

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF MWANZA
AT MWANZA
LAND CASE NO. 3853 OF 2024**

ATHANAS CELESTINE KAIJI PLAINTIFF

VERSUS

THE DISTRICT COUNCIL OF SENGEREMA 1st DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

SOTTA MINING COMPANY LIMITED 1ST NECESSARY PARTY

JOYCE MWANZALIMA2ND NECESSARY PARTY

RULING

8th April and 7th June 2024.

CHUMA, J.

It is on record that on the 24th day of February 2024 Plaintiff herein, instituted this suit against the defendants seeking five reliefs as follows:-

- a. For a declaratory order, the plaintiff and the second necessary party are jointly rightful and lawful occupiers of the land in dispute owning a shared stake of 60% and 40% respectively.
- b. The first necessary party is ordered to undertake a valuation exercise on the land in dispute to compensate and re-allocate the plaintiff and the second necessary party and make full, fair,

and prompt compensation in terms of section 3(1) (g) of the Land Act No. 4 of 1999 and any other enabling provision.

- c. General damages at the Court's discretion
- d. Punitive damages against the first defendant
- e. Cost be provided for and
- f. Any other order or relief the Court may deem just and fair to grant.

On the 18th day of April 2024, the counsel for the first and second defendants filed a Written Statement of Defence disputing the claims and raised a point of Preliminary Objection on two grounds as follows;

- i. That the suit is incompetent and bad in law for contravening the provisions of Order VII Rule 3 of the Civil Procedure Code [CAP 33 R.E 2019]*
- ii. That the suit is incompetent in law for non-joinder of parties*

At the hearing of the preliminary Objection Messrs Felician Daniel and Samara H. Matiko, both learned State Attorneys appeared for the first and second Defendants while Heri Louis Kayinga, learned counsel appeared for the plaintiff. This preliminary point of objection was argued by way of written submission and all learned counsels adhered to the court's order by filing their submissions.

Arguing in support of the first limb of the preliminary point of objection, counsels for the first and second defendants based their submission on the provisions of Order VII Rule 3 of the Civil Procedure Code, which states as follows;

"Where the subject matter 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 title number under the Land Act, the plaint shall specify such title number"

Referring to section 53 (2) of the Interpretation Act, Cap 1 RE 2019, the counsels submitted that the word "*shall*" means mandatory. According to them, the plaint in paragraphs 6 and 8 does not describe the disputed land, particularly its size, and boundaries. To the counsels, the omission will render the court's orders uncertain and cannot be executable as the said particulars are necessary for determining the dispute of land and preclude future litigation of the same property. To substantiate their submissions, the counsels cited the cases of **Martin Fredrick Rajabu Vs Ilemela Municipal Council and Another**, Civil Appeal No. 197 of 2019 (CAT) and **Khamis Ramadhani Mggalu vs. Attorney General**, Land Case No. 164 of 2021.

Regarding the second limb of the preliminary point of objection on non-joinder and misjoinder of parties, the counsels for the first and second defendants submitted that, although the law does not clearly state, it is established through case laws. They cited the case of **Anatolia J. Mgeni vs. Njocoba & 3 Others**, Civil Appeal No. 291 of 2021 to reiterate their submission.

They further submitted that paragraph 8 of the plaint and its annexures demonstrate that they were confirmed as co-owners of the land in dispute by Sotta Village Council on 18/02/2023 through a village meeting. However, the plaintiff has not joined her as the necessary party to resolve all issues raised by the plaintiff to facilitate effective and complete adjudication in the context of Order 10(2) of The Civil Procedure Code [CAP 33 R.E 2019]. To bolster their submission, they relied on the case of **Farida Mbaraka and Farid Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006(unreported). Finally, it was their submission that the plaint was bad in law, and prayed for the plaintiff's case to be struck out with costs.

Responding to the preliminary point of objection Mr. Kayinga counsel for the plaintiff vigorously challenged the points of preliminary objection. The

counsel for the plaintiff submitted that the point of the preliminary objection raised by the counsels for the first and second defendants is a misconception.

He then contended that the case of **Martin Fredrick Rajabu vs. Ilemela Municipal Council and Another** cited by the counsels in support of the first preliminary point of objection is distinguishable because the description of the neighboring properties in the present case, is available on the court record in Annex JM-1 to the WSD of the second necessary party. This is the letter from the District Executive Director of the first defendant with the subject; "following upon the ownership of the hillside near Sotta Primary School in Sotta Village, Igalula Ward Sengerema" hence it is the nearest landmark to the land.

