IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 137 OF 2022

RAJESH KHENDAR BARMEDA ..... PLAINTIFF

VERSUS

REUBENI LUBANGA ..... DEFENDANT

Date of last Order: 14/03/2023
Date of Ruling: 27/04/2023

RULING

I. ARUFANI, J

The plaintiff filed in this court the present suit against the defendant praying for various reliefs including the relief to be declared lawful and beneficial owner of pieces of lands known as Plots No. 3393 and 3394 both measuring 2.5 acres located at Mbutu, Amani Gomvu, Kigamboni (Formerly known as Temeke) Municipality in Dar es Salaam Region (hereinafter referred as the suit land). He is also praying for a declaration that the defendant is a trespasser to the suit property and an order for the defendant to quit from the suit land and give vacant possession to the plaintiff.

After the defendant being served with the plaintiff's claims, he filed in the court his written statement of defence denying the claims of the

plaintiff in toto and raised in his written statement of defence notice of preliminary objection on points of law to the effect that: -

1. *This honourable court has no any pecuniary jurisdiction to try the instant suit.*
2. *The purported suit is hopelessly time barred*
3. *The purported suit is bad in law for failure to join the vendor as a necessary party as required by the law.*
4. *That the purported application contravenes the mandatory provisions of section 4 (1) (a) and (b) of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Government Notice No. 66/2022 Published on 4th day of February, 2022.*

When the matter came for hearing the raised points of preliminary objections the plaintiff was represented by Mr. Alex Mashamba Balomi, learned advocate and the defendant appeared in the court in person. The counsel for the plaintiff prayed the raised points of preliminary objections be argued by way of written submissions and as the defendant had no objection the prayer was granted. Therefore, the points of preliminary objections were argued by way of written submissions.

The defendant submitted in relation to the first preliminary objection that, as provided under section 37 (1) of the Land Disputes Courts Act, Cap 216 R.E 2019 the pecuniary jurisdiction of this court to entertain a dispute concerning recovery of possession of immovable property is

limited to the property which its value does exceed three hundred million shillings. He stated that, although the plaintiff averred at paragraph 6 of the plaint that he purchased the suit land on 20th July, 2012 at a consideration of TZS 100,000,000/= only but it is also averred at paragraph 16 of the plaint that the current value of the suit land is estimated at TZS 300,000,000/= only.

He argued that being the case, then as provided under section 33 (2) of the Land Disputes Courts Act this is a fit case to be adjudicated by the District Land and Housing Tribunal which its pecuniary jurisdiction on proceedings for the recovery of possession of immovable property goes up to TZS 300,000,000/=. He referred the court to the case of **Maisha Muchunguzi V. Saab-Scania Tanzania Branch**, Civil Appeal No. 41 of 1998, CAT at DSM (unreported) where it was held that, the issue of jurisdiction of a court is sacrosanct and that issue takes precedence over every other issue in the proceedings when it is raised.

He argued in relation to the second preliminary objection that, the record of the court reveals the suit property was purchased by the defendant in the year 2002. He stated from the said year to date it is almost 20 years have passed and the defendant has been in peaceful occupation of the suit land without any interruption from the plaintiff. He argued that, section 3 (1) read together with item 22 of Part I of the

Schedule to the Law of Limitation Act, Cap 89 R.E 2019 requires every proceeding to recover land instituted after twelve years to be dismissed whether or not limitation has been set up as a defence.

He supported his submission with the case of **Bhoke Kitangita V. Makuru Mahemba**, Civil Appeal No. 22 of 2017, CAT at Mwanza where it was stated that, the time under which the adverse possessor may have been in uninterrupted occupation of that property is of great essence. He submitted that, as he has been in occupation of the suit property for more than twenty years now without any interruption the plaintiff is time barred to claim for the same against him.

As for the third point of preliminary objection the defendant stated that, it is a trite law that where a land is sold to a third party, the buyer and the vendor must be joined in the proceedings and non-joinder of the vendor will vitiate the whole proceedings. To support his argument, he referred the court to the case of **Juma B. Kadala V. Laurent Mnkande** [1983] TLR 103 where it was stated that, in recovery of land sold to a third party the buyer and the vendor must be joined as a necessary party and non-joinder of the vendor will vitiate the whole proceedings.

