

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

LAND CASE NO. 150 OF 2021

VOLUSTAN EPHARIM TESHAPLAINTIFF

VERSUS

**ABDALLAH MINTANGA1ST DEFENDANT
IDD RASHID PEMBE..... 2ND DEFENDANT
MOHAMED MSICHOKE PEMBE.....3RD DEFENDANT
ADRAM SONDE.....4TH DEFENDANT**

Date of last Order: 25.04.2022
Date of Ruling: 30.05.2022

RULING

V.L. MAKANI, J

This ruling is in respect of preliminary objections raised by the defendants. The 1st defendant raised objection as follows that:

"The suit is misconceived, bad in law and utter abuse of the courts process for being instituted against the 1st defendant who is a wrongful party with no locus standi."

The 2nd defendant also raised an objection that:

"The plaintiff has no cause of action against the 2nd defendant."

The 1st and 2nd defendants prayed for the suit to be struck out with costs.

With leave of the court the objections were argued by way of written submissions. Mr. Mkanyali drew and filed submissions on behalf of the 1st defendant. He said the 1st defendant was appointed Administrator of the estate of his father one Mintanga Kondo. He instituted Land Case No. 251 of 2014 against the plaintiff and others over the same subject matter but the matter was dismissed for want of prosecution. He said the appointment as an administrator has never been revoked and the probate has not been closed. He said he has been sued in his own name instead of the title of administrator of the estate of his late father of which the disputed subject matter is involved as alleged in paragraphs 7 and 8 of the plaint. He said the fact that the 1st defendant has been sued in his own name makes him to have no right or interest over the disputed subject matter according to Order 1 Rule 3 of the Civil Procedure Code CAP 33 RE 2019. He also relied on section 71 of the Probate and Administration Act CAP 352 RE 2002 and the case of **Lujuna Shubi Balonzi Snr vs;. Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203**. Mr. Mkanyali concluded by saying that the suit has been instituted against the 1st defendant who is a wrong party and has no locus standi hence have no right or interest as the property subject

of the case has always been under the administrator of the deceased estates. He prayed for the suit to be dismissed with costs.

The 2nd defendant's submissions were drawn and filed by Mr. Mkenda, Advocate. He said the suit land forms part of the estate of his late father one Rashid Pembe whereas the 2nd defendant is the legal representative as appointed by Mwambao Primary Court. He said whatever he is doing regarding the suit land is because he is the legal representative within the ambit of section 100 of the Probate & Administration of Estates Act. He said this means if the late Rashid Pembe was alive he was the one who ought to have been sued regarding the suit land and not the 2nd defendant in the manner that has been brought in this case. He said the 2nd defendant is therefore a wrong party and there is no cause of action against him. He relied on the case of **Respicius Emilian Mwijage vs. the Director Iala Municipal Council & 2 Others, land Case No. 27 of 2021 (HC-Land Division)** (unreported). He said in the cited case the suit was struck out because the plaintiff sued a wrong party and he prayed to adopt the position of the case and further pray for the suit against the 2nd defendant be struck out with costs.

The submissions in reply were drawn and filed by Mr. Living Raphael, Advocate. As for the objection by the 1st defendant, Mr. Living said that the allegation that the plaintiff has sued a wrong party is wanting because in June 2020 when the cause of action arose it was the 1st defendant who invaded the plaintiff's suit property and it has not been established that the suit property was part of the deceased land. Such allegation needs evidence and cannot be entertained at this stage by virtue of landmark case of **Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696**. He said the issue of *locus* does not arise because it goes to the one who has instituted the suit if he has interest, but it does not go to the said of the defendant. The obligation of the defendant is to set out his defence against the allegation raised against him by the plaintiff. He prayed for the preliminary objection by the plaintiff to be dismissed with costs.

As for the objection by the 2nd defendant Mr Living said the issue of cause of action against the 2nd defendant was well disclosed in paragraphs 3,4,5, and 6 of the plaint. He said according to the case of **Jeraj Sharif & Co. vs. Chotal Fancy Stores [1960] EA 371** it was held that the question whether the plaint disclosed a cause of

action must be determined upon a glance of the plaint alone together with anything attached to form part of it on implied allegations of the acts therein are true. He also relied on the case of **John M. Byombalirwa vs. AMI (T) Limited [1983] TLR 1**. Mr. Living said the contents of paragraphs 3,4,5, and 6 of the plaint contains issues regarding the cause of action and what should be looked upon is the plaint and the subsequent pleadings/documents and nothing else. He said the plaintiff's allegation is that he is the lawful owner of the suit property whether the 2nd, 3rd and 4th defendants are saying the land is within the estate of their late father then they need to adduce evidence to prove to the court and this cannot be entertained at this stage. He said this goes against the rules envisaged in the case of **Mukisa Biscuits Co. Limited** (supra). He prayed for the preliminary objection to be dismissed with costs.

In their rejoinders the 1st and 2nd defendants reiterated their main submissions and the prayers therein.

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

It is common knowledge that a preliminary objection should raise a pure point of law based on ascertained facts from the pleadings or by necessary implication, not on facts, which have not been ascertained; and even if ascertained if argued, a preliminary objection should be capable of disposing of the case. A preliminary objection cannot also be raised if what is sought is the exercise of judicial discretion. (see: **Mukisa Biscuits Co. Limited (supra)** which was followed in **COTWU (T) OTTU Union & Another vs. Hon. Iddi Simba Minister of Industries and Trade and Others [2002] TLR 88**). Also see the case of **Attorney General vs. The Board of Trustees of Cashewnut Industry Development Trust Fund & Another, Civil Application No. 72 of 2015 (CAT-DSM)** (unreported).

The defendants have raised two issues, that is, *locus standi* and want of cause of action. Though these points may seem different but their basis is that the defendants are only legal representatives of their late parents who were owners of the suit property so they cannot be personally sued. Now is this a purely point of law? In my considered view, this cannot stand because the claims by the defendants that

they are legal representatives need to be ascertained by tendering proof. Further it has to be established, and this needs proof also, that at the time the plaintiff is claiming invasion, the defendants were still administrators and their obligations of administrators in such circumstances. These facts require ascertainment by way of evidence. The court has to hear evidence from both the parties in order to correctly determine whether the claims by the plaintiff deserve the reliefs that are prayed for. The parties cannot do this in any other way except through evidence to be presented orally and by exhibits. The case of **Respicius Emilian Mwijage** (supra) is distinguishable because it involves the Municipal Council whose impleading is statutorily provided for. But in the present suit the plaintiff has sued the defendants in their personal capacities as invaders in his suit property, so if the defendants are claiming that they are legal representatives then they have to prove as such, and this cannot be at this initial stage. In that respect the objections raised cannot be termed as purely points of law in terms of **Mukisa Biscuits Co. Limited** (supra) as they require ascertainment by way of evidence.

In the result the preliminary objections have no merit and are dismissed. Costs to follow events. It is so ordered.

V.L. Makani

**V.L. MAKANI
JUDGE
30/05/2022**

