

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MBEYA SUB- REGISTRY**

**AT MBEYA**

**LAND CASE NO. 14 OF 2023**

**FWANDA LIMITED .....PLAINTIFF**

**VERSUS**

**MARMO E. GRANITO MINES (T) LTD.....DEFENDANT**

**RULING**

*05/12/2023 & 23/02/2024*

**POMO, J**

The instant suit was filed by the plaintiff on 11<sup>th</sup> May, 2023 claiming the following against the defendant: -

- (i) That, the defendant be ordered to pay Tshs 40,000,000/- as a compensation amount for the removal of building stones from the Plaintiff's plot No. 49*
- (ii) That, the Defendant be ordered to pay Tshs 40,000,000/- being compensation amount for the removal of top soil from the Plaintiff's land plot No. 49*
- (iii) That, the Defendant be ordered to construct his wall along his genuine boundary of plot No. 18 from*

*beacon No. IN 336 of plot No. 18 along beacons No. 338, No. IK131, No. IK 130 to beacon No. 348 of plot No. 18.*

*The defendant also be ordered to construct a wall along his genuine boundary of plot No. JQ5 of plots No. 19 and 49*

*The Defendant as well be ordered to join his plot No. 19 to another plot No. 18 from beacon No. JQ5 of the Land Strip across the Land Strip adjacent to beacon No. IN 348 of the Land Strip as was instructed by Mbeya City Council in its letter Ref No. MCC/LD/E.17/4 of 20/6/2008*

- (iv) The Defendant be ordered to disclaim the Plaintiff's legitimate land plot No. 49 and the associated Land Strip.*
- (v) The Defendant be ordered to demolish the second crooked wall which has been constructed outside his genuine boundaries of plot No. 18 and No. 19*
- (vi) The Defendant be ordered to pay general damages of Tshs. 500,000,000/- being compensation for delaying the Plaintiff in setting up an Avocado Oil Processing Plant on plot No. 49*
- (vii) The Defendant be ordered to pay interest at Court's rate to decretal sum from the date of judgment till the payment is made in full*
- (viii) The Defendant be ordered to pay the costs of this suit*

- (ix) *The Defendant be ordered to pay any other reliefs that this Honourable Court deems fit and just to grant*

Against the suit, the Defendant filed a preliminary objection. The notice of which is incorporated into the Defendant's Written Statement of Defence (the WSD) filed on 10<sup>th</sup> November, 2023. The objection reads thus: -

*1. That, the plaintiff's **suit** instituted through a cleverly and/or trickery drafted plaint **is time barred** and an **abuse of court process** for the reasons that*

- a. The suit has been instituted in violation of the withdrawal leave given by this court on 28.10.2021 in Land Case No. 13/2017 between the plaintiff herein Fwanda Limited versus the defendant herein Marmo E. Granito Mines (T) Ltd in which the cause of action had arisen in September, 2009*
- b. The suit has been instituted in total disregard of the Ruling of this Court of 30.06.2022 in Misc. Land Application No. 106 of 2021 (arising from Land Case No. 13/2017).*

I ordered the raised objection be argued by way of written submissions. Whereas the defendant enjoyed legal representation of Mr. Samson Suwi, learned advocate, the plaintiff appeared through Mr. Joseph Z.M. Mwendabwila, who is its managing director.



Submitting in support of the objection, Mr. Suwi argued that in 2017 the plaintiff filed Land Case No. 13 of 2017 against the defendant. The suit involved the same parties, same subject matter (that is to say, plot No. 49 located at Iyunga Industrial area) and the same cause of action. In the plaint forming the aforesaid Land Case No. 13 of 2017, the plaintiff, under paragraph 8, pleaded that the cause of action arose in 2009. On 28/10/2021 the plaintiff prayed to withdraw the suit and the court granted the prayer. Thus, this court marked it withdrawn with leave to refile subject to the law of limitation, Hon. J.M. Karayemaha, J.

Following that, the Plaintiff filed Misc. Land Application No. 106 of 2021 seeking extension of time to refile the suit, however on 30<sup>th</sup> June, 2022 it met a deadlock by being struck out by this court Hon. J.M. Karayamaha, J. The court did so on a reasoning which is not far-fetched, that it had no jurisdiction to entertain the Application as power to extent time for instituting a suit out of time is vested in the Minister for Constitution and Legal Affairs and not in the court

Concluding, Mr. Suwi argued that under the circumstances the plaintiff lacks an automatic right to reinstitute the suit and thus the filing of the instant suit is tantamount to abuse of court process. In support, he cited the

case of **East African Development Bank versus Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 CAT at Dar es Salaam and **Swahili Travel Services Limited @ Swahili Swahili and 3 Others versus Peter Thomas Assenga**, Civil Appeal No. 126 of 2022 High Court at Dar es Salaam (Both unreported). In the end, he prayed the suit be dismissed with costs for being time barred

In reply, refuting, the plaintiff argued that the cause of action arose in 2015 reliance being on, **one**, letter Ref. No. MCC/LD/E.17/4 of 2008 which she asserts received it in July, 2015, **two**, in 2015 the defendant was intercepted carrying out a survey of the second crooked wall which was constructed inside the Plaintiff's legitimate land plot No.49 in order to plant beacons along the second crooked wall. That 2009 is taken by the defendant as the year the cause of action arose in disregard the written correspondence between the parties by their letters dated 5/3/2010 and 18/3/2010.