He submitted that, as the record of the court and specifically paragraphs 5 and 6 of the plaint reveals the plaintiff purchased the suit land from Esther John Mkeu, (Esther Lubanga) the stated vendor or

administrator of her estate was supposed to be joined in the proceedings as a necessary party. He argued that, basing on the position of the law stated in the above cited case, failure to join the vendor in the proceedings as a necessary party renders the instant suit unmaintainable in law.

With regards to the fourth point of preliminary objection the defendant argued that, section 84A (1) of the Interpretation of Laws Act, Cap 1 as amended by GN No. 66 of 2022 states the language of courts, tribunal and other bodies charged with the duty of dispensing justice shall be Kiswahili. He argued that, as the word used in the cited provision of the law is the word "shall" then as provided under section 53 (2) of the Interpretation of Laws Act it is mandatory for the conferred function to be complied with.

He argued that, as the word used in the cited section 84A (1) of the Interpretation of Laws Act is coached in mandatory terms, the instant suit which is made in English is defective for contravening section 84A (1) of the Interpretation of Laws Act and Rule 4 (1) (a) and (b) of the GN No. 66 of 2022. He stated the plaintiff has not deposed any affidavit stating the ground upon which he relies to have the proceedings conducted in English and not in Kiswahili. At the end he prays the court to upheld all points of preliminary objection raised in the matter and dismiss the suit in its entirety with costs.

In his reply the counsel for the plaintiff stated the first, second and third points of preliminary objections raised by the defendant do not qualify to be points of preliminary objection as they are supposed to be determined in the course of the trial by giving evidence. He referred the court to the case of **Mukisa Biscuit Manufacturing Co. Limited V. West End Distributors Co. Limited** [1969] EA 696 where the meaning of preliminary objection was stated. He also referred the court to the case of **Karata Ernest & Others V. Attorney General**, Civil Revision No. 10 of 2010, CAT at DSM (unreported) which followed the position of the law stated in the above cited case and stated that, preliminary objection consists of point of law which has been pleaded or which arise from clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit.

He went on referring the court to the cases of **Judge Incharge High Court at Arusha & Another V. N. I. N. Munuo Ng'uni**, [2004] TLR at Page 50 and **Nimrod Mkono V. State Travel Services**, [1992] TLR where it was stated courts are required to administer justice without being constrained too much by technicalities which are capable of stopping justice from being done and justice should always be done without undue regard to technicalities.

He also referred the court to the case of **Katondwaki V. Birano** (1977) HCB 33 where High Court of Uganda stated it is no longer necessary to follow the strict requirement concerning form and irregularities in form may be ignored or cured by amendment if they occasion no prejudice. He argued that, the raised objections offend the principle of overriding objectives of civil litigations. He invited the court to the provision of section 3A of the Civil Procedure Code, Cap 33 R.E 2019 and stated the court is required to invoke the overriding objective principle in the circumstances of the suit pending in this court. He summarized in his submission the amendment introduced in the above cited law which gave rise to the oxygen rule or principle to be applied by the court to determine a suit justly and expeditiously.

As for the merit of the preliminary objections raised by the defendant, he argued in relation to the first preliminary objection that, the suit property is in excess of TZS 300,000,000/= well within the jurisdiction of this court. He argued that, the issue of pecuniary jurisdiction of the suit is relied by the defendant on paragraph 4 of the affidavit which contains annexure RAJU1 – Agreement and stated that are matters of evidence and cannot be determined at this stage but during the trial process. He referred the court to the case of **Olais Loth** (suing as administrator of the estate of the late **Loth Kalama**) **V. Moshono Village Council,** Civil

Appeal No. 95 of 2012, CAT at Arusha (unreported) where the issue of reliance on annexure was discussed. He argued that the case of **Maisha Muchunguzi** (supra) is distinguishable and does not give the position on the point of pecuniary jurisdiction raised in the present suit.

