

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 89 OF 2023

ELIDADIS M. RUSHIKALA.....PLAINTIFF

VERSUS

SAMUEL MALECELA.....DEFENDANT

RULING

*Date of last Order:04/08/2023
Date of Judgment:09/08/2023*

K. D. MHINA, J.

This is the ruling in respect of the preliminary objections raised by the defendant against the plaintiff's suit over the land ownership.

The facts of this matter briefly, as can be gleaned from the pleadings, is that the plaintiff, on 17 August 2021, purchased the suit property from Juma Ali Ngawanai and started to construct a fence surrounding the suit land.

The plaintiff further alleges that without the court order, the defendant, who claimed that the land belonged to his father, started to demolish the structures built on the land, including the fence, leading to loss and obstruction of peaceful enjoyment of land legally acquired.

The above scenario moved the plaintiff to seek reliefs from this Court as follows;

- i. A declaration that the defendant has invaded the plaintiff's landed property.*
- ii. An order against the defendant to redeem the plaintiff for the loss suffered as the result of the defendant's illegal action*
- iii. Costs of the suit*

In response, the defendant;

One; vehemently disputed the claims by filling a written statement of defence.

Two, as the attorney of Dr. John Samwel Malecela, countered the claims by filing the counter-claim alleging that the plaintiff and Juma Alli Ngawanai trespassed into the land, described as Farm No. 3753 with Certificate of Title No. 57132 located at Mbopo allocated to Dr. John Samwel Malecela on 25 January 2005.

Three; confronted the plaintiff with a notice of a preliminary objection that canvassed six grounds, namely;

- i. The plaintiff had failed to describe the disputed area and identify the demarcations.*

- ii. This Court lacks jurisdiction.*
- iii. The disputed premises is over-estimated.*
- iv. The plaint is bad in law for non-joinder and/or wrong name of a necessary party to the suit.*
- v. The plaintiff has no cause of action against the defendant, Samuel Malecela.*
- vi. The plaint is bad in law, for it has been prepared contrary to the provisions of Order VII Rule 1 of the CPC.*

As it is trite, this Court had to deal with preliminary objections first because once a court is seized with a preliminary objection, it is first required to determine the objection before going into the merits or the substance of the case or application.

The objections were argued by way of written submissions duly drawn and filed by Mr. Gabriel B. Masinga, learned advocate for the defendant, and Mr. Eric Mora Magige, learned advocate for the plaintiff. In the submission, the defendant abandoned to argue the sixth ground of preliminary objection.

In supporting the first limb of the objection, Mr. Masinga submitted that, from what was pleaded by the plaintiff, the description of the suit property was not given. He did neither the identity of the suit property by a title number, the size or neighbouring owners of pieces of land.

He argued that was not proper because it was incumbent for the Plaintiff to state in the plaint the description of the suit property as per **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 is registered under the Land Registration Act, to be identified by a title number, the plaint shall specify such title number."

He further submitted that the rationale for identifying the property is very clear, as was observed in the case of **Abutwalib A.Shoko v. John Long & Albin Tarimo**, Land Case No.20 of 2017 (HC-Arusha) at pages 4-5, it was held that-

"The purpose of Order VII Rule 3 of CPC is that, unless the Plaintiff indicates the description of the property claimed by him either by means of boundaries or by means of title number under the Land Registration Act, it would be difficult for the court to find whether the Plaintiff has title to the property claimed and whether any encroachment or dispossession has been made by the defendant. Thus, the duty of the party is to give a description sufficient to identify the property in dispute so that if a decree is passed in relation to it, it shall be unworkable. The court needs to pass a

decree which can be executed. So, without proper specification of the land, the decree passed is executable.

The other purposes for specific identification of the suit property is to know whether or not the suit land was subject to a previous litigation, and also to preclude future litigation in respect of the same property.

On the remedy, he prayed for the suit to be struck out as per the decision among others of **Joha Ismail and five others vs. Emmanuel Mwami and three others**, Land Case No.3 of 2021 (HC- Tabora).

On the second limb of the objection, he submitted that since the disputed property is surveyed, and there is a Certificate of Title issued by the Registrar of Titles hence varying and/or rectifying the same by this Court will be contrary to the Law as per section 100 of the Land Registration Act.

He narrated that according to the fact by the Defendant that the suit Land is Farm No.3753, Certificate of Title Number 57132 issued to Dr. John Samwel Malecela, then this Court lacks jurisdiction to entertain this case as per section 102 of the **Land Registration Act, Cap. 334 [R.E 2019]**.

