

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA**

**LAND CASE NO. 33 OF 2022**

**MASSAY QAMUNGA .....PLAINTIFF**

**VERSUS**

**SAMWEL SURUMBU MASSAY.....1<sup>ST</sup> DEFENDANT**

**MARTINI MARMO ERRO.....2<sup>ND</sup> DEFENDANT**

**RULING**

**28/10/2022 & 27/01/2023**

**GWAE, J**

The plaintiff, Massay Qamunga instituted this land case against the 1<sup>st</sup> defendant, Samwel Surumbu Massay (her husband) and 2<sup>nd</sup> defendant, Martini Marmo Eroo praying for the following reliefs;

- i. A declaration that the plaintiff and 1<sup>st</sup> defendant are joint and lawful owners of the landed property comprising of certificate of title No. 34736 Plot No. 1210 Block "G" Karatu Urban (Suit property)
- ii. A declaratory order that the 1<sup>st</sup> defendant has no capacity to transfer the landed property to the 2<sup>nd</sup> defendant without informed consent of the plaintiff

- iii. An order that the suit property be registered in the name of the plaintiff and the 1<sup>st</sup> defendant
- iv. An order of permanent injunction be issued by the court against the 2<sup>nd</sup> defendant, his agents, workmen or whoever working under his instruction from transferring or disturbing from peaceful use and enjoyment of the suit property
- v. That, the defendants be ordered to pay general damages as may be assessed by the court
- vi. An order for payment of costs of this suit
- vii. Any further orders and relief (s) as the court may deem fit and just to grant

Upon service of the plaintiff's plaint to the defendants and a copy of the applicant's Misc. Land Application No. 109 of 2022, the defendants' counsel one Qamara Aloyce Peter duly issued a notice of a preliminary objection founded on five points of law to wit;

1. This court lacks jurisdiction to entertain the plaintiff's suit
2. That, the plaintiff's suit is hopelessly time barred
3. That, the plaintiff's suit is bad for non-joinder of Karatu District Council, Commissioner for Lands and Registrar of Titles who

issued the certificate of title to the 1<sup>st</sup> defendant as necessary parties

4. That, the plaintiff's suit is incompetently before this court for being filed in contravention of the binding order of Karatu District Land and Housing Tribunal (DLHT) issued on 13<sup>th</sup> October 2021 via Application No. 6 of 2021 and Misc. Application No. 68 of 2021
5. That, the plaintiff's suit is incompetently before this court for being filed in contravention of the binding order of Karatu District Land and Housing Tribunal (DLHT) issued on 13<sup>th</sup> December 2017 via Criminal Case No. 100 of 2017 which operates as estoppel against the plaintiff from representing herself to be Massay Qamunga

Following the defendants' notice of preliminary objection on the same five points of law herein above for both Suit and Misc. Application, hence, necessitating this ruling.

During hearing of this application, Mr. Bungaya Matle Panga and Mr. Qamara Aloyce Peter, both learned counsel duly represented the plaintiff and defendants respectively. Mr. Qamara decided to abandon 2<sup>nd</sup> point and argued the rest of the points of law separately.

Arguing for the 1<sup>st</sup> limb of the PO, Mr. Qamara stated that, the plaintiff ought to have filed a petition instead of this suit and that is by virtue of section 102 (2) and (3) of the Land Registration Act, Revised Edition, 2019 which requires the plaintiff to file his grievances within three months period. He added that there is a letter 21<sup>st</sup> July 2022 annexed by the plaintiff to her plaint exhibiting that this court lacks the jurisdiction by way of suit

Elaborating the 3<sup>rd</sup> limb of his objection on non-joinder, Mr Qamara argued that, the Karatu District Council and Registrar of Titles were necessary parties since they are the ones who effected the alleged transfer. He referred this court to Para. 6,7, 8 and 12 of the plaint and urged this court to adhere to the case of **TRC vs. GBP** (T), Civil Appeal No. 1218 of 2020 (unreported). He then sought an order striking out the suit since there are maintainable points of law.

Mr. Qamara also argued the 4<sup>th</sup> limb by stating that, there was an order of the DLHT in Application No. 6 of 2021 which certainly directed the way forward of the dispute that is, presentation of complaints by way of a petition to the court.