He argued in relation to the second point of preliminary objection that, cause of action occurred sometimes in the mid of the year 2021 and is continuing to date. He stated that, since then the defendant has continued to trespass the suit land without any color of right and maliciously obstructed the plaintiff to develop the suit land. He stated the plaintiff has been in occupation of the suit land for nine years now and evidence to prove the same cannot be adduced in the preliminary point of objection.

He bolstered his submission with the position of the law stated in the case of **Olais Loth** (supra) that the issue of limitation raised in the matter was open for proof of the allegation of facts contained in the paragraphs of the plaint. He submitted that, item 22 of the First Part of the Schedule to the Law of Limitation Act provides for 12 years to recover the land. He went on submitting that, as the cause of action arose in the mid of 2021 and the present suit was filed in the court in the mid of 2022, it was filed in the court well within the statutory time. He stated the case

of **Bhoke Kitangita** (supra) is distinguishable and irrelevant in the present suit.

He argued in relation to the third point of preliminary objection that, non-joinder of the parties is not fatal to the suit and stated the case of **Juma Kadala** (supra) relied upon by the defendant is neither binding nor persuasive decision and may occasion injustice to the plaintiff. He referred the court to Order I Rule 9 of the Civil Procedure Code where it is provided misjoinder or non-joinder of parties is not fatal and is curable.

As for the fourth point of preliminary objection he stated the cited law does not apply in the present suit as the laws are not yet changed into Kiswahili. He supported his argument by referring the court to the case of **Zaid Jumanne Zaid V. Pili Rajabu Abdallah**, Land Appeal No. 09 of 2022, HC at Kigoma (unreported). In conclusion, he prays the four points of preliminary objections raised in the matter be overruled with costs for being devoid of merit.

In his rejoinder the defendant stated the plaintiff's counsel submission in reply to his submission and the authorities cited in his submission has no any assistance to the plaintiff under the circumstance of four preliminary objections he has raised in the present suit and the authorities cited in his submission. He stated he has raised preliminary

objections relating to the jurisdiction of the court to entertain the instant suit along with the plea of limitation of time which are pure points of law.

He stated the counsel for the plaintiff has cited in his submission the cases of **Karata Ernest** and **Mukisa Biscuit** (supra) where it was stated examples of preliminary objections are objections to the jurisdiction of the court, or plea of limitation. He argued that, as the first and second points of preliminary objections relates to jurisdiction of the court to entertain the present suit, the submission by the counsel for the plaintiff hold no water at all under the eyes of the law. He went on amplifying what he argued in his submission in chief and reiterated his prayer in his submission in chief that, the preliminary objections be upheld and the plaintiff's suit be dismissed with costs.

Having carefully going through the points of preliminary objections raised by the defendant and painstakingly considered the rival submissions filed in the court by both sides in relation to the raised points of preliminary objections, the court has found proper to start with the observation raised by the counsel for the plaintiff that the first, second and third points of preliminary objections do not qualify to be points of preliminary objections. The court has found the position of the law as to what constitutes preliminary objection is well settled in the famous case

of **Mukisa Biscuit** cited in the submissions of the counsel for the plaintiff where it was stated that: -

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

That being the position of the law the question to determine here is whether the first, second and third preliminary objections raised by the defendant qualify to be points of law as per the definition of preliminary objection given in the above cited case. The court has found the defendant states categorically in his submission in chief that the first preliminary objection relating to the pecuniary jurisdiction of the court to entertain the matter is pleaded at paragraphs 6 and 16 of the plaint.

As for the second point of preliminary objection the court has found it is raised basing on the reply by the defendant at paragraph 5 of his written statement of defence that he has been in possession of the suit property from 2002 when he purchased the same without being interrupted and plaintiff alleges the defendant trespassed into the suit land in the mid of 2021. Coming to the third point of preliminary objection which states the suit is bad in law for failure to join the vendor of the suit land as necessary party the court has found Order I Rule 3 of the Civil

Procedure Code provides for the persons who may be joined in a suit as defendant.

