

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND CASE NO. 09 OF 2023

SAMSON ELIEZA KUTAMKA.....1<sup>ST</sup> PLAINTIFF

JOHN DANIEL GABRIEL.....2<sup>ND</sup> PLAINTIFF

HAMIS JONAS CHEREHANI.....3<sup>RD</sup> PLAINTIFF

VERSUS

WAKALA WA HUDUMA ZA MISITU TANZANIA.....1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

RULING

22<sup>nd</sup> Sep, 2023 & 16<sup>th</sup> Jan, 2024

**M.J. CHABA, J.**

For the second time in a row, the defendants have moved this Court to pose its mind on preliminary objection (PO) on points of law to the effect that: -

- (a) That, the suit is bad and untenable in law as it was instituted as representative suit after lapse of time contrary to the First Schedule, Part III, Item 21 of the Law of Limitation Act [CAP. 89 R. E, 2019]; and
- (b) That, the suit is bad in law as the plaint does not feature in representative capacity.



It should be noted that, this Court had once entertained the PO on points of law raised by the defendants which was couched to the effect that:

*"The suit is time barred for being filed out of time as per the Law of Limitation Act [CAP. 89 R.E, 2019]"*.

Upon hearing the PO, I overruled the same on the 30<sup>th</sup> day of June, 2023 and ordered the suit to proceed on merits.

When the application was called on for hearing of the PO, with the parties' consensus, the application was argued and disposed of by way of written submissions. Mr. Iddi Msawanga, Learned Advocate represented all the plaintiffs, while Mr. Nzumbe Eliackim Machunda, Learned State Attorney entered appearance for the defendants. Both parties complied with the Court's scheduled order.

Submitting in support of the first PO, which is to the effect that, the suit is bad and untenable in law as it was instituted as representative suit after lapse of time contrary to the First Schedule, Part III, Item 21 of the Law of Limitation Act [CAP. 89 R. E, 2019] (the Law of Limitation Act), Mr. Machunda highlighted that the plaintiffs filed their plaint in this Court on 30<sup>th</sup> November, 2021 while sixty (60) days had already lapsed counting from the date the order to file a representative suit was granted by this Court (Maghimbi, J.) on 12<sup>th</sup> October,



2020 via Misc. Land Application No. 561 of 2019, High Court of Tanzania, at Dar es Salaam.

To cement his contention, Mr. Machunda referred this Court to the First Schedule of the Law of Limitation Act, Part III, specifically on Item 21 where the law says:

*"Application under the Civil Procedure Code, the Magistrate Court Act or other written laws for which no period of limitation is provided in this Act or any other written laws is sixty days".*

He further argued that, since the present suit was instituted in this Court out of time prescribed by the law, as a matter of procedures, the plaintiffs were required to seek first, for an extension of time and count for each day of delay, which are 324 days, from the date in which the order for filing a representative suit was granted on 12<sup>th</sup> day of October, 2020. The State Attorney, invited the Court to take heed on the case of **BARCLAYS BANK TANZANIA LIMITED VS. PHYLSIAH HUSSEIN MCHENI**, CIVIL APPEAL NO. 19 OF 2016 and **MARIA THOMAS MADEGA AND ANOTHER VS. MIHIDINI HAJI MUSHI**, CIVIL REVISION NO. 03 OF 2022(All unreported), and afterward dismiss the suit under section 3(1) of the Law of Limitation Act.





On the second point of PO, Mr. Machunda averred that, the suit is bad in law as the plaint does not feature in representative capacity. He therefore, invited the Court for the sake of clarity to struck out the plaint for a reason that, its title does not indicate precisely the said 121 plaintiffs (Others) who are represented by the plaintiffs herein, despite the fact that their recognitions have been shown on paragraphs 9 and 10 of the said plaint. Mr. Machunda cited the case of **SAID OMARI MTULIA AND 4 OTHERS VS. CHAMA CHA USHIRIKA IKWIRIRI AND 3 OTHERS**, CIVIL CASE NO. 170 OF 2019, HCT AT DSM (unreported), to fortify his contention.

In reply, the plaintiffs vide their legal Counsel, Mr. Iddi Msawanga briefly countered the points of preliminary objections raised by the defendants and submitted that, the same have been misconceived, as the Learned State Attorney who represents the defendants failed to direct properly his mind to the applicable law.

