

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
LAND CASE NO. 14 OF 2023

SIBITARI MAGORI MKERETI..... PLAINTIFF

VERSUS

SALOME SEMWENDA..... 1ST DEFENDANT
MUSOMA MUNICIPAL COUNCIL..... 2ND DEFENDANT
THE COMMISSIONER FOR LANDS 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT

RULING

11th & 14th September, 2023

M. L. KOMBA, J.:

SIBITARI MAGORI MKERETI applied for and was granted a plot of land for residential purpose, it was via MMC/LD/15024/2 issued on 29/12/2006. Official identification of the plot is Plot No. 711 Bweri Area. When Sibitari visited his plot, he found the 1st defendant there claiming that she has been allocated the said plot by 2nd defendant and 3rd defendant issued the certificate of Occupancy to that effect.

Following that fracas, Mr. Sibitari sued the 2nd and 4th defendant in this court (Land Case No. 13 of 2022 Musoma District Registry). During court

annexed mediation, Sibitari was assured that his plot is safe under his hand and as the 2nd defendant issued CT No. 4385 MRLR dated 02/11/2022. His effort to occupy and develop his plot no 711 Bweri is impossible as the same has been occupied by 1st defendant who maintained that the land is hers and refuse to give vacant possession and the 2nd and 3rd defendant are of no help hence the present suit. As plaintiff, Mr. Sibitari is praying for vacant possession and declaration that he is the lawful owner of plot No. 711 Bweri area.

Both defendants file WSD as required under Order VIII of the Civil Procedure Code, [Cap 33 R.E] (the CPC). Together with WSD, 1st defendant filed Preliminary Objection on point of law that;

- (a) The plaintiff has sued an ineligible person because the claims of the plaintiff are related to the plot No. 711 Block Bweri which does not belong to the 1st defendant and also the first defendant has never owned plot no. 711 Block Bweri as stated by the Plaintiff.*
- (b) That, the claim by the plaintiff has already been decided by the District Land and Housing Tribunal of the Mara Region in Musoma in Appeal 129 of 2012 which it is between the 1st defendant and the plaintiff so it should not be repeated, it will be a res judicata.*

(c) That the plaintiff does not have the right to sue because he does not have locus stand to manage in court (sic) after the judgment of the Land Tribunal of the Mara Region, explaining that the plaintiff Sibirari Magori does not have any plot between plot No. 713 and plot No. 711 Block Bweri.

As custom, before full trial I have to determine this PO as was in **Deonesia Onesmo Muyoga & 4 Others vs. Emmanuel Jumanne Luhahula**, Civil Appeal No. 219 of 2020 CAT at Tabora. When the matter was scheduled for hearing, plaintiff had legal service of Mr. Baraka Makowe, an Advocate, 1st defendant defended for herself while the 2nd, 3rd and 4th defendants were represented by Ms. Neema Mwaipyana and Mr. Anesius Kamugisha both being State Attorneys.

1st defendant (Salome) was the first to argue her PO and she was brief that plaintiff has no cause of action against her as she (Salome) has never own plot no. 711 Block Bweri as claimed by plaintiff. On the second limb of objection, she submitted that the claim is res judicata as there was a land suit and an appeal was decided in the District Land and Housing Tribunal for Mara at Musoma (the DLHT) in Appeal No. 129 of 2012 between the 1st defendant and the plaintiff and the matter was determined to finality. She said there is no need of repeating the same.

On the 3rd limb it was her submission that the plaintiff has no locus to sue over the disputed plot as he has never owned Plot no. 711 neither Plot no. 713 Block Bweri as decided in Appeal No. 129/2012. She prayed his PO to be found with merit and the suit be dismissed with costs.

Protesting the PO Mr. Makowe submitted that generally the PO has no legal point. Starting with the 1st limb of objection that plaintiff has never owned plot no. 711 Bweri, he invited this court to read the plaint at para 8 page 2 where plaintiff pleaded, he found the 1st defendant on his plot. He submitted that he finds this point need evidence. Further, he submitted that in WSD by 2nd, 3rd and 4th defendants pleaded that the 1st defendant has never been allocated the plot no. 711 and she has unlawful constructed house in that plot. It was his position that that allegation need evidence and therefore find the 1st limb collapse.

On the second limb, it was his submission that the plaint has information on what happened in 2022, that 2nd defendant offered a plot no. 711 to the plaintiff on 02/11/2022 that means, the suit which was determined in 2012 should not involve this plot rather this court should find that the cause of action arose in 2022 after the plaintiff was given Certificate of Occupancy under Title No. 4385 MRLR plot no. 711 Bweri in which the 1st defendant

has constructed house there. That means what happened in 2012 has no direct connection to current situation and therefore the matter is not *res judicata*.

He further submitted that the 1st defendant has annexed her Land offer and it shows that she is the owner of plot no. 713 and the complain of plaintiff is about plot no. 711, according to him there is a need of evidence to prove where the 1st defendant has constructed house that's why the 2nd and 3rd defendants pleaded that 1st defendant has constructed house in a plot which is not owned by her.

Submitting for the 3rd limb of objection, he prays this court to find the plaintiff has locus to stand in a suit contrary to what has been submitted by 1st defendant as after 2/11/2022 the plaintiff is legal owner of the land. He said under that premises S. 9 of the CPC should not be applicable in this case because former suit found the plaintiff own nothing but today, he is the owner of plot no. 711 Bweri. He prays this court to overrule the objection and dismiss it with costs.

This court is called upon to determine if the PO has merit.

Starting with 1st limb that the plaintiff has sued an ineligible person because the 1st defendant has never owned plot no. 711 Bweri. It was pleaded by the plaintiff that when he visited his plot no.711 he found it was occupied by the 1st defendant. I find this allegation need proof by evidence so that this court should know the plot in which Salome has constructed the house.

On the second limb of objection that the suit is *res judicata*, I join hands with Mr. Makowe that plaintiff's cause of action arose in 2022 when he was given Certificate of Occupancy. From that moment he visited the plot and find somebody has constructed the house. I find this is new cause of action and therefore the matter is not fit to fall under section 9 of the CPC. Plaintiff is located with plot no. 711 Block Bweri and I find he has *locus* to claim his property as he found there is a house in the said plot and it seems it was not constructed by him (plaintiff).

It is trite that Preliminary Objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion and its aim is to save time of the court and of the parties by not going into the merit of an application

because there is a point of law that will dispose of the matter summarily. See **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696, **Selcom Gaming Limited vs. Gaming Management (T) Limited & Gaming Board of Tanzania**, Civil Application No. 175 of 2005, (unreported) and **Shahida Abdul Hassanali Kasam vs. Mahed Mohamed Gulamali Kanji**, Civil Application. No. 42 of 1999 (unreported).

I find 1st and 3rd limb of PO as raised by 1st defendant need proof of matters and therefore lacks quality to be PO and the 2nd limb, I find there is different cause of action which give the plaintiff legal mandate and therefore it is not *res judicata*.

In generally, I find the PO has no merit and hereby overrule with costs.

It is accordingly ordered.

DATED at **MUSOMA** this 14th day of September 2023.




M. L. KOMBA
JUDGE