

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

LAND CASE No. 08 OF 2022

ELIKANA KULOLA.....PLAINTIFF

VERSUS

MKOKWA LOCAL GOVERNMENT.....1ST DEFENDANT
MPANDA MUNICIPAL COUNCIL.....2ND DEFENDANT
THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

23/08/2023 & 29/09/2023

MWENEMPAZI, J.:

The plaintiff herein has sued the defendants for interference of his peaceful occupation of his land located at Mkokwa village within Mpanda District in Katavi Region. That, sometimes in March, 2023 the plaintiff discovered that the 1st defendant had taken the disputed land and surveyed the same which is approximated valued at Tshs. 5,000,000/=. That, the 1st defendant claimed to have done so under the instructions of the 2nd defendant without paying prompt compensation to the plaintiff, hence this suit for legal redress.

On the other hand, the 2nd and 3rd defendants filed a joint written statement of defence which contained three points of preliminary objections which are;

- i. That, this suit is incompetent in law for offending the requirements of Order VII Rule 3 of the Civil Procedure Code [Cap 33 R. E. 2019].
- ii. That, this suit is incompetent for suing a wrong party (1st defendant) who is non existing in law.

When the matter was scheduled for hearing, the respondents were represented by Mr. Fortunatus Mwandu Senior Learned State Attorney being assisted by Mr. Siyumwe Shabani and Mr. Erasto Balua Learned State Attorney; while, the plaintiff was represented by Mr. Lawrence John learned advocate. However, both sides agreed to present on the grounds of preliminary objections by way of written submissions, a mode which was gladly granted by this court.

Mr. Mwandu submitted first that, it is trite Law and indeed mandatorily requirement under Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019 that *"where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a tittle number under the Land Registration Act, the plaint shall specify such title number"*

The learned Counsel added that, in this case the plaint did not provide the description of the suit land sufficiently and authentically

enough to identify it as the Plaintiff gave very short description in paragraph 6 of his plaint as he stated that *"the suit land is located at Mkokwa area, Mpanda District within Katavi region"*. That, the information is insufficient to inform the court as well as the 2nd and 3rd Defendants the real location of the suit land contrary to the mandatory requirement of Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019.

Mr. Mwandu proceeded further that, the law did not make these obligatory provisions for cosmetic purposes. He clarified that the intention was to ensure that, the court determines, the controversy between two sides with a suit related to landed property and that the law further intended that, when the court passes a decree, the same becomes certain and executable. The learned Counsel then referred me to the wisdom of the court in the case of **Daniel Dagala Kanunda (as Administrator of the estate of the late Mbalu Kushaba Buluda) vs Masaka Ibeho and 4 others, Land Appeal No. 26 of 2015, High Court of Tanzania (HCT), at Tabora (Unreported)** in which the court stated at page 4-5 that: -

"The legal requirement for disclosure of the address or location was not cosmetic. It was intended for informing the Tribunal of sufficient description so as to specify the land in dispute for purposes of

identifying it from other pieces of land around it. In case of surveyed land, mentioning the plot and block numbers or other specifications would thus suffice for the purpose. This is because such particulars are capable of identifying the suit land specifically so as to effectively distinguish it from any other land adjacent to it"

In stressing further, the learned Counsel again cited another case in **Romuald Andrea © Andrea Romuald ©Romuald A. Materu Vs. Mbeya City Council and Lazaro George and 16 Others, Land Case No. 13 of 2019, High Court of Tanzania (HCT) at Mbeya (Unreported) Hon. Utamwa J**, confronted with the same issue at page 7 and 8 had this to say: -

"The description of the disputed land in the matter at hand was thus, not sufficient enough for identifying it so that this court can effectively resolve the controversy between the parties. I therefore, answer the third issue in negative that, the plaint at issue does not properly disclose the description of the suit land as required by the law"

Winding up, Mr. Mwandu submitted that as clearly shown in the argument he made above, it is his humble submissions that the plaint before this court, offends Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019, and therefore, it deserves to be struck out with costs.

Submitting for the second point of Preliminary Objection, Mr. Mwandu submitted that Section 26 (2) (b) of the Local Government (District Authorities) Cap 287 R.E 2019 recognize the village council to be body corporate, and that, it further states that: -

"Upon the issue of certificate of incorporation in relation to village, the village council of the village in question shall, with effect from the date of that certificate be a body corporate, and shall in its corporate name be capable of suing or be sued"

Mr. Mwandu proceeded further that, it is the village council which is registrable and not the village government, and therefore, the proper party ought to be Mkokwa Village Council and not Mkokwa Local Government. That, in the case at hand, the Plaintiff wrongly sued the 1st Defendant by referring to an entity which does not exist and legally not corporate body capable of suing and being sued.

