

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 226 OF 2022

PROF. GEORGE GREGORY CELESTINE

RWEGELLERA.....PLAINTIFF

VERSUS

PROF. GADI PAUL KILONZO.....1ST DEFENDANT

THERESIA KIYAO.....2ND DEFENDANT

**THERESIA KIYAO (As the administratrix of the estates of
the late RAPHAEL KIYAO)..... 3RD DEFENDANT**

OMARI ISSA.....4TH DEFENDANT

RULING

Date of Last Order: 27/02/2023

Date of Ruling: 15/03/2023

A. MSAFIRI, J.

The 4th defendant, has raised a notice of preliminary objections, challenging the competency of this suit on two points of law to the effect that;

- 1. The plaint is in contravention of Order VII, Rule 1 (e) of the Civil Procedure Code [Cap 33 R.E 2019], that it does not provide the cause of action and when it arose against the 4th defendant; and*
- 2. The plaint is in contravention of Order VII, Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019], that it has not provided the description of the immovable property (suit property) as required*

Aelle

under the Land Registration Act, Cap 334 by providing the description of the property sufficient to identify it.

On 27th day of February, 2023 when this matter was scheduled for hearing, the 4th defendant was represented by Ms Nora Marah. Submitting on the first limb of preliminary objection, she contended that, the whole plaint has no any paragraph which refers to the 4th defendant or any claim or any breach of right by the 4th defendant except on the part of reliefs sought.

She asserted that, in the present case even the annexures do not involve the 4th defendant. She prayed for the Court to see that the facts adduced by the plaintiff does not show how and when the 4th defendant has infringed the rights of the plaintiff thereof. Hence, she prayed that the plaint be struck out with costs. To back up her submission, she cited the case of **John Ambalilwa vs. Agency Maritime International** [1983] TLR 1.

Regarding the second limb of preliminary objection, Ms Marah averred that, the plaint does not describe clearly the location of the suit land. It refers to Gezaulole in Kigamboni but that was too general according to her as Gezaulole is a big area so the plaint should have been specific.

Still on her part, she stated that, the plaint has failed to identify properly the subject matter of the dispute. That even the annexures does not clearly describe the location of the suit land. She said further, by that, all the people of Gezaulole ought to have been joined in this case. At end, she prayed for the matter to be struck out.

Alle

In rebuttal, thereto, Mr. Ditrick Mwesigwa for the plaintiff, submitted on the first limb of objection that, for now, lack of cause of action does not qualify as a preliminary objection on point of law as it needs more evidence to prove it. He averred that, a cause of action against the 4th defendant is revealed at paragraph 6 (b) and paragraph 10 of the plaint including the reliefs. He contended that, the case of **John Ambalilwa (supra)** is no longer a new precedent. He referred this Court to the decision of **Anthony Leonard Msanze & Another vs. Juliana Elias Msanze & Others, Civil Appeal No. 76 of 2012** basically at page 5 and 8. Thus, he prayed the objection to be overruled with costs.

As to the second limb of objection, he detailed that, the plaintiff has clearly described the suit land *i.e.* 6 (six) acres situated at Gezaulole Village and that the same is not a village, it is a specific name of that suit land. Also, at paragraphs 10 and 13 of the plaint, the suit land is clearly described.

To fortify his propositions, he cited the case of **Mbwana M. Chuma & 2 Others vs. DSM Parkland Holding Ltd, Land Appeal No. 34 of 2022** at page 10 to 12. To conclude, he prayed for the objection to be overruled.

Re-joining, Ms Marah asseverated that, the two cases submitted by the counsel for the plaintiff, are distinguishable in a sense that the said plaint has to reveal the cause of action. She said that, the subject matter in the cited case of **Mbwana Chuma (supra)** was well described. So, she reiterated her submissions in chief and prayers thereof. *Alle.*

I have carefully considered the arguments advanced by the 4th defendant, rebuttal from the plaintiff plus the short rejoinder so as to determine the merit or demerit of the preliminary objections raised.

Order VII, Rule 1 (e) of the Civil Procedure Code, provides to the effect that the plaint shall contain the following particulars, to say, the facts constituting the cause of action and when it arose.

