IN THE HIGH COURT OF THE UNITED OF REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE NO. 57 OF 2019

ROSEBAY ELTON KWAKABULI ..... PLAINTIFF

VERSUS

AZIZA SELEMANI ..... 1ST DEFENDANT

TUMAINI AMASISYE ..... 2ND DEFENDANT

SALAHA MOHAMED ..... 3RD DEFENDANT

RULING

OPIYO, J.

The court asked the counsel for the parties to address it on the competence of the suit before it in terms of description of subject matter (order VII rule 1 (c) and 3 of the Civil Procedure Code, Cap. 33 RE 2019. The court *suo motu* observed that only part of farm No. 1917 under CT No. 58025 Vikindu area in Mkuranga District was involved in suit at the District Land and Housing Tribunal of MKuranga in Land Appeal(sic) no. 31/2010 between Aziza Selemani and Lusajo Elton Mwakabuli (the current plaintiff's son). From the facts on record, it is this same case that resulted to objection proceedings via Misc. Land Application no. 16/2010 with Rosebay Elton Mwakabuli (the current plaintiff) as an objector. The plaintiff lost in the said objection proceedings. Her objection having been dismissed she filed Land

case no. 171 of 2012 in the High Court land Division, which was dismissed on 5th Nov 2014 for want of prosecution when the matter was called for first pre-trial conference. It was restored through Misc. Land Application no. 553/2017. However, later the court found formal defects in the suit the fact that led to withdrawal of the same with leave to refile, resulting to the current suit. The current suit includes the 2nd and 3rd defendants who derived the title from the first defendant.

In addressing the court Mr. Robert Mtaiwa, counsel for the plaintiff, appreciated the court's observation and prayed for amendment to meet the end of justice by putting right the noticed anomaly. He argued that it is the amendment that will serve the interest of both parties by specifying the disputed property, which is only piece of land constituting ¾ of an acre not the entire property. That, the amendment to that effect will serve the purpose because it will single out the area in dispute leaving the other land not in dispute to be used by the plaintiff.

He went on to put forward argument that the amendment will still enable the suit to be maintained in this court. This is because, apart from reduction in the size effect that will occur, there are some unexhausted improvements that has been made to the property that reaches the pecuniary jurisdiction of this court. Thus, the value determination should not only be based on purchase price. There is a constructed house and the area is fenced by the 3rd defendant as current occupier. The said improvements changed the property from being a farmland to a commercial land not to be pegged on

purchase price, he argued. He also argued that, as this matter has been in the court for considerable period of time and with all understanding that land has value which is always appreciating, taking all of the considerations he is convinced that with amendment still this court will be clothed with pecuniary jurisdiction to hear the matter.

His further argument is that in the course of their deliberations they have realized that the 3rd defendant is holding a certificate of title based on their written statement of defence, the fact that convinced them to add more parties including the authorities concerned with issuing title deeds for superimposing the third defendant's title on plaintiff's already existing title. And therefore, because in terms of order VI Rule 17 of the Civil Procedure Code, Cap 33 Re 2019 amendment of pleadings is allowed at any stage of proceedings, their prayer for amendment is attainable at this stage. With above observation in mind, he requested for an amendment to include Commissioner for Lands in the matter that will make the suit attainable by this court, as it will entail joining Attorney as necessary party, the suit that can only be heard by the High Court. He cited the case of **TRC V GBP (T) LTD Civil Appeal No. 218 of 2020 (CAT)** to fortify his argument.

He continued to argue that it is the plaintiff who sets pecuniary jurisdiction of his claim. It is him who knows what he claims (**Charles Musama Nyirabu V. The Chairman DSM City Commission others**). It is therefore his submission that the amendment be accorded to the plaintiff to enable court to determine the real question between the parties. That,

should the court not be impressed with their prayer, he had alternative prayer of returning the plaint with instruction that it be filed in lower Court in terms of order VII Rule 10(1) of the Civil Procedure Code. He argued that, this is what is in the interest of justice given the time the parties have been in court and it is only the court which is vested with authority to determine dispute between the parties. He added that, based on overriding objective principle, as applied in the case of **Nassoro Mohamed Mtawazi V. Tanzania Remix Centre Ltd,** this court had powers to order for amendment at this stage. Therefore, given the resources the parties have put in this case, dismissal is not a best option.

