

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

AT MOROGORO

LAND CASE NO. 15 OF 2023

EMMANUEL MAKWASINGA PLAINTIFF

VERSUS

BWANAALLY IBRAHIM 1ST DEFENDANT

DISTRICT EXECUTIVE DIRECTOR OF

ULANGA DISTRICT COUNCIL 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

21/02/2024 & 29/02/2024

KINYAKA, J.:

The plaintiff instituted the present suit jointly and severally against the defendants claiming for the following orders; that the defendants' acts are unlawful, that the suit belongs to the plaintiff, vacant possession against the 1st defendant from the suit land, the immediate return of the ownership of a portion of plaintiff's land that has now been reallocated to the 1st defendant, the defendants be immediately desisted from doing any act whatsoever calculated to infringe the plaintiff's right over the said Plots No. 111 Block D Low Density, Mahenge Town, cancellation of Plot No. 122A, Block D by the



2nd Defendant, and payment of costs and any other relief the Court may deem fit and just to grant.

All defendants strongly opposed the plaintiff's claim through their respective written statements of defence. In response, on 11th December 2023, the 2nd and 3rd defendants filed their joint written statement of defence coupled with a notice of preliminary objection to the effect that:

- i. The suit is bad in law as the plaint does not include necessary party to the case; and*
- ii. The suit is bad in law for suing the wrong party.*

On the other hand, the 1st defendant also filed his written statement of defence on 31st January 2024, accompanied by a notice of the preliminary objection challenging the competence of the present suit. It is based on the complaint that the Plaintiff sued a wrong person with no legal personality to be sued.

At the hearing of the preliminary objections which was conducted orally, the plaintiff was represented by Mr. Gelas B. Severine, learned advocate while the 1st defendant enjoyed the services of Mr. Tumaini Mgonja. Mr. Mzumbe



Eliakim Machunda and Mr. Elikarim Samwel, both Learned State Attorneys represented the 2nd, and 3rd defendants.

Upon taking the floor, Mr. Machunda, opted to start submitting on the second point of preliminary objection which is to the effect that the suit is bad in law for suing the wrong party. Submitting on this ground, the learned state attorney contended that it is the requirement of the law that when the Council is established, it acquires the status of a legal personality with capacity to sue and be sued in its own name. He argued that any complaint against the Council should be preferred in the name of the Council as required by section 12(b) the Local Government District Authorities Act Cap. 287 R.E. 2019 (hereinafter, the "LGDA"). He said, in the present matter, the plaintiff sued the employee of the Council, the District Executive Director of Ulanga District Council which is not proper at law. According to him, the Plaintiff ought to have sued the District Council.

Relying on the holdings in the cases of **Maulidi Shabani v. Temeke Municipal Executive Director and Another, Misc. Land Application No. 1030 of 2017**, the High Court sitting at Dar es Salaam, on page 4, and that of **Temeke Municipal Director v. Nixon Njolla and Another, Revision No. 564 of 2019**, on page 7 of the decision, where in both cases

the applications were struck out for suing the Temeke Municipal Director instead of the Temeke Municipal Council, the learned state attorney prayed for the Court to find the positions of the High Court in the said decisions correct and follow them by striking out the present suit.

In respect of the first ground of preliminary objection that the plaint does not include the Commissioner for Lands as a necessary party to the case, Mr. Machunda averred that, is true that the law has left it to the plaintiff to choose a party to sue, but with exceptions where there is a necessary party in order for an effective decree to be passed.

The learned state attorney illustrated that the cause of action in the present suit is reflected in paragraph 6 of the Plaint. He submitted that the plaintiff complains that his piece of land, Plot No. 111, Block D, Low Density, Mahenge Town has been taken and added to Plot No. 122A, Block D, hence should be cancelled. He elaborated that the prayers sought involved a dispute over land which is under the administration of the Commissioner for Lands on behalf of the President as provided for under section 10 of the Land Act. In his view, any order of the court in this suit will require the enforcement of the administrative powers of the Commissioner for Lands whose absence in this case is contrary to the dictates of the law. Citing the

case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another, Civil Revision No. 6 of 2017**, the Court of Appeal on page 25, Mr. Machunda elaborated that it was necessary for the Commissioner for Lands to be joined in the suit for executable orders in the suit, especially the cancellation of Plot No. 122A, Block D. He added that the important tests to determine who is a necessary party has been established in the case of **Leonard Peter v. Joseph Mabao and 2 Others, Land Case No. 4 of 2020** which on page 6 the Court specified that, there has to be a right to relief against a party who is not part to a suit, and that the court must not be in a position to pass an effective decree in absence of such a party.

