IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE No.213 OF 2020

ALLY MUSA MGULU.....1ST PLAINTIFF
OMARY SHABANI RAMADHANI.....2ND PLAINTIFF

VERSUS

PETER PETER JUNIOR.....1ST DEFENDANT
SAMWEL WILLIAM KILOBA.....2ND DEFENDANT
PETER PAULO MARO.....3RD DEFENDANT
WILLHEM ERIO.....4TH DEFENDANT

Date of last Order: 14.09.2021
Date of Ruling: 04.10.2021

RULING

V.L. MAKANI, J

This is the ruling in respect of the preliminary objection raised by the 3rd defendant that.

1. *The suit is fatally defective for suing a wrong party in law.*
2. *The suit is unmaintainable for being res-sub judice.*
3. *The suit is hopelessly time barred.*

With leave of the court the preliminary objections were argued by way of written submissions. Mr. Muharami Rajabu Chuma, Advocate drew and filed submissions on behalf of the 3rd respondent while

Richard Peter, Advocate drew and filed reply submissions in reply on behalf of the plaintiffs.

Submitting on the first point of preliminary objection, Mr. Chuma said that the 3rd defendant is the administrator of the estate of the late Paul Steven Maro who passed away on 22/03/2016. He said the 3rd defendant was appointed to be an Administrator through Mirathi No. 313 of 2016 (**Annexure P1)** of the Written Statement of Defence **(WSD)** of the 3rd Defendant). In that regard Counsel said that it is improper in this case for the plaintiffs to sue the 3rd defendant in his personal capacity. He insisted that the defect is fatal and renders the suit unmaintainable for suing the wrong party. That it is a procedural irregularity to sue the 3rd defendant in his personal capacity in a property of the deceased person which is the subject of the dispute. Mr. Chuma said that the remedy is to strike out the suit with costs. He relied on the case of **Suzan Waryoba vs. Shija Dalali, Civil Appeal No.44 Of 2017 (CAT-Mwanza)** (unreported) where the Court of Appeal stated that it is desirable that where a litigant sues as an administrator of an estate the same should be reflected in the title.

On the point that the matter is res subjudice, Mr. Chuma said that the suit is res subjudice to Land Application No.159 of 2018 and Land Application No.28 of 2019 of which matters are all pending at the District Land and Housing Tribunal for Kibaha (**the Tribunal**) as it is shown in **Annexure P4** to the **WSD.** He said that this Court therefore lacks jurisdiction to determine the matter in terms of section 8 of the Civil Procedure Code CAp 33 RE 2019 (**The CPC**). He relied on the case of **Exim Tanzania Limited vs. Bhesania Garage Limited & 4 Others, Commercial Case No.18 Of 2015 (HC-Commercial Division)** (unreported) where he said that the court, among other things observed that for the matter to be res subjudice, first there must be two pending suits, one previously filed. Second, the parties to the suit must be the same or must claim to be suing under the same title. Third, the matter in issue must be directly and substantially the same in the two suits. Fourth, the two suits must be pending in a court of competent jurisdiction. He added that the pending cases at the Tribunal seeks to determine the ownership of the suit property namely a piece of land located at Mapinga Ward, Kibosha Street, Bagamoyo District Coast Region which is about 18 acres, and that both the Tribunal and this court have competent jurisdiction to grant the reliefs claimed by the plaintiff. He said that the parties are

claiming to sue under the same title and therefore the matter fits to the tests of the principle of res subjudice. He said the court should therefore dismiss the present suit at hand.

On the third point that the matter is time barred, Mr. Chuma said that the late Paul Stephen Maro was in possession of the suit property since 2006 as reflected in the Certificate of Occupancy (**Annexure P2** to the **WSD**). That the suit at hand was instituted in 2020. He said that it is almost 14 years counting from 2006. That according to Item 22 of part I to the Schedule of the Law of Limitation Act, CAP 89 RE 2019 (the **Limitation Act**), suits for recovery of land must be instituted within 12 years. He therefore said, the matter has been instituted out of time without leave of the Court. He added that the right of action arose in 2006 when the late Paul Stephen Maro was granted the Right of Occupancy of the suit property, and that the cause of action arose when the plaintiff became aware of the infringement and that is when the late Paul Stephen Maro was granted the Certificate of Occupancy. He prayed for the suit to be dismissed with costs in terms of section 3 of the Limitation Act.