Mr. Frank Michael, counsel for the first defendant on the other hand submitted that amendment is not attainable after the court has raised question of jurisdiction. That, the plaintiff had a long time to pray for amendment, but he did not. He contended that the law is noticeably clear that the suit is to be filed in the lowest court competent to try it. Thus, prayer for amendment is not viable at this stage. He argued that single fenced house is not a guarantee to make the court competent based on pecuniary jurisdiction in absence of valuation report. Also, that the issue of joining commissioner as a necessary party is not attainable. His argument is that, since plaintiff is suing 3rd defendant for trespass, it is not necessary to join the Commissioner for Land. After all, such prayer cannot be considered now as the court have already raised a jurisdiction issue.

He continued to argue that when the court finds that it is not clothed with jurisdiction, the only remedy is to dismiss the suit, it cannot order amendment. He further argued that a lower court is also a court with competent jurisdiction, so the matter being entertained there is also in the interest of justice. The argument that, the court order for transfer is in violation of the law. It should just dismiss the suit with costs, he prayed.

Angros Ntahondi representing the second defendant argued in response that as long as the plaintiff admitted that the plaint is not attainable before this court for there being previous suits at the tribunal (Appeal (sic) No. 31/2010 and Misc. Application No. 16/2010 (objection proceedings) in which the claim was of ¾ acre, filing a fresh suit involving a bigger piece of land entails change of a claim by the plaintiff. He therefore argued that, once there is failure to ascertain size of suit property, it brings jurisdiction issues into question because the court fails to satisfy itself of its jurisdiction. It is his submission that the court cannot ascertain the claim now relying on available plaint as it cannot rely on mere assumption or nonexistent facts that it will have jurisdiction based on amended plaint. He agrees that amendment can be made at this stage of proceedings, but that is only if other things remain right. He argued that the circumstances in the cases referred to by counsel for plaintiff were different from what we have at hand. Therefore, the only options in this case are either to strike out the suit or to pray to withdraw the same.

On the issue of desire to join the Commissioner for Land, he argued that this prayer is based on nonexistent facts that cannot be considered by the court. Above all, the plaintiff had more than three years since the institution of the suit to make such application if he so desired. Granting amendment now is against order VII Rule 23 of CPC RE 2019 for not being made earlier. The option is either to struck out the suit to enable plaintiff to determine the proper court to file her suit or prayer to withdraw the suit with costs.

He also disputed the prayer of returning plaint as it does not fit our circumstances. He argued that the same is applicable when the value stated in jurisdiction clause makes it mandatory to be tried by court competent to try it. In our case the value stated is 350,000,000/= which makes it inapplicable to be returned to the lower court. That, in Land Case No. 322/2015 Malaba, J. (as he then was) returned plaint to the plaintiff to submit the same to the proper tribunal as it appeared then, not as it was supposed to be after the amendment. This is equally the same with the case of case of **Said Kassim Ahmed V. Amin Said Alhamis, Comm. Case No. 246 of 1991 H/C DSM**, he argued. And that, all the authorities cited by plaintiff's counsel are about amendment not on returning plaint prayed for, therefore, they are not relevant to support the argument he had put forward.

On the 3rd defendant's part, his advocate, one Fahad Hafif supported the argument of both Michael and Ntahondi and added that as the plaintiff is claiming piece of land his claim will be based only on that not on unexhausted improvements made by the 3rd defendant. He argued that, according to the

certificate of title submitted by plaintiff the land is 6 hectors equals 14.9 acres while trespassed land is just ¾ of an acre. Her current claimed value is unrealistic for such piece of land. Therefore, her prayer for amendment should not be granted, instead the suit be struck out.

Rejoining, Advocate Mtaiwa submitted that the argument by the 1st respondents to the prayer for amendment is misguided as amendment is to be done at any stage of proceedings in terms of Order VI Rule 17 of the Civil Procedure Code. That the misguidance is also true for his argument that property constituting one house cannot fetch the amount constituting pecuniary jurisdiction of this court, he argued.

