

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.91 OF 2021

NABEEL ABDULHAKIM FUAD 1ST PLAINTIFF

NABEELAH FUAD 2ND PLAINTIFF

VERSUS

TAUSI LUFUNGA NGOMA 1ST DEFENDANT

JUMA BAU 2ND DEFENDANT

AMASHA BAU 3RD DEFENDANT

ATHUMANI MUSSA 4TH DEFENDANT

HAMISI MTINGE 5TH DEFENDANT

SELEMANI MUSSA 6TH DEFENDANT

CHALINZE DISTRICT COUNCIL 7TH DEFENDANT

THE ATTORNEY GENERAL 8TH DEFENDANT

RULING

Date of last order: 15.03.2022

Date of Ruling: 18.03.2022

A.Z.MGEYEKWA, J

On 30th June, 2021 the Plaintiff herein, instituted this suit against eight defendants including Kinondoni Municipal Council and the Attorney General, seeking seven reliefs as follows:-

- a) *For a declaratory order that the landed property located at Msolwa-Chalinze covering an approximate four hundred acres which comprise four hundred and forty-five (445) plots developed by the 1st Defendant vide Reg. Plan NO. 91828 and a parcel of land occupied by the 2nd to 6th Defendants form part of the farm formerly described as farm No. 98 at Msolwa-Chalinze (Hereinafter referred to as the "Suit Property") is lawfully owned by the Plaintiffs.*
- b) *For a declaratory order that acts and conducts of the 1st Defendant to introduce herself to the 7th Defendant as the owner of the 445 plots at Msolwa-Chalinze (part of the Land Comprised in then farm No. 98), her procurance from the 7th Defendant survey instructions and to survey for the land forming part of the suit property, to draw a survey plan and register a drawn Survey Plan for 445 plots vide Reg. Plan No. 91829 and No. 91828 forming part of the suit property amounts to trespass to the suit property.*
- c) *For a declaratory order that survey instructions given to the 1st Defendant by the 7th Defendant in respect of the land forming part of the suit property and which led to the drawn survey Plan for 445 plots of the aforesaid land while 7th Defendant is aware that the said land forming part of the Land Comprised in the then farm No. 98 owned by the Plaintiffs is illegal and in-effectual.*

- d) *For an eviction order against the 1st to 6th Defendants and/or their agents, assignees or any person occupying the land forming part of the suit property from the Defendants.*
- e) *For general damages at the assessment by the Court.*
- f) *Costs of the suit.*

The 1st, 2nd, 3rd, 5th, and 6th Defendants' filed a Written Statement of Defence disputing the claims and before the hearing of the suit on merit, The suit did not have a smooth sail, for, ahead of the hearing, it is hurdled by five points of preliminary objection lodged by Mr. Mwapongo. The preliminary objections notice was lodged on 13th September, 2021, reads:-

1. *The Plaintiff does not disclose when the cause of action arose contrary to Order VII Rule 1 (e) of the Civil Procedure Code Cap. 33 [R.E 2019].*
2. *The Plaintiff did not obtain leave of the Court to join the cause of action as required by Order II Rule 4 of the Civil Procedure Code Cap. 33 [R.E 2019].*
3. *The suit is time-barred.*
4. *The Plaintiff offends Order VII Rule 3 of the Civil Procedure Code Cap. 33 [R.E 2019].*
5. *The Plaintiffs have no locus standi*

When the matter was placed before this court for hearing on 18th August, 2021 the Plaintiffs enjoyed the legal service of Mr. Mashaka Ngole, learned counsel whereas the 1st, 2nd, and 3rd Defendants appeared in person. The 7th and 8th Defendants enjoyed the legal service of Ms. Rose Kashamba, learned State Attorney.

On the 1st limb of the objection, the learned counsel for 1st, 2nd, 3rd, 5th, and 6th Defendants was brief and straight to the point. He contended that the suit lacks a cause of action against the defendants. Stressing, the learned counsel for the 1st, 2nd, 3rd, 5th and 6th Defendants submitted that the Plaintiff does not disclose when the cause of action arose contrary to Order VII Rule 1 (e) of the Civil Procedure Code Cap.33 [R.E 2019]. Mr. Mwapongo went on to argue that there have been several dates indicated in the Plaintiff. To buttress his submission he referred this court to paragraph 27 of the Plaintiff which did not indicate the date upon which the 1st to 8th Defendants alleged to trespass the Plaintiff's land.