To bolster his argument, he cited the decision of this Court in **Imtiaz Hussein Banji vs. Dilshad Hussein Banji**, Land Case No. 101 Of 2022 (HC-Land Division), where it was held that;

"the cited section 102 (1) of the Land Registration Act, Cap. 334 is related to a decision of the Registrar of Title whereas any party aggrieved by the decision or order or act of the Registrar may appeal to the High Court. Conversely, following the same section of the law, the parties who have any grievances in land matters involving registered land are required to settle the matter at the Registrar of Title and not lodging a suit at the High Court. "

"The aggrieved party, in accordance with section 102 of the Land Registration Act, Cap. 334 [R.E 2019] can challenge the Registrar of Title's decision by way of an appeal before this court against the decision or order of the Registrar of Titles within time specified under the Act."

Regarding the third limb of the objection, Mr. Masinga submitted that according to paragraph 4 of the plaint, the plaintiff stated that on 17 August 2021, he purchased the suit property from Juma Alli Ngawanai. However, the said vendor had not been joined as a necessary party to the suit for recovery of land as required by the law. He cited **Juma B. Kadala vs. Laurent Mnkande [1983] TLR 103**, where it was held that

"in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant".

On the remedy, he prayed the suit to be struck out as per **Respicius Emilian Mwijage vs. The Municipal Director, Ilala Municipal Council & 2 Other**, Land Case No.27 of 2021 (Tanzlii) whereby the High Court quoted with approval the Court of Appeal case held that-

"it is my view that for a party who has been wrongly sued, Order 1 Rule 10(2) provides the remedy. That is to strike out the pleading in which the name was wrongly joined. It is trite law that where there are defects in pleadings the remedy is to struck out the same".

Submitting on the fourth limb of the preliminary objection, Mr. Masinga submitted that the plaint and annexures do not show the cause of action against the defendant.

He narrated that the alleged invasion, demolition and obstruction of peaceful enjoyment of the plaintiff's landed property, allegedly bought from a person, not a party to these proceedings, was a vague statement carrying no water.

Further, he submitted that according to the defendant's Written Statement of Defense, the defendant Samuel Malecela is a mere son of the

Title Holder, Dr. John Samwel Malecela. Thus, the plaintiff has failed to plead the facts necessary, showing cause of action against Samuel Malecela.

On the last limb of preliminary objection, Mr. Masinga submitted that Plaintiff had failed to mention the person who verified the verification clause in the plaint, thus rendering the entire suit incompetent and should be struck out with costs. Verification is a mandatory requirement in civil litigation as per Order VI Rule 15(1), (2) and (3) of **the CPC**. The Order read that;

"Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

He stated that the omission is incurable and defective, which goes to the root of the suit; therefore, he urged this Court to strike out the suit.

In response, Mr. Magige submitted that the first limb of the preliminary objection raised by Defendant does not qualify or fit in it as a preliminary

objection as per ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696*** at page 700, where it was stated that,

"Preliminary objection is in the nature of what used to be a demurrer. It raised 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 what is the exercise of judicial discretion."

Further, he stated that failure to describe the suit property in the Plaint is not fatal and can be cured at later stages; on top of that, the sale agreement (annexure SLC-1) provides for the description of the suit land.

Regarding the second and third points of preliminary objection, Mr. Magige submitted that the price of developed land differs from that of undeveloped land. In this matter, the claim by the defendant was that the suit property was surveyed, which is not disputed by the plaintiff, but the question to be asked is whether the value of the suit property is still the same after being developed. To bolster his argument, he cited the decision of the Court of Appeal in **Maige E.M. Magenda vs. Abrogast Maugo Magenda, Civil Appeal No. 218 of 2017** (Tanzlii), where it was held that;

"...this does not suggest that the claimant should bring evidence on the value of the property the subject of the dispute in the form of valuation report".

From above, he submitted that the defendant had failed to establish the value of the area in dispute since he had only prayed this Court to rely on a survey report from 2005, while the Plaintiff bought it in 2021 and made several developments.

Submitting on the fourth point of preliminary objection, he submitted that it is not disputed that the plaintiff purchased the suit property from Ali Juma Ngawanai. But according to Order 1 Rule 9 of CPC, a suit cannot be defeated by reason of misjoinder or non-joinder of parties.

Regarding the fifth point of the preliminary objection raised that the plaintiff has no cause of action against the defendant, Mr. Magige submitted that the plaintiff was aggrieved by the acts of the defendant who demolished the structures built in the suit property, including the fence, leading to loss and obstruction of peaceful enjoyment. Therefore, it was well a reason enough for the Plaintiff to seek remedy against the defendant.

