

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

LAND CASE NO. 139 OF 2022

**BAHENGE HASSAN DOTTO.....1ST PLAINTIFF
ANDEW MUSHI.....2ND PLAINTIFF
GEORGE GAIDIE KIMARO.....3RD PLANTIFF
GLORY FELIX SANGA.....4TH PLAINTIFF
DAILES E. NDOZI.....5TH PLAINTIFF
OMBENI MWANDRI.....6TH PLAINTIFF
NURDINI MUHUNGO.....7TH PLAINTIFF
GODWIN GRAITAN KAILEMBO.....8TH PLAINTIFF
GABRIEL MATHIAS MICHAEL.....9TH PLAINTIFF
LIPEKELO LUVUNDA.....10TH PLAINTIFF
CHARLES T. MMARI.....11TH PLAINTIFF**

VERSUS

**EMMANUEL SEVERRE LUYENYEYEKI.....1ST DEFENDANT
WILLIAM MANAGHA GIDEME.....2ND DEFENDANT
LEP AUCTIONEERS COMPANY.....3RD DEFENDANT**

Date of Last Order: 18.11.2022
Date of Ruling: 12.12.2022

RULING

V.L. MAKANI, J.

The 1st and 2nd defendants raised preliminary objections on points of law as follows:

- 1. That the plaintiffs' plaint is bad in law for failure to provide sufficient description of the suit property in contravention of Order VI Rule 3 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**).*
- 2. In so far as the plaintiffs are complaining against lawful orders of eviction and demolition that are being*

carried out by a competent execution court, the above suit is misconceived and premature because the plaintiffs' have not exhausted the remedy of investigation of their claims and objection that is available and provided under Order XXI Rule 58,59, 60 and 61 of the CPC

The objections were argued by written submissions and Mr. Sylvester E. Shayo, Advocate drew and filed submissions on behalf of the 1st and 2nd defendants (the defendants).

Mr. Shayo started with the second objection and stated that the basis of the plaintiffs' suit is found in paragraphs 7 and 8 of the plaint. As for paragraph 7 he said the plaintiff's case is that the Tribunal granted the prayers as shown in the judgment and decree (**Annexure KM-2** to the plaint) whereas the 2nd defendant was declared the lawful owner of the suit land and the respondents (who are not parties herein) were ordered to vacate the suit land and immediately demolish all their structures. The order further stated that the third respondent (Maganga A. Maganga) was wrongly sued. Each party was to bear his own costs.

Mr. Shayo said it is further pleaded in paragraph 8 of the plaint that the plaintiffs received notice from the court broker who is the 3rd

defendant claiming to be under instructions of the Tribunal. He said the alleged instructions required the plaintiffs to evict and demolish all their developments within the suit land on reasons that the controversies on ownership were already sorted out in favour of the 2nd defendant herein. He said the contents of these two paragraphs show that the cause of action for the plaintiffs' claim of declaration is constituted in the instructions of the Tribunal. He said the cause of action arose on 24/05/2022 when the plaintiffs received a notice from the court ordering the 3rd defendant to carry out the orders of eviction and demolition.

Mr. Shayo said since the plaintiffs are complaining about eviction and demolition being carried by the Tribunal, which is the competent executing court, the suit is misconceived and premature because the plaintiffs have not exhausted the remedy of investigation of their claims and objections under Order XXI Rule 58,59,60 and 61 of the CPC. He said if at all the plaintiffs had claims of interest in the suit land subject of execution, they ought to have filed an application for revision and not file the suit as is the present case. Or alternatively, they would have filed objection proceedings in the executing court for the said court to carry out an investigation of their claims. He said the

principle of exhausting the remedies of objection proceedings is important in the administration of justice and should be observed in order to avoid conflicting orders of the different courts and also chaos within the judiciary.

Mr. Shayo went on submitting that according to paragraphs 8, 10,11 and 12 it is stated that the plaintiffs upon receiving the eviction and demolition order attempted an amicable settlement without success and this necessitated the institution of this suit for court's intervention. He said this court has no jurisdiction to intervene on the stated ground, but the law requires the plaintiff to use the mechanism of investigation of the claims and objections as opposed to mere amicable settlement before seeking the court's intervention and in the alternative, the plaintiffs ought to have filed revision to challenge the orders of eviction and demolition issued. He said the power of intervention by the court is through appeal but since the plaintiffs were not parties at the Tribunal then they would have used the supervisory powers in section 43 of the Land Disputes Courts Act CAP 216 RE 2019 to enable the court to inspect the records of the Tribunal and make directions it considers necessary in the interest of justice.