He reiterated his point on the plaintiff being the one to come up with estimated value of his property not otherwise and argued that section S. 13 of the Civil Procedure Code on filing a suit at the lowest court competent to try it is applied as a matter of convenience not on determination of jurisdiction of the courts. Therefore, in the proposed amendment the S. 13 will be redundant.

He further submitted that their alternative prayer for returning the plaint is attainable and the court has jurisdiction to do so and that in case the court finds their prayer unattainable the remedy is not the dismissal of the suit but striking it out.

He continued to argue that the argument that no amendment can be done after scheduling conference is misconceived as the law provides the amendment to be done at any time. What the law require is the satisfaction of the court with reasons for prayer. The court can even order inclusion a necessary party on its own instance.

Also, that the argument that the plaint can only be returned when the amount permits is also misconceived. Had the counsel appreciated the argument of this court in the case of Nassor Mohamed Mtawazi, he would have not argued so, he submits. The court ordered to return the plaint in the circumstances that supports our position and prayer, he submitted.

He contended that the argument by Hafif that improvements are not included in claim for land is also a misconception as land includes whatever is attached to it and improvements increases the value of land where the same is made. He thus, reiterated his prayer to be granted with no order as to costs.

The above elaborate submissions by all parties are appreciated. The issue to look into is whether this suit is attainable. From the plaint there is narration of how this suit cropped up from a decision in objection proceedings in Misc. Land Application No. 16/2010 in which the current objector Rosebay Elton Mwakabuli lost against the 1st defendant, Aziza Selemani and one Lusajo Elton Mwakabuli who is not a party in the current suit. In the original suit leading to objection proceedings, the claim was based on a piece of land

measuring ¾ of an acre. But the claim in current suit is over a property measuring 6 hectors which is about 14.9 acres. That means in the two matters (the one resulting to objection proceedings and this suit) the subject matters are different leading to different claims, in my view. The difference is also noted on parties. In this suit only one party to the original suit from which objection proceeding was filed is a party, that is the 1st defendant herein. She is being sued together with other two new parties to whom she allegedly transferred the title to. One party, Lusajo Elton Mwakabuli has not been made a party to the current suit claimed to have emanated from the objection proceedings in which he was a party.

According to order XXI Rule 62 of the Civil Procedure Code (supra), in objection proceedings the party against whom an order is made has no right of appeal, his only remedy is to file a separate suit to establish the right he claims to the property in dispute. The question is, can the current suit be the one filed in terms of the above provision. The answer is no because, the plaintiff preferred a different cause of action by suing on a different subject matter which was not in dispute in objection proceedings and suing different parties from the original suit. To file a fresh suit to establish one's title contemplated in the circumstances of the above provision entail suing on the same subject matter pursued in the objection proceedings and against all parties involved preferably in the same court that heard the original suit and objection proceedings. Suing over a different subject matter and different parties from what and who were involved in the objection proceedings is not suing in terms of XXI rule 62 above. By saying so, suing new parties who

might have acquired interest over the disputed property along the way, to give chance for their interests to be considered is not barred, but they should be additional parties in that they be sued together with all parties to the original suit and to objection proceedings for effective determination of matters between the parties.

In essence all counsels appreciated this court's concern on competence of the suit, but they disagreed on what should be the outcome of the said concern. Mr. Mtaiwa, counsel for plaintiff prayed for amendment of pleadings to reflect the original claim. Allowing such prayer entails reducing the claim from about 14.9 acres to only ¾ an acre. This consequently have the effect on the value of the property in question which I believe goes below the claimed value by far, thus inevitably below the pecuniary jurisdiction of this court. Mr. Mtaiwa argued that the value will still remain the same and within the pecuniary jurisdiction of this court due to unexhausted developments that have been put in by the 3rd defendant who claim to have derived the title from the decree holder in the objection proceedings, the 1st defendant here in. It might be true that the 3rd defendant's improvements in the area are valuable, but it is not for plaintiff to peg her claim on the property that does not concern him and does not form part of his/her claim. As argued by Hafif, even if the value was still falling within pecuniary jurisdiction after removal of undisputed piece of land, which I doubt, it is not for plaintiff to rely on that value for her claim, it is the 3rd defendant who is in the position to estimate that value to know whether it falls within the jurisdiction of this court or not. Assuming the value still remains within the jurisdiction of this

court even after reduction on the size of the property as argued by the counsel for the plaintiff, in my considered view this suit is still not attainable because the fresh suit provided under order XXI Rule 62 of the CPC should have been filed in the same court that heard the original suit and the objection proceedings against the same parties involved. In this case the District Land and Housing Tribunal for Mkuranga involving both original parties in objection proceedings.