He claimed that the Plaintiff was required to show facts as to when the cause of action arose to establish whether the suit is not time-barred. Fortifying his submission he cited the case of **Materin M. Muhumbila v Clarence M. Muhumbila & Two others**, Land Case No. 276 of 2010 (unreported). Mr. Mwapongo urged this court to strike out the Plaintiff for

non-compliance with Order VII Rule 1 (e) of the Civil Procedure Code Cap.33 [R.E 2019].

On the limb of the objection, the learned counsel for the 1st, 2nd, 3rd, 5th and 6th Defendants contended that the Plaintiff did not obtain leave of the court to join the cause of action as per Order VII Rule 1 (e) of the Civil Procedure Code Cap.33 [R.E 2019]. He averred that it needs no thorough reading to ascertain that the Plaint at hand contains several causes of action which occurred on different dates, places, and against different institutions or some against individual persons. He went on to submit that there have been several allegations against the 1st to 6th Defendants encroaching on his alleged farm in 2016. To support his submission he referred this court to paragraphs 20 and 27 of the Plaint.

Mr. Mwapongo added that there is an allegation against the 7th Defendant for suspending the alleged survey plan which allegedly occurred on 6th March, 2018. To bolster his submission he referred this court to paragraphs 16, 17, 18, 19, 21, 23 and 34 of the Plaint. In his conclusion, he insisted that the Plaint contains two different causes of action and that there has been no leave sought as required by law to join two causes of action in one suit.

Submitting on the third limb of the objection, Mr. Mwapongo insisted that there was no specific date which have been indicated as the one to be referred to assess if the matter have been filed on time or not. The learned counsel for the 1st, 2nd, 3rd, 5th and 6th Defendants referred this court to section 3 of the Law of Limitation Act, Cap.89 [R.E 2019], outs of the jurisdiction of the Court to deal with the matter which has been filed out of time. He went on to argue that paragraph 27 of the Plaint indicates that the suit is founded on the common law tort of trespass which under the law has to be filed within three (3) years. Supporting his position he referred this court to Item 6, Part I to the Schedule of the Law of Limitation Act, Cap.89. He stressed that paragraph 27 does not state when the alleged trespass occurred against all Defendants. The learned counsel for the 1st, 2nd, 3rd, 5th, and 6th Defendants went on to argue that the parties and the court are left in a dilemma of guessing the dates from which the cause of action arose in the Plaint.

It was his further submission that they are assuming the year 2016 mentioned on paragraphs 20 and the date 6th March, 2018 of the Plaint renders the suit out of time as stipulated under the law. The learned counsel for the 1st, 2nd, 3rd, 5th, and 6th Defendants submitted that the remedy for the time-barred matter is to dismiss the suit.

As to the last limb of objection, Mr. Mwapongo submitted that the *locus stand* is premised on the affidavit sworn on 28th February, 2018 by the Plaintiff in respect to Misc. Application No. 136 of 2018 and the same is attached thereto Deed of Surrender of a right of occupancy for CT. No. 33418, Farm No. 98, Msolwa – Chalinze. He added that the Deed of Surrender relates to the same landed property indicated by the Plaintiff at paragraphs 11 and 12 of the Plaint. He added that the said property was surrendered to the President of the United Republic of Tanzania and the same has not been allocated again to the Plaintiffs for that reason it was his submission that the Plaintiffs has no locus stand to claim ownership. He urged this court to strike out the suit for want of locus stand.

On the strength of the above submission, the learned counsel for the 1st, 2nd, 3rd, 5th, and 6th Defendants beckoned upon this court to dismiss the suit with costs.

