining unanswered question is what cause should be taken under the circumstances. Mr. Mwigira is of the view that, this court be pleased to invoke the principle of overriding objectives and proceed to order alteration of the title by cancelling the word **Civil** and replace it by inserting the word **Land** so that the suit reads as **Land Case**, while Mr. Hamza is of the opposite view in that, the principle is inapplicable under the circumstances as the error sought to be cured goes to the root of the matter. It is true and I agree with Mr. Hamza that, the defect in the plaint by the plaintiff for filing the suit as a normal case is fatal and incurable defect as it affects the jurisdiction of this Court to entertain the matter. It cannot simply and easily amended as Mr. Mwigira would want to impress this Court. I therefore find the case of **Alliance One Tobacco** (supra) is inapplicable under the circumstances of this Court instead I rely on the case of **Mondorosi Village Council and 2 Others** (supra), to hold that overriding objective cannot be blindly applied in this matter.

For all intents and purposes, the plaint being incompetent before the Court the only remedy is to strike it out, the order which I hereby enter.

Regarding the prayer for cost by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, I refuse to grant the same as the issue disposing of the suit has been raised by the court suo mottu.

It is so ordered.

DATED at Dar es salaam this 05<sup>th</sup> April, 2023.



E. E. KAKOLAKI

**JUDGE**

05/04/2023.

The Ruling has been delivered at Dar es Salaam today 04<sup>th</sup> day of April, 2023 in the presence of Mr. George Mwiga, advocate for the plaintiff, and Ms. Asha Livanga, Court clerk and in the absence of the defendants.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

05/04/2023.