In reply, Mr. Richard Peter on the first point of objection said that, the plaintiff in 2019 sued the 3rd defendant for the reason of trespassing into the land of the plaintiff. He said that plaintiff never knew that the 3rd was the alleged owner of the suit property in his capacity as an Administrator of the estates of Paul Stephen Maro. That even the late Paul Stephen Maro was stranger to the plaintiff. He said that the 3rd defendant as an administrator of the estate of the late Paul Stephen Maro has to be approved in the course of the hearing. He said that the issue on whether the 3rd defendant is the legal representative of Paul Steven Maro is a matter of fact which needs to be proved and therefore does not fit to be preliminary point of objection. In support thereof he relied on the case of **Mukisa Biscuit Co. Limited vs. West End Distributors Limited (1969) EA 696.** He said that the case of **Suzan S. Waryoba** (supra) cited by Mr. Chuma is distinguishable to this case simply because the plaintiff was the one who sued the respondent in the Ward Tribunal, so she knew that she was suing under the capacity of an administrator. However, in this matter the plaintiff sued the 3rd defendant for trespass and did not know his capacity.

Counsel further argued that even if this court is of the opinion that the point is fit for preliminary objection, still the remedy is not to dismiss the suit, rather is to order amendment of the plaint under the oxygen principle.

On the issue of res subjudice, Mr. Peter said that, in his **WSD**, the 3rd defendant has only attached copies of Land Application No.28 of 2019 which was supposed to be Misc. Application No. 28 of 2019 and does not even show that it arose from which application. He said that the Chamber Application attached by the 3rd defendant is to the effect that the parties at the Tribunal were **Peter Peter Junior vs. Samuel William Koroba** & **Peter Paul Maro**, and that Peter Peter Junior is claiming ownership of 25 acres. In this present suit, the plaintiffs are **Ally Musa Mgulu & Omary Shabani Ramadhani vs. Peter Peter Junior, Samwel William Kiloba, Peter Paul Maro & Wilhem Urio** and that the plaintiffs are claiming 18 acres. He said that the parties are different and the matter in issue is also different as the suit pending in the Tribunal is for 25 acres and the pleading attached is only for temporary injunction. He insisted that the matter is not res subjudice.

On the third limb of objection Mr. Peter said that, the cause of action did not accrue in 2006. That the 3rd defendant did not show anything to manifest his ownership from 2006. That he should have said that he cultivated the area from 2006 to 2020 without any interference. He said in absence of that it remains that the cause of action arose in 2019 when the 3rd defendant started to cultivate the area, and that is when the plaintiffs became aware and decided to file the suit against the defendant. He added therefore that, the matter has been filed within the time. He prayed for the preliminary objections to be overruled with costs.

In rejoinder, Mr. Chuma reiterated his main submissions. He added that the preliminary objection being pure point of law cannot be taken from abstract rather from facts. That the court cannot determine a preliminary objection in isolation of the pleadings which contains annexures as they are part of the pleadings. He relied on the cases of **Ali Shabani & 48 Others vs Tanroads & Attorney General, Civil Appeal No.261 of 2020 (CAT-Tanga)** (unreported) and the **Standard Charterd Bank & Another vs. VIP Engineering & Marketing Limited & 3 Others**, in which he said the Court observed that where a party has raised preliminary objection, the

other party cannot be allowed to rectify the defect complained of by the party who raised the objection as for doing so amount to pre-emptying that preliminary objection.

The main issue for consideration is whether the preliminary objections raised by the 3rd defendant have merit.

