

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

**AT DAR ES SALAAM**

**LAND CASE NO. 193 OF 2021**

**ABDUL RAJABU ZAHORO** (Administrator of the Estate  
of the late **Rajabu Zahoro**) ..... **PLAINTIFF**

**VERSUS**

**KURINGE REAL ESTATE COMPANY LIMITED** ..... **1<sup>ST</sup> DEFENDANT**

**EDWARD EUGINE MUSHI** ..... **2<sup>ND</sup> DEFENDANT**

**HILDA RAPHAEL SOKA** ..... **3<sup>RD</sup> DEFENDANT**

*Date of last Order: 25/09/2023*

*Date of Ruling: 10/10/2023*

**RULING**

**I. ARUFANI, J**

This ruling is for the points of objection raised by the counsel for the defendants in the instant suit that: -

- 1. This suit is hopeless time barred henceforth the same is to be dismissed with costs.*
- 2. That the plaintiff amended complaint is incurably defective and bad in law for want of proper verification of paragraph 10 (i) and (ii) therein contrary to Order VI Rule 15 (1), (2) and (3) of the CPC Cap 33 R.E 2019.*
- 3. That the plaintiff has no locus to sue in this matter.*

During hearing of the above points of preliminary objection, the plaintiff was represented by Mr. Gideon Opanda, learned advocate and the defendants were represented by Mr. Anindumi Semu and Mr. Goodluck Charles, learned advocates.

Mr. Anindumi Semu told the court in respect of the first point of preliminary objection that, the present suit was filed in the court on 9<sup>th</sup> November, 2021 when the original plaint was filed in the court. He stated that the cause of action in the instant suit is averred at paragraph 6 of the amended plaint and the plaintiff is claiming for Tshs. 374,400,000/= from the defendants which arose from what is pleaded at paragraph 10 (i) and (ii) of the amended plaint.

He argued that, the first claim of the plaintiff as indicated in the first part of paragraph 10 of the amended plaint arose in 2008 and the claim of the plaintiff in the second part of the mentioned paragraph states the claim of the plaintiff arose On August, 2008. He stated that the afore mentioned claims are also prayed in the reliefs the plaintiff is seeking from this court as appearing in the amended plaint. He submitted that, section 3 (1) of the Law of Limitation Act, Cap 89 R.E 2019 (henceforth; LLA) states every proceeding filed in the court out of time is supposed to be dismissed and Item 22 of the first part of the schedule to the LLA states the period of time within which to claim for recovery of land is twelve years from the date when the cause of action arose.

He cited in his submission section 3 (2) of the LLA which states the suit is filed when a plaint is presented for filing in court and sections 4 and 5 of the same law states the right of action commences on the date

on which the cause of action arose. He submitted that, counting from 2008 when the causes of action in the present suit are stated to have arisen until 2021 when the suit was filed in the court it is crystal clear that the suit was filed in the court beyond twelve years provided under the law.

He submitted that the plaintiff has not annexed leave from the Minister responsible with legal affairs for filing the suit in the court out of time as provided under section 44 (1) of the LLA. To support his submission, he referred the court to the case of **Aloysius Benedicto Rutahiwa V. Emmanuel Bakundukize Kendurumo & Nine Others**, Land Case No. 23 of 2020, HC at Bukoba (unreported) where it was stated that the period for claiming for recovery of land is twelve years.

He argued in relation to the second point of preliminary objection that, verification clause of the amended plaint and specifically verification of paragraph 10 (i) and (ii) of the amended plaint contravenes Order VI Rule 15 (2) of the Civil Procedure Code, Cap 33 R.E 2019 (henceforth; the CPC). He argued that, although the plaintiff states the mentioned paragraphs are verified on the best knowledge of the plaintiff but there are words like "*the action of the defendants deprived our client*" which shows were not from the knowledge of the plaintiff. He stated that the aim of having proper verification of a pleading is to show the genuineness

and authenticity of the facts averred in a pleading. He stated that any defect in a verification of a pleading renders a pleading defective and the remedy is for the defective pleading to be struck out.

As for the third point of preliminary objection, the counsel for the defendants stated that the plaintiff has no locus to sue in the present suit. This point of preliminary objection was argued in two limbs. The submission by the counsel for the defendants in respect of the first limb was made on 22<sup>nd</sup> June, 2023 and the submission in respect of the second limb was made on 8<sup>th</sup> September, 2023 before the ruling in respect of the first limb being delivered.