The counsel for the defendant filed the rejoinder, but since most of the issues are the reiteration of the earlier submission in chief, I don't see the reason to narrate here what was submitted in the rejoinder.

Having gone through both parties' pleadings and submissions, the first issue for determination is the first limb of objection on whether the suit land was properly described.

But before going to the merits or demerits of this first limb of preliminary objection, I have to deal with an issue raised by Mr. Magige that this raised is not a pure point of law, as per **Mukisa Biscuits Manufacturing vs. West End Distributors Ltd** (1969) EACA 696.

What was raised as the first limb of the preliminary objection is that the suit property is not described. Therefore, the question is whether that is a pure point of law or not. The issue should not detain me long, and the entry point is Order VII Rule 3 of the CPC, which reads:

"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 number under the Land Registration Act, the plaint shall specify such title number".

According to the cited provision of law, it is mandatory for the plaintiff in the plaint to describe the subject matter. If the property can be identified by a title number, it can be identified by a Land Registration Act, and the plaint shall specify the title number.

In the decision of this Court in **Fereji Said Fereji vs. Jaluna General Suppliers Ltd and Others**, Land Case No. 86 of 2020, the rationale of describing the immovable property in the plaint is to distinguish it from other properties.

Flowing from above, the issue of description is so fundamental in filing cases as per Order VII Rule 3 of the CPC; then, it is a pure point of law. Without a proper description, the Court may end up issuing an executable decree. This Court, in **Joel Kondela Maduhu vs Siya Ndeja**, Land Appeal No. 3 of 2021 (unreported) at page 8, held that;

"It is a settled principle of the law that, any claim of land should comprise a proper description of the suit land for definite and complete execution order".

From the above discussion, it is; therefore, the preliminary objection raised is a pure point of law, and it qualifies the conditions set in **Mukisa Biscuits Manufacturing (Supra)**, and it was properly raised.

Coming back to the issue of whether the suit land is described or not, I have to revisit the submissions from both parties and the plaint.

In the plaint, which contains eight (8) paragraphs, nothing was pleaded as the description of the suit property. There is no single paragraph or line describing the suit property.

In his submission, Mr. Magige stated that the sale agreement attached to the plaint (annexure SLC-1) described the suit land. I perused that sale agreement, and I have the following observations;

One, I agree with Mr. Magige that a sale agreement attached to the plaint may be a proper document to support the plaint to describe the property. But it must sufficiently describe the land.

This Court in **Fereji Said Fereji (Supra)** it held that;

"Such description may include the location, title number for surveyed plots, neighbours or boundaries for unsurveyed plots, or any form of description that would sufficiently identify and distinguish the suit property from other properties".

The Court of Appeal, also in the cited case **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another, Civil Appeal No. 197 of 2019** CAT (unreported) at page 13, held 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.

..... Apart from what is amiss in the pleadings, at the trial none of the witnesses on the appellant's side managed to give any description of the suit property. This is evident in the sale agreements at pages 121 to 123 of the record of appeal which, besides showing the names of the sellers, buyer, the respective prices and those who witnessed the sale including PW4, nothing is stated on the location, size and neighbours to the said suit land."

What can be gleaned from the above-cited cases with regard to the description of the land are as follows;

- i. title number if the land is registered.
- ii. location
- iii. size and

iv. neighbours or boundaries.

In this matter, the sale agreement does not have the size of the disputed land. Further, the plaint did not reveal whether the land was registered or unregistered.

Two, on the other hand, the defendant in the WSD and Counter-claim pleaded that the suit land is registered and has a title deed. This fact was admitted by the counsel for the plaintiff in the submission. For this, I wish to quote what was submitted in verbatim;

*"The price of developed land is different from the price of undeveloped land, in our case **the claim by the Defendant that the suit property was surveyed, is not disputed by the Plaintiff** but the question to be asked is whether the value of the suit property is still the same after being developed".*

[Emphasis provided]

Therefore, if the land in dispute is surveyed and registered, the proper description is by the registration number to enable the court an effective decree.

Flowing from above the purpose of Order 7 Rule 3 of the CPC, the description of the suit land is not pleaded nor sufficiently described in the plaint.

In the upshot and conclusion, I sustain the first limb of the preliminary objection that the plaint does not describe the suit land for the reasons I elaborated above. And since this alone disposes of the suit, I will not determine the remaining limbs of preliminary objection.

Consequently, I strike it out the suit with costs awarded to the defendant.

I order accordingly.




K. D. MHINA

JUDGE

09/08/2023