

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 57 OF 2022

ABDULLAH SULEIMAN RICHY (Suing under the constituted Power of Attorney
conferred to him by **African Marble Company Limited**) **PLAINTIFF**

VERSUS

SELEMANI MENENGALI & 64 OTHERS **DEFENDANTS**

Date of last Order: 01/08/2022

Date of Ruling: 27/09/2022

RULING

I. ARUFANI, J

This ruling is for the points of preliminary objection filed in this court
by the counsel for the defendants that: -

- 1. The plaintiff's suit is time barred on account that the plaintiff since the year 2001 was aware with the defendants' occupation of the suit land and he attempted to evict them through Civil Case No. 81 of 2001 through the defendants' community known as Kambarage Community.*
- 2. The suit is bad in law as the same is res judicata to Civil Case No. 81 of 2001 between the plaintiff versus Kambarage Community and members and or officers, defendants being members of Kambarage Community.*
- 3. That the suit is time res judicata to Land Application No. 314 of 2017 between the plaintiff versus Selemani Menengali, Manase Kipingu and Ford Maro of which the suit was dismissed for want of prosecution*

4. *That the plaint is bad in law for violating mandatory provision of Order VII Rule 1 (e) of the Civil Procedure Code for failure to disclose when the cause of action arose.*

At the hearing of the above listed points of preliminary objection the plaintiff was represented by Mr. Laurent Ntanga, learned advocate and the defendants were represented by Mr. Living Raphael Kimaro, learned advocate. By consent of the counsel for the parties the afore listed points of preliminary objections were argued by way of written submissions. The counsel for the defendant argued the points of preliminary objection seriatim and in response the counsel for the respondent argued the first and fourth points of preliminary objections separately but argued the second and third points of preliminary objection jointly.

The counsel for the defendants argued in relation to the first point of preliminary objection that, the statutory period provided under section 9 (2) of our Law of Limitation Act, Cap 89 R.E 2019 for a person who has been dispossessed or his possession has been discontinued to claim for his or her land is twelve years from when the cause of action arose. He argued that, the cause of action does not arise when a wrong doer is available but from when the wrong is committed. He submitted that, in 2001 the plaintiff **MS African Mables Company Limited** instituted a suit in court by its association name of **Kambarage Community and**

Members and Officials claiming for the land in dispute which is Plot No. 199 with Letter of Offer No. 04405 located at Mbezi Industrial Area Dar es Salaam.

He prayed the court to take judicial notice of the judgment given in the said case and stated that, the first defendant who was leader of the defendants gave evidence on behalf of his members who are the defendants in the suit at hand and the plaintiff was claiming for vacant possession of the suit land before 2001. He argued that, it was decided in the mentioned case that there was no justification for the defendants to give vacant possession unless they were paid compensation for their exhaustive improvements they had made on the land. He stated the defendants refused and the position is the same to date. He submitted that from 2001 until when the suit was instituted in the court more than twelve years out of the time prescribed by the law has elapsed.

Coming to the second point of preliminary objection the counsel for the defendants stated that, in 2001 the plaintiff sued the defendants through their association and the same subject matter was involved in the said case which on 21st October, 2005 was conclusively determined by Kinondoni District Court. He argued that shows this case is res judicata to the said case because Kambarage Community was sued by the plaintiff in 2001 on the same Plot of land and the occupiers of the land were the

same. He submitted that the reliefs claimed in the previous suit is the same as the one claimed in the present suit.

As for the third point of preliminary objection the counsel for the defendants stated that, the plaintiff through Application No. 314 of 2017 sued the first, fourth and seventeenth defendants claiming for the same land and claiming for vacant possession. He submitted that, the plaintiff failed to prosecute the stated application and caused the same to be dismissed for want of prosecution. He submitted further that the stated situation renders the present suit res judicata. He referred the court to the case of **George Shambwe V. Tanzania Italian Petroleum Co. Ltd**, [1995] TLR 20 where the principles to be considered in determining a suit is res judicata were stated.

As for the fourth point of preliminary objection the counsel for the defendants stated that, Order VII Rule 1 (e) of the Civil Procedure Code makes it mandatory that the time when the cause of action arose must be disclosed in the plaint. He stated the above cited provision of the law is couched in mandatory terms and it provides for material particulars to be disclosed in a plaint. He submitted that, paragraph 5 of the plaint states on various dates without mentioning specific date on which the cause of action arose. He stated that, specific date of cause of action is very important to enable the court to gauge whether the suit is within the time

prescribed by the law and to establish the court has jurisdiction to entertain the matter. He submitted that, the court cannot assume when the cause of action arose and urged the court to strike out the suit.