On the basis of the above submissions, the learned state attorney prayed for the Court to find the Plaintiff to have defaulted to sue a necessary party and proceed to sustain the second point of preliminary objection.

On his part, Mr. Tumaini Mgonja, learned Advocate for the 1st defendant was brief and straight. He asserted that the Plaintiff sued a wrong person because section 12(b) of the LGDAA provides that the District Council is a body corporate with a legal personality to sue and be sued. He opined that the Plaintiff's act of suing the District Executive Director (DED) instead of the District Council is wrong as the DED is an employee like any other employee

of the Council, and that anything done by the DED is done under the authority and on behalf of the Council. He rounded up, praying for the suit to be struck out with costs.

In response, Mr. Gelas Severin, Advocate for the plaintiff prayed to jointly submit on the 2nd and 3rd Defendants' second point of preliminary objection and 1st Defendant's preliminary objection. At the onset, he objected the respective objections raised for not qualifying as preliminary objections. He argued that the plaintiff issued a 90 days' notice of his intention to sue the District Council in compliance with section 6(2) of the Government Proceedings Act Cap. 5 R.E. 2019 (hereinafter, the "GPA") which was attached to the plaint.

He was of the view that the omission not to include the District Council fall under mis-joinder and non-joinder of a party which can be rectified according to Order I Rule 9 of the Civil Procedure Code, Cap. 33 R.E. 2019 (hereinafter, the "CPC"). On that basis he said, the Court may order an amendment in order to include the name of the District Council. He rested his submission praying for the preliminary objection to be overruled as the omission are rectifiable.



In respect of the 2nd and 3rd Defendants' first ground of preliminary objection, Mr. Severin argued that the objection fall short of qualification for a preliminary objection as it goes into the merit of the case in terms of facts, evidence and reliefs claimed in the suit. He elaborated that the objection has the effect of going into the merit of the present suit as to whether the Commissioner for Lands is or is not required to appear and prove if Plot No. 122A Block D was the 1st Defendant's or it should be canceled. Citing the case of **Mukisa Biscuits Manufacturing Ltd v. West End Distributors Limited (1969) EA 696** on page 100, the learned counsel submitted that as long as the point of objection would require the Court to assess whether the Commissioner for Lands will or will not be required to prove facts of the case and reliefs claimed by the Plaintiff, the point lacks the qualities of preliminary objection hence prayed for the same be overruled with costs.

Rejoining, Mr. Elikarim Samwel, learned State Attorney, submitted that the Counsel for the Plaintiff has failed to contest their second point of preliminary objection and instead he has submitted on mis-joinder and non-joinder of a party. He insisted that their objection is based on a point of law and meritorious.



With regard to the first ground of preliminary objection, the learned state attorney stated that the Counsel for Plaintiff has admitted that the Commissioner for Lands is a necessary party to be sued in the present suit. Referring to paragraph 6(a)(i) of the Plaint where the Plaintiff has prayed for cancellation of Plot No. 122A, Block D, it was his contention that it is only the Commissioner for Lands who has powers to cancel the land in question. Fortified by the case of **Leonard Peter** (supra) he asserted that if the Court passes such a decree for cancellation, such a decree cannot be executed in the absence of the Commissioner for Lands. He insisted that the raised point of law on failure by the Plaintiff to sue a necessary party, qualifies a preliminary objection. He prayed for the objections to be sustained and the suit be struck out with costs.

On his part, Mr. Tumaini Mgonja, reiterated that the preliminary objection raised by the 1st Defendant is with regard to suing a wrong party and not failure by the Plaintiff to issue 90 days' notice to the 2nd defendant. He viewed the argument by Plaintiff's Counsel that the omission is rectifiable as an admission that the objection is meritorious and ought to be sustained with costs.



I have considered the submissions of both parties on the points of objection raised by the defendants. For a smooth determination of the matter at hand, I will resolve the preliminary objections by following the course taken by the learned counsels by jointly determining the 2nd and 3rd defendants' second point of objection with the 1st defendant's, and finally if need arises, the 2nd and 3rd defendants' first point of objection.