The counsel for the defendants stated in relation to the first limb that, the plaintiff is suing in the present suit under the capacity of being administrator of the estate of his late father, Rajabu Zahoro. He stated that the plaintiff has not disclosed in his plaint that he was jointly appointed with Amani Hassan Rajabu to be joint administrators of the estate of the late Rajabu Zahoro.

He argued that, appointment of joint administrators of estate of a deceased person is done under section 100 of the Probate and Administration of Estates Act, Cap 352, R.E 2019. He submitted that, where there are joint administrators of estate of a deceased person they are supposed to act together and one administrator cannot act

independently. To support his submission, he referred the court to the case of **May Mgaya V. Salim Saidi** (the administrator of the estate of the late **Said Salehe**) & Another, Civil Appeal No. 264 of 2017, CAT at Tanga (Unreported).

He argued in the second limb that, the plaintiff has no locus standi to sue in this case because his appointment as administrator of the estate of late Rajabu Zahoro was revoked by Ilala District Court in Civil Revision No. 07 of 2022 in which its decision was delivered on 30<sup>th</sup> June, 2023. He stated that the foregoing stated decision revised the proceedings of Probate and Administration Cause No. 21 of 1981 and the decision made on 20<sup>th</sup> August, 2020 upon which the plaintiff was granted letters of administration of the estate of late Rajabu Zahoro was quashed and set aside. The counsel for the defendants supplied to the court the afore stated decision of the Ilala District Court. He based on the above submissions to pray to the court to dismiss the plaintiff's suit.

In his reply the counsel for the plaintiff cited to the court the case of **Hammers Incorporation Co. Ltd V. The Board of Trustees of the Cashewnut Industry Development Trust Fund**, Civil Application No. 93 of 2015, CAT at DSM (unreported) where it was stated that preliminary objections are supposed to be raised at the earliest stage and should be on point of law. He also referred the court to the case of **Mukisa Biscuit**

**Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] E.A 696

which laid a principle that preliminary objection should be based on point of law and not facts which need to be ascertained by evidence.

He also referred the court to section 8 of the Evidence Act which states which facts forms the same transaction. He argued that, as the points of preliminary objections raised by the counsel for the defendants need evidence to prove, they have failed to meet qualification of being entertained as points of preliminary objections.

He went on arguing that, the counsel for the defendants has attacked the averment made at paragraph 6 of the amended plaint where it is stated the claim of the plaintiff is Tshs, 374,400,000/= and paragraph 10 of the amended plaint which he stated it is establishing the suit is time barred.

He stated that the point of locus standi is not a pure point of law as it is a mixed facts and law. He argued in order to establish the plaintiff has locus standi to sue in the present suit or not there must be evidence to establish the same. He went on submitting that, as the points of preliminary objections raised by the counsel for the defendants have already been raised and withdrawn from the court they cannot be raised again in the suit. He prayed the court to dismiss the raised points of preliminary objection for being an abuse of the court process.

As for the merit of the preliminary objection raised by the counsel for the defendants, he stated in relation to the first point of preliminary objection that it is misconceived. He argued that the preliminary objection is totally misconceived as the plaintiff's claims did not arise in 2008. He stated that there was a development agreement entered on 20<sup>th</sup> August, 2008 which was still continuing which was entered by the second defendant and the plaintiff together with his relatives namely Kitwana Rajabu Zahoro, Hassan Rajabu Zahoro and Ramadhani Rajabu Zahoro. He submitted that the plaintiff is complaining the first defendant failed to perform what was agreed in the development agreement they entered.

He argued that, as pleaded at paragraph 10 (ii) of the amended plaint the plaintiff and his relatives were given the shops frames but the second defendant took them from them in 2013. He submitted that, counting from 2013 when the shops frames were taken from them until when the present suit was filed in the court in 2021 you will find the suit is not time barred as twelve years have not yet elapsed.

He said the contract entered by the parties was supposed to come to an end in 2019 and stated as averred at paragraph 11 of the amended plaint for all that period there was continuing breach of the contract. He said after the contract come to an end the plaintiff followed the second

defendant and the second defendant told him he had already purchased the suit house in dispute.

