

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**

**LAND CASE NO. 155 OF 2021**

**BAHIYYA AHMAD KIBOLA** (*Administratrix of the Estates of the Late*

**TAANISAH TAMBWE AREND**.....**PLAINTIFF**

**VERSUS**

**ASSISTANT COMMISSIONER FOR LANDS**

**DAR ES SALAAM ZONE**.....**1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURVEY AND**

**MAPPING DAR ES SALAAM ZONE**.....**2<sup>ND</sup> DEFENDANT**

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

**GERALD PETER SWAI** .....**4<sup>TH</sup> DEFENDANT**

**SIRVEL DICK MENDULLO**.....**5<sup>TH</sup> DEFENDANT**

**AFRED MULOKOZI** .....**6<sup>TH</sup> DEFENDANT**

**LUCAS SIMONI MONGI**.....**7<sup>TH</sup> DEFENDANT**

**JIMMY PAUL NTOBI**.....**8<sup>TH</sup> DEFENDANT**

**THOMAS RAYMOND MKINGA**.....**9<sup>TH</sup> DEFENDANT**

*Date of last Order: 15/6/2022*

*Date of Ruling: 19/8/2022*

**RULING**

**I. ARUFANI, J.**

The plaintiff instituted in this court the present suit against the defendants jointly and severally claiming for among other reliefs for a

declaration that the resurveying of landed properties forming part of plot No. 68 at Hananasif and designated it as Plots No. 411, 412, 413 and 414 Block 40 by the 2<sup>nd</sup> defendant is illegal as the same is lawfully owned by the Plaintiff.

On lodging their joint written statements of defence in the court, the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> defendants filed in the court a notice of preliminary objection containing four points which are to the effect that;

- i. That the plaint is irreparably defective for having being filed against a deceased person (the 5<sup>th</sup> Defendant whose legal personal representative is Parmo Mathew Mendulo).*
- ii. That the plaint is incurably defective for being filed out of time.*
- iii. That the plaintiff has no cause of action against the 9<sup>th</sup> defendant.*
- iv. The plaint is incurably defective for non-joinder of a party (the seller).*

When the matter came for hearing the above raised points of preliminary objection on 25<sup>th</sup> April, 2022, the plaintiff was represented by Mr. Mashaka Ngole, learned advocate. On the other hand, while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were represented by Mr. Daniel Nyakiha, learned State Attorney, Ms. Miriam Majamba assisted by Mr. Yona Habiye, learned

advocates represented the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> defendants and while the 8<sup>th</sup> defendant was represented by Mr. Masinde Kisumo, learned advocate the 7<sup>th</sup> defendant was absent. The Court ordered the counsel for the parties to disposed of the raised preliminary objection by way of written submissions. The order was duly complied with by the counsel for the parties and now the court is making its ruling on the raised preliminary objections.

Submitting on the first point of preliminary objection, the counsel for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 9<sup>th</sup> defendants (hereinafter referred as the counsel for the defendants) contended that, the present plaint has been filed in the court against a deceased person who is the 5<sup>th</sup> defendant namely Sirvel Dick Mendullo. It has been contended that the administrator of the deceased's estate should have been joined in the present matter as required by Section 100 of the Probate and Administration of Estate Act [CAP 352 R.E 2019].

In reply to the first preliminary objection, the plaintiff contended that the first preliminary objection is not only misconceived but also it does not meet the legal test set in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696 which requires a preliminary objection be on pure point of law. It was submitted further by the plaintiff that, at the time the plaint in this matter was filed in the court

the plaintiff had no information that the 5<sup>th</sup> defendant had passed on and that his legal representative is now one **Mathew Mendullo**.

The plaintiff submitted that the advocate for the defendants was required to bring the death concern to the attention of the court which would have invoked the provisions of Order 1 Rule 10(2) of the Civil Procedure Code [CAP 33 R.E 2019] (hereinafter to be referred as the CPC), to order the substitution of the name of the 5<sup>th</sup> defendant with that of the personal legal representative.

In their rejoinder the counsel for the defendants reiterated their submission in chief and contended that, where a suit has been filed against a deceased person the same must fail.

