

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 27 OF 2021**

**RESPICIUS EMILIAN MWIJAGE..... PLAINTIFF**

**VERSUS**

**THE MUNICIPAL DIRECTOR,**

**ILALA MUNICIPAL COUNCIL.....1<sup>ST</sup> DEFENDANT**

**CLEMENT ALBERT KEENJA.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

Date of Last Order: 14/09/2021

Date of Ruling: 26/10/2021

**A. MSAFIRI, J:**

This Ruling pertains to preliminary objection on point of law raised by the 1<sup>st</sup> and 3<sup>rd</sup> defendants to the effect that:

- 1. The suit is unmaintainable and bad in law for impleading among party contrary to section 14 of the Local Government (Urban Authorities) Act [Cap. 288 R.E. 2002].*
- 2. The suit is unmaintainable and bad in law for suing a non-existent party not known to law (sic).*

The preliminary objection was raised in objection of a suit Land Case No. 27 of 2021 whereby the plaintiff has sued the defendants claiming that the 1<sup>st</sup> defendant has unlawfully trespassed the plaintiff's unsurveyed

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piece of land. He is praying among other orders, the declaration that the plaintiff is the lawful owner of the land trespassed by the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant should vacate from the said land.

With order of the court, the preliminary objections were argued by way of written submissions. On the 1<sup>st</sup> and 3<sup>rd</sup> defendants, the submission was drawn and filed by Hosana Mgeni, State Attorney, whilst those of the plaintiff were drawn and filed by Leticia Msechu, Advocate for the plaintiff.

In support of 1<sup>st</sup> preliminary objection, Hossana Mgeni, stated that Ilala Municipal Council is a local government authority established under Local Government (Urban Authorities) Act, Cap. 288 and was registered on 10<sup>th</sup> November, 1999, and that once it was established, it enjoys the right of having the capacity to sue or being sued in its own name as per section 14(1)(b) of the Local Government (Urban Authorities) Act, (supra).

Ms. Hossana Mgeni submitted that, contrary to the law, the plaintiff has sued the Municipal Director of Ilala Municipal Council who is a mere employee like any other employees of the Council. The proper approach by the plaintiff was to sue the Ilala Municipal Council as a body corporate.

Ms. Hossana Mgeni cemented her arguments by citing the cases of **Temeke Municipal Council vs. Nixon Njolla & Mariam Chimbala**, Labour Revision No. 564 of 2019. HC. (unreported) and the case of **Maulidi Shabani vs. Temeke Municipal Executive Director and Farida Mohamed Said**, Misc. Land Application No. 1030 of 2017, HC. DSM (unreported).



Submitting on the second ground of preliminary objection, Ms. Mgeni stated that, the suit at hand is untenable for being instituted against the 1<sup>st</sup> defendant who is a non-existent person. That this mistake cannot be corrected under Order 1 Rule 10 of the Civil Procedure Code, Cap. 33 R.E. 2019 as the same has also been wrongly sued. Ms. Mgeni cemented this argument by referring the court to the Ugandan case of **Waswa Primon vs. Moulders Limited, Miscellaneous Application No. 685 of 2017** (unreported). She pointed that although the court is not bound by the referred case, but the case is highly persuasive. She concluded by praying the court to strike out the suit with costs.

In the reply, Ms. Msechu opposed the objections and submitted on the first ground of the preliminary objection that the Municipal Director in a specific Municipality is not a mere employee, but the same is the Principal Officer who is responsible for the affairs and management of that Municipality. That, the Municipal Director being the Principal Officer conversant with the facts of the Municipality, have managed to file defense against the plaintiff's suit as per the written statement of defence filed jointly by the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

Ms. Msechu submitted further that, since the pleadings have been correctly stated by all parties, the only remedy available as regards suing a wrong party is to amend the pleadings as per Order 1 Rule 9, Order VI Rule 17, Order XXII Rule 10(1) and Section 97 all of the Civil Procedure Code, Cap. 33 R.E. 2019. She cited the cases of **Nuru Hussein vs Abdul Ghani Ismail Hussein [2000] TLR 2017** and **Kilombero North Safaris Limited vs Registered Trustees of Mbopima Authorities**

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**Association, Civil Appeal No. 273 of 2017, Court of Appeal Tanzania** (unreported).

On the 2<sup>nd</sup> point of preliminary objection, Ms. Msechu vehemently denied to have sued the non-existing party. She stated that, the council was existing as on 18<sup>th</sup> February, 2021. That it was through that existence that the 1<sup>st</sup> and 3<sup>rd</sup> defendants managed to get the facts and filed their defense case on 18<sup>th</sup> May, 2021. She stated that the Ugandan case cited by the defendants are distinguishable from this matter as in the cited case, the party in dispute never existed. She argued that as long as all parties are aware that Ilala Municipal Council have been dissolved to Dar es Salaam City Council, for the interest of justice, the available remedy is to amend the pleading and not to strike out the suit with costs. She concluded by praying for the preliminary objections to be overruled with costs.