He proceeded that, it being the correct position of law as clearly shown in section 26 (2)(b) of the Local Government (District Authorities) Act Cap 287 R.E 2019, that the remaining question to be asked is the consequences of suing a wrong party, the learned counsel referred this court to the case of **Lujuna Shubi Balozi vs Registered Trustees of Chama cha Mapinduzi (1996) TLR 203**, where the court discussed

the consequence of suing the wrong party and, that the same position was adopted in the case of **Serikali ya Kijiji cha Bugoji vs Zephania Mahindi, Land Case 91 of 2020**, High Court of Tanzania (HCT) at Musoma, Hon. F.H Mahimbali J. where the court at page 7 and 8 had this observation in respect of suing a wrong party: -

"This being the right position of the law, I find, the appellant was not the proper party to be sued at the trial tribunal as is not the corporate body with legal mandate of suing or being sued"

Mr. Mwandu referred me further to the case of **William Godfrey Urasa vs TANAPA Arusha, Miscellaneous Civil Appeal No.12 of 2000** (High Court Arusha) where the legal consequences of suing a wrong and non-existing party was addressed as the Appellant preferred an appeal against the TANAPA of ARUSHA, where it was stated at page 10 that: -

"In conclusion we are satisfied that the preliminary objection has merits which we accordingly uphold. In consequence, we strike out this appeal for being incompetent."

In conclusion, Mr. Mwandu submitted that in the same vein his side humbly prays that this ground of Preliminary objection be upheld and that this suit be struck out with costs.

In reply to the submission made by the counsel for the respondent, Mr. Laurence John firstly referred me to the case of In the case of **Mbwana M. Chuma and 2 Others vs Dar es Salaam Park Land Holding Ltd, Land Appeal No.34 /2022 HC(T) DSM(Unreported)** - at page 10 where it was held that;

"The duty of the party is to give a description sufficient to identify. In my view, as long as the appellants have stated the location in the pleadings, I find it is sufficient to locate the unsurveyed suit land, it is located at Kiziza Street, Kibada in Dar es Salaam and the description of the suit land is stated under Paragraph 6 (a) (iii) of the application, that there are graves. In my view, for unsurveyed land, this is a clear description. I have considered the fact that the appellants' will have an opportunity to tender their documentary evidence to support their allegations during the hearing of the case"

(Emphasis supplied)

Mr. Laurence proceeded that, adding to the above position, that it is also pressed, whether description suits the provisions of the law depends on the evidence presented. He cited the case of **Stewart Ernest Zindutse vs The Registered Trustees of**

Baraza Kuu La Waislam Tanzania (Bakwata) and 2 Others,
Land Case No.25/2021, High Court of Tanzania at Kigoma
(Unreported) at Page 14 which held that:

*"The issue of whether such description suits the suitland depends on **evidence to be presented**"* (Emphasis Supplied)

He proceeded that, from the above cases as cited, it is his submission that the plaintiff did describe the disputed land properly and his description is sufficient to identify the same, and that the submission in chief by the defendant did not explain how the description was supposed to be narrated at the plaint, and he referred to the cases of **Daniel Dagala Kanunda (Supra)** and **Romuald Andrea (Supra)** in which he believes they are not applicable in the circumstance of this case because the cases are not recent and that since the decisions are both of the High Court, that this court is bound to follow **Mbwana M.Chuma** and **Stewart's Case** as expounded. That, also all the claims referred by the defendants in their submissions require evidence to substantiate the same which defeats the purpose of Preliminary objection.

Mr. Laurence therefore winded up by submitting that, basing on the above submission, he prays for the 1st point of objection to be overruled.

The learned Counsel then proceeded to submit against the 2nd point of objection, that, with due respect it is his humble submission that the same is misconceived. He proceeded that, it is his submission that the 1st defendant is a proper entity which the plaintiff has a cause of action against, as depicted in paragraph 6 of the plaint. That, with due respect, the defendants' counsel cannot compel the plaintiff and choose for him the entity to sue, whom the plaintiff does not have a **cause of action** against.

