

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.83 OF 2023

(Arising from the Judgment of the District Land and Housing Tribunal for Kibaha in Land Application No. 1294 of 2021 Originating from the Judgment of Ward Tribunal of Kawe)

JOYMETHA KASHAIJA ..... APPLICANT

VERSUS

VERONIKA MATHEW ..... 1<sup>ST</sup> RESPONDENT

TAMASHA M. MAMBO ..... 2<sup>ND</sup> RESPONDENT

KABANGO GENERAL BUSINESS (T) LTD ..... 3<sup>RD</sup> RESPONDENT

RULING

*Date of last Order: 23.03.2023*

*Date of Ruling: 28.03.2023*

**A.Z.MGEYEKWA, J**

In this application, the applicant is seeking an order of the Court to extend time within which to file a revision out of time against the decision of the District Land Housing Tribunal for Kinondoni in Application No. 1294 of 2021. The Application is made under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019], section 38 (1) and 14 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The Application is premised on

- a) *That this Court be pleased to declare that the act of the 1<sup>st</sup> Defendant to evict Plaintiffs from their land is unlawful.*
- b) *That, this Honourable Court be pleased to order the Defendants jointly to set permanent boundaries in accordance with GN. No. 306 of 1954.*
- c) *Costs of this suit be borne from the Defendants.*
- d) *Any other relief (s) this Honourable Court may deem just to grant.*

The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants' filed a joint Written Statement of Defence disputing the claims. The suit did not have a smooth sail, for, ahead of the hearing, it is hurdled by one point of preliminary objection lodged by Ms. Pauline Mdendemi. The preliminary objections notice was lodged on 23<sup>rd</sup> February 2023. It reads:-

1. *There is no cause of action against the Defendants.*

In their written submission in chief, Ms. Mdendemi included another preliminary objection that the reliefs sought are not clear,

When the matter was placed before this court for hearing on 7<sup>th</sup> March 2023, the Plaintiffs appeared in persons, unrepresented whereas the Defendants enjoyed the legal service of Ms. Pauline, learned State Attorney. The plaintiffs urged this Court to argue the objection by way of written submission. By the Court's consent, the Defendants filed their

submission in chief on 13<sup>th</sup> March 2023 and the Defendants filed their reply on 17<sup>th</sup> March 2023.

The learned State Attorney started to kick the ball rolling. On the first limb of the objection, Ms. Mdendemi was brief and straight to the point. She submitted that the Plaintiffs have no cause of action against the Defendants. In defining the meaning of cause of action the learned State Attorney referred this Court to Black's Law Dictionary 8<sup>th</sup> Edition, Bryan A. Garner, 2007, the cause of action was defined to mean

*"A group of operative facts gives rise to one or more bases for suing a factual situation that entitles one person to obtain a remedy in Court from another person..."*

To cement her submission, she cited the case of **John M. Byombalirwa Agency Maritime Internationale (Tanzania) Ltd** 1983 TLR 1. The learned State Attorney for the Defendant went on to submit that in paragraph 5 of the Plaint, Plaintiff claims against the Defendants jointly and severally to set boundaries and permanent marks (beacons) along the Kazimxumbwi Forest Reserve in accordance with GN No.306 of 1954 to avoid recurring conflicts with the officers of the 1<sup>st</sup> Defendant. It was her submission that the Plaintiffs did not mention the names of the alleged

officers of the 1<sup>st</sup> Defendant since the 1<sup>st</sup> Defendant has different institutions with different responsibilities under the Ministry. Thus, it was her view that the Plaintiff ought to have mentioned those officers and the name of institutions. Ms. Mdendemi stated that for the Plaintiffs to establish a cause of action, they must show that they have the right and that another person has infringed or breached that right which led to the material loss of any other loss. Fortifying her submission, she cited the case of **Mashado Game Fishing Lodge Ltd & 2 others v Board of Trustees of TANAPA** (2002) TLR 319 -320.

Arguing on the second limb of the objection, the learned State Attorney contended that as per the wording of paragraph 5 and the relief sought shows that the Plaintiffs are seeking the assistance of the Court to order the Defendants to set permanent boundaries along the Kazimzumbwi Forest Reserve. The learned State Attorney urged this Court to find that the question of permanent boundaries and beacons along Kazimzumbwi Forest Reserve does not need to be proved by the Plaintiffs since Kazimzumbwi Forest Reserve was established by GN No. 306 of 1854 with JB Map No. 196 of 1954. She went on to submit that they are not required to prove the Plaintiffs' facts in paragraph 7 of their Plaint because the boundaries of Kazimzumbwi Forest Reserve are already in existence.

Ms. Mdendemi went on to submit that the issue of whether the officials of the 3<sup>rd</sup> Defendant fraudulently tempered with beacons demarcating the Kazimzumbwi Forest Reserve was determined in the Land Case No. 227 of 2012 Boniface Makunja, Waziri Njau (on behalf of themselves and on behalf of 239 others residence of Nzasa and Kisiwani Villagers in Chanika Ward Ilala District, DSM) v The Regional Commissioner Coast Region, The Permanent Secretary Ministry of Natural Resources and Tourism and Attorney General. She added that the Court had an opportunity to visit *locus in quo* and observed the Defendant's officials had removed and replaced the same with new beacons.

On the strength of the above submission, the learned State Attorney for the Defendants beckoned upon this court to dismiss the suit with costs.