The first preliminary objection should not detain me longer than it is necessary. As correctly submitted by the learned advocate for the plaintiff death is a matter of evidence, which is proved by producing in court a death certificate. The same cannot therefore, be determined as a preliminary objection within the test laid down in the case of **Mukisa Biscuit** (supra). I also agree with the submission by the learned advocate for the plaintiff that, if indeed the 5<sup>th</sup> defendant is no more, then that ought not to have been resolved through preliminary objection. Rather the learned advocate for the

defendants should have brought it to the attention of the court so that the name of the legal representative for the deceased defendant can be substituted with that of his legal representative.

I have seen the written statement of defence lodged by the defendants whereby the legal representative of the 5<sup>th</sup> defendant has signed the same on behalf of the 5<sup>th</sup> defendant. I am of the settled view that the name of legal representative can be safely substituted with that of the 5<sup>th</sup> defendant and the matter can proceed without striking out the matter as prayed by the counsel for the defendants. In the premises the first preliminary objection is hereby found it is without merit.

On the second preliminary objection it is contended that the plaint has been filed out of time contrary to section 3 (1) of the Law of Limitation Act [CAP 89 R.E 2019] which prescribes that, the time frame to file land matter in court is 12 years. In the present matter it has been contended that, the cause of action arose in 1978 hence the matter has been filed out of time.

On reply to the second preliminary objection, the learned advocate for the plaintiff contended that the period of limitation in all suits for recovery of land begins to run from the time when the alleged owner becomes knowledgeable of the trespass to the land in dispute. In the present matter

it is contended under paragraphs 17 and 19 of the plaint that, the defendants' physical encroachment on plot No. 68 begun in 2016 and in the year 2021 the plaintiff discovered that the defendants' encroachment was formalized as the defendants were registered as owners of the suit property.

On rejoinder the defendants reiterated their submission in chief.

Much as I could discern parties' argument on the second preliminary objection, while the counsel for defendants are of the firm view that the matter at hand has been filed in the court out of time as the cause of action arose in 1970's, the plaintiff on the other hand contended that she became aware of the encroachment on the suit land in 2016 and in 2021 the defendants were registered as owners of the suit land.

I am of the considered view that, as there is a dispute as to when the cause of action arose, determination as to when exactly the cause of action arose in the present matter cannot be made without requiring evidence to establish the same. As the said issue cannot be determined without requiring evidence it is finding of this court that the second point of preliminary objection cannot be sustained and deserve to be overruled for being devoid of merits.

As for the third preliminary objection it has been contended that the plaintiff does not disclose a cause of action against the 9<sup>th</sup> defendant. It was contended that, Order VII Rule 1 (e) of the CPC, requires a plaintiff to show facts which give rise for them to seek redress from the defendant. It was argued by the counsel for the defendants that, the plaintiff filed in the present matter does not show whether the plaintiff have claims of legal rights against the 9<sup>th</sup> defendant. The counsel for the defendants contended further that where the plaintiff does not disclose a cause of action the remedy is to reject the same and the defendant will be discharged.

In his reply the counsel for the plaintiff contended that the third preliminary objection is misconceived because reading through the plaintiff, the same has disclosed a cause of action against the 9<sup>th</sup> defendant. The advocate for the plaintiff has referred the court to the decision in the case of **Mukesh Gaurishankr Joshi and Gintext Supplies and 2 others** Civil Case No. 102 of 1997 (Unreported) in which the court had to say;

*"The question whether a plaintiff discloses a cause of action must be determined upon perusal of the plaintiff alone, together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of facts in it are true."*

The plaintiff's advocate argued that, looking at the plaint, the plaintiff claims against all the defendants jointly and severally including the 9<sup>th</sup> defendant that they have fraudulently trespassed on the suit land. The counsel for the plaintiff submitted that, assuming that the plaint does not disclose a cause of action against the 9<sup>th</sup> defendant the remedy is to reject the claims against the 9<sup>th</sup> defendant and not to strike out the plaint as prayed by the counsel for the defendants.

On rejoinder the defendants' counsel have reiterated their submission in chief. The court has found the sole issue for determination on the third preliminary objection is whether the plaint does not disclose a cause of action against the 9<sup>th</sup> defendant.