Arguing in respect of the first PO. Mr. Msawanga contended that, the First Schedule to the Law of Limitation Act, Part III, Item 21, provides for three conditions to enable its applicability. First; it must be an Application, Second; it must be made under Civil Procedure Code [CAP. 33 R. E, 2019] (the CPC), The Magistrate Court's Act [CAP. 11 R. E, 2019] (the MCA) or other Written Laws; thirdly, no period of limitation is provided. It was his argument that, the first PO has no merit because the matter at hand is not at all an application. It is a land



matter or civil suit associated with land disputes. He underlined that, since the two terms differs from one another and/or the two are distinct to each other, as the law under section 2 (1) of the Law of Limitation Act, provides a clear meaning as it defines the word application to mean: -

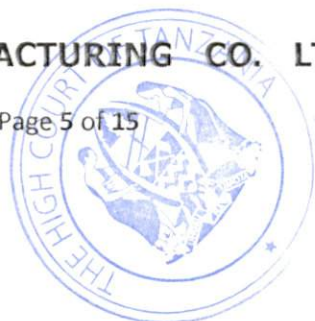
*"An application made to a court, which is of, or in relation to any proceeding of, a civil nature.*

He highlighted that, since the matter under consideration is a land matter concerning with the recovery of land, the proper provision of the law to be applied is the First Schedule, Part I, Item 22 of the Law of Limitation Act which articulates that: -

*"A suit for recovery of land should be instituted not later than twelve (12) years from the time when the dispute arose".*

In view of the above submission, Mr. Msawanga prayed the Court to dismiss the first point of PO for being unmerited.

As regards to the second PO, Mr. Msawanga accentuated that, the State Attorney for the defendants misdirected himself on this point upon believing that, the plaint does not feature a representative suit. According to him, this point is not pure a point of law, rather an issue of facts as it was expounded in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END**



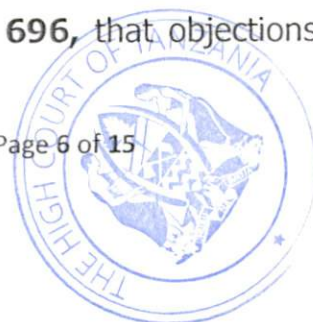
**DISTRIBUTORS LTD (1969) E.A. 696** which was cited with approval by this Court at Mwanza in the case of **MUSA NGANG'ANDWA VS. CHIEF JAPHET WANZAGI AND EIGHT OTHERS [2006] TLR 351.**

He concluded his submission by stating that, as the State Attorney misdirected himself by confusing facts and points of law, the proper remedy for this second PO is to overthrow the same over the board, asserting that the same have been raised as a delaying trick and embarrassing the plaintiffs, citing the case of **ASHMORE VS. CORP. OF LLOYDS (1992) 2 ALL ER 486 (HL) AT PAGE 493.** He once again, prayed the Court to dismiss this second PO with costs.

By way of rejoinder, Mr. Machunda had nothing new to add rather than reiterating his submission in chief.

I have dispassionately considered and weighed the contending arguments from both parties, and further carefully considered the parties' pleadings in line with the points of preliminary objections raised by the defendants through the Learned State Attorney, Mr. Nzumbe Eliackim Machunda.

To begin with, it is trite to point at the outset that, in deliberating on the preliminary objections raised by the defendants, I will be guided by the principle enunciated in **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WESTEND DISTRIBUTORS LTD [1969] EA 696,** that objections should be raised on a





pure point of law, and cannot be raised if any fact has to be ascertained. Further, that a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit.

Now, turning to the matter under consideration, Mr. Machunda asserted that, the suit is bad and untenable in law as it was instituted as a representative suit after lapse of time contrary to the First Schedule, Part III, Item 21 of the Law of Limitation Act. He said, the plaint was filed by the plaintiffs on 30<sup>th</sup> November, 2021 whereas the order to file a representative suit was granted on 12<sup>th</sup> October, 2020 via Misc. Land Application No. 561 of 2019, HCT at Dar es Salaam. In his view, the statutory time limits which is sixty (60) days had already expired in terms of the First Schedule, Part III, Item 21 of the Law of Limitation Act.

On the other hand, the Counsel for the plaintiffs countered by arguing that, the first PO has no merit because the matter at hand is not at all an application, rather it is a land matter or civil suit associated with land disputes. He argues that, the time limitation for a suit for recovery of land is twelve (12) years from the date or time when the dispute arose, citing the First Schedule, Part I, Item 22 of the Law of Limitation Act.

