IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND CASE NO. 4 OF 2021

JOHARI IBRAHIM CHATA ..... PLAINTIFF

VERSUS

MPANDA MUNICIPAL COUNCIL ..... 1st DEFENDANT

DONALT LESSERY TARIMO ..... 2nd DEFENDANT

THE ATTORNEY GENERAL ..... 3rd DEFENDANT

Date: 14/12/2021 & 23/02/2022

RULING

Nkwabi, J.:

The plaintiff dragged the three defendants to this court for judgment and decree as follows:

1. An order that the act of the 1st respondent (defendant) allocating the parcel of land to the 2nd respondent (defendant) is unlawful,
2. An order that the disputed land belongs to the Plaintiff,
3. That the defendants be ordered to pay T.shs 15,000,000/= to the plaintiff as a loss of earnings from the invaded parcel of land.
4. Costs of this case be borne by the defendants.
5. Such other relief as this honourable court may deem fit and just to grant.

Surprisingly, I suppose, to the plaintiff, she encountered a preliminary objection raised by the counsel for the 1st and 3rd defendants. In which the State Counsel prayed the suit be dismissed with costs. The preliminary objection has four points of law as follows:

1. *That, this suit is incurably defective as the plaintiff has no locus standi to sue defendants.*
2. *The plaintiff has no cause of action against the defendants.*
3. *That, the suit is incurably defective for failure to identify the disputed land contrary to Order VII Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019.*
4. *That this suit is unmaintainable in law for being filed prematurely without 90 days statutory notice of intention to sue the 3rd defendant.*

The preliminary objection was argued by way of written submissions. The counsel for the 1st and 3rd defendants began arguing the preliminary objection. He however, proposed to argue the 1st and 2nd points of law together. He maintained, the suit is incurably defective as the plaintiff has no locus standi to sue the defendants as a result, has no cause of action against the defendants. He stated, she has no locus standi to sue the

defendants since she has no any land to claim against the defendants as the land was disposed to Daudi Kagoma Bahangaza on 07/12/2015, and advanced that the right person to sue the defendants is Daudi Kagoma Bahangaza, alternatively, the plaintiff ought to join Daudi Kagoma Bahangaza as co-plaintiff to protect the interest of the purchaser as per Order 1 rule 1 of the Civil Procedure Code, Cap 33, R.E. 2019. He insisted as the land was disposed of to Daudi Kagoma Bahangaza, it is Daudi who had the locus standi to sue and not Johari Ibrahim Chata. He argued, if the case is heard in merits, the court cannot declare the plaintiff as the owner of the suit which is already disposed of to another person.

The counsel for the 1st and 3rd defendants backed his argument by citing **Omary Yusuph v Albert Munuo, Civil Appeal No. 12 of 2018,** CAT:

> *"we are aware that locus stand is all about directness of a litigant's interest in proceeding which warrant his or her tittle to prosecute the claim asserted which among the initial matter to be established in a litigation matter. It is a settled principle of law that for a person to institute a suit he/she must have locus standi".*

The counsel for the 1st and 3rd defendant's too lamented for non-joinder of the buyer and said it entails lack of cause of action on part of the plaintiff, he referred this Court to **Juma B. Kadala vs. Laurent Mnkande [1983] TLR 103** HC:

> *"in a suit for the recovery of land sold to the third party, the buyer should be joined with the seller as a necessary party ... non-joinder will be fatal to the proceedings."*

Replying to the submissions, Mr. Gadiel Sindamenya, learned advocate for the plaintiff maintained that it was the decision of this court in **Land Appeal No.6/2018 Daudi Kagoma Bahangaza v Donati Lessery Tarimo** that:

> *"It is Johari Ibrahim Chato only who would have been in a better position to claim the ownership of the disputed land or compensation once the disputed land acquired from her, surveyed and allocated to the Respondent by the land allocating authority."*

Mr. Sindamenya further contended that it is meaningless to have joined Daudi Kagoma Bahangaza who acquired the land after it was planned and worse still before it was sold to him. He added, misjoinder or nonjoinder of