Regarding 5<sup>th</sup> limb of the defendants' objection, the learned counsel submitted that, according to Paragraph 15 of the plaint, the plaintiff's

assertion is based on fraud and illegality, it is his opinion that, the plaintiff lodged her criminal, case through Criminal Case No. 100 of 2017 in the District Court but failed to prove the same. She is thus, estopped from instituting this case and this is by virtue of section 123 of the Tanzania Evidence Act, Cap 6 Revised Edition, 2019. He further bolstered his argument with a judicial jurisprudence in Civil Appeal No. 166 of 2018; **Parvis Gulamali vs. NHC** (unreported) at gage 13 and 14 of the judgment. The defendants' counsel finally argued that, the plaintiff is estopped from telling two different versions as per affidavit and plaint especially her prayers.

Resisting the defendants' preliminary objection, Mr. Panga strongly argued that the 1<sup>st</sup> limb of objection raised by the defendants' counsel is not meritorious by stating that, the plaint to be read as whole in order to get the genesis of the dispute. He went on submitting that, the plaintiff and 1<sup>st</sup> defendant are wife and husband respectively and this case is new cause of action. He further vigorously argued that, there is no any order or decision or act made by the Assistant Registrar of Titles, which is appealable.

However, the counsel for the plaintiff admitted that the DLHT plainly directed that, the matter between the parties' be brought to the High

Court by way of an appeal but he added that since the caveat was lodged with the Registrar of Titles, there was no transfer that was done. He called upon this court to refer to Order 1 Rule 1 of CPC).

On the 3<sup>rd</sup> point of objection on the alleged non-joinder of necessary parties, the learned counsel for the plaintiff submitted that, the Registrar of Titles is a Public Officer who is bound to comply with the court's orders. Therefore, he argued that they did not see any reason to join Karatu District Council and Registrar of Titles as they are also victims of the 1<sup>st</sup> defendant's fraud. He further went to state that the plaintiff cannot be compelled to implead a certain person on the basis that a suit be properly defended.

Responding to the arguments by the counsel for the defendants in respect of the 4<sup>th</sup> point of law raised and argued by the defence, Mr. Panga stated that the same is more factual than preliminary objection. He thus prayed this point be overruled based on the famous case of **Mukisa Biskuit Manufacturing Co. Ltd vs. West End Distributors** (1969) EA 696 .

More so, Mr. Panga stated that the cause of action in this present case is different from the former and that cause of action before DLHT did not join the 2<sup>nd</sup> defendant. He additionally stated that, there is no

court's judgment restraining the plaintiff from using her name, Massay Qamunga as Application No. 2 of 2012 before DLHT-Karatu did not prohibit the plaintiff from using the name of Massay Qamunga. The counsel for the plaintiff finally prayed for an order of the court overruling points of law canvassed by the defendants.

In his response to the 5<sup>th</sup> Point of law raised by the defendant, Mr. Panga muscularly submitted that there is no court's judgment with effect of restraining the plaintiff from using her name known as "Massay Qamunga" as Application No. 2 of 2012 before DLHT-Karatu did not prohibit the plaintiff from using the name of Massay Qamunga).

In his rejoinder to the plaintiff's reply oral submission, Mr. Qamara as far as the 1<sup>st</sup> limb and 3<sup>rd</sup> point of the objection stated there is issue of Right of Occupancy in the name of the 1<sup>st</sup> defendant. Hence, Registrar of Titles is involved.

Mr. Qamara further rejoined that, the plaintiff had instituted this suit immediately after issuance of the notice by the RTs directing her that, if she would not take any step he would transfer the suit property that is why this court issued injunctive orders against the Registrar via Misc. Application No. 109 of 2022. He maintained that, there is an act or order or directive by the Registrar appealable to the court by way of a petition.

He maintained that, there is the act of the Registrar challengeable to the court by way of Petition instead of by way of a plaint.

He also reiterated that, the plaintiff is estopped from denying her affidavit addressed to DLHT. Finally, Mr. Qamara stated that in the 5<sup>th</sup> point of the PO they did not mean that, the plaintiff's name but the offence of fraud.

This is what briefly transpired during oral hearing of the defendants' preliminary hearing. It is now the noble duty of the court to determine the points of objection as raised and argued by the parties' advocates.