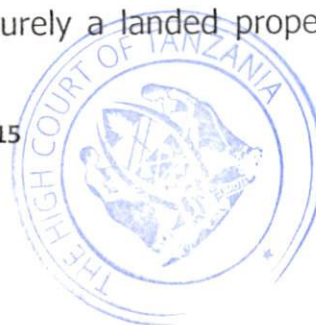


On my part, in resolving the issue in which the parties locked their horns, as to whether the matter falls within the realms of application or civil suit, I have had ample time to read and examine the entire records, and carefully scrutinized the guiding provisions of the law. Without wasting the precious time of the Court, I totally agree with the Counsel for the plaintiffs that, the State Attorney misdirected himself to interpret the applicable law on this facet. As rightly submitted by the Counsel for the plaintiffs, the First Schedule to the Law of Limitation Act, provides three conditions for proper applicability of an application as alluded to above. I agree that, "*a representative suit*" is not an application, rather it is qualifying to be treated as a civil suit because the same meets all credentials of a normal civil suit as stated by the law under Order IV, Rule 1(1) and (2) of the CPC, which states that: -

*"Rule 1(1) Every suit shall be instituted by presenting a plaint electronically or manually to the court or such officer appointed in that behalf.*

*(2) Every plaint shall comply with the rules contained in Order VI and VIII, so far as they are applicable".*

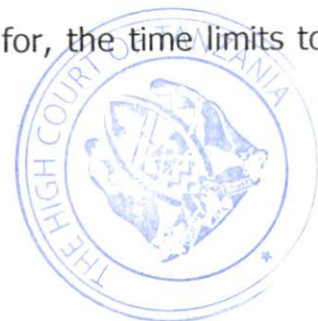
From the foregoing, I have no flicker of doubt that the matter under consideration involves a landed property. For that matter, it is not an application as suggested by the State Attorney, but purely a landed property. However, I





disagree with the Counsel for the plaintiff on one aspect that, the matter at hand is a suit for recovery of a landed property. I will explain. It is evident from the parties' pleadings that, the cause of action arose in 2013. I say so because, as stated at paragraphs 4 and 5 of the plaint, the plaintiffs averred that in 2013 without colour of right, the 1<sup>st</sup> defendant came to the plaintiffs' land and started to put demarcations alleging that the suit premises is a forest reserve, and that on 1<sup>st</sup> January, 2017; the 1<sup>st</sup> defendant issued a notice to all plaintiffs requiring them to vacate from the respective suit premises. Few days later, the 1<sup>st</sup> defendant entered into the suit premises under the supervision of the police officers where she destroyed each and everything erected and planted by the plaintiffs therein. From that particular date, the 1<sup>st</sup> defendant pressed her guards to prevent the plaintiffs from re-entering the suit premises.

Apart from the facts narrated in paragraphs 4 and 5 of the plaint, the last part of the plaint, is referring to the reliefs sought by the plaintiffs. In essence, among other orders, the plaintiffs are craving from this Honorable Court for a declaratory order that, are the lawful owner of the suit premises measuring 1,380 acres situated at Kisoamwili Sub Village no. 30 at Kumbulu Village, Chanjale Ward, Nongwe Division within Gairo District in Morogoro region, they are now before this Court seeking for a declaration order to that effect. It is worth noting that, under the First Schedule, Part I, Item 24 of the Law of Limitation Act that, any suit not otherwise provided for, the time limits to file a



suit to the Court or Tribunal with competent jurisdiction is six (6) years from the accrual date the cause of action arose. See also the case of **CRDB (1996) VS. BONIFACE CHIMYA [2003] TLR 415.**

From the foregoing, it is not true that the plaintiffs' claim against the defendants is for the recovery of suit land, but for a declaratory order that they are the lawful owners of the suit land.

Coming to the second PO, Mr. Machunda submitted that, the suit is bad in law as the plaint does not feature in a representative capacity. Due to this anomaly, he invited the Court for the sake of clarity to struck out the entire plaint as the title of the same did not indicate precisely the other 121 plaintiffs alleged to have been represented by the plaintiffs herein, despite their recognitions in paragraphs 9 and 10 of the said plaint. In rebuttal, Mr. Msawanga had the view that, Mr. Machunda, Learned State Attorney who entered appearance for the defendants misdirected himself by confusing facts and points of law, citing the case of **MUKISA BISCUIT MANUFACTURING CO. LTD** (supra) as guiding authority on this second point of PO.