Arguing further, the plaintiff asserts that, in determining the cause of action and limitation of action, the courts of law should not rely on the documents forming the Written Statement of Defence (the WSD) but only the plaint. In support, this court was referred to the following cases which decided to that effect. **Jeraj Sharif and Co. versus Chotal Fancy Store**

[1960] E.A 375; **John Byombalirwa versus Agency Maritime Internationale (Tanzania) Limited** T.L.R.1; **Babito Limited versus Freight Africa NV – Belgium and 2 Others**, Civil Appeal No. 355 of 2020 CAT at Moshi (unreported). Having so submitted, prayed the objection be overruled with costs

Having considered the objection, both sides submissions for and against the objection, the plaint as well the Written Statement of Defence, the issue for determination is whether the objection raised against the suit is merited or otherwise

It is common ground that, in the reply submission, the plaintiff does not dispute she filed Land Case No.13 of 2017 before this court which on 28<sup>th</sup> October, 2021, basing on the prayer made by the plaintiff, was marked withdrawn by this court with leave to refile subject to the law of limitation. Again, there is no dispute that, subsequently the plaintiff filed Misc. Land Application No. 106 of 2021 arising from the said withdrawn Land Case No. 13 of 2017. The Application was for extension of time to file out of time a suit against the defendant. On 30<sup>th</sup> June, 2022 this court struck it out for want of jurisdiction, Hon. J.M. Karayemaha, J. because that power to extend



time for filing a suit out of time, under section 44(1) of the Law of Limitation, [Cap.89 R.E. 2019] is vested in the Minister for Constitution and Legal Affairs

These facts are not disclosed by the plaintiff in her plaint instead are disclosed by the defendant in her Written Statement of Defence (the WSD).

As expounded in the cases cited by the plaintiff, I fully subscribe to the plaintiff's submission that; the position of the law is that what is to be looked at in determining the cause of action and limitation of time is the plaint and not the WSD. However, can the plaintiff use that stance of the law as a shield for her none disclosure of her previous cases on the same matter? In other words, is the opposing party not entitled to disclose the undisclosed facts of the case by the plaintiff? In my considered view, the opposing party has that right. The attention brought by the defendant is centred at preventing reinstitution of cases already determined by the court. It is all about bringing into play the principle of res-judicate enshrined under section 9 of the Civil Procedure Code, [Cap. 33 R.E. 2022] (the CPC) and abuse of court process.

Section 9 of the CPC provides as follows:

***Sec. 9 – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim***

*litigation under the same title in a court competent to try such subsequently suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.*

Apart from the above, judicial proceedings and court orders are things which courts of law take judicial notice of their existence under section 59(1) of the Tanzania Evidence Act, Cap. 6 R.E. 2019. Therefore, the scenario obtaining in the cited cases are distinguishable to the one at hand where the defendant is informing this court on the existence of previously determined cases on the same matter in dispute between the same parties. In my view, deciding otherwise will amount allowing every litigant to refile in court his case when he losses one.

Now, looking into the instant case in comparison to the previous land Case No. 13 of 2017, claims by the plaintiff against the defendant are the same. Aware of being time barred, the plaintiff filed Misc. Land Application No. 106 of 2021 in an attempt to revive life to her intended suit over the defendant, the application which was wrongly filed in court which has no jurisdiction to entertain it. As correctly submitted by Mr. Suwi, in my view, the suit herein is nothing but a filed case in abuse of court process. The plaintiff is aware that her suit is time barred a reason for her to seek

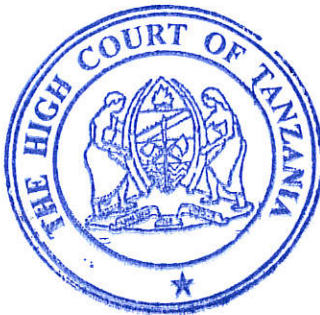


extension of time to file it out of time although such attempt was preferred in a wrong forum.

From the above exposition, I uphold the objection raised and consequently, in terms of section 3(1) of the Law of Limitation Act, [Cap. 89 R.E.2019], I hereby dismiss with costs the suit for being time barred

It is so ordered

Right of Appeal explained to an aggrieved party



  
**MUSA K. POMO**

**JUDGE**

**23/02/2024**

Ruling delivered in chamber in presence of Mr. Joseph Z.M. Mwendabwila, the plaintiff's managing director and Mr. Binthony Kullinga, the Defendant's Administrative Manager

  
**MUSA K. POMO**

**JUDGE**

**23/02/2024**