

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 95 OF 2021

PAUL MEENDA MUSHI.....PLAINTIFF

VERSUS

JUSTIN KYAMTOIJO TINEISHEMO.....1ST DEFENDANT

PETER KAMBARAGE NYERERE (*administrator of estate of the late*

JOHN JULIUS NYERERE.....2ND DEFENDANT

THE COMMISSIONER FOR LAND.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

THE SOCILITOR GENERAL.....5TH DEFENDANT

Date of last order: 15/9/2022

Date of ruling: 28/9/2022

RULING

A. MSAFIRI, J.

On 29th day of April 2021, the above named plaintiff instituted the present suit against the defendants jointly and severally for reliefs *inter alia* a declaration that he is the lawful owner of Plot No. 507/2/1 and 507/2/2 Block C, Mikocheni, Kinondoni District, Dar es Salaam (disputed premises).

On lodging his written statements of defence, the 1st defendant on 18th August 2021 raised a preliminary objection to the effect that;

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- i. That the suit is improperly filed before the court for contravening mandatory provisions of the law with regards suits by or against administrators.*

The 1st defendant therefore prayed the suit be dismissed with costs.

When the matter was called on for hearing of the preliminary objection on 15th September 2022, Mr. Adrian Mhina learned advocate appeared for the plaintiff whereas the 1st defendant had the service of the Mr. Denis Kahana learned advocate, Ms Lilian Machange learned state attorney appeared for the 3rd, 4th and 5th defendants while the 2nd defendant did not enter appearance.

Arguing the preliminary objection raised, Mr. Kahana learned advocate, contended that the present plaint has been filed against the 1st defendant in his own personal capacity irrespective of the fact that he is the administrator of his late father's estate namely Jason Kyamtojo Tineishemo. It was submitted further that the fact that the 1st defendant is the administrator of the deceased's estate is borne out of the pleadings as the certificate of title in respect of the disputed premises indicates that the 1st defendant is the legal representative of the estate of his deceased father. *Ads.*

To fortify his stance the learned advocate referred to me the decision of this court in **Ally Ahmed Ally v Wastara Kipati**, Land Case No. 126 of 2017 (unreported) in which a suit was struck out for being preferred against the defendant in his personal capacity instead of as the administrator of the deceased estate. Therefore the learned advocate implored on this court to dismiss the present matter for being preferred against the 1st defendant in his personal capacity instead of administrator of the deceased's estate.

On reply, Mr. Mhina learned advocate contended that the preliminary objection raised lacks merits. He submitted further that a fact of someone being administrator of the estate of the deceased is a fact to be proved by that person himself. In the present matter going by the 1st defendant's written statement of defence he declares himself as a legal owner of the disputed premises.

On further submission Mr. Mhina contended that on the written statement of defence by the 1st defendant, he was appointed as an administrator since 1996 which is about 26 years todate while the cause of action arose on 27/2/2015. He pointed that, being an administrator is not a permanent title to a person.

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On further submission the learned advocate for the plaintiff was of the view that since the matter is at initial stage the proper remedy is to amend the plaint. He went on citing the provisions of Order 1 Rule 9 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) which states that a suit cannot be defeated by non-joinder or mis-joinder of parties as the court may order joinder of a party at any stage as provided under Order 1 Rule 10(2) of the CPC.

On rejoinder the learned advocate for the 1st defendant essentially reiterated his submission in chief.

Having gone through the submissions of parties rival and in support of the preliminary objection, the sole issue that calls for court's determination is whether the preliminary objection raised has merits.

It is not in dispute that the 1st defendant has been sued in his personal capacity equally no dispute that the 1st defendant is an administrator of the estate of the late Kyamtoijo Tineishemo. Although on the plaint filed in the present suit there is nowhere the plaintiff describes the 1st defendant as an administrator of the estate of his late father. It is without doubt that whether the 1st defendant is an administrator of his *Alle.*

deceased's father estate was a fact known personally to the 1st defendant and the plaintiff cannot be faulted for suing the 1st defendant in his personal capacity unless it is established that the plaintiff had a prior knowledge that the 1st defendant is an administrator of the estate of his late father.

I agree with the submission by the learned advocate for the plaintiff that as the fact has been brought to attention of the court at this early stage the remedy is to invoke the provision of Order 1 Rule 10 of the CPC to amend the plaint and a proper party be joined.

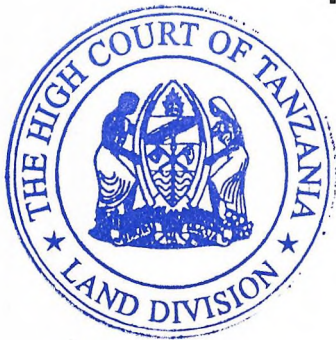
It follows therefore that, as the fact was known to the 1st defendant alone, then he should not have raised a preliminary objection rather he should have brought it to the attention of the court that he is an administrator of the estate of his late father and therefore he be sued in the capacity as the legal representative.

I have gone through the written statement of defence there is nowhere the 1st defendant has claimed that the disputed premises forms the estate of his late father rather he claims to be the legal owner of the disputed premises as per paragraph 2; 2.1. Also, there is a title to the

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effect after he had requested to be registered as owner of the disputed premises. But after the disputed premises had been registered in the name of the 1st defendant herein it was proper for him to be sued in his personal capacity in as far as the disputed premises is concerned. Consequently the preliminary objection is without merits and the same is accordingly overruled with costs.

Order accordingly.



A. MSAFIRI,
JUDGE
28/9/2022