That being the gist of three points of preliminary objections which the counsel for the plaintiff argued do not qualify to be preliminary objections the court has failed to side with his view. To the contrary the court has found they are all points of law which may be argued and determined without requiring evidence out of what is pleaded in the pleadings filed in the court by the parties. The court has arrived to the above stated finding after seeing the meaning and examples of preliminary objection given in the case of **Mukisa Biscuit** (supra) is clearly embracing the points of preliminary objection stated by the counsel for the plaintiff do not qualify to be points of preliminary objection. It was stated in the cited case that: -

> *... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and if argued as a preliminary point may dispose of the suit.* ***Examples are objection to the jurisdiction of the court, or a plea of limitation****, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.* [Emphasis added].

Since the first point of preliminary objection is challenging jurisdiction of the court to entertain the matter, the second point of

preliminary objection states the suit is time barred and the third point of preliminary objection states the suit is barred in law for non-joinder of the necessary party, the court has found all the three points of preliminary objections qualify under the definition given in the case of **Mukisa Biscuit** (supra) to be points of preliminary objections.

The court has found the argument by the counsel for the plaintiff that the stated points of preliminary objections need evidence to ascertain them has no merit. The court has come to the stated finding after seeing the impugned points of preliminary objections can be determined without requiring evidence to ascertain the same out of the pleadings filed in the court by the parties. In the premises the court has found the argument by the counsel for the plaintiff that the mentioned points of preliminary objection do not qualify to be points of preliminary objection is devoid of merit.

Back to the merit of the points of preliminary objections raised by the defendant the court has found in relation to the first point of preliminary objection that, as rightly argued by the defendant, pecuniary jurisdiction of this court to entertain a dispute relating to recovery of immovable property is provided under section 37 (1) (a) of the Land Disputes Courts Act. The cited provision of the law states categorically that the court has and can exercise original jurisdiction in proceedings for

recovery of possession of immovable property in which the value of the property exceeds three hundred million shillings.

That being the position of the law the court has found that, although it is true as argued by the defendant that the plaintiff avers at paragraph 6 of the plaint that he purchased the suit property at the price of TZS 100,000,000/= but he has also averred at paragraph 16 of the plaint that, the current market value of the suit property for the purpose of jurisdiction of the court is more than TZS 300,000,000/=. For clarity purposes, part of the cited paragraph 16 of the plaint states as follows: -

> *"... the value of the suit properties is currently at the market price to be more than Tshs. 300,000,000/= hence this Hon Court is vested with the requisite jurisdiction to entertain this suit."*

The above quoted part of paragraph 16 of the plaint shows clearly that, what is averred by the plaintiff is that the current value of the suit property is exceeding TZS 300,000,000/= and not estimated to be TZS 300,000,000/= only as argued by the defendants. If the value of the suit property is more than TZS 300,000,000/= it is crystal clear that the court can exercise original jurisdiction to entertain the present suit pursuant to section 37 (1) (a) of the Land Disputes Courts Act. In the premises the court has found the first point of preliminary objection is lacking merit.

Coming to the second point of preliminary objection which states the suit is hopelessly time barred the court has found the defendant has based his objection on the ground that he purchased the suit property way back in the year 2002. He argued from the stated period of time, he has been in possession of the suit property without interruption until 16th June, 2022 when the present suit was filed in the court which shows about 20 years have elapsed. The court has found the stated arguments were strongly disputed by the counsel for the plaintiff who argued the plaintiff's cause of action against the defendant accrued in the mid of 2021.

The position of the law as to when the cause of action in relation to the claim of possession of an immovable property accrued is provided under item 22 of Part I of the Schedule to law of Limitation Act read together with section 5 of the same law. Item 22 of the Schedule to the law of Limitation states the time to recover land is twelve years and Section 5 of the same law provides that, the right of action in respect of any proceeding, shall accrue on the date on which the cause of action arose. If the right of action to recover land is twelve years and the stated period of time is required to start to accrue from when the cause of action arose, then the question to determine here is whether the suit at hand is hopelessly time barred.