In reply, the learned counsel for Plaintiff was brief and focused. She started by defining the meaning of cause of action, according to **Mulla, on Civil Procedure, 13<sup>th</sup> Edition**, cause of action was defined to mean:-

*"A suit is always based on a cause of action. There can be a suit without a cause of action and such cause of action has accrued to the plaintiff "A cause of action" means every fact, which, if traversed, would be necessary for the plaintiff to prove and support his right to a judgment of the Court. In other words, it is a bundle of facts that are taken with the law applicable to them gives*

*the plaintiffs a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded."*

**Ms. Nyatega submitted that** the cause action arose when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants expanded its land about 900 meters towards the Plaintiff's land which have caused unrest to the Plaintiffs. She went on to submit that the Plaintiffs in their Plaint specifically paragraph 9 have stated that the 2<sup>nd</sup> Defendant formed a team to review the demarcation of the Kazimzumbwi Forest Reserve and said team issued its report noting that the 1<sup>st</sup> Defendant has left its land about 900 meters in Eastern part and entered Plaintiffs land about 800 meters in the Western part. To support her submission she referred this Court to annexure KMBF - 4.

She went on to submit that in paragraph 10, Plaintiff stated that in 2012 the 1<sup>st</sup> Defendant orders all Villages of Maguruwe in Kisarawe District who invaded Kazimzumbwi Forest Reserve to vacate the reserved areas, unfortunately, its officers wrongfully started to evict the Plaintiff in their lands. To support her submission she referred this Court to annexure KMBF- 5. The learned counsel for the Plaintiff also referred this Court to paragraph 11 of the Plaint.

Ms. Nyatega continued to submit that in determining the cause of action, the Court is required to look at the **Plaint** and its annexure. Fortifying her submission, she referred this Court to the cases of **Domin Mshana. Almasi Chande**, Civil Case No. 68 of 1994, Kalegeya J (as he was then) **NBC Holding Cooperation v Shirika la Uchumi na Kilimo Ltd (SUKITA) and Others**, Commercial Case No. 24 of 2001 and **Jeraj Shariff & Sons v Chotai Fancy Store** (1960) EA. In **Domin Mshana** (supra), the Court held that:-

*“Here we are simply interested in the existence or otherwise of the cause of action, and in doing that we don't have to look at the defence but simply at the **Plaint**.”*

It was her submission that the Court is asked to consider whether the **Plaint** discloses a cause of action and is called upon to look at the facts in the **Plaint** to find out whether they established the Plaintiff's right. The learned counsel for the Plaintiffs insisted that the Plaintiffs have disclosed the cause of action in paragraphs 9, 10, and 11 of the **Plaint**.

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

I have carefully gone through the respective submissions of the learned counsel for the Plaintiffs and the learned State Attorney for the Defendants

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*.

I have opted to combine the two objections and argue them together because they are intertwined. The learned State Attorney is complaining that the Plaintiff has no cause of action against the Defendants.

On the first limb of objection, the learned State Attorney argued that there is no any cause of action. Before I determine the raised objections, I find it apposite to define the term "cause of action". In the Black Dictionary 9th Edition, the word cause of action is defined to mean:-

*“ The ground on which an action can be maintained; as when we say that such a person has no cause of action.”*

I am aware that the cause of action as defined above must be found in the Plaintiff. I cannot attempt to go to the written statement of defence or wait for proof by evidence to find a cause of action and associate it with the Plaintiff. This is the essence of the decision of the Court of Appeal of Tanzania in **John M. Byombalirwa v Agency Maritime Internationale (Tanzania) Ltd [1983] TLR 1**.

I have scrutinized the Plaintiff and noted that in paragraph 8 the Plaintiffs have clearly stated that in 2011, the Plaintiffs were unlawfully invaded and evicted by the officers of the 1<sup>st</sup> Defendant's office alleging that the plaintiff have trespassed the reserved area. Contrary to the submission made by the Plaintiff, the cause of action is not featured under paragraphs 9, 10, and 11.

In my considered view, the cause of action is articulated in Plaintiff's Plaintiff in paragraph 8 only and the Plaintiffs have a burden to prove at the trial whether the Defendants invaded their suit land. The issue of the Plaintiffs have not mentioned the officers who evicted them and whether the Defendants evicted the Plaintiff requires evidence to prove their claims, the same cannot be determined during this stage.

Likewise, the second relief which state that this Honourable Court be pleased to order the Defendants jointly to set permanent boundaries in accordance with CN No. 306 of 1954 is not a pure point of law, the Plaintiffs need to prove their allegations during trial. 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 a 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".*

Applying the above authority, I find that the preliminary objections raised by the learned State Attorney do not dispose of the suit. The nature and scope of a "preliminary issue" is cogently defined in the statement of Law J.A., in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696. The Eastern African Court had this to say:-

*"A preliminary objection consists of a 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". [Emphasis added].*

Considering the *ratio decidendi* in the above-cited authority, I am settled in mind that both points of preliminary objections do not raise a pure point of law. See **Karori Chogoro v Waitihache Merengo**, Civil Appeal No. 164 of 2018 delivered on 5<sup>th</sup> July 2021 CAT, **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 and **Charles Chama and Two Others v. The Regional Manager (TRA) and Three Others**, Civil Appeal No. 224 of 2018 (both unreported).

In the end of it all, this application for extension of time to file a revision before this Court is refused with costs.

Order accordingly.

Dated at Dar es Salaam this date 28<sup>th</sup> March 2023.



  
A.Z.MGEYEKWA

**JUDGE**

28.03.2023

Ruling delivered on 28<sup>th</sup> March 2023 via audio teleconference, whereas 1<sup>st</sup> respondent was remotely present.



  
A.Z.MGEYEKWA

**JUDGE**

28.03.2023