In reply the counsel for the plaintiff stated that, ever since the defendants commenced their encroachments in the suit premises the plaintiff has made various efforts to evict them to no avail. He stated that, the trespassers commenced their encroachments on suit premises on various dates. He stated in 2001 there were only three trespassers who identified themselves as members of Kambarage Community and stated the said Community is not registered anywhere, hence they had no locus standi to sue or be sued on its own capacity. He argued that, the stated trespassers caused the plaintiff to institute Civil Case No. 81 of 2001 in the court against them.

He argued that, the defendants knew or ought to know that the suit premises were mandatorily allocated for industrial purposes only as per Urban Planning (Use Groups and Classes) Regulations, 2018 as pleaded at paragraph 6 of the plaint. He stated the defendants continued to invade and trespassed into the suit premises and converted the same into their residential use which is sheer violation of the law and public policy which cannot be condoned by the Law of limitation Act.

He supported his argument with the case of **Universal African Logistics Limited V. Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 431 of 2020, CAT at Dodoma (unreported) where it was stated no estoppel whatever its nature can operate to annul statutory provisions. He argued that, the plaintiff pleaded fraud at paragraph 5 of its plaint and added that, under section 26 of the Law of Limitation Act, acts of fraud cannot be condoned by the Law of Limitation Act. He based on the above stated provisions of the law to pray the first point of preliminary objection to be dismissed with costs.

He responded to the second and third points of preliminary objections conjunctively and stated that, the instant case is totally different from the cases cited by the defendants. He stated that, although the mentioned cases involved the same issues and the same cause of action but they involved different parties. He argued that, the defendants knew or ought to know that for the doctrine of res judicata to be sustained the parties in previous suit must be the same in the subsequent litigation or suing under the same title.

He argued the record of the present suit involves 65 defendants while each of the cases mentioned by the counsel for the defendants involved less than 5 defendants. He referred the court to the case of **Emmanuel Simforian Massawe V. The Attorney General**, Civil

Appeal No. 216 of 2019, CAT at DSM (unreported) where the object and necessary elements of the doctrine of res judicata were stated. He based on the above stated argument to pray the court to dismiss the second and third points of preliminary objection.

He argued in relation to the fourth point of preliminary objection that, as stated in the preceding points of preliminary objection the plaintiff pleaded fraud at paragraph 5 of its plaint. He argued that, the trespassers encroached into the suit premises unlawfully and on various occasion as pleaded by the plaintiff. He submitted that, under that circumstances the plaintiff could have not know exactly when each of the defendants trespassed into the suit premises as there is no official record on any authority to establish the exact time of encroachment. At the end he prayed the court to find the four points of preliminary objection raised by the counsel for the defendants are devoid of merit and dismiss them with costs.

Upon giving due consideration the rival submissions filed in this court by the counsel for the parties and after going through the pleadings filed in this court by the parties, the court has found the issue to determine here is whether the four points of preliminary objection raised by the counsel for the defendants deserve to be upheld. In determine the raised points of preliminary objections the court has found it is proper to start

with the fourth point of preliminary objection and thereafter I will revert to the rest of the points of preliminary objections.

The court has found Order VII Rule 1 (e) of the CPC which the counsel for the defendants argued has not been complied with in the present matter and renders the plaint bad in law states that, the plaint shall contain the facts constituting the cause of action and when it arose. The court has found the submission filed in the court by the counsel for the defendants is mainly centred in argument that the plaint does not contain facts constituting when the cause of action in the instant matter arose and not on non-existence of cause of action against the defendants.

That being the gist of the stated point of preliminary objection the court has found the question to determine here is whether the plaint filed in this court by the plaintiff contain the facts stating when the cause of action in the present matter arose. The court has gone through the plaint filed in this court by the plaintiff and find that, as rightly argued by the counsel for the defendants it is not stated anywhere in the plaint as to when the cause of action averred was done by the defendants arose.