In addition to that, Mr. Laurence referred to **Section 26(2)(b)** of the Local Government (District Authorities) Cap 287 R.E 2019 and submitted that it is not applicable because the plaintiff does not have cause of action against the alleged Village Council. He pressed further that, the plaintiff can not be compelled to sue a person who he does not have a cause of action against, as per the case of **Cma Cgm (Tanzania) Limited vs Insignia Limited (Misc. Commercial Application No.168 of 2016) {2017} TZHCComD 4 (6 February 2017)** at page 9 where the court held that;

"I think the respondent is right. The plaintiff is at liberty to sue a person she wishes to and against whom she feels she has a cause of action..."

The learned Counsel for the plaintiff added further that, it is the trite of the law under **Order 1 Rule 9 of the Civil Procedure Code Cap 33 R.E 2019** that a suit cannot be defeated for the reasons of mis-joinder of parties, hence the allegation of the counsel for the defendant is of no merits.

He then referred me to the case of **Enoshi N. Lukuwi vs CRDB Bank PLC, Civil Case No.126/2020**, High Court of Tanzania, Dar es Salaam (Unreported) at page 4 where it was held that;

"Furthermore, in respect to Order I Rule 9 of the Civil Procedure Code, Cap. 33 [R. E. 2019], that the court has been given a mandate to regards the rights and interests of the parties in a suit and shall not a subject to be defeated by reason of the non- joinder of parties. Hence, the failure to join a proper or necessary party in the suit is cured by Order I Rule 9 of the Civil Procedure Code. I agree with Plaintiffs counsel that the best this honourable Court can do is to order that the defendant's driver be included as a co Defendant in this case."

Mr. Laurence then distinguished the case of **Lujuna Sliubi Balonzi** (Supra) which deals with the issue of “**locus standi**” of which it is not the case in this matter at hand. The learned counsel then distinguished further that the cases of **William Godfrey Urassa** (Supra) and the case of **Serikali ya Kijiji cha Bugoji** (Supra) are not applicable in this case at hand because the conditions at hand and what was stated in the above cited cases are not similar, further to that it is the trite law that each case has to be decided in its own merits.

As he penned off, Mr. Laurence submitted that, basing on the above submission it is his humble observation that this court be pleased to overrule the points of objection with costs.

In rejoinder, Mr. Mwandu submitted that the plaintiff's counsel failed to identify disputed piece of land. That, on the sixth paragraph of his plaint, it provides that the Suitland is located at Mkokwa Area, Mpanda District within Katavi Region. Unfortunately, the information was not enough as it did not describe within Mkokwa area where the disputed piece of land located.

Mr. Mwandu proceeded that, the target and purposes of mandatory requirements of order VII Rule 3 of The Civil Procedure Code [Cap 33 R.E 2019] is that plaint must provide the description of the

Suitland sufficiently enough to identify it intentionally in order that when the court passes a decree, the same becomes certain and executable.

Re-joining for the second ground of their preliminary objection, Mr Mwandu submitted that, the local government is established under the **Local Government (District Authorities) Act [Cap 287 R.E 2019]**. That, section 26(2)(b) of the above cited law vests the village council with the status of body corporate to mean that it can sue or be sued on its name.

He added that, the learned Counsel for the plaintiff tried to mislead this Honourable Court to perceive that Mkokwa Local Government is an existing party instead of Mkokwa Village Council which is established under the law and has a status of body of corporate. That, if Mkokwa Local Government is not recognized under the Local Government (District Authorities) Act [Cap 287 R.E 2019] but Mkokwa Village Council is the one recognized, that means the 1st defendant is non-existing party and therefore it is the wrong party before this suit.

Mr. Mwandu rejoined further that, in his reply submission the plaintiff contented that they were not compelled to choose whom to sue. But he insisted that, the issue is the proper party in the eyes of the law., meaning, the one who is supposed to sue or be sued. That, if party in

the case have more than ten proper parties, he is on the liberty to choose who to sue, but not to choose to sue a wrong party.

The learned Counsel then referred the case of **Cma Cgm (Tanzania) Limited Vs Insignia Limited (supra)** as cited by the counsel for the plaintiff at page 9, that it is irrelevant and not related with this case at hand, simply because the 1st defendant does not exist under the eyes of law.

He proceeded further that, his side believe that, the counsel for the plaintiff tried to miss direct this honourable court as the issue here is not mis-joinder of party as contended in the submission in chief by the plaintiff through Order 1 Rule 9 Of the Civil Procedure Code [Cap 33 R.E 2019] but, it is non-existing of the party to the suit.