Daudi Kagoma Bahangaza is not a reason for defeating justice citing **Order I rule 9 of the Civil Procedure Code**:

> *"No suit shall be defeated by reason of misjoinder or non-joinder and the court may in every suit deal with the matter in controversy so far as regards the right and interest of the parties actually before it."*

While making a rejoinder on this point of objection, the counsel for the 1st and 3rd defendants argued that the plaintiff still lacks locus standi to sue the defendants since she has no title over the land which she sold to the person not part in this suit unless joined as co-plaintiff. The case of **Daudi Bahangaza** does not waive the requirement of joinder of the buyer to protect his interest. The case of **Mwalimu Omary** (supra) is distinguishable, he argued. He insisted this court finds the plaintiff to have no locus stand to sue and strike out the suit.

I am aware, as per **Lujuna Shubi Ballonzi, Senior V Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203** (HC), Samatta, J.K., as he then was, that:

"Because a court of law is a court of justice and not an academy of law, to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application."

Mulla's Code of Civil Procedure defines a cause of action as follows:

"Cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. It is not limited to the actual infringement of the right to sue on but includes every piece of evidence which is necessary to be proved to entitle the plaintiff to a decree. Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit." (Page 144, 13th Edition).

In addition, what constitutes a cause of action was clearly defined in the case of **Musanga Ngándwa v. Chief Japhet Wanzagi & 8 Others**, [2006] TLR 351.

With the above position of the law live in my mind, I do not think, that is the case in this present suit this court is called upon to rule that the plaintiff has no locus standi or has no cause of action to sue the defendants. The State Counsel was fair enough to point out that the plaintiff could join Daudi Kagoma Bahangaza as a co-plaintiff. That suggestion, as well, gives effect to the decision in **Musika Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. [1969] EA 696** where it was stated:

> *"A preliminary objection contains a point of law ... and which if argued as a preliminary point may dispose of the suit."*

and

> *"... a preliminary objection cannot be raised if any fact has to be ascertained."*

Further, before I pen off on this first limb of the preliminary objection, this point is put in the light by two decisions I have to cite hereinbelow. These are **Stroud v Lawson (1898) 2 QB. 44** in which the Court said:

It is necessary that both these conditions should be fulfilled, that is to say, the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule (see also Bangue De Mosccu v Midland Bank (1939) All E.R. 354

And, in an Indian case of **Sampat Bai v. Madhu Singh (A.I.R.) 1960** Mandha Paradesh 84 the Court stated:

"The test is not whether the joinder of the person proposed to be added as a defendant would be according to or against the wishes of the plaintiff or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the plaintiff. It is whether the relief claimed by the plaintiff will directly affect the intervenor in the enjoyment of his rights in the enjoyment of his rights. It is not enough that the plaintiff's right, and rights which the person desiring to be made a defendant wishes to assert should be connected with the same subject – matter. The intervener must be directly and legally interested in the answers to the questions involved in the case.

A person is legally interested in the answer only if he can say that it may lead to a result that it will affect him legally that is by curtailing his legal rights."

I, having carefully gone through the pleadings and the submissions in this case, I am not persuaded by the argument that the plaintiff has no locus stand. The 1st and 3rd defendants too have not convinced me that the plaintiff has no cause of action against them. The WSD of the defendants too lacks some material information which make the plaintiff's plaint to have a cause of action against them. It is better for the case to go to full trial. Further, the submissions by Mr. Sindamenya while relying on **Order I rule 9 of the Civil Procedure Code** have some substance. I place reliance on the decision of my learned brother Mushi, J. in **J. B. Shirima & Others Express Bus Service v Humphrey Meena t/a Comfort Bus Service [1992] TLR 290**:

"The question is what should this court do. There are two options which are open to the court. The first are in to strike out the plaint as prayed by the counsel for the defendant. The other

option is to order an amendment to the plaint to disclose a cause of action, if possible, as prayed by the counsel for the plaintiff."