I have gone through the pleadings filed by parties, read the authorities cited in support of the arguments made and considered the submissions made for and against the objections. The question for my determination is whether the preliminary objections raised by the 1<sup>st</sup> and 3<sup>rd</sup> defendants are merited. It is trite law that preliminary objection must be on point of law, whereas a point of law must be apparent on the fact of record. The preliminary objection should consist of a point of law which has been pleaded or which arises by clear implication out of pleading, and which, if argued as a preliminary objection may dispose of the suit. **(See Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited [1969] E.A. 696)**. Also, in the case of **The**

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**Soitsambu Village Council vs. Tanzania Breweries Limited and Tanzania Conservation Limited, Civil Appeal No. 105 of 2011** (unreported), it was observed by the court of that, the ***Court will treat as preliminary objection only those points that are pure law.***

In the present application, I am of the view that the raised objections are pure law and does not contain facts or evidence which attracts proof or has to be ascertained.

Section 14 of the Local Government (Urban Authorities) Act, (supra) provides that:

*14(1); Every urban authority established under this part, and in respect of which there is existence a Certificate of establishment furnished under section 9, shall, with effect from the date of commencement of the establishment order, be a body corporate, and shall: -*

a) N/A

***b) In its corporate name be capable of suing or being sued (Emphasis mine).***

From the hereinabove provision, the then Ilala Municipal has a legal entity which can sue and be sued on her own name. However, in the present suit the plaintiff has sued the Director, I find that the plaintiff sued a wrong party. I agree with the respondent's observations that the Director is a mere employee of the council and as that in his capacity he is just the representative of the council. Since the Director of Ilala Municipality is not a legal personality then he was not a proper party and in case a decree has to be preferred against him, it cannot be effective (see the cases of **Temeke Municipal Director vs Nixon Njolla & Mariam Chimbala**

(supra) and in the case **Elizabeth Simon Mwakapangala (Administratrix of the Estate of the late SAID SHOMARI LOKO) vs Municipal Director, Ilala Municipality & Another, Misc. Land Case Application No. 580 of 2020**). Therefore, this ground of objection is sustained.

Since the first ground of preliminary objection suffices to dispose this matter. I find no reason to determine the second ground of objection.

The major question here is what is the remedy in a situation where the plaintiff has sued the wrong person? The counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants has asked the court to strike out the suit in its entirety with costs. They argued that since the plaintiff has sued a non-existing person, the situation is not curable under Order 1 Rule 10 of the Civil Procedure Code (supra). On her part, counsel for the plaintiff asked the court to invoke section 97, Order I Rule 10 and Order VI Rule 17 of the Civil Procedure Code (supra). She maintained that the situation is curable under those provisions.

On examination of the above cited provisions, it is my view that for a party who has been wrongly sued, Order 1 Rule 10(2) provides the remedy. That is to strike out the pleading in which the name was wrongly joined. It is trite law that where there are defects in pleadings, the remedy is to strike out the same. This has been said by the court once and again in numerous cases.

In the case of **Director General NSSF vs. Consolata Mwakisu, No. 329 of 2017 [2018] TZ CA** (unreported), it was held that,

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*"It is stated that proper position is to dismiss only competent application, those which suffer from material defects are to be struck out"* (Emphasis mine).

In the case of **Mugeta Torokoko & Another vs Ministry of Lands, Housing and Human Settlement & 2 Others, Civil Case No. 1 of 2019, HC. Musoma** (unreported), the plaintiffs in the cited case prayed to amend their plaint to rectify the error. The prayer was not granted. In his decision, Kahyoza, J, reiterated the findings of the Court of Appeal in the similar position in the case of **Noel Palangyo vs. Tanga Cement Co. Limited, Civil Application No. 4 of 2015 (CAT unreported)** in which the Court of Appeal held that;

*"To grant a withdrawal is tantamount to pre-empt a preliminary objection. More so, the remedy of the incompetent application is to strike it out...."* (Emphasis mine).

Having said so, I hold that the Municipal Director Ilala Municipality has been wrongly sued in this suit. I also hold that the remedy is not to amend the plaint but to strike it out. The preliminary objection on the point of law raised is therefore sustained, and the Land Case No. 27 of 2021 is struck out with no order as to costs. The plaintiff is at liberty to file a proper suit. **It is so ordered.**



*A. Msafiri*  
**A. MSAFIRI**

**JUDGE**

**26/10/2021**