

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

LAND CASE NO. 118 OF 2019

**THE REGISTERED TRUSTEES OF
KHOJA SHIA ITHNA ASHERI JAMAAT.....PLAINTIFF**

VERSUS

**THE ATTORNEY GENERAL.....1ST DEFENDANT
THE COMMISSIONER FOR LANDS,
THE MINISTRY FOR LANDS, HOUSING &
HUMAN SETTLEMENT DEVELOPMENT.....2ND DEFENDANT
KINONDIONI MUNICIPAL COUNCIL.....3RD DEFENDANT
ELLY KAVISHE.....4TH DEFENDANT**

Date of Last Order: 25.04.2022
Date of Judgment: 27.06.2022

JUDGMENT

V.L. MAKANI, J

The plaintiff in this suit THE REGISTERED TRUSTEES OF KHOJA SHIA
ITHNA ASHERI JAMAAT is seeking for the following orders:

- 1. A court declaratory order that the plaintiff is the lawful owner of all that piece of land constituting Plot No. 586 and 587, Block F, Msasani Village, Kinondoni Municipality within Dar es Salaam City.*

- 2. A permanent injunction to forever restrain the defendant their agents, servants or anyone acting under them from further interference and disturbances with the Plot No. 5876 Block F Msasani Village, Kinondoni Municipality within Dar es Salaam City.*
- 3. An order for removal of any structure or plants illegally erected thereon and/or at the entrance thereof and/or any obstruction or building that limits and/or interferes with access to and from Plot No. 5876 Block F Msasani Village, Kinondoni Municipality within Dar es Salaam City.*
- 4. An order for payment of TZS 900,000,000/= (say TZS Nine Hundred Million Only) being specific damages as a result of defendants act which hindered the plaintiff to develop Plot No. 5876 Block F Msasani Village, Kinondoni Municipality within Dar es Salaam City and occasioned loss to the tune above mentioned.*
- 5. In addition to that the plaintiff claims for general damages of which will be assessed by this honourable court.*
- 6. Costs to be provided for.*
- 7. Any other order and relief as the honourable court may deem fit to grant in the circumstances.*

The plaintiff in this suit was represented by Carlos J. Cathberty and Godfrey Samwel, Advocates. The 1st, 2nd and 3rd defendants were represented by Ms. Kilonzo, Mr. Masunga Kamihanda, Mr. Saleh

Mohamed and Mr. Mwambalasa, and Mr. Kause Izuna, State Attorneys. The 4th defendant was represented by Mr. James Bwana, Advocate.

The issues that were framed in terms of Order VII Rule 40(1) of the Civil Procedure Code CAP 33 RE 2022 (the **CPC**) were as follows:

- (a) *Whether the plaintiff is the owner of the property known as Plots No. 586 and 587, Block F, Msasani Village, Kinondoni Municipality within Dar es Salaam City (the **suit plots**).*
- (b) *Whether there was proper revocation and re-allocation of the suit plots to the plaintiff.*
- (c) *Whether the suit plots were designed as an "open space".*
- (d) *Whether the plaintiff is entitled to any damages as claimed.*
- (e) *To what reliefs are the parties entitled to.*

The plaintiff had three witnesses; and Yakati Hassanali Nanji (**PW1**) was the first witness. He said he is the Administrator of the plaintiff, a religious institution which deals with religion and education development. He said the plaintiff was in 1999 granted Right of Occupancy for 33 years in respect of the suit plots which is about

34,610 square meters. He said they were given original Certificate of Title No. 49331 dated 03/02/1999 in the name of the plaintiff (**Exhibit P1**). He said they initially had another Certificate of Title No. 35904 granted in 1989 (**Exhibit D2**) which was revoked for reason that the property was not developed. **PW1** said in 1998 they received a letter from the Commissioner for Lands informing them that the Certificate of Title was revoked (**Exhibit P2**). He went on saying that after the revocation the plaintiff appealed to the Minister and thereafter the plaintiff received a letter from the Commissioner for Lands returning the said suit plots to the plaintiff (**Exhibit P3**). He said after that they started processing a Building Permit and a Certificate of Title. He said by 1999 the plaintiff was granted a new Certificate of Title (**Exhibit P1**) with the same conditions and also a Building Permit (**Exhibit P4**).