The term cause of action has not been defined under the CPC, but in the case of **John M. Byombalirwa v Agency Maritime Internationale (Tanzania) Ltd** [1983] TLR 1 (CA), the term cause of action was defined to mean: -

*"... Essentially facts which it is necessary for the plaintiff to prove before he can succeed in the suit..."*

The Court of Appeal held further in the above cited case that: -



*"For purposes of deciding whether or not the plaint discloses a cause of action the plaint and not the reply to the written statement of defence should be looked at."*

I have gone through the plaint filed in the present matter and find paragraph 19 of the plaint states that, the 4<sup>th</sup> to 9<sup>th</sup> defendants have encroached on the suit land. The said paragraph read as follows: -

*"That, later in the year 2016, the 4<sup>th</sup> to 9<sup>th</sup> defendants without colour of right encroached part of plot No. 68 at Hananasif, forming part of the suit property (part of the land comprised in the then Plot No. 68) taking advantage of the approval of the survey plan by the 2<sup>nd</sup> defendant made in favour of the 4<sup>th</sup> to 9<sup>th</sup> defendants, trespassed into the suit properties and constructed six houses thereat which is illegal and unlawful."*

The similar claims have been repeated on paragraphs 20, 21, 23 and 24 of the plaint filed in the present matter. I am of the settled mind that the plaint filed in the present matter by the plaintiff has disclosed sufficient cause of action for all the defendants including the 9<sup>th</sup> defendant. Consequently, the third preliminary objection is without merits and it is accordingly overruled.

Coming to the last point of objection regarding the non-joinder of a party namely the seller, the defendants have submitted that, such omission

is fatal to the proceedings at hand. It is contended that Shirika la Nyumba la Taifa was a seller of the suit land hence it ought to have been joined in the matter at hand so as to enable the court to determine the matter to its finality and also to avoid multiplicity of cases.

On reply the counsel for the plaintiff contended that, nowhere it has been pleaded that the plaintiff acquired the suit land through sale process. It has been submitted further that even though the defendants have pleaded their respective possession and ownership of the suit land flows from the sale by the NHC then they should have applied for joining the alleged seller of the suit land under the provisions of Order 1 Rule 10(2) of the CPC.

On rejoinder it has been contended by the defendants' counsel that, the plaint is incurably defective for non-joinder of the seller who is the National Housing Corporation and it is a necessary part in the matter at hand.

After considering the rival submission from the counsel for the parties in relation to the fourth point of preliminary objection, the court has come to the settled view that, the issue as to whether NHC is a necessary party to the present matter is a matter of evidence. It is also the views of this court that, if the defendants have any claim against the NHC they should have

brought a counter claim against the NHC and other parties they think are necessary for determination of their rights.

Besides the court has been of the view that, even if I were to agree with the defendants that the NHC is a necessary party to the present matter the remedy is not to strike out the matter rather it would have been to order the mentioned party be joined in the matter as a necessary party. The court has come to the above view after seeing Order 1 Rule 9 of the CPC provides that: -

*"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."*

In the strength of what is provided in the above quoted provision of the law, it is the finding of this court that the present suit cannot simply be defeated by non-joinder of the NHC as suggested by the counsel for the defendants. In the premises the court has found the fourth point of preliminary objection is equally devoid of merit and it cannot be sustained.

It is in the light of what I have stated hereinabove the court has found all the points of preliminary objections raised by the defendants are devoid

of merit and are hereby overruled. Costs to be within the cause. It is so ordered.

Dated at Dar es Salaam this 19<sup>th</sup> day of August, 2022



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

**JUDGE**

19/08/2022

**Court:**

Ruling delivered today 19<sup>th</sup> day of August, 2022 in the presence of Mr. Jacob Minja, Advocate holding of Mr. Mashaka Ngole, Advocate for the plaintiff and in the presence of Mr. Daniel Nyakiha, State Attorney for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Ruling is also delivered in the presence of Ms. Miriam Majamba, Advocate and assisted by Mr. Yona Habiye, advocate for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 9<sup>th</sup> defendants and in the absence of the 7<sup>th</sup> and 8<sup>th</sup> defendants.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

**JUDGE**

19/08/2022