

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 12 OF 2023

K. A ENGINEERING CO LTD PLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

KIBAHA TOWN COUNCIL 2ND DEFENDANT

JACOB SWAI & 18 OTHERS 3RD DEFENDANT

Date of Last Order: 21/06/2023

Date of Ruling: 20/07/2023

RULING

I. ARUFANI, J

The court is called upon to determine a point of preliminary objection raised by the first and second defendants in the matter at hand which read as follows: -

- 1. The suit is bad in law for failure to establish cause of action against the 1st and 2nd defendants, contrary to order VII Rule 1 (e) of the Civil Procedure Code Cap 33 R.E 2019.*

During hearing of the raised preliminary objection, the plaintiff was represented by Mr. Christian Rutagatina, learned advocate. On the other side Ms. Leonia Maneno, learned State Attorney represented the first and second defendants (Hereinafter referred as the defendants) who raised the foregoing preliminary objection. Hearing of the preliminary objection

was entertained without involving the rest of the defendants as they have not dully been served.

The counsel for the defendants argued in support of the preliminary objection that, it is a trite law that for a suit to be tenable there must be a cause of action against each defendant. She stated the term cause of action has been defined in number of cases and referred the court to the case of **John M. Byombalirwa V. Agency Maritime Internationale (Tanzania) Ltd**, 1983 TLR 1 where the term cause of action was defined to mean essential facts which it is necessary for the plaintiff to prove before he can succeed in a suit.

It was stated further in the same case that, for the purposes of deciding whether or not a plaint discloses cause of action, it is the plaint that must be looked. She also cited the case of **Mashando Game Fishing Lodge and 2 Others V. Board of Trustees of TANAPA**, [TLR] 2002 where it was stated that, a person is said to have cause of action against another where that person has a right and other person has infringed that right with a result that the person with right suffers material loss.

She argued that, the plaintiff was required to show in the plaint the right which has been infringed by the second defendant and she has suffered loss because of the stated infringement. It is her submission that, the land in dispute was lawfully allocated to the plaintiff and issued with

a Certificate of Title No. 47948 after adhering to all procedures of acquiring land in Tanzania including payment of compensation in an exhausted improvement as provided under the law.

She submitted that, in all paragraphs of the plaint there is no paragraph showing there is a dispute or complaint between the plaintiff and the second defendant and there is no fact which states the reason why the plaintiff joined the defendants in the suit. She submitted that if, the plaintiff joined the defendants in the matter as necessary parties, the plaintiff was obliged to specifically pleaded in the plaint the facts showing why the defendants were joined in the suit.

She submitted that, Order VII Rule 1 (e) of the Civil Procedure Code Cap 33 R.E 2019 states the plaint shall contain the facts constituting the cause of action and when it arose. She referred the court to the **Muller Code of Civil Procedure**, 13th Edition at page 144 where it is stated that, a suit is always based on cause of action. It is further stated that there can be no suit without cause of action and such cause of action accrued to the plaintiff.

The counsel for the defendants cited in her submission the case of **Jumanne Philbert Chiza & 7 Others V. Tanzania Forest Services (TFS) Shamba la Miti Biharamuro & Attorney General**, High Court Land Case No. 18 of 2021 at Mwanza (unreported) where it was stated

the facts averred in the plaint and its annexures must connect the defendant to an infringement establishing cause of action against him or her. She went on arguing that, it is not stated anywhere in the plaint as to when the said cause of action if any arose. She based on the stated gaps to submit the plaint of the plaintiff has not raised sufficient cause of action against the second defendant.

She argued in respect of the first defendant that, although the law requires the second defendant to be joined in any case involving Government but the plaint is not showing how the second defendant infringed the right of the plaintiff or participated in any activity that offended the plaintiff in her disputed property to justify the act of joining them in the instant suit. She stated even the documents annexed to the plaint are not showing how the second defendant is connected to the matter. At the end she prayed the plaintiff's suit be dismissed against the defendants with costs.