The first point of preliminary objection entails locus standi of the 3rd defendant. Mr. Chuma for the 3rd defendant stated that, it was wrong for the plaintiff to sue the 3rd defendant in his personal capacity as he is the administrator of the estate of the late Paul Steven Maro. On the other hand Mr. Peter claims that the plaintiff was not aware that the 3rd defendant was an administrator, he only became aware when the WSD was filed. To establish whether or not the 3rd defendant is legally an administrator of the estate of the late Paul Steven Maro, the court must go through the evidence including the Letters of Administration. In other words, whether or not the 3rd defendant is an administrator is a fact that requires ascertainment by way of evidence and that defeats the principles set out in the case of **Mukisa Biscuits Company Limited** (supra). In any case, the plaintiffs were not aware of the status of the 3rd defendant they only knew about it when

the defence was filed so the plaintiff cannot be penalised on a fact that he was not aware of. The first point of preliminary objection therefore does not qualify under the law to be a preliminary objection.

On the 2nd limb of objection, Advocate Chuma was of opinion that the matter at hand is res sub-judice to Land application No.28 of 2019 and Land application No.159 of 2018. Res-subjudice is governed by section 8 of the CPC. It provides:

> *"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed"*

As correctly stated by Mr. Peter, for the matter to be res- subjudice, it must, firstly be directly and substantially in issue in a previously instituted suit, secondly, it must be between the same parties or parties or any of them litigating under the same title and thirdly, the suit must be pending in the same or any court having jurisdiction to grant relief sought. I also subscribe to the cases cited by Mr. Peter of **Ali Shabani & 48 Others** and **Standard Chartered Bank** (supra)

As pointed out by Mr. Peter, the 3rd defendant did not file a copy of Land Application No. 159 of 2018 and Land Application No. 28 of 2019 does not show if it arises from Land Application No. 159 of 2018. Indeed, the parties in the suit and the application are not the same as some of the parties in the application are not reflected in the suit. The only parties that appear in both the application and the suit are **Peter Peter Junior**, **Samwel William Kiloba** and **Peter Paul Maro.** The plaintiffs in the instant case have never been parties to any of the pending applications at the Tribunal. The land subject of the dispute is also different that is 18 acres in the application and 25 in the suit. Obviously, parties in Misc. Land Application No.28 of 2019 are not the same parties in the present case. On top of that, Mr. Chuma did not advance any argument to show whether or not the plaintiffs in the instant case are claiming under the same title to any of the parties in the Land Application No.159 of 2018. In absence of that therefore, what remains is that the parties are different.

Further, the reliefs sought are also different; in Land Application No. 28 of 2019 the 1st defendant was seeking to be joined as the 2nd defendant in Land Application No.159 of 2018 while in the case at hand the plaintiffs are seeking a declaratory order that they are the

lawful owners of the 18 acres of land located at Mapinga Ward, Kibosha Street in Bagamoyo District of Coastal Region. In that regard, the present suit (Land case No.213 of 2020) cannot operate as res subjudice to Land Application No.28 of 2019. The second point of preliminary objection is therefore devoid of merit.

Lastly, Mr. Chuma stated that this this matter at hand is time barred. He based his argument on the point that the late Paul Stephen Maro was in possession of the suit property since 2006 and that was the year the cause of action arose as it was the time he was granted the right of occupancy. He said the present case was instituted in 2020 and almost 14 years has lapsed while the law requires claim for recovery of land to be filed within 12 years from when the cause of action arose. This point of objection will not consume much of my time for some reasons amongst others that there is nowhere in the plaint the plaintiffs have established that the cause of action arose in 2006. The plaintiffs claim in paragraph 8 of the plaint is that the defendants invaded the suit land in 2019. If at all Mr. Chuma has genuine evidence that the 3rd defendant is in occupation of the suit land since 2006, he should prove the same during the hearing of the

matter on merit as it needs proof on evidence. The last point of preliminary objection lacks merit as well.

In the final analysis, this court finds the preliminary objections raised by the 3rd defendant without merit and they are hereby dismissed. Costs shall be in the cause.

It is so ordered.

V.L. MAKANI
JUDGE
04/10/2021