As for the second objection in respect of the description of the property, Mr. Shayo submitted that the suit land is described in paragraph 5 of the plaint. He said the law under Order VII Rule 3 of the CPC requires the plaint to contain a description of the property sufficient to identify it. He said the plaintiffs have failed to describe the property as required by the law because it is not clear amongst the different plaintiffs who owns unregistered and registered land. He said presumably the registered land referred in paragraph 5 would normally have a title number which should have been shown. He said in the same paragraph 5 the suit land is said to constitute fifty (50) acres. However, in the prayers the suit land is described to constitute a total of more than 50 acres, and it is an unregistered piece of land. he said the plaint is therefore bad in law for contravening Orde VII Rule 3 of the CPC. Mr. Shayo also relied on the case of **Victoria Kokubana (As an Attorney of Angelina Mimbazi Byarugaba) vs. Wilson Gervas & Anirod Olomi, Land Case No. 70 of 2010 (HC-Land Division)** (unreported). He prayed for the objections to be upheld and the plaint be struck out for offending the law and the entire suit for being premature and incompetent before the court.

In reply, Mr. Wallace Boniface Mfuko, Advocate for the plaintiffs said that the notice for objection was contravention of Order VI Rule 3 of the CPC and this provision does not entail the description of the land but what the pleadings contain. He said the wrongly cited preliminary objection cannot be taken as a typing error as these are two different provisions that is Order VI Rule 3 and Order VII Rule 3 of the CPC. He said non citation or wrong citation renders the matter before the court incompetent. He cited the case of **Mr. Wilfred Lucas Tarimo & 3 Others vs. the Grand Alliance Limited, Civil Application No. 22 of 2014 (CAT-Arusha)** (unreported), **China Henan International Co-operation Group vs. Rwegasia, Civil Reference 22 of 2005 (CAT)** (unreported) and **NBC vs. Sadrudin Meghji, Civil Application No. 20 of 1997.**

Mr. Mfuko said without prejudice to the above, the second point is not a point of law rather facts that need evidence to prove the same and so they do not fall without the landmark case on preliminary objections, that is, **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696.** He said the objection is vague because it calls for the court to dig into the facts of the matter and touches on the gist of the matter which is

not proper. He said the court cannot ascertain and determine this point unless evidence is given.

Alternatively, Mr. Mfuko said the court should not shut out the plaintiffs for the error of their advocates because by doing so the said plaintiffs would lose their constitutional right to freedom. He cited the case of **Kiko Rajabu Kilo & Another vs. Bakari Rajabu Kiko, Misc. Land application No. 01 of 2019 (HC-Moshi)** (unreported) for invocation of the oxygen principle to do away with technical points of law and avoiding going to the merits of the case. He prayed for this court to use its inherent powers so that the suit can proceed on merit.

As for the first point of objection, Mr. Mfuko said some of the plaintiffs in the case had already sought the remedy of objection proceedings in Misc. Land Application No. 318 of 2018 in Kibaha District Land and Housing Tribunal and the said application was struck out. He said the remedy available after objection proceedings is to institute a fresh suit. He said this is according to the cases of **Thomas Joseph Kimaro vs. Apaisaria Martin Carl Mkumbu & Another [2002] TLR 369** and **National Housing vs. Peter Kassid, Civil**

Application No. 294/16 of 2017, Venance Benedict Minde vs. Musa Ally Lwayo (Administrator of the Estate of Mwalimu Lwayo) & Others, Land Revision No. 20 of 2021 (HC-DSM)

(unreported). In conclusion Mr. Mfuko prayed for the objections to be dismissed with costs as they are a waste of the court's time and an abuse of the process of the court.

In rejoinder, Mr. Shayo said the wrong citation of Order VI Rule 3 instead of Order VII Rule 3 of the CPC is an accidental slip and it is evident from the wording of the objection itself of which the plaintiffs were not misled with the notice and were well informed of the point that they would be faced at the hearing. He further said the defect is innocuous and inconsequential. He said the notice of preliminary objection is not an application and is made when a party makes the submission hence the objection to the notice is misplaced. He said the cases cited are old cases when wrong citation was fatal. But since the introduction of overriding objective principle in 2018, courts have departed from the principles of these old cases.

As for the first objection Mr. Shayo said identification of immovable property is matter of law as required in Order VII Rule 3 of the CPC.

On the second objection Mr. Shayo said the plaintiffs concede that the objection proceedings were taken by some of the plaintiffs but the same were struck out. He said "some" of the plaintiffs have not been revealed and when objection proceedings are struck out it means the plaintiffs reverted to the same position as if no objections proceedings were taken as the matter was not decided on merit, that is, it was not decided at all. He relied on the case of **John Mwimi vs. Mantrac Tanzania Limited, Civil Application No. 367/01 of 2020 (CAT)**(unreported). On the allegation of wasting the court's time, abuse of the court process and others, Mr. Shayo said these accusations against the defendants are unfounded and he pointed out that the duty imposed on the parties and their advocates under section 3B (2) of the CPC is to assist the court to further the overriding objectives namely to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. He reiterated his prayer for the preliminary objections to be sustained and the suit to be struck out with costs.

I have gone through the pleadings and submissions on the objections by Counsel for the parties. The main issue for determination is whether the objections raised have merit.