As such, no one can base a preliminary objection on unascertained factual matters which is the situation in this case on the claim that the plaintiff has no locus standi and no cause of action against the 1st and 3rd Defendants. The plaintiff has the liberty to join Daudi Kagoma Bahangaza if she so wishes. This leg of the preliminary objection is therefore overruled and dismissed.

Another ball in the court of the 1st and 3rd defendants is that the plaintiff failed to identify the disputed land contrary to **Order VII rule 3 of the Civil Procedure Code Cap. 33 R.E. 2019** which provides:

"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."

The counsel for the 1st and the 3rd defendants argued that the plaintiff has failed to describe the parcel of land at controversy such as its size, its demarcations on four cardinal points and area located as block number. He

prayed the plaint be ruled incompetent and it be struck out with costs as a mandatory provision has been violated. He fortified his argument by the case of **Anthony Kingazi v Milka Maiga Misc. Land case Appeal No. 84 of 2016** HC Land Division (unreported), Makuru, J.:

> *"Given the nature of this case and in order to identify the boundaries demarcating the parties' pieces of land I think it was necessary for both parties to state the size of their respective pieces of land and the trial and boundaries."*

He also cited the case of **Victoria Kokubana (as an attorney of Angelina Mimbazi Byarugaba) v Wilson Gervas and Anirod Oromi, Land Case No. 70/2016** HC at Dar-es-Salaam, (unreported) Maghimbi, J.

In reply, Mr. Sindamenya is of the view, that the point of objection on law offends the Overriding objective principle. The plaint clarifies that the land in dispute is at Kawajense area and when planned it produced six plots.

In rejoinder, the counsel for the 1st and 3rd defendants said that the anomaly cannot be cured by the overriding objective principle so as Article 107A of the Constitution of the United Republic of Tanzania 1977.

On my own considered view, it would be better for parties to dwell on the substantive issues rather than technicalities which do not go to the root of the matter. This is the position in **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017** (CAT) (unreported):

> *With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT NO. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice; section 45 of the Land Disputes Courts Act should be given more prominence to cut back on over-reliance on procedural technicalities.*

The overriding objective principle ensures that cases are decided on merit(s) and without undue delay and costs. The plaintiff can, if she wishes to, amend the plaint to indicate or describe the area, and in this case as the area has been surveyed and plots allocated, the plaintiff may indicate the area by mentioning the plot numbers. What Mr. Sindamenya tries to impress upon me seems, to me, to be insufficient description even if it is surveyed and plot numbers given then the same should be indicated if not then the boundaries should be clearly indicated. Therefore, as the anomalies complained of, can

be remedied by amendment of the plaint, then, this is not a ground sufficient for striking out the suit, as a preliminary objection.

To that effect, the plaintiff may amend the plaint so that plaint describes the disputed piece of land whether by plot number(s) and block number or adequate description. The **Kingazi's** case (supra) was in an appeal stage while this case is on trial stage, so the plaintiff has a chance to amend pleadings while in appeal that cannot be done by an appellate court, else the trial court will be directed to do so and re-try the case as what happened in the case of **Juma B. Kadala V Laurent Mnkande [1983] TLR 103** (HC), Sisya J.

> *"It was the respondent who, ostensibly, was no longer in actual or physical occupation of the disputed piece of land at the time the plaint or application was presented who was sued. The person who was and, apparently, he still is in actual and/or physical occupation of the disputed piece of land, one Omari Kiziwa, was left out. He was not made a party to the proceeding.*
>
> *In the event I direct that this matter will now be remitted back to Soni Primary Court with directions that Omari Kuziwa be joined*

as a party to the case and the subsequent trial will proceed in the normal way and according to law."

If the plaintiff does not amend the plaint, she should be prepared of whatever outcome if she fails to join properly describe the suit land. The limb of preliminary objection is held not to be sufficient to strike out the suit. It is dismissed.

The 1st and 3rd defendants have a last legal point of objection against the suit. This is that the suit is unmaintainable in law for being filed prematurely without 90 days statutory notice of intention to sue the third defendant.