From the position of the law provided under section 5 of the Law of Limitation Act it is crystal clear that limitation of time for the instant suit is required to start to accrue from the mid 2021 when the plaintiff alleges at paragraph 12 of the plaint that the defendant trespassed the suit land and not from 2002 when the defendant alleges to have purchased the same. Now counting from the mid, 2021 to 16th June, 2022 when the present suit was filed in the court it is crystal clear that the suit was filed in the court hardly one year from when the alleged cause of action arose which is well within the period of twelve years provided under the law.

Even if for the sake of argument, it will be said the cause of action arose on 20th July, 2012 when the plaintiff purchased the suit land but it is only ten years which had passed when the suit at hand was filed in the court which is well within twelve years period of time provided by the law. In the premises the court has found the second point of preliminary objection is devoid of merit as the suit is not hopelessly time barred.

Before dealing with the third preliminary objection the court has found it is proper to venture into dealing with the fourth preliminary objection. Thereafter, I will revert to the third preliminary objection. The court has found that, as rightly argued by the defendant section 84A (1) of the Interpretation of Laws Act states the language of the courts, tribunal and other bodies charged with the duties of dispensing justice

shall be Kiswahili. However, subsection (2) of section 84A states that, where the interest of justice so requires, the courts, tribunals and other bodies charged with a duty of dispensing justice may use English language in the proceedings and decisions. The provision of subsection (5) of section 84A of the same law vests powers on the Chief Justice to make Rules for the better carrying out of the provisions of section 84A (2), (3) and (4) of the Interpretation of the Laws Act.

In view of that, the Chief Justice issued the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, 2022 (GN No. 66 of 2022) published on the 4th February, 2022. As rightly argued by the defendant, and as provided under Rule 4 (1) of the Rules a party intending to initiate proceedings in the court which in his opinion falls under the circumstances where the proceedings and decision thereto are to be conducted in English language is required to file his pleadings in the court in English Language with their corresponding translation in Kiswahili.

The circumstances in which proceedings and decisions thereto are to be conducted in English Language are provided under Rule 3 of the Rules which states that, subject to the provisions of subsection (2) of Section 84A of the Act, pleadings, proceedings or decisions may be in English Language where it relates to matters stipulated in the schedule to the

Rules. The schedule to the Rules lists the circumstances whereby English Language can be used in the courts, tribunals or other bodies vested with powers to dispense justice.

The circumstances upon which English language can be used as provided under paragraphs (a), (g) and (i) of Rule 3 of the Rules includes where either of the parties or their representative to the proceedings are not Swahili Speakers, the law governing the subject matter of litigation, practice and procedures thereto are not available in Kiswahili Language and for any other reason the interest of justice demands so.

That being the circumstances upon which English Language can be used in the court, the court has found the plaintiff has stated at paragraph 2 of the plaint that the defendant is a Kenyan citizen. It is well known that, although most of Kenyans use both English and Kiswahili as their official language and language of communication but most of them are more conversant in English language than Kiswahili Language.

The court has also found that, although some of the law governing land disputes like the Land Act have been translated into Kiswahili Language but it is not all laws governing practice and procedure of conducting land disputes which have been translated in Kiswahili language and are carrying the current amendment of the laws. The court has found as stated in the case of **Zaid Jumanne Zaid** (supra) some of the law

governing practice and procedure of conducting proceedings of land disputes are still in English Language and they are yet to be translated into Kiswahili Language.

The court has found that, although it is true that Rule 4 (1) of the GN No. 66 of 2022 requires a party initiating proceedings by filing in the court his pleadings in English Language is required to file in the court a corresponding translation in Kiswahili Language and the plaintiff has not done so in the present suit but to the view of this court that is not an incurable omission or irregularity. To the view of this court that is an omission or irregularity which is curable by way of ordering the plaintiff to file in the court a corresponding translation of his pleadings in Kiswahili Language where the court is satisfied there is a need for the same to be provided.

Basing on the stated reasons and the law referred hereinabove the court has found the plaintiff has not contravened the provisions of the law cited in the fourth objection raised by the defendant by filing his pleadings in the court by using in English Language. In the upshot the court has found the fourth preliminary objection is equally devoid of merit.