Before I go to the merit of the objections, I would wish to address the issue raised by Mr. Mfuko that the court has not been moved as the notice of objection has referred to Order VI Rule 3 instead of Order VII Rule 3 of the CPC. Indeed, the notice has this discrepancy but, in my view, this has not misled the plaintiffs in anyway because the notice has a narration, it was not only a mention of the law. The plaintiffs were actually put on notice of what the defendants intended to argue. Secondly, the mention of Order VI instead of VII of the CPC is obviously a slip of the pen. If the defendants had mentioned another law altogether then this would have raised questions. Thirdly, the cited cases by the plaintiffs' Counsel are based on applications and not notices. And fourthly, the error has not in any way prejudiced the plaintiffs. For these reasons, I find these complaints to be of no consequence and I invoke section 3A of the CPC and the notice is corrected to read Order VII Rule 3 of the CPC instead of Order VI Rule 3 of the CPC.

As for the substantive objections, I will start with the objection on description of the suit land. Order VII Rule 3 of the CPC states:

"Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the

Land Registration Act, the plaint shall specify such title number."

In the case of **Daniel Dagala Kanuda (As an administrator of the estate of the late Mbalo Lusha Mbulida) vs. Masaka Ibeho & 4 Others, Land Appeal No. 26 of 2015 (HC-Tabora)** (unreported) it was stated:

"The legal requirement for disclosure of the address or location was not cosmetic. It was intended for informing the Tribunal of sufficient description so as to specify the land in dispute for purposes of identifying it from other pieces of land around it. In case of a surveyed land, mentioning the plot and block numbers or other specifications would thus suffice for the purpose. This is because such particulars are capable of identifying the suit land specifically so as to effectively distinguish it from any other land adjacent to it."

The rationale behind the provision above as pointed by the cited case of **Daniel Dagala Kanuda** (supra), is to ensure that the claimant knows well the property he is claiming so as to distinguish it from any other properties to avoid chaos and controversies especially at the time of execution. In **Romuald Andrea @ Andrea Romuald @ Romuald A. Materu vs. Mbeya City Council & Others, Land Case No. 13 of 2019 (HC-Mbeya)** (unreported) the court said:

"The legal requirement highlighted above [Order VII Rule 3 of the CPC] is intended for the purposes of an authentic identification of the land in dispute so as to afford courts make certain and executable orders, It is the law that, court orders must be certain and executable. It follows thus that, where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it."

Paragraph 5 of the plaint is the one that describes the suit land, and it states:

That, the plaintiffs claim against the defendants is for the declaration orders as lawful owners of unregistered and registered land and the structures contained thereon located at Kimele area Mapinga, Bagamoyo Municipality in Costal Region which constitute a total of fifty (50) acres.

It is settled law that one is bound by his pleadings, and it is apparent from the quoted paragraph of the plaint that the description of the suit land is general and does not comply with the mandatory provisions of Order VII Rule 3 of the CPC. According to the said paragraph the suit property is un-registered and registered land, the size (50 acres) and the location (Kimele area Bagamoyo) are mentioned in the plaint. However, there are no landmark boundaries to differentiate the suit land from any other piece of land in Kimele area within Bagamoyo. Certainly, the plaint shows that the suit land is 50 acres, but it must be noted that Kimele area, Bagamoyo is not a small area and without proper identification and/or description, such as landmark features or boundaries, then execution of any court order may be a problem or lead to confusion and chaos. It should also be noted that the prayer is also confusing in that it reflects declaration

of ownership of the suit land which is unregistered (see item (i) of the reliefs in the plaint). The registered suit land claimed in paragraph 5 in the plaint is not mentioned in the prayers. One wonders what happened to it? And as correctly said by Mr. Shayo, if there was land that was registered then a Certificate of Title would have been availed which is not the case in the present suit. So, in my view the description of the suit land ought to have been specific and current to assist the court in the administration of justice.

Mr. Mfuko said that if description is made then it would entail evidence which cannot be an objection in terms of the case of **Mukisa Biscuits** (supra). However, landmark facts of the suit land in the plaint and is not evidence but a description which identifies the suit land against the rest of the properties adjacent to it (see **Daniel Dagala Kanuda** (supra). And Order VII Rule 3 of the CPC states mandatorily that where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. The law made it clear that description of the property has to be in the plaint and should not wait until presentation of the evidence. A blanket description as provided in the plaint may mislead the court especially where the plaintiffs are many as in the present suit. In view

thereof, the description of the suit land in the plaint is not sufficient for purposes of resolving the controversy between the parties. The plaint is thus defective contrary to the mandatory provisions of Order VII Rule 3 of the CPC resulting to the suit to be incompetent.

This preliminary objection disposes of the suit, in that regard I shall not dwell on the remaining objection that has been raised.

In the result, the first preliminary objection is sustained. Subsequently, the suit is hereby struck out with costs for being incompetent.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
12/12/2022