PW1 informed the court that the plaintiff started construction, but their construction workers were arrested and later released by officers of the 3rd defendant, Kinondoni Municipal Council. **PW1** went on saying that they complained that they have been refused to develop the property and from 2003 to 2012 they were seeking for a solution. He said in 2012 the plaintiff was told to pay so as to revive the Building

Permit and they did so and were granted a receipt (**Exhibit P5**). He said when they went to the suit plots, they found that there was a person taking care of the property, so they complained once again to the Councillor who told the plaintiff that the suit plots were allocated for "open space" (**Exhibit P6**). He said they had to go back to the Municipal Council to inform them that the plaintiff was the owner of the suit plots and asked for assistance because construction had started vide a letter (**Exhibit P7**).

PW1 observed that the plaintiff was granted a Certificate of Title, but it was revoked after 10 years for not developing the property. But after the revival of the said Title the plaintiff has been facing a lot of obstacles in developing the suit plots. He questioned as to why the Certificate of Title would be returned to the plaintiff if the suit plots were "open space". He pointed out that the current status is that the suit plots contain permanent trees, brick benches and he said there is a certain construction going on. He also said there are stone barricades so no one can enter the said suit plots.

On cross examination **PW1** said the Trustees of the plaintiff are the ones who can sue and be sued. He said he is not among the Trustees

but was authorised to testify as a witness on behalf of the Trustees. He said he is an employee of the plaintiff and not the owner of the suit plots. **PW1** said **Exhibit P1** is the new Certificate of Title No. 49331 that was issued in 1999. The previous Certificate of Title that was issued in 1989 was revoked. He said **Exhibit P4** the Building Permit did not describe the plots subject of the said permit. **PW1** admitted that the use of land was for nursery school only, but the Building Permit reflected that the intended buildings were for "madrassa" which also means school. He said he did not know who owned the suit plots before the plaintiff.

The second witness was Mehboob Versi (**PW2**). He said he is one of the Trustees of the plaintiff and he was Trustee from 2012 but now he is retired. His testimony was similar to that of **PW1** but he emphasized that currently the suit plots have a garden and a clinic which was built recently. He said since the Plaintiff has a Certificate of Title and it has not been revoked, then the suit plots belong to the plaintiff and there are correspondences to that effect. He further said that the plaintiff has paid Land Rent and Land Rent Assessment and Exchequer receipts for 2009 and 2016 were tendered as **Exhibit P8** and **P9** respectively.

In cross examination **PW2** admitted that the Minister cannot nullify the directives of the President. He also admitted that when they paid the Land Rent in 2003 and 2016 the plaintiff was already aware that the suit plots were "*open space*" by virtue of **Exhibit P6** which letter was from Kinondoni Municipal Council. He said the compensation claimed by the plaintiff is for development as there was a wall which was demolished. **PW2** also admitted that the 4th defendant is the one who maintains the garden on the suit plots. He said both the 4th defendant and the Municipal Council workers barred the plaintiff from developing the suit plots (**Exhibit P12**). He said though they are no photos of demolition of the wall, but the plaintiff had started construction and they had a Building Permit. He said the TZS 900,000,000/= the plaintiff is claiming is the value of the land.

PW3 was Fakrudin Tayabali. He said he is a retired citizen and in 2010 he was given the task of investigating about the dispute of the suit plots by the plaintiff. He said in the course of his investigation he visited many authorities, and he wrote a letter to the Minister for Lands to inquire about the dispute (**Exhibit P13**) and specifically who had barred the plaintiff from continuing construction at the suit plots.

He said the file could not be found at the Land Registry, and when he went with a Municipal Officer to the said suit plots, he found the beacons removed and the neighbour did not allow anything to be done on the suit plots as there was a garden and benches. He said he was informed by the office of *Serikali ya Mitaa* that the neighbour who was taking care of the suit plots was Elly Kavishe the 4th defendant.