The stated finding of this court is being bolstered by the submission made by the counsel for the plaintiff who stated in his submission that, the defendants fraudulently encroached into the land in dispute on various occasion hence the plaintiff could have not known when exactly each of

the defendants trespassed into the suit land. The court has found it is true that section 26 (a) of the Law of Limitation Act states where any proceeding is based on fraud of a party against whom the proceeding is prosecuted or of his agent the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with diligence, have discovered.

Although it is true that as stated by the counsel for the plaintiff that the plaintiff has averred at paragraph 5 of its plaint that the defendants fraudulently trespassed into the suit premises in the present matter but the plaintiff does not state when they discovered the defendants had trespassed into the land in dispute. Since section 26 (a) of the Law of Limitation Act states the limitation of time begin to run from when the plaintiff discovered the fraud or ought to have discovered the fraud the court has found the plaintiff was required to state in their plaint when they discovered the defendants encroached or trespassed into the suit premises.

Failure to disclose when the defendants encroached or trespassed into the suit premises is as rightly argued by the counsel for the defendants, violation of Order VII Rule 1 (e) of the CPC which requires the plaint to show when the cause of action arose. The consequences of failure to show in the plaint when the cause of action arose has the effect

of causing the court to fail to know if the suit is within or out of time for the purpose of determine whether it has jurisdiction to entertain the suit or not. As rightly argued by the counsel for the defendants, compliance with the requirements of the law provided under Order VII Rule (1) of the CPC is mandatory and failure to comply with the same renders the whole proceedings a nullity.

The above finding of this court is getting support from the case of **Gozbert Cleoplace & Another V. Valerain Moses Bandungi**, Land Case No. 60 of 2020 where when this court was dealing with the similar issue it cited the case of **Stanbic Finance (TZ) Ltd V. Giuseppe Trupia and Chiaramalavasi**, [2002] TLR 217 and stated failure to comply with requirement provided under Order VII Rule 1 of the CPC vitiates the entire proceedings initiated in court. In addition to that, the court has also found when the court was dealing with the similar issue in the case of **Anna Joseph Luvanda V Swaibu Salimu Hoza & 2 Other**, [2014] TLR 73 it held that, the plaint was fatally defective for non-disclosure as to when the cause of action arose. Consequently, the court has found the fourth point of preliminary objection is meritorious.

Back to the first point of preliminary objection the court has found it states the plaintiff's suit is time barred. The court has found that, as the court has already found the plaintiff has not disclosed in the plaint as to

when the cause of action alleged to have been committed by the defendants arose cannot determine whether the suit is within or out of time as there is no sufficient material facts pleaded in the plaint to establish when the plaintiff's cause of action arose. The court has found that, although the plaintiff admitted to have instituted a suit in court in 2001 but they stated categorically the stated suit was instituted in the court against some of the defendants in the present suit and not all defendants.

As the plaintiff stated when the mentioned suit was instituted in the court it is only three defendants who had trespassed into the land in dispute and the rest of the defendants had not trespassed into the land in dispute which the plaintiff is alleging that it has been encroached or trespassed by the defendants then it cannot be said the issue of limitation of time can properly be determined in this matter. In the premises the court has found the first point of preliminary objection can neither be upheld nor overruled because there are no sufficient material facts pleaded in the pleadings of the plaintiff to enable the court to determine the same.

As for the second and third points of preliminary objection which states the present matter is res judicata against some matters filed in the court by the plaintiff against the defendants but the court has found there

is no sufficient facts pleaded in the present suit to determine those points of preliminary objection. The court has arrived to the stated finding after seeing that, although the counsel for the defendants urged the court to take judicial notice of the cases stated were filed in the court by the plaintiff against the defendants but there is no anything relating to the stated cases being the pleadings, proceedings or decisions availed to the court to enable the court to determine the present suit is res judicata against the stated cases or not.

In the light of all what I have stated hereinabove the court has found that, as the fourth point of preliminary objection has been found it is meritorious the court cannot continue to entertain the plaintiff's suit because it is contravening the requirement of the law which requires the plaintiff to disclose when the cause of action filed in the court arose. Consequently, the plaintiff's suit is hereby struck out for being defective and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 27th day of September, 2022



I. Arufani
I. Arufani

Judge

27/09/2022

Court:

Ruling delivered today 27th day of September, 2022 in the presence of Mr. Laurent Ntanga, learned advocate for the plaintiff and in the presence of Mr. Living Raphael Kimaro, learned counsel for the defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

Judge

27/09/2022