In the 1<sup>st</sup> limb of the preliminary objection on whether this court lacks jurisdiction to entertain the suit at hand. I have carefully traversed the plaintiff's plaint plus annexures thereto as well as the defendants' joint written statement of defence together with documents appended therein. It plainly clear that, the plaintiff happened to institute the case against the 1<sup>st</sup> defendant and 8 others (tenants of the suit property) praying being recognized as lawful owner of the suit property via Application No. 2 of 2012 duly filed in the DLHT. It is clearly observed that the 1<sup>st</sup> defendant was charged with an offence of forgery in the District Court of Karatu however he was acquitted under section 230 of the CPA.



Similarly, it is undisputable fact that, the plaintiff in the year 2021 lodged an Application in the DLHT through Application No. 6 of 2021 but the same was struck out. The DLHT upheld the preliminary objection on jurisdictional issue. The DLHT's chairperson was of the view that the plaintiff who was aggrieved by change of name of the owner of the suit premise by the Registrar of Title would file an appeal to the High Court by way of petition. For the purpose of clarity the holding of the DLHT issued on 13<sup>th</sup> October 2021 is reproduced herein under;

*"Aidha kwa malalalmiko yoyote yahasuyo kubadilishwa kwa jina katika HATI sheria imeweka utaratibu. Rejea kifungu 102 Land Registration Act, Cap 334 R.E, 2019.....Kwa kuzingatia hoja hapo juu na kifungu cha sharia tajwa hakuna ubishi kwamba Mdai alipaswa kukata rufaa Mahakama Kuu kupinga ubadilishwaji jina katika HATI.....Baraza linakubaliana na pingamizi ya mdaiwa na baraza linatoa ...Baraza linaifuta kesi hii kwa gharama."*

That being the case, the plaintiff, in my considered view, ought to have filed an appeal if she was not pleased by the decision of the DLHT instead of re-filing the same resulting the defendants to raise the same points of law. The act of the plaintiff, in my opinion, amounts to abuse of court process.

Notwithstanding the above court's finding, I have also considered the plaintiff's assertion through the submission by her learned counsel that, this case is a new cause of action different from the former. Yes, it is different in form especially in its inclusion of the 2<sup>nd</sup> defendant on the reason that, he (2<sup>nd</sup> defendant) was offered a sale of the suit property by the 1<sup>st</sup> defendant. However, if one carefully looks at the para. 5, 6, 7, 8, 9, 10, 14 and 15 of the plaint, he will not hesitate to hold that, the plaintiff is challenging change or erasing of her name in the Registration of the suit property with the office of the Registrar of Titles to those of the defendants.

Equally, in the defendants' joint written statement of defence where it is plainly observed that, the 1<sup>st</sup> defendant is claiming to be owner since the grant of the Right of Occupancy of the property in dispute (See Para. 4 of WSD) and to have been known by the names of Massay Qamunga, now the plaintiff's name.

The 1<sup>st</sup> defendant's stance is also supported by the copy of caveat duly filed by the plaintiff signed on 13<sup>th</sup> June 2016 and registered on the following day as well as the plaintiff's letter addressed to the Registrar of Titles-Arusha dated 5<sup>th</sup> May 2022 followed by the letter dated 17<sup>th</sup> May 2022 from the office of Registrar of Titles-Arusha. The parties' counsel are

in controversy on whether the plaintiff was to file an appeal or this suit.

Section 102 of the Land Registration Act (Supra) reads and I quote;

*"102 (1) Any person aggrieved by a decision, order or act of the Registrar may appeal to the High Court within three months from the date of such decision, order or act:*

*Provided that-*

*(a) No such appeal shall lie unless the appellant or his advocate shall, within one month from the date of such decision, order or act, have given to the Registrar and to the High Court notice of intention of appeals; and*

*(b) In the case of a decision allowing or dismissing an application for first registration-*

*(i) No such appeal shall lie except on a matter of law or on a matter of mixed law and fact; and*

*(ii) No such appeal shall lie except at the instance of the applicant or a person who has given notice of objection to such application under the provisions of section 13:And*

*provided further that, the High Court may, for good cause, admit an appeal notwithstanding that the periods of limitation prescribed in this subsection have elapsed.*