The above discussion brings us to another level of incompetence of current suit, in my opinion. The said incompetency comes from the fact that the decree debtor in the objection proceedings have not been sued, only the decree holder and others who allegedly derived title from her. This is not in compliance with the provision of order XXI Rule 62 of the CPC allegedly relied upon in filing this suit. The court that competently determined the objection proceedings is the one competent to determine the fresh suit filed by the one losing in objection proceedings contemplated under order XXI Rule 62 of the Civil Procedure Code. This is not the court that heard the original suit and the objection proceedings. Therefore, all remaining constant, it is not a competent court to determine a fresh suit filed on the basis of the above provision.

Reading advocate Mtaiwa's mind from what he presented above, two points were not his only reasons for praying for amendment of plaint to make the suit attainable in this court. His prayer for amendment is also made based on the fact that the plaintiff is contemplating joining Commissioner for Lands

for creating a title over the existing title. Thus, the District Land and Housing tribunal will not have jurisdiction to hear the matter upon joining the Commissioner. For this, I am in agreement with Ntahondi that the court cannot determine matters that are not before it. The commissioner for Land has not been sued yet. It is still in the plaintiff's thoughts as a possibility, as Mr. Mtaiwa put it. That desire to sue Commissioner for Land was not raised prior to this court's concern on the competence of the suit. Although this suit has been in our records for the past three years, the plaintiff had not seen the need to sue the Commissioner for Lands, as he never insinuated that to the court before. It came as an afterthought to circumvent effect of this court's concern. In my view, speculation of amendment that is raised to pre-empty objection raised is not in itself attainable. What that means is that the prayer for amendment made will not address the concern on jurisdiction raised but will come with new facts in an attempt to leave the matter this court's determination.

It is true that under order VI Rule 17 of the Civil Procedure Code, Cap 33 Re 2019 amendment of pleadings is allowed at any stage of proceedings, but the amendment contemplated under the provision above is not open ended it depends on the nature and aim of the amendment. Therefore, the same is only made upon the leave of the court which will set the parameters within which the amendment will be made in a manner that ensure justice to all parties and aiming at and limited to what will be necessary for determining the real questions in dispute between the parties (See **Salum Abdallah Chande T/A Rahma Tailors V The Loans and Advances Realization**

Trust and Two Others Civil Appeal No. 49 OF 1997, CA. It is therefore, my considered view that the amendment prayed for here is not falling within the brackets above as it brings uncertainty on the pecuniary jurisdiction of the court and aimed at running away from the competent court to determine the matter as it competently determined the original matters leading to this suit. Thus, it is not attainable.

The plaintiff's counsel had alternative prayer of returning the plaint with instruction that it be filed in lower Court in terms of order VII Rule 10(1) of the Civil Procedure Code should the court fail to be impressed with their prayer for amendment. His view is shaped with the duration the parties have been in court and necessity of giving due consideration to overriding objective principle which require considering substantive justice rather than technicalities in determining cases as applied in **Mawazi's case.**

In this, also agree with defendants' counsels that returning of the plaint is also not fit in our circumstances because of uncertainty in the value of the disputed property and on parties to the matter. The current value is beyond the pecuniary jurisdiction of the contemplated lower court and it is not certain what will be the value after removing the undisputed property from the claim. The current plaint also left out a necessary party who was involved in the original suit and in objection proceedings at the lower court and even contemplating joining other parties. The section as applied by Hon. Malaba, J. (as he then was) in Land Case No. 322/2015 (supra) requires the returned plaint to be fit for the move, the fact which is distinguishable with the

circumstances of our case which is not yet fit for that purpose for the uncertainties noted above. It means, it requires amendment to be a fit case for the application of the above provision of law. As the amendment has already been denied in the first concern, this prayer is also not attainable, it is therefore equally denied. And consequently, this suit is struck out for being incompetent before this court.

M. P. OPIYO,

JUDGE

30/09/2021