The 2nd and 3rd defendants' second preliminary objection and the 1st defendant's preliminary objection is premised on the single ground that the plaintiff sued the Director of the Ulanga District Council instead of Ulanga District Council. The learned counsel for the plaintiff attacked the said objections claiming that the same does not qualify a preliminary objection for a reason that the plaintiff issued a 90 days' notice of his intention to sue the District Council in compliance with section 6(2) of the GPA. He argued further that the omission fall under mis-joinder and non-joinder of a party which can be rectified under Order I Rule 9 of the CPC.

On my part, I find the reasons disqualifying the respective preliminary objection adduced by Mr. Severin unfounded. The plaintiff's advocate want this court to believe that for a proper determination of the ground of objection, one has to refer to the plaintiff's 90 days' notice to sue the District

Council to ascertain the propriety of the plaintiff's suit against the District Council. In my view, the raised point of objection is not based on the failure by the plaintiff to give a 90 days' notice to the 2nd defendant but rather, on suing the District Executive Director instead of the District Council. Had it been that the gist of the objection is on the former, one would agree that the same is a matter of fact that needs proof by evidence and hence disqualify a preliminary objection.

With that said, being alive to the tests laid down in **Mukisa Biscuits' case**, that a preliminary objection must raise a point of law based on ascertained facts and, if sustained should dispose of the matter, I hold that the present preliminary objection has met the laid down tests of pure point of law, as it does not require factual proof to dispose of the suit. It is apparent that no evidence needs to be established to ascertain if the plaintiff sued the Director of the Ulanga District Council instead of the Ulanga District Council. I hold so because the point of law as to the plaintiff suing a wrong party, is so express and manifested in the plaintiff's plaint.

With the holding above in mind, I now turn to consider as to whether the omission not to include the District Council fall under mis-joinder and non-joinder of a party which can be rectified under Order I Rule 9 of the CPC as

asserted by the plaintiff's advocate. My starting point is section 12 (b) of the LGDAA which provides that:

"Every district council established under this Part, and in respect of which there is furnished to the Minister by the Clerk of the National Assembly a certificate of establishment, shall, with effect from the date of commencement of the establishment order, be a body corporate, and shall—

- (a) have perpetual succession and an official seal;*
- (b) in its corporate name be capable of suing or being sued;*
- (c) N/A"*

As rightly submitted by the learned state attorney for the 2nd and 3rd Defendants and Counsel for the 1st Defendant, my literal interpretation of the provision above in relation to the matter under scrutiny, is that it is the Ulanga District Council that is capable of suing and being sued in its own name. I am settled in my mind that since the Director of Ulanga District Council has no legal personality, it was wrong for the plaintiff to sue Director, who is a mere employee of the District Council, [**see the case of Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another, Civil Revision 6 of 2017** (unreported)]. Undoubtedly, this is not the case of



misjoinder or non-joinder of parties covered under Order I Rule 9 of the CPC as pointed out by Mr. Severin.

It is now a settled principle that the consequence of suing a wrong party is for the suit to be struck out in the court's registry. In the case of **Sendama General Enterprises Co. Ltd v. Magu District Executive Director & Another, Civil Case No. 24 of 2022 (unreported)** on page 3 through to 4, this court being inspired by the route taken by the same Court in the case of **M/s Musoma Enterprises Ltd v. DED of Magu, Civil Appeal No. 19 of 2015**, sustained the preliminary objection and proceeded to strike out the suit for the plaintiff's act of suing the Executive Director of Magu District Council instead of Magu District Council. Armed with such authority, I apply the same to the present matter.

Since it is without question that the determination of this point of objection suffices to dispose of the entire suit as deliberated above, I find no need to canvass the remaining point of the 2nd and 3rd Defendants' objection on failure to join a necessary party, the Commissioner for Lands.



From the foregoing, the preliminary objection raised by both the 1st defendant and the 2nd and 3rd defendants is sustained. As a result, the suit is struck out with costs.

It is so ordered.

DATED at **MOROGORO** this 16th day of February 2024.


H. A. KINYAKA

JUDGE

29/02/2024



H. A. KINYAKA

JUDGE

29/02/2024