In reply, on the first limb of the objection, the learned counsel for the Plaintiffs contended that this objection is misplaced since the cause of the action against the Defendants and the facts are clearly stated in the Plaint. It was his view that the Plaint was prepared in accordance with Order VII Rule 1 (e) of the Civil Procedure Code Cap.33 [R.E 2019]. He went on to submit that the time when the cause of action arose is indicated in the

contents of paragraphs 16 of the plaint which reads together with paragraphs 17 and 20 of the Plaint. Mr. Ngole contended that the Plaint reads in its entirety, not in parts and the same offers an opportunity for the Court and for the parties to scrutinize when and how the cause of action occurred. Mr. Ngole went on to argue that Mr. Mwapongo alleged that the prime objective is to ascertain when the cause of action arose and whether the suit is not time-barred. It was his submission that the issue of ownership of suit land from the facts stated in the Plaint the time frame can be computed and the cause of action is still within the prescribed time frame of 12 years. The learned counsel for the Plaintiffs distinguished the cited case of **Materin M. Muhimbili** (supra) that it is relevant in the sense that the plaint was not struck out for non-compliance with Order VII Rule 1 (e) of the Civil Procedure Code Cap. 33 [R.E 2019].

It was his further submission that this court in the case of **The Open University of Tanzania v Frida Aliweuli & 2 Others**, Civil Case No.4 of 2019 set up a principle of law on how the contents of the Plaint should be treated in terms of Order VII Rule 1 (e) of the Civil Procedure Code Cap. 33 [R.E 2019].

Arguing for the second limb of the objection, the learned counsel for Plaintiffs contended that the cited Order II Rule 4 of the Civil Procedure

Code Cap.33 is inapplicable in the instant circumstances for there is a single cause of action against all Defendants in determining the issue of ownership of the suit land. It was his submission that the involvement of the 7th and 8th Defendants does not affect the interest of the Plaintiffs in the suit land and does not draw any implication that there are two different causes of actions.

With respect to the third limb of the objection, Mr. Ngole contended that the cause of action indicated in the Pliant is for a declaration on ownership of the suit land. He added that assuming that the cause of action arose in 2016 or 2018, the suit has not been filed out of tike thus the provision of section 3 of the Law of Limitation Act, Cap.89 [R.E 2019] is inapplicable and the Plaintiff is within the prescribed period of time.

The learned counsel for the Plaintiffs did not end there, whenever there is a claim over ownership of landed property, the act of trespass forms the claim for determination of ownership. He added that even though it stated that a cause of action arose from the common law tort of trespass the court should consider and be guided on the facts of the case constituting the cause of action instead of a mere statement. He went on to submit that on paragraph 27 of the Plaint, the Plaintiffs have also pleaded an additional cause of action for a declaratory order on ownership

of the land in a dispute whose time limit is 12 years from the date of encroachment by the Defendants.

Concerning the fourth limb of the objection, the learned counsel for the Plaintiffs contended that the 1st, 2nd, 3rd, 5th and 6th Defendants Advocate faulted himself by looking at annexure MK5 in exclusion of the Plaintiff, alleging that it has not contained a description of the property in dispute as per Order VII Rule 3 of the Civil Procedure Code, Cap.33. He argued that Mr. Mwapongo submission is misplaced the same be disregarded by this court. Insisting he submitted that from the averments of paragraphs 10 (a), 10 (b), 11 and 12 of the Plaintiff, the portion of Farm No.98 at Msolwa Chalinze is in dispute between the Plaintiffs and the Defendants. He added that the same is a registered land thus it is well known and sufficient for identification.

He went on to argue that assuming that the Plaintiff did not feature the description of the suit property to the satisfaction of the court, the remedy is to order an amendment of the offending pleadings. Fortifying his position he cited the case of **Michael Ngereka Shilima v African Baking Corporation Tanzania Ltd**, Commercial Case No.54 of 2016. He invited this court to be guided by the wisdom projected in the case of **The Open University of Tanzania** (supra) where Hon. Masabo. J

emphasized that the court should not confine itself to the Plaintiff without due regard to the merit of the case.

As to the fifth limb of the objection, the learned counsel for the Plaintiff from the outset stated that this limb of objection does not meet the legal test set in the Mukisa Biscuits case.

On the strength of the above submission, Mr. Ngole urged this court to dismiss the preliminary objections for want of merit.