In his reply the counsel for the plaintiff stated at the preamble of his submission that, on 14th March, 2023 he filed in the court his reply to the notice of preliminary objection raised by the defendants and prayed to adopt the same in his submission. He invited the court to go through paragraphs 2 and 4 of the defendants' written statement of defence where the issue of payment of compensation was adequately covered. He argued

it is averred in the said paragraphs that, there is nothing left on the part of the plaintiff due and owing to the 18 intruders.

He submitted that, the genesis of this land dispute preceded Land Appeal No. 18 of 2018 which was decided by Hon. Mlyambina, J who stated that, in the cases involving payment of compensation through the Local Government Authority, as it applies to cases involving recovery of land sold to the third party, the one alleged to be responsible for payment of compensation, buyer and seller must be joined to the proceedings.

He added that the contents of paragraph 6 of the plaint shows that Tumbi Ward Executive Officer was involved in the payment of compensation following evaluation conducted by Byarushengo who acted as regional valuer. He went on arguing that, even though the record of the second defendant is clean, but the second defendant is a necessary party in the suit as there is an existence of some disclaimer of receiving compensation which the plaintiff wants to iron out being the payer. He stated that, as the plaintiff want to develop the land and stand as payer of compensation through Local Government Authority, the second defendant cannot escape its responsibility of participating in the instant dispute.

He submitted that the preliminary objection raised by the defendant belongs to the category of matters fit to be argued in the ordinary way

and cited in his submission the case of **Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] EA 696 where the practice of raising preliminary objection was castigated. He argued that, the written statement of defence of the defendants shows there is no controversy between the plaintiff and the defendants.

He stated they want to put the matters right, especially the existence of disgruntled element amongst 18 intruders and the plaintiff which should be brought to an end. He finalised his submission by noting that the written submission filed in the court by the counsel for the defendants was addressed to unknown court and prayed the preliminary objection be dismissed with costs.

Having carefully considered the submission from the counsels for parties the court has found the profound question to determine in this matter is whether the raised point of preliminary objection is meritorious. Before going to the determination of the stated issue, the court has found it is proper to state here that, as rightly argued by the learned State Attorney it is a requirement of the law as provided under Order VII Rule 1 (e) of the Civil Procedure Code that the plaint shall contain the facts constituting the cause of action and when it arose.

That being the requirement of the law the court has found proper to have a look on what is a cause of action. The court has found the

meaning of the term cause of action has been traversed in number of cases and books written by different eminent writers. Among the cases where the term cause of action has been defined is the case of **John M. Byombalirwa**, (supra) cited by the counsel for the defendants where it is stated it means essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. It was also stated in the same case that, in determining there is a cause of action in a suit it is only the plaintiff with anything attached thereto should be looked at.

While being guided by the position of the law stated in the above cited case the court has gone through the plaintiff's averments at paragraphs 5, 6 and 7 of the plaintiff's pleadings to find out how the plaintiff acquired the land in dispute and what is the gist of the dispute in the land in dispute. The court has found the plaintiff's averments in the mentioned paragraphs that she applied for the land from the Coast Regional Land Officer in 1995 for building a school and she was allocated the land reserved by the Government for building school but the plaintiff was required to pay compensation to the customary owners of the land.

It was stated that, after the customary owners of the land being identified by the Village Executive Officer and Ward Executive Officer, valuation of the land was conducted by the Regional Valuer namely Byarushengo and the customary owners were paid compensation of their

land through the Tumbi Ward Executive Officer. The plaintiff avers that, after payment of the compensation to the customary owners she was granted certificate of title No. 47948 over the land in dispute which was issued on 20th January, 1998 which its tenure is 99 years.

The plaintiff avers that, the 18th defendants have refused to give vacant possession of the land in dispute to enable the plaintiff to develop the same on allegations that they were not paid compensation hence their rights over the land in dispute have not been extinguished. Now the plaintiff is praying the court to declare the plaintiff is the rightful owner of the land in dispute and the 18 defendants are trespassers to the land in dispute.