In the case of **Martin Fredrick Rajab Vs Ilemela District Council**, the court dealt with the case at the appellate stage while the case at hand is in the preliminary stage where there is room for the parties to furnish more evidence and there is room for the Court to order visitation of the locus in quo in which further details can be obtained for effective determination of the suit.

On the other hand, the counsel for the plaintiff has submitted that Annexure JM-2 to the WSD of the second necessary party is self-explanatory

that the neighboring property to the land is Sotta Primary School. Annexure JM-3 to the WSD of the second necessary party which is the minutes of the Sotta Village Assembly clearly described the land in dispute. The counsel for the plaintiff has further submitted that the first and second defendants pleaded in their joint WSD that the land in dispute belongs to Sotta Primary School located in Sotta village, Igalula Ward within Sengerema District and that evidence on record shows that the 1st and 2nd defendant were both served with the WSD of the necessary party.

He further contended that the cases of **Khamis Ramadhani** and **Martin Fredrick Rajabu** relied on by the counsels for the first and second defendants are distinguishable from the case at hand because in the case at hand, the nearest landmark or neighboring property to the landed property in dispute was stated.

The counsel for the plaintiff has submitted that, the Court of Appeal in the case of **Mwananchi Insurance Company Ltd vs. The Commissioner for Insurance**, Misc. Commercial Cause No. 2 of 2016 [2016] TZHC which quoted with approval the case of **Soitsambu Village Counsel vs Tanzania Breweries Ltd & Another**, Civil Appeal No. 105 of 2011, extended these protections when it held as follows;

Where a court is to investigate facts, such an issue cannot be raised as a preliminary objection on point of law... it will treat as a preliminary objection only those points that are pure law, unstrained by facts or evidence.

The Counsel for the plaintiff also cited the case of **The Director of Public Prosecution vs Barrick Enos Mwasaga**, Crim. Appeal No. 472 of 2019 where the Court stated that;

*We have subjected the arguments of the parties before the High Court and before us to the proper sieve they deserve. Having so done, we think the High Court had no material upon which to perfectly determine whether the appeal was time-barred. As the question of whether was time-barred was to be answered with certainty by the production of documents that showed the date on which the appellant received the documents for appeal purposes, the respondent's purported preliminary objection ceased to be a preliminary objection. This is a tenor and import in **Mukisa Biscuit manufacturing**, the decision referred by Mr. Rwekaza in the High Court.*

He, therefore, argued that the counsels for the first and second Defendants have not shown how the defendants were prejudiced by the said irregularity. Moreover, the first limb of the preliminary point of objection is

an afterthought, misconception, and therefore, devoid of merit and should be dismissed with costs.

Submitting in respect of the second preliminary objection, Mr. Kayinga has stated that, the counsels' contention that non-joinder of parties on account of Sotta Village Council to confirm the ownership of land in dispute by Plaintiff and the 2nd necessary party, is a misconception. He reiterated that the mere fact that Sotta Village Council confirmed the disputed land to be owned by the Plaintiff and the second necessary party does not make Sotta Village Council a party to the suit. He as well, prayed for the Court to dismiss the preliminary point of objection with cost

Rejoining to the submissions made by Mr. Kayinga, the counsels for the first and second defendants, reverted to their submission in chief and stated that the property in dispute has not been described properly since it is an unregistered land contrary to the requirements of Order VII Rule 3 of the Civil Procedure Code. They also submitted that the plaintiff has not joined Sotta Village Council although the village council confirmed the land in dispute hence being a necessary party to this matter.

Having gone through the submissions for and against of both sides, my starting point will be on what amounts to a preliminary point of objection.

I need not labor much on this, as the law is well settled. In the celebrated case of **Mukisa Biscuit Manufactures Ltd. v. West End Distributors Ltd** [1969] E.A. 696 which has often been cited with approval by the Court, the nature of a preliminary objection was stated as follows:-

*"A preliminary objection is in the nature of what used to be a demurrer. It raises 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.**" [Emphasis added].*

In the case of **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji** – Civil Application No. 42 of 1999 (unreported), the Court of Appeal of Tanzania expressed its view on the point in similar terms when it said:-

"The aim of a preliminary objection is to save the time of the court and the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily".

Guided by the above observations, the issue to be determined first in the instant case is whether the two points of objection raised by the counsels for the first and second defendants are worth being preliminary objections.