PW3 went on saying that though he visited the 4th defendant they did not discuss anything, but he decided to send a letter to the Minister as a reminder (**Exhibit P14**). He said he kept following up and he sent another reminder letter to the Minister (**Exhibit P15**). He said his letter was responded vide **Exhibit P10** which stated that the suit plots were "*open space*" and the procedure for construction of a kindergarten was not proper. He said after this letter he wrote another letter to the Commissioner for Lands (**Exhibit P16**) and he reminded the Commissioner vide another letter vide **Exhibit P17**. He then received the letter **Exhibit P11** from the Commissioner for Lands telling the plaintiff that the suit plots were wrongly surveyed and given to the plaintiff, as the suit plots were allocated for an "*open space*", that the Certificate of Title was mistakenly issued and hence

would be revoked. He said they were then advised to go to court. He said before this case the plaintiff filed Land Case No. 61/2013, Land Case No. 381/2016 and Land Case No. 307/2017 which were all struck out on technicalities. He prayed for justice to be done and said in the suit plots there is currently a government hospital.

In cross-examination **PW3** said **Exhibit P11** was telling the plaintiff that the plots were wrongly surveyed, wrongly allocated to the plaintiff as suit plots were allocated as "*open space*". He said the letter was addressed to him and he has never gone back to the Commissioner for clarification. He admitted that the Certificate of Title was issued by the Commissioner for Lands and the Commissioner was the one who informed the plaintiff that the suit plots were wrongly allocated to them. He also admitted that the letters for complaints, that is, **Exhibit P13, P14** and **P15** were not addressed to the Commissioner for Lands but to the Minister. The letters **Exhibit P16** and **P17** were addressed to the Commissioner for Lands and were responded to vide **Exhibit P11**.

In further cross examination **PW3** said he is not aware if the Certificate of Title of the plaintiff has been revoked. He said the 4th

defendant has never barred them from making developments but some youngsters (*wahuni*) who were sent to bring chaos so no development could proceed.

The first witness for the defence was Sijaona Dimond Mwasomola (**DW1**). He said he is a Town Planner in the Ministry of Lands. He said according to Map No.1/501/569 (**Exhibit D1**) the suit plots were "*open space*" and no changes have been effected. He said the final say on usage of land is **Exhibit D1**. And if there is a dispute of the Deed Plan in any Certificate of Title then a Map such as **Exhibit D1** takes precedence. On cross examination he said that the initial Certificate of Titles No. 35904 (**Exhibit D2**) shows the usage of the land as for nursery school.

DW2 was Adelfrida Camilius Lekule Land Officer at the Office of the Commissioner of Land. She said according to records the suit plots were initially owned by the plaintiff. But in 1998 the ownership was revoked by the President on the ground that the property was not developed. She said the office of the Commissioner also discovered that the suit plots were mistakenly allocated to the plaintiff contrary to the City Planners. She said in 1999 the ownership of the suit plots

was reinstated to the plaintiff but later it was again discovered that the land use was still wrong as there was no permit or application as the use was still "*open space*". She said the land ownership was revoked in 1998 and the initial Certificate of Title has an endorsement to that effect. She said reinstatement of ownership by the plaintiff did not follow procedure because there was no application to the Land Allocation Committee. She said **Exhibit P11** informed the plaintiff that the suit plots were wrongly surveyed and allocated to the plaintiff as the use of the said plots remain as "*open space*" and there is no change of use.

The witness continued to say that there was intention of rectification but there was a report that there is a case in court in 2013 so the process of rectification stopped in lieu of the pending case. She said after informing the plaintiff that the suit plots remain as "open space" there have not received any complaints from them. She said the ownership of the suit plots was mistakenly allocated so there is need of rectification by the Commissioner for Lands or by order of the court. She said compensation on rectification depends on the use of the land and also the land bank prevailing at that time and the readiness of the person applying for the compensation. She said in the present

case the plaintiff has not applied for any compensation. She prayed for the court to note that the suit plots are "open space" and if the plaintiff was granted ownership, then it was a mistake.

On cross examination **DW2** stated that a Certificate of Title can mistakenly be issued because of the infrastructure and procedures which were previously in place which were mostly manual. She said the sketch plans before did not reflect the "*open space*". She said it was not intentional but it was due to infrastructure but there was still room for remedy. She said the remedy was for the plaintiff to approach the office for discussion. She said she does not know if there is a dispensary/clinic or any developments on the suit plots. She emphasized that there was further need of revocation of which rectification is in the process. She said the rectification of the said plots commenced in 2012 under the Land Registration Act which allows the Commissioner to pioneer rectification where necessary. She said the plaintiff has not come to the Commissioner for the remedy of the mistaken allocation of the suit plots because the initial remedy is administrative and thereafter the court where necessary. **DW2** admitted that the owner of the suit plots is the plaintiff as rectification is at standstill because of the pending case. She said the

rectification in this case was in respect of the Certificate of Title by withdrawing the right of ownership, and when rectification is concluded the suit plots will remain as "*open space*". She said the process has stopped because of this pending case. She insisted that she does not know the 4th defendant and the records do not show any developments on the suit plots.