Back to the third preliminary objection the court has found it states the suit is barred in law for failure to join the vendor in the suit as a necessary party. The court has found it is true as argued by the defendant

that it was held in the case of **Juma B. Kadala** (supra) that, in recovery of land sold to a third party, the buyer should be joined with the vendor as a necessary party and non-joinder will be fatal to the proceedings. The question to determine here is whether the vendor sold the land to the plaintiff was required to be joined in the present suit as a necessary party.

The court has found it was stated in the case of **Abdullatif Mohamed Hamis V. Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017, CAT at DSM (unreported) that, a necessary party is the one whose presence in a matter is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. When the Court of Appeal was dealing with the issue of non-joinder of a necessary party in a suit it drew an inference from the Indian case of **Benares Bank Ltd V. Bhangwandas, A.I.R.** (1947) All 18 where it was stated that: -

> *"The two tests for determining the question of whether a particular party is a necessary party to the proceedings are;* ***first****, there has to be a right of relief against such a party in respect of the matter involved in the suit and* ***secondly****, the court must not be in a position to pass an effective decree in the absence of such party."*

Applying the above stated tests in the case at hand the court has found that, the plaintiff avers at paragraph 5 of the plaint that he

purchased the land in dispute from Esther John Mkeu (Esther Lubanga) on 20th July, 2012. On the other hand, the defendant avers at paragraph 5 of the written statement of defence that, the suit land is part of his land measuring 16.22 hectares he purchased with his legal wife the late Esther Lubanga in the year 2002 from the lawful heirs of the late Malkus Punda and denied to have been involved into any transaction of selling the suit land to the plaintiff.

The stated position of the matter makes the court to find that, as rightly argued by the defendant the stated vendor of the suit land or administrator of her estate (as it has been stated by the defendant the vendor is now a deceased) is a necessary party to the suit to enable the court to determine the claim of the plaintiff effectually and completely and settle all the questions involved in the suit. The vendor or her administrator will enable the court to determine how the vendor sold the land which the defendant alleges was part of the land he bought jointly with the vendor without involving him and now is being sued for trespassing the same.

Although it is true that it is provided under Rule 9 of Order I of the Civil Procedure Code that a suit shall not be defeated by reason of misjoinder or non-joinder of parties but the stated provision is not applicable to a necessary party. The stated position of the law can be

seeing in the case of **Abdullatif Mohamed Hamis** (supra) where it was stated that: -

> *"... there is no gainsaying the fact that the presence of necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decree. Viewed from that perspective,* ***we take the position that Rule 9 of Order I only holds good with respect to the misjoinder and non-joinder of non-necessary parties.*** *"*[Emphasis added].

That means non-joinder of necessary party in the present suit is a fatal irregularity to the suit at hand. The court has been of the view that, although it is vested power by Rule 10 (2) of Order I of the Civil Procedure Code to order a party to be joined in the suit as a plaintiff or defendant for the purpose of enabling the court to effectually and completely adjudicate upon and settle all questions involved in the suit but to the view of this court it cannot invoke the stated power in the present suit to order the vendor be joined in the suit. To the contrary the court is leaving that duty to the plaintiff if he may wish to refile the suit in the court.

In conclusion the court has found that, although the first, second and fourth preliminary objections have been found are devoid of merit but the court has found the third point of preliminary objection is meritorious and deserve to be upheld. Consequently, the third preliminary objection which states the suit is barred in law for failure to join the vendor as a necessary

party as required by the law is upheld and the plaintiff's suit is struck out with no order as to costs. It is so ordered.

Dated at Dar es Salaam this 27th day of April, 2023.

I. Arufani

JUDGE

27/04/2023

Court:

Ruling delivered today 27th day of April, 2023 in the presence of Mr. Hemed Nassoro, learned advocate holding brief of Mr. Alex Mashamba Balomi, learned advocate for the plaintiff and in the presence of Mr. Paulo Kamanga, son of the friend of the defendant sent to receive the ruling on behalf of the defendant. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

27/04/2023