Conclusively, Mr. Mwandu submitted on the consequences of the case, he humbly prayed that these grounds of Preliminary Objection be upheld and that this suit be struck out with costs.

At this juncture, I find it prudent to appreciate the efforts put by both camps in attempts of assisting this court in dealing with this matter smoothly specifically the preliminary objections raised. I read between the lines the submissions made by both sides, and it is considered reasoning that the only issue to be delt with is ***whether these preliminary objections are meritorious.***

In my perspective, the second limb of the raised preliminary objections that, *this suit is incompetent for suing a wrong party (1st Defendant) who is non-existing in law*, duly suffices to come out with a reasonable decision.

As rightly submitted by Mr. Mwandu that under the Local Government (District Authorities) Cap 287 R. E. 2019, Section 26 (2) (b), only recognizes a village council as a corporate body capable of suing and being sued. That, it is the village council that is registrable and not a village government. I do concur with the counsel's submission that, the plaintiff indeed sued a wrong party as the Mkokwa Local Government is not a corporate body capable of suing or being sued.

However, the remedy for misjoinder is not to strike out the suit but to order an amendment. Looking at Rules 9 and 10 (2) of Order I of the CPC, The rules stipulate that: -

9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

10. (I) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may

at any stage of the suit, if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

It is in Rule 9 of Order I of the CPC that states in no uncertain terms that no suit shall be defeated by reason of the misjoinder or non-joinder of parties.

As the matter of fact, I have no reason to depart from that position. Considering the decision of the Court of Appeal in **Abdulatif Mohamed Hamis vs Mehboob Yusuf Osman & Fatna Mohamed**, Civ. Revision No. 6/2017 where the Court was of the view that if a necessary party is not joined the court may strike out the suit for non-joinder. The Court further held that position to be an exception to the general rule under rule 9 of Order I of the CPC. It observed as follows: -

*"Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non joinder of non necessary parties. **On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a***

court, so to say, to pass a decree which would be of no practical utility to the plaintiff."

[Emphasis is Mine]

Commenting on this aspect, Mulla, Code of Civil Procedure, 13th Edition Volume I pg. 620 writes;

"As regards non-joinder of parties, a distinction has been drawn between non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because O. 1 Rule 9 is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed."

I find the position of the Court of Appeal in **Abdulatif Mohamed Hamis vs Mehboob Yusuf Osman & Fatna Mohamed and Stanslaus Kalokola vs Tanzania Building Agency and Mwanza City Council** (supra) not applicable in the present case as there is no non-joinder of the parties in the present case but misjoinder of parties. There is no dispute that the plaintiff wrongly joined the Mkokwa Local Government as 1st defendant to this suit. However, the remedy for misjoinder is not to strike out the suit but to order the removal of the mis joined party by an amendment. In that, I partly allow the second

limb of the preliminary objection raised by holding that the plaintiff wrongly joined Mkokwa Local Government as a party to this case.

Nevertheless, in his submission, the counsel for the plaintiff had not conceded that he had mis-joined a party in Mkokwa Local Government, but rather insisted that, his client has the cause of action against Mkokwa Local Government and not Mkokwa village Council.

Upon perusing the plaint as filed by the plaintiff at the second paragraph, the learned counsel himself failed to recognise the address that the 1st Defendant would be reached at for the purpose of this suit. I do believe this is because the 1st Defendant is not a legal entity. To clarify my point, the same plaint at paragraph 6, the plaintiff did state that the suitland is at Mkokwa Area, at Mpanda District within Katavi Region. It is evident that Mkokwa area is under Mpanda District and the proper party ought to be Mkokwa village council.

In that respect, an order for an amendment of the removal of the mis-joined party would not be of help to the plaintiff in this case as the counsel never agreed that his side has mis-joined the 1st defendant and in that it is not a bona fide mistake. My hands are therefore tied up, and I am left with one option of striking out this suit for it is not maintainable in law.

In the end, I uphold the second preliminary objection as it is meritorious before this court. Consequently, I proceed to strike out this suit for misjoinder of party. Costs to follow the event.

It is so ordered.

Dated and delivered at Sumbawanga this 29th day of September, 2023.



T. M. MWENEMPAZI

JUDGE

Ruling delivered in the presence of Mr. Erasto Balua, State Attorney and Mr. Siyumwi Shabani, State Attorney and absence of the plaintiff but presence of Mr. Laurence John Advocate for plaintiff who was online via video conference.



T. M. MWENEMPAZI

JUDGE

29/09/2023