As stated earlier, the parties in this are at issue as to whether the property in dispute was well described in the plaint lodged by the plaintiff. The case of **The Director of Public Prosecution vs Barrick Enos Mwasaga**, (supra) cited by the counsel for the plaintiff is distinguishable from the instant case. As in the cited case, the issue was whether the case was time-barred or not. With due respect to the counsel for the plaintiff, this is a pure point of law that does not need to refer to the evidence.

Having found that the first point of preliminary point of objection is worth being a point of objection, the follow-up question is whether the objection that the plaint does not properly describe the disputed land holds water. I have gone through the plaint filed by the plaintiff, which involves immovable property I did not come across a clear or proper description of the property sufficient to identify the subject matter of the suit for identification as required by Order VII Rule 3 of the Civil Procedure Code Cap 33 [R.E 2002].

For ease of reference, I find it pertinent to reproduce Order VII Rule 3 of the Civil Procedure Code Cap.33 as hereunder;

“Where the subject matter to 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 title number under the Land Registration Act, the plaint shall specify such title number”.

Reading between the lines of Order VII Rule 3 as quoted above, the provision of the law is very clear that the law mandatorily requires a description of the property sufficient to identify it. The gist of the Plaintiff's claim is ownership found under Paragraph 6 of the Plaint which read as follows:-

6. That the first defendant is anticipating opening a large-scale gold mining operation in Sotta and Nyabila Villages, Igalula Ward of Sengerema District, Mwanza region (hereinafter referred to as “Nyanzaga Gold Project”). Implementation of the Nyanzaga Gold Project necessitated the acquisition of land by the first defendant.

In the above paragraph of the plaint, apart from the plaintiff alleging that the said area is near Sotta and Nyanzaga village Igalula Ward of Sengerema District, Mwanza region, he has failed to describe the size and boundaries of the claimed suit land sufficient to describe it. The plaint also does not describe whether the suit property is surveyed or un-surveyed or whether is registered or not for purposes of establishing whether it has the

Title number or not. As correctly submitted by the counsel for the first and second defendants this is a contravention of **Order VII Rule 3 of the Civil Procedure Code**, [Cap 33 RE 2019].

The plaintiff was bound to state in the plaint the description of the suit property in dispute in terms of size, boundaries, and the neighboring properties of the land in dispute considering that the suit property is not surveyed. I do subscribe to the submission made by the counsels for the first and second defendants that sufficient description of the suit's landed property affords the Court with an opportunity to pass final and definite Orders. In the absence of a sufficient description of the property, no Court would issue an executable decree.

In the case of **Dickon Namakonde v. Kinanja Msalanji & 3 Others**, Land Appeal No. 17 of 2023 the Court insisted on the importance of describing the suit property. In the Indian Case of **Bandhu Das and Anr. vs Uttam Charau Pattanaik**, AIR 2007 Ori 24, 2006 II OLR 80, the High Court of India, while interpreting Order VII Rule 3 of the Indian Civil Procedure Code, which is in parametria with Order VII Rule 3 of the Civil Procedure Code, of Tanzania had this to say: -

"A bare reading of the above provision makes it crystal clear that what exactly the land or the area over which the dispute

exists is a question which goes into the root of the matter relating to the substance of the case. In the absence of such description in the plaint or supply of the map by annexing the same to the plaint and the evidence to the above effect, no Court would pass a decree, as such a decree would be inexecutable or would be rendered otiose. Even if the Court finds that the Plaintiff had title and possession in respect of the suit land, in absence of proper description...the decree cannot be executed..."

In the case of **Elidadius M. Rushikala vs Samuel Malecela**, Land case No. 83 of 2023 (unreported) which cited the case of **Joel Kondela Maduhu vs. Siya Ndeja**, Land Appeal No. 3 of 2021 (unreported) it was observed that;

"It is a settled principle of law that, any claim of land should contain a proper description of the suit land for definite and complete execution order"

In view thereof, I am of the settled mind that, the plaint before this court is incurably defective, incompetent ab initio for non-compliance with the provisions of the law. In the premises, the first limb of the objection is accordingly sustained.

The fact that the first limb of the preliminary objection surfaces to dispose of the entire suit, I find it inappropriate to determine the second limb. I thus proceed to strike out the entire suit with Costs.

It is so ordered.

DATED at **MWANZA** this 7th day of June 2024.



W. M. CHUMA
JUDGE

Ruling delivered in court in the presence of Mr. F. Daniel, Advocate for the 1st and 2nd Defendants in the absence of the Plaintiff, 1st and 2nd necessary parties this 7th day of June, 2024.

W. M. CHUMA
JUDGE