I have read the rival submissions from both parties, and further consulted the relevant authorities on the subject. At the outset, I accede to the line of argument advanced by the State Attorney that, if the nature of the matter is in the form of a representative suit, the best practice is that the plaint should



disclose precisely the number of numerous persons being represented after the names of few plaintiffs who have been given leave to represent others in a suit. As gleaned from the records, the plaintiffs herein, approached this Court (Maghimbi, J.) via Misc. Land Application No. 561 of 2019 under the provision of Order I, Rule 8 (1) of the CPC praying the Court to grant them with the leave to sue for and on behalf of 123 Others. At the end of hearing of the applicants' application, this Court held *inter-alia* that: I quote: -

*".....On my part, having gone through the records of this application and having no objection from the respondent, I am satisfied that the conditions set in Order I, Rule 8 (1) of the CPC are fulfilled. The applicants (plaintiffs) have a common interest against the same respondent on the same subject matter. Therefore, save for the two people whose names appear in the list of people to be represented by the applicants but did not sign the said document, this application is hereby allowed and the Court proceeds to make the following orders:*

- 1. The applicants herein shall file the representative suit after fulfilling the conditions set in the Government Proceedings Act, Cap. 5 R.E. 2019;*





*2. In the said suit, the applicants shall sue in representative manner on behalf of 121 Others who have signed and consented to the representation as per the list of the appended as annexure KKC-02 to their supporting affidavit;*

*3. NA;*

*4. NA.....”.*

From the above excerpt of the decision of this Court, there is no doubt that the applicants, now the plaintiffs herein, were allowed to sue the defendants herein, in a representative manner on behalf of 121 Others who appears to sign and consented to the representation, and the list of their names were appended as annexure to support the affidavit. In compliance with the orders issued by this Court (Maghimbi, J.), the plaintiffs filed their representative suit on 30<sup>th</sup> day of November, 2021 but without indicating in the title of the plaint that they were suing in a representative manner on behalf of 121 Others, and the list of the purported 121 Others were not appended as annexure to support the plaint. As correctly submitted by the State Attorney, in this case, the plaintiffs are three but frankly speaking, it is hard to detect and understand whether the same is a representative suit or otherwise, unless and until one read between lines at paragraphs 9 and 10 of the plaint. I also agree with the State Attorney that, the plaint ought to have indicated or mentioned the names of the plaintiffs and 121



Others for a reason that, at the culmination of trial, will not bind the three plaintiffs but also the said 121 Others whose names are unknown in this Court. In my considered view, disclosure of their names is vital to avoid multiplicity of suits arose from the same cause of action.

In this regard, I am also inspired by the decision of this Court (Masabo, J.) in SAID OMARI MTULIA's case where the Court was faced with akin scenario in which only five plaintiffs were mentioned and left out to mention 297 Others. The Court went on stating that: -

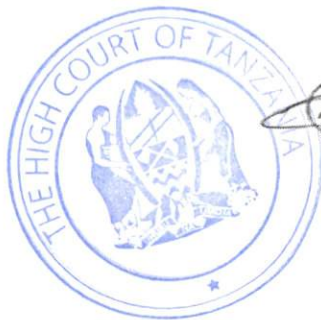
*".....Elements of the representative nature of the suit are contained under paragraphs 4 and 6 of the plaint. As the title is entirely silent on the representative aspect, unless one reads the two paragraphs, he cannot tell whether it is of a representative nature. The form preferred by the plaintiff is not in tandem with the well-established practice on titling representative suits. I have observed that, the number of persons listed in the appended list does not correspond to the number listed in the leave for representative suit. It is also not signed. To this extent the third preliminary objection is allowed...."*



In view of what I have endeavored to deliberate hereinabove, the second point of preliminary objection crumble, hence capable of disposing of the entire suit for contravening the guiding principle of law pertaining to a representative suit. As submitted by the State Attorney, this suit is bad in law as the plaintiff does not feature in a representative capacity.

In the premises, I find and hold that the second point of preliminary objection raised by Mr. Machunda, Learned State Attorney for the defendants has merit. In the event, I struck out the plaintiff (suit) on the ground of being defective to the extent above demonstrated. Costs shall follow the events. I so order.

**DATED at MOROGORO, this 16<sup>th</sup> day of January, 2024.**



A handwritten signature in black ink, appearing to read "M.J. Chaba", is written over the seal.

**M.J. CHABA**

**JUDGE**

**16/01/2024**



**Court:**

Ruling delivered under my Hand and the Seal of the Court in Chamber's this 16<sup>th</sup> day of January, 2024 in the presence of Ms. Lightness Tarimo, Learned State Attorney for the Defendants and in absence of the Plaintiffs.



  
**S. P. KIHAWA**

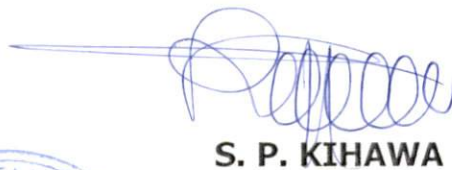
**DEPUTY REGISTRAR**

**16/01/2024**

**Court:**

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.



  
**S. P. KIHAWA**

**DEPUTY REGISTRAR**

**16/01/2024**