Expounding this ground of objection, Mr. Mwandu, learned State Attorney cited section 6(3) of the Government Proceedings Act Cap 5 R.E. 2019:

"All suits against the Government shall after the expiry of the notice be brought against the Government Attorney General and a copy of the plaint shall be served upon the Government Ministry Department ..."

Mr. Mwandu lamented that the notice was not served to the Attorney General and there is no proof on the part of the plaintiff that she served one since

the attached one does not bear signature of receiving officer or the stamp of the office. The plaintiff contravened the provisions of section 6 (2) of the Act.

Mr. Sindamenya for the plaintiff was quick to observe that luckily enough the 1st defendant replied on the notice on 08 September, 2020. The rest kept deaf ears over it. He cited section 31(1)(a) of the Miscellaneous Amendment Act No. 1 of 2020:

31(1) No suit shall be commenced against a Local Government Authority

(a) Unless a ninety days' notice of intention to sue has been served upon the Local Government Authority and a copy thereof to the Attorney General and the Solicitor General.

Mr. Sindamenya added that the plaintiff knew of it and met the requirement, therefore since the counsel for the defendants is in his sub office of the Solicitor General can never know to whether the notice was served. He was of the view that if it pleases the counsel for the 1st and 3rd defendants consult the Solicitor General to know the whereabouts of the notice for the plaintiff did what the law directs. He prayed the preliminary objection on points of law be struck out with punitive costs.

While making a rejoinder submission, the counsel for the 1st and 3rd defendants pressed that the plaintiff did not serve the 90 days' notice to the Attorney General and the Solicitor General. No proof has been shown that the 3rd defendant was served with one. That contravened the mandatory provisions of section 6 of the Government Proceedings Act Cap. 5 R.E. 2019. He prayed the ground to be found to have merits. He rested the submission by praying that the preliminary objection be upheld with costs.

In **Musanga Ngándwa's** case (supra) this court faced with the alike concern, Rweyemamu, J. had these to say:

> *"I agree with counsel for the plaintiff. On the facts of this case; where notice was given and acted on; as per letter annexure JUC.D to the plaint; whether defect in form make the notice null and void, as to the basis of disposing of the suit is an arguable issue. It is not an issue to be disposed of by way of preliminary objection. I accordingly also dismiss the second preliminary objection."*

What could be said of the complained anomaly by the defendants that no notice was served to the AG and the Solicitor General?

To answer the above question, I start to consider the rationale of the notice. The rationale behind the serving of notice of intention to sue was adequately stated in the case of **Musanga** (supra) in the following convincing words:

> *The object of the Notice contemplated by section 80 of Civil Procedure Code is to give the concerned Government and Public Officer opportunity to consider the legal position and make amends or settle the claim if so advised without litigation. The Legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The provisions of sec. 80 are not intended to be used as booby traps against ignorant and illiterate persons.*
>
> *.... Section 80 is not doubt imperative. Failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim ..."*

I have carefully considered the arguments by both parties in respect of this limb of preliminary objection. While, it is desirable to serve the Attorney General and the Solicitor General as per the letter of the law, the pertinent question in this case is whether where there is such non service of the notice to them occasions a failure of injustice. I do not think so since the notice, after the 1st defendant received the same on 20th August 2020, he replied the same and copied the reply to both the Attorney General and the Solicitor General. In my view, in the circumstances of this case both the Attorney General and the Solicitor General got the notice of intention to sue issued by the plaintiff. That afforded them sufficient time to consider and prepare for the case that was filed in this court in March 2021. So, the Attorney General cannot be heard to claim that the has been prejudiced by the trial, if the trial proceeds while the notice of intention to sue landed in his office through the 1st defendant's counsel. Otherwise, it cannot be a preliminary objection as some facts have to be proved.

Finally, based on the above discussion, the preliminary objection is overruled. In the circumstances of this preliminary objection, I order each party to bear their own costs of the preliminary objection.

It is so ordered.

DATED at **SUMBAWANGA** this 23rd day of February, 2022.

J. F. Nkwabi

JUDGE