After traversing the facts of the case pleaded in the plaint as demonstrated hereinabove the court found that, as rightly argued by the counsel for the defendants it is true that there is no fact pleaded in the plaint showing the plaintiff has a cause of action against the mentioned defendants. The stated position of the matter was also made clear by the submission of the counsel for the plaintiff where it is stated the record of the second defendant towards the dispute before the court is clean.

The court has found that, the counsel for the plaintiff stated in his submission that the defendants were joined in the matter as necessary parties because there is a claim from the customary owners of the land

who have refused to vacate from the land in dispute on allegation that they have not been paid their compensation. The court has found that, as rightly argued by the counsel for the plaintiff the issue of the second defendant to be joined in the matter was considered by the court in the Land Appeal No. 18 of 2018. The court ordered the parties in the stated land appeal that their case be heard de novo and ordered further that the second defendant be joined in the matter as a necessary party by the one who has cause of action against her.

That being the position of the matter the court has found the question to determine here is whether it was proper for the defendants to be joined in the matter by the plaintiff as necessary parties. The court has found the issue of who may be joined in a matter as a defendant is provided under Order, I Rule 1 (3) of the Civil Procedure Code which states as follows: -

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."

The court has also found Rule 9 of the same Order I of the Civil Procedure Code states clearly that a suit shall not be defeated because of

misjoinder or non-joinder of the parties. That being the position of the law the court has found that, although the counsel for the plaintiff stated in his submission that the record of the second defendant is clean which means they have no claim against the second defendant but as rightly argued by him still the second defendant can be joined in the matter as a necessary party as submitted by the counsel for the plaintiff.

The court has come to the stated finding after seeing it was held in the case of **Mussa Chande Jape V. Moza Mohammed Salim**, Civil Appeal No. 141 of 2018, CAT at Zanzibar which followed the decision made by the Supreme Court of Uganda in the case of **Departed Asians Property Custodian Board V. Jaffer Brothers Ltd**, [1999] 1 EA 55 where it was stated that, there is a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of one whose presence before the court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit.

The court has found as stated earlier in this judgment plaintiff avers at paragraph 6 of the plaint that she applied from the Regional Land Development Officer Coast Region to be allocated a land for construction of the school and she was allocated the land in dispute. The court has found the plaintiff avers further that, after being allocated the land in dispute she was directed to pay compensation to the customary owners

of the land allocated to her and after paying the required compensation through Tumbi Ward Executive Officer she was issued with Certificate of title No. 47948 dated 20th January, 1998.

Since the plaintiff was allocated the land in dispute by the Government and there are people who are claiming they are owners of the stated land the court has found the second defendant is a necessary party to the suit for the purpose of enabling the court to effectively and completely adjudicate the dispute between the plaintiff and the persons who claiming they are owners of the land in dispute. The court has found the necessity of joining the second defendant in the matter was made clear in the Land Appeal No. 18 of 2018 where it was stated by the court that, the second defendant be joined in the matter as a necessary party.

The court has also found justification of joining the second defendant in the matter can be bolstered by the holding made in the case of **Oilcom Tanzania Ltd V. Christopher Letson Mgalla**, Land Case No. 29 of 2015, HC at Mbeya (unreported) where it was stated that, in land suits a person who is alleged in pleadings to have conferred title to the parties or any of them by way of allocation or sale is a necessary party to the suit whose presence is indispensable. Since the plaintiff avers, she was allocated the suit land by the Government, then joining of the



defendants in the instant suit is a matter of necessity and not the issue of having cause of action against them.

It is because of the above stated reasons the court has found the preliminary objection raised by the defendants in the matter that the suit is bad in law for failure to establish a cause of action against them cannot be sustained as it is devoid of merit. Consequently, the preliminary objection is hereby overruled in its entirety and the costs to be within the suit. It is so ordered.

Dated at Dar es Salaam this 20th day of July, 2023



Court:

I. Arufani
I. Arufani
JUDGE
20/07/2023

Ruling delivered today 20th day of July, 2023 in the presence of Mr. Christian Rutagatina, learned advocate for the plaintiff and in the presence of Ms. Leonia Maneno, learned State Attorney for the first and second defendants. The rest of the defendants are absent as they have not dully been served to appear in the matter. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
20/07/2023