DW3 was Palmon Martin Rwegoshora, Assistant Registrar of Titles, Office of the Registrar of Titles operating from Dar es Salaam. He said the suit plots under Certificate of Title No. 35904 (**Exhibit D2**) were in the name of the plaintiff but in 1998 the said Certificate of Title was revoked and reverted to the name of the President. He said the revocation was on 03/09/1998

On cross-examination **DW3** said **Exhibit P1** and **Exhibit D2** are different as **Exhibit P1** is CT No. 49331 (34,610 square meters) and **Exhibit D2** is CT No. 35904 (34,406 square meters). He said the issue of "*open space*" is been dealt with at the office of the Commissioner for Lands and a deed of revocation is normally submitted to the Registrar of Titles and then the revocation is registered. **DW3** could not verify **Exhibit P1** because he insisted that

it was not original. He said a title could not be issued twice and there could not be two valid certificates of title on the same plots. He insisted that when search is conducted then the owner of the said plots would read as the President.

Counsel for the parties filed their final submissions as they were ordered by the court and I commend their assistance to the court by their well-researched submissions.

by the plaintiff and ought to be struck out with costs.

I would wish to first address the irregularity that was raised by Mr. Izuna in his final submissions. The irregularity was the impropriety of **PW3** to instruct an advocate to draw, institute and prosecute this suit and also to instruct **PW1, PW2** and **PW3** to testify without being lawfully instructed and authorised by the plaintiff. Mr. Izuna relied on section 8(1)(a)(b) and (2) of the Trustees Incorporation Act CAP 318 RE 2002, Order VI Rule 15(1)(2) and (3) of the Civil Procedure Code CAP 33 RE 2019 and the case of **Ilela Village Council vs. Ansaar Muslim Youth Centre & Another, Civil Appeal NO. 317 of 2019 (CAT-Iringa)** (unreported). I wish to state at the outset that the irregularity raised is an afterthought and without merit. In my

considered view, the said irregularity ought to have been raised in the course of the hearing when all the parties had an opportunity to respond thereof. Raising them at them in the final submissions is an afterthought and condemning the defendants unheard is an injustice on their part. This issue is therefore disregarded.

Now coming to the substantive issues. The first issue for determination is whether the plaintiff is the lawful owner of the suit plots. Section 2 of the Land Registration Act Cap 334 R.E 2019 provides that prima facie proof of ownership of land is Certificate of Title or at least a Letter of Offer. And this position was illustrated in **Salum Mateyo vs. Mohamed Mateyo (1987) TLR 111** where the court held:

"This means, any presentation of a registered interest in land is prima facie evidence that the person so registered is the lawful owner of the said land."

It is the plaintiff's case that she initially had Certificate of Title No. 35904 (**Exhibit D2**) in respect of the suit plots which was revoked and reverted to His Excellency the President. The plaintiff alleges that after the revocation the suit plots were returned to her under Certificate of Title No. 49331 (**Exhibit P1**) hence the plaintiff considers to be the owner of the said suit plots. However, it is also on

record that the Commissioner for Lands after the issuance of Certificate of Title No. 49331 (**Exhibit D2**), later informed the plaintiff that the said certificate was mistakenly issued as the suit plots were "*open space*" and called for the rectification of the said Certificate of Title No. 49331 (**Exhibit D2**). It is apparent therefore there are two certificates in respect of the suit plots that is Certificate of Title No. 35904 which is now in the name of Her Excellency the President and Certificate of Title No. 49331 in the name of the plaintiff. This is so because according to **DW3**, whose evidence was not controverted, Certificate of Title No. 35904 is still on the and there cannot be two certificates in respect of the same plots. This creates doubt as regards the issuance of the subsequent Certificate of Title No. 49331 (**Exhibit P1**) and whether it was duly registered at the Registrar of Titles as there is no evidence that was led as regards of the process of the registration of **Exhibit P1**.

Another controversy as regards to ownership of the suit plots is that the Commissioner for Lands noted and informed the plaintiff that there was a mistake in the issuance of the Certificate of Title (**Exhibit P1**). This information was communicated to the plaintiff vide **Exhibits P10** and **P11** and the Commissioner told the plaintiff the

mistake had to be rectified. **DW2** testified that the process for rectification had commenced but was halted by the ongoing cases filed by the plaintiff. The plaintiff is in knowledge of the said letters and the directives of the Commissioner for Lands as these are exhibits tendered by the plaintiff. In essence therefore, though the Certificate of Title No. 49331 is in the name of the plaintiff, but after discovery by the Commissioner for Lands that it was mistakenly issued, he informed the plaintiff that there was need for rectification which process according to **DW2** has been held in abeyance pending this court case filed by the plaintiff. This assertion by **DW2** was not controverted and the plaintiff, on the other hand, is in cognisance of this mistake as she was duly informed by the Commissioner for Lands vide **Exhibit P10** and **Exhibit P11** as corroborated by the testimony of **PW1**, **PW2** and also **PW3**. According to **Exhibit P11** the Commissioner for Lands stated in part that: *"...the Certificate of Title [No. 49331] which was wrongly issued over these plots will be revoked by the means of rectification in the Land Register.*

As stated above, the plaintiff does not deny the receipt of these letters **Exhibit P10** and **P11** but has not shown what she did after receipt of these letters. From the records it is apparent that after the letter

Exhibit P11, which was the last correspondence between the plaintiff and the Commissioner for Lands, the plaintiff find it necessary to call upon the Commissioner for Lands for any further enquiries, and this was also confirmed by **PW3** in his testimony.

Since section 10(1) of the Land Act states that the Commissioner for Lands is the principal administrative and professional officer of, and adviser to the Government on all matters connected with the administration of land and shall be responsible to the Minister for the administration of land; then the court cannot ignore what was noted and discovered by the Commissioner for Lands that there was a mistake in the issuance of the latter Certificate of Title (**Exhibit P1**) which mistake was also notified and is in the knowledge of the plaintiff in terms of the letters **Exhibit P10** and **P11**. It is obvious that there was and still is a process of rectification of **Exhibit P1** which is yet to be finalised by the Commissioner for Lands as stated by **DW2**. In the circumstances, and considering that this process has not been finalised, it means the ownership cannot be in the hands of plaintiff until it is sorted out by the Office of the Commissioner for Lands. In the premise, the court cannot declare ownership to the plaintiff with the controversy of issuance of the second Certificate of Title (**Exhibit**

P1) at hand. Further, as said by **DW3** there cannot be two valid Certificates of Title in respect of the same plots. For that matter it is obvious that the Certificate of Title No. 49331 (**Exhibit P1**) was mistakenly issued and unless this problem which have been noted by the Commissioner for Land is cleared; in other words, until the rectification process is exhausted, the court cannot declare ownership to the plaintiff by virtue of Certificate of Title No. 49331 (**Exhibit P1**). The suit plots remain in the name of Her Excellency the President and I hold as such.

The second and third issues are straight forward and will be considered together. It has been established that the first Certificate of Title No. 35904 (**Exhibit D2**) was revoked and that the second Certificate of Title No. 49331 (**Exhibit P1**) was mistakenly issued. It is quite clear therefore that the revocation of **Exhibit D2** is not at issue here, but the problem is the issuance of the second Certificate **Exhibit P1** and re-allocation of the plots to the plaintiff. It has been established that the Commissioner for Lands discovered that there was a mistake in issuance of the Certificate of Title No. 49331 (**Exhibit P1**), and the plaintiff is duly informed of the said mistake and the need for rectification, then the mistake in re-allocation and

issuance of **Exhibit P1** was wrong because the plots as noted in the Town Plan (**Exhibit D1**) were "*open spaces*" and this was asserted in evidence by **DW2** and **DW1**.