For the avoidance of doubt, paragraphs 6 (b), 10, 13, prayer (a) and annexure GGR-1 to the plaint filed on 2nd September, 2022 before this Court; all adduce facts which constitutes the cause of action that the plaintiff has against the defendants in this suit. The denials and disputed facts by the 4th defendants in his written statement of defence filed on 25th October, 2022 is subject to the full trial, so, the same cannot be maintained at this juncture.

The case of **John M. Byombalirwa vs. Agency Maritime Internationale (T) Ltd (supra)**, is a respectable decision in expounding the meaning of cause of action as essential facts which are necessary for the plaintiff to prove before he can succeed in the suit. Emphasis is underlined.

In the upshot, I find the first limb of objection with no iota of merit and accordingly it is overruled.

As to the second limb of objection, the law in contravention is Order VII, Rule 3 of the Civil Procedure Code which provides that;

*"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*

Alle.

number under the Land Registration Act, the plaintiff shall specify such title number.” (emphasis added).

From the foregoing provision, the bolded words are couched in mandatory form. In accordance with paragraph 6 (a) (b) (c) and prayer (a) (b) (c) of the plaint, the alleged particulars of the landed property is six (6) acres located at Gezaulole (then Gezaulole Village) in Kigamboni Area closer to the Indian Ocean in Dar es salaam.

In the premises, that is not sufficient enough to describe the suit land. The plaintiff ought to have pleaded and submitted in detail as to the description of the land in dispute and not to make a blanket description, as the way he did, therefore, this makes the so-called description of the suit property to be vague for not sufficing to identify the suit property properly as per the dictate of the provision of law above.

In the case of **Daniel Ndagala Kanuda (As an Administrator of the Estate of the late Mbalu Kushaha Baluda) vs. Masaka Ibeho & 4 Others**, Land Appeal No. 26 of 2015, (HCT-Tabora), (Unreported) it was stated at page 4-5 that;

"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".

Adelle

Likewise, in the case of **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another, Civil Appeal No. 197 of 2019 (Unreported), (CAT-MWZ)** it was observed and stated that:

"From what was pleaded by the appellant, it is glaring that the description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint. This was not proper and we agree with the learned trial Judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]".

Putting the matter under scrutiny, with utmost respect to Mr. Mwesigwa's submissions, what comes out of paragraphs 10 and 13 of the plaint is but unsubstantiated pleading and cannot be sugar-coated under the prevailing circumstances.

For clarity purpose as to the description of the property, the plaintiff ought to have gone further and be more specific in terms of road/ street if any, Ward and important features surrounding the area given the fact that the disputed land is un-surveyed so as to distinguish it from other lands adjacent to it. Furthermore, there is no mention of borders of the suit land and the neighbours surrounding the area. What is seen is a mere assertion that the land is closer to the Indian Ocean in Dar es Salaam. If I was to pose a question on how many lands particularly of six (6) acres are there in Gezaulole (then called Gezaulole Village) in Kigamboni Area closer to the Indian Ocean in Dar es salaam, in my view, the answer is plenty of them!

Adils

Nevertheless, the Plaintiff in its entirety does not disclose anywhere that the suit premises is un surveyed, so to speak, the counsel for the plaintiff's has gone beyond of what he has pleaded in the Plaintiff and the same is not acceptable in law as parties are bound by their pleadings. See the case of **Martin Fredrick Rajab** *supra* at page 15 to that effect.

In other words, the submissions by the advocate of the plaintiff in response to the submissions in chief of the advocate for the 4th defendant's was an afterthought, since they were not backed by the contents of the Plaintiff. Again, going with annexure GGR-1 collectively as attached to the Plaintiff, it does not designate properly the description of the subject matter.

Consequently, I join hands with Ms. Marah, that, all the people of Gezaulole ought to have been joined in this case for the plaintiff to investigate who are the trespassers to his land if that is the case and not otherwise as the described suit property is uncertain.

That said and done, I proceed to sustain the second limb of preliminary objection for being meritorious. As a result, the suit is struck out with costs.

Order accordingly.



A. Msafiri

A. MSAFIRI

JUDGE

15/03/2023