He said the counsel for the defendants has not led the court to know this is a case of administration of estate of the late Rajabu Zahoro who died in 1971. He said the estate of the deceased has been administered by other different administrators before the plaintiff being granted letters of administration of the estate of the deceased. He said when the estate of the deceased was being administered by Kitwana Rajabu Zahoro he changed the ownership of the estate of the deceased into his name and the second defendant purchased the house in dispute from the said Kitwana Rajabu Zahoro who died in 2012.

He said limitation of time for claiming estate of a deceased person was discussed in the case of **Habiba Bush** (Surviving legal personal representative of the late **Bushi Mwinyi Bohari**) **V. Ramadhani Lila Gogo @ Jeba & Another**, Land Appeal No. 40 of 2020, HC Land Div. at DSM (unreported) where it was stated that the limitation of time for claim of recovery of an estate of a deceased person is governed by sections 9 and 35 of the LLA which states the right of action is counted from the date of the death of the deceased who was in possession of the property in dispute.



He said counting from 2012 when the late Kitwana Rajabu Zahoro who was in possession of the house in dispute as administrator of the estate of the late Rajabu Zahoro died to when the present suit was filed in the court it is crystal clear that limitation of time for filing the present suit in the court had not passed. He referred the court to the case of **Hamisi Mohamed** (As administrator of the Estate of the late **Risasi Ngawe**) **V. Mtumwa Moshi** (As the administrator of the Estate of the late **Moshi Abdallah**), Civil Appeal No. 87 of 2020, CAT at DSM (unreported) where it was stated the date of death of the deceased must be established to determine whether limitation of time has passed or not.

He said the case of **Aloysius Benedict Rutaihwa** (supra) cited by the counsel for the defendant is distinguishable from the case at hand as the suit was filed in the court after passing 36 years from the date of the death of the deceased. He said the case of **Habiba Bush** (supra) is a decision of this court hence the court is not bound by the same. He said sections 71, 99 and 100 of the Probate and Administration of Estate Act states claim of an estate of a deceased is filed in court when there is administrator of the estate of a deceased.

He argued that the plaintiff was appointed in 2020 and he filed the suit at hand in the court in 2021 and argued that the defendants averred in the amended written statement of defence that the house in dispute

was purchased in 2010. He argued that, as the breach was in continuation the suit before the court is well within the time prescribed by the law. He referred the court to the case of **Lindi Express Ltd V. Infinite Estate Limited**, Commercial Case No. 17 of 2021, HC Com. Div. at DSM (unreported) where it was stated that when the breach is continuing the right of action is not extinguished. He stated the court said section 3 (1) of the Law of Limitation Act must be read together with section 7 of the same law which provides for limitation of time for claim relating to continuing breach of contract.

He went on arguing that, it was stated there was a case of 2011 which was pending in the court and the stated case was determined in 2016 and stated the house in dispute in the present suit was the property of the late Rajabu Zahoro. He stated it was alleged the house in dispute was sold in 2010 and he finalized his submission in relation to the first preliminary objection by submitting that the suit before the court is well within the time.

He argued in relation to the second preliminary objection that, the counsel for the defendant talked about the content of paragraph 10 of the amended plaint and not the verification clause. He stated the plaintiff stated to have verified the facts stated in the amended plaint basing on his own knowledge and others on the information he obtained from his

advocate. He stated during cross examination the plaintiff stated how he is knowledgeable about the facts pleaded in the impugned paragraph of the plaint. He said the Court of Appeal stated in the case of **Hammers Incorporation Co. Ltd** (supra) that verification like the one in the case at hand is proper.

He argued in relation to the first limb of the third preliminary objection that, the same is totally misconceived because the counsel for the defendants has not stated the plaintiff is an administrator of the estate of his late father and section 99 of the Probate and Administration of Estate Act states a person who can institute a suit in court is the administrator of the estate of the deceased alone. He referred the court to the case of **William Sulus V. Joseph Samson Wajanga**, Civil Appeal No. 193 of 2019, CAT at Mwanza (unreported) where it was stated a person with power to bring a suit in respect of an estate of a deceased person is an administrator of the estate.

He argued that, there is nowhere in the above cited case it was stated where there is more than one administrator, they must bring to court a suit in respect of the estate of a deceased together. He said the case of **May Mgaya** (supra) cited by the counsel for the defendants is distinguishable to case at hand as there is nowhere stated where there is more than one administrator, they must bring a suit in the court together.

He referred the court to the case of **Zaria Omari V. Hamisi Mkandwa**, Land Case No