*(2) For the purposes of subparagraph (ii) of paragraph (b) of subsection (1), the Government be deemed to have given notice of objection under the provisions of section 13, whether or not any such objection was given by or on behalf of the Government.*

*(3) Every appeal shall be made in the form of a petition in writing presented to the High Court by the appellant or his advocate and every such petition shall be accompanied by a copy of the decision, order or act appealed against.*

According to the above quoted provisions of law, it is soundly clear that, in order a person to file an appeal in this court against the Registrar of Titles there must be a decision or an order or an act done by the Registrar. It is also the requirement of the law that, such appeal shall be by way of a petition accompanied by such decision, or order or act desired to appeal. It is the position of the plaintiff that there is no order or decision or act appealable to the court since the Registrar of Titles had not issued an order.

As earlier explained, the plaintiff's claims are all about acts of the 1<sup>st</sup> defendant to erase her name in the title of the suit property and the defendants' move to change ownership from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant by way of sale. More so, there is clear transfer of the ownership from that of Mr. Massay Qumunga granted on 28<sup>th</sup> October 1985 to the 1<sup>st</sup> defendant. That, there is an act of the Registrar of Titles or agents of the Registrar including his act of stating that he would not hesitate take actions including issuance of 30 days' notice and transfer of ownership to

the 2<sup>nd</sup> defendant. Also, the act of his refusal to enter another caveat as requested by the plaintiff which subsequently led to the institution of this suit by the in July 2022.

I have also considered the fact that, the dispute between the parties should not determined into meals or pieces but in its totality taking into account that the parties' pleadings touch all the defendants. It is my view that, there should not be fears on limitation of time by the plaintiff provided that, the sequence of the events are clearly pleaded in a petition, if so wished.

The 1<sup>st</sup> point of the defendants' objection suffices for a disposal of this matter nevertheless for the interest of justice, let me briefly determine the 3<sup>rd</sup> limb of the defendants' objection. From the onset, I am of the view that, from the parties' pleadings, it was necessary for the Karatu District Council to be joined as a party (See the plaintiff's letter dated 5<sup>th</sup> May 2022 addressed to RT, See RT's reply letter dated 17<sup>th</sup> May 2022) as well as the Registrar of Titles if this suit was maintainable. This position was correctly articulated by the Court of Appeal of Tanzania in the case of **Farida Mbaraka and Farid Ahmed Mbaraka vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) where it held inter alia

*"Under this rule, a person may be added to a suit (i) when he ought to have be joined as plaintiff or defendant and*

*is not joined so or (ii) when, without his presence the question in the suit cannot be completely decided."*

Perhaps I should also cite the foreign jurisprudence emphasizing the same principle in the case of **Amon vs. Raphael Tuck Sons Ltd** (1956)

1 ALL ER 273, where it was among other things held that:

*"Whether the order for which the plaintiff was asking in the action might directly affect the intervener (the person proposed to be added as a party) by curtailing the enjoyment of his rights.....for the only reason which might render the presence of a party before the court "necessary" to enable the court to adjudicate completely... he should be bound by the result of the proceedings."*

See also Order 1, Rule 3 of the Civil Procedure Code Cap 33 Revised Edition, 2002,

It is settled law in our country that, whenever it is discovered that, a necessary party has not been joined in the suit and neither party is ready to apply to have him or her added as a party, the court or tribunal has a duty separate and independent from that of the parties to have him added or joined. This is so, in order to have a dispute conclusively determined and to have an effective decree as the case here, where the plaintiff and 1<sup>st</sup> defendant are seriously asserting to be granted R/O in the same name, Massay Qumunga and the one who is responsible for

registration and keeping of certificate of titles is the Registrar of Titles. Hence, it was prudent for either the parties or the court to join them in the proceedings if the matter was properly preferred. Having discussed as herein, I find no compelling reasons for dwelling into the remaining points of law raised by the defendants.

Consequently, the 1<sup>st</sup> limb of PO is sustained. The plaintiff's suit is therefore struck out. Bearing in mind of the parties' relationship, I shall make no order as to the costs of this suit. It is so ordered.

**DATED** at **ARUSHA** this 27<sup>th</sup> January 2023



  
**M. R. GWAE**  
**JUDGE**