In his final submissions Mr. Carlos said the evidence of the defence witnesses show that the error was not occasioned by the plaintiff and there was illegal rectification by the 2nd and 3rd defendants and in essence there was no rectification was done as admitted by **DW2**. He went on saying that the plaintiff during the process of rectification was not given the right to be heard according to Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended, and this also infringed the plaintiff's constitutional right of right to be heard under Article 24 of the Constitution which is a mandatory right. He also relied on the case of **Charles Christopher Humprey Kombe vs. Kinondoni Municipal Council, Civil Appeal No. 81 of 2017 (CAT-DSM)**(unreported). Indeed, I agree that the right to be heard is mandatory. But as stated above, the rectification process has, according to **DW2**, been put in abeyance pending the completion of this case; and secondly, the plaintiff is in knowledge of the rectification process and as said by **PW3** though they were recalled by the Commissioner for Lands in his letters

Exhibit 10 and **11**, the plaintiff has not made any effort to visit his office or otherwise make a complaint about the whole process of rectification. In such circumstances, the plaintiff cannot cry that there is unfair procedure, or she has not been heard.

Mr. Carlos also pointed out that the defendant failed to establish that the suit plots were designed as "*open space*" as there were a lot of uncertainties in the Map (**Exhibit D1**) but on the other hand there was no other Map or evidence to controvert the fact that the suit plots were indeed not "*open spaces*" as demarcated in the map. In fine, I hold that the re-allocation and issuance of the new Certificate of Title **Exhibit P1** was improper and hence ineffectual because the plots as noted in the Town Plan (**Exhibit D1**) were "*open spaces*", and the process of rectification is under process and in the knowledge of the plaintiff.

As for the fourth issue, it is settled law that specific damages have to be specifically pleaded and strictly proved. As correctly said by Mr. Bwana in his final submissions the claimed amount of TZS 900,000,000/= has not been specifically pleaded as the plaintiff has not in his pleadings given particulars of the special damages. I

subscribe to the Mr. Bwana's cited cases on specific damages namely, **Samwel Kimaro vs. Hidaya Didas, Civil Appeal No. 271 of 2018 (CAT-DSM)** (unreported) and the case of **Stanbic Bank (T) Limited vs. Abercrombie & Kent (T) Limited, Civil Appeal No. 2001, (CAT-DSM)** (unreported). The plaintiff's witnesses have not proved how the demolition and obstruction of development were done and the amount of loss incurred. The plaintiff had the duty in law to prove the costs incurred, if any, towards the alleged demolition. And as Mr. Bwana put it, and correctly in my view, *"the plaintiff failed to pinpoint the quantum of losses"* for which the court could have assessed the specific damages. In view thereof, I don't find reason to award the specific damages prayed.

As for the claim for general damages, it is trite law that the court discretionarily awards general damages after taking into account all relevant factors of the case (see the case of **Cooper Motor Corporation Limited vs. Moshi Arusha Occupational Health Services [1990] TLR 96**) also see the case of **Antony Ngoo and Denis Antony Ngoo vs Kitinda Kimaro, Civil Appeal No. 35 of 2014 (CAT-Arusha)** (unreported). Since the plaintiff has failed to

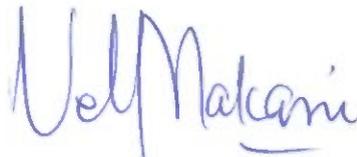
prove the claims in the plaint then this court cannot award general damages.

Before I pen off, I would also wish to touch on claims against the 4th defendant. I agree with Mr. Bwana as observed in his final submissions that the first to fourth issues are on matters that are beyond the knowledge and functions of the 4th defendant, as they were matters handled by the plaintiff, the 2nd and 3rd defendants. The 4th defendant therefore was not in a position to testify on them as she has never worked for the 2nd or 3rd defendants, or even participated in the grant or revocation of the Certificate of Title subject of the suit. In principle and according to the evidence, the 4th defendant was joined because she was just a neighbour and was taking care of the suit plots, she was not the owner of the plots or had any complaint regarding the plots. In my view, the cause of action against the 4th defendant was very remote she could have as well been a witness to either the parties to explain the current status of the suit plots.

For the reasons I have endeavoured to address, it is evident that the evidence the plaintiff has failed to prove the case to the standards of

law required and clearly the balance is leaning in favour of the defendants. Subsequently, the suit is hereby dismissed with costs, and the plaintiff is not entitled to the reliefs prayed in the plaint or at all.

It is so ordered.



V.L. MAKANI
JUDGE
27/06/2022