In rejoinder, the 1st, 2nd, 3rd, 5th, and 6th Defendants recapped what was submitted in their written submission in support of the preliminary objection. He cemented that so long as the Plaintiffs have admitted that the cause of action is arising from Tort of trespass as pleaded under paragraph 27 of the plaint, then there is no need to waste the precious time of this court as the law of limitation is very clear as to time limit for instituting suits arising out of Tort.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserve. I should state at the outset that the main issue for determination is *whether the objections raised are meritorious*.

Concerning the first and second objections, Mr. Mwapongo is claiming that the Plaintiff has not disclosed when the cause of action arose that the Plaintiff contains two causes of action. As far as submissions are concerned, it is very clear that the Defendants did not object that the Plaintiff did not disclose the cause of action instead Mr. Mwapongo claimed that the Plaintiff contains more than one cause of action and the cause of action is combined without leave of the court. In his written submission, Mr. Mwapongo stated that they have noticed two causes of action; the first cause of action is against the 1st to 6th Defendants, who have been alleged to have encroached the Plaintiff's land in 2016 and the second cause of action is against the 7th Defendant, who is alleged to have suspended the alleged survey plan. In the case of **Mukisa Biscuits Manufacturing Co. LTD vs West End Distributors LTD (1969) EA**, it was held that:-

“A preliminary objection consists of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

Similarly, in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young women Christians Association of**

Tanzania, Civil Appeal No. 2 of 2010 (unreported) the Court of Appeal of Tanzania discussed the issue of point of law as follows: -

“... a point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.”

I have gone through the Plaint specifically paragraph 12, it appears that the cause of action is trespass. The Plaintiffs are complaining that the Defendants have trespassed into the Plaintiff's land. The law is very clear that the Plaintiff must show among other things, the fact constituting a cause of action and the cause of action in the instant case is trespass. It is my considered opinion that what has been stated by the Plaintiff in paragraph 27 of the Plaint, in my view, is not a direct cause of action. Therefore, the learned counsel for the 1st to 5th Defendants argument that tort is also a cause of action cannot stand. This court is guided by the facts constituting the cause of action as explained above not otherwise. Thus, even the issue of obtaining leave of the court to combine two causes of action cannot stand. Consequently, the first and second objections are devoid of merit.

As to the third objection, without wasting much time in court, I find that the suit is lodged within time. Reading paragraph 20 of the Plaintiff, the Plaintiffs have stated that in 2016, the 1st to 6th Defendants without colour of rights encroached part of Farm No. 98. The statutory time limit in recovering a piece of land emanates from section 3 of The Law of Limitation Act Cap. 89 [R.E. 2019] and Schedule Part I Item 22. The time limit to lodge a suit claiming ownership is 12 years. The Plaintiff instituted the present suit in 2021, counting the days from 2016 to 2021, it is only five and therefore, the suit is properly before this court. I think that was in compliance with the provision under Order VII Rule 1(e) of the CPC Cap 33 [R.E. 2019].

Concerning the fourth and fifth objections, the Plaintiff in his plaint has described the suit plot clearly under paragraphs 10 (a) 10 (b) 11 and 12 of the Plaintiff to mean a portion of Farm No.98 located at Msolwa Chalinze hence the plaintiff has complied with the legal requirement stated in Order VII Rule 3 of the Civil Procedure Code Cap.33 [R.E. 2019]. The issue of title number requires evidence. At this juncture, the court is concerned with matters which are touching on pure points of law. The issue of whether or not the Deed of Title was surrendered to the President of the United Republic of Tanzania requires a long argument. Therefore, the fourth and fifth limb of objection is disregarded.

Having found and held that the preliminary objections are wanting in merit, I overrule them and order the case to proceed on merit. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 18th March, 2022.



A.Z.MGEYEKWA

JUDGE

18.03.2022

Ruling delivered on 18th March, 2022 via audio teleconference whereas Mr. Mashaka Ngole, learned counsel for the Plaintiff, Mr. Mwapongo, learned counsel for the 1st – 6th Defendants and Mr. Luoga, learned State Attorney for the 5th – 8th Defendants were remotely present.



A.Z.MGEYEKWA

JUDGE

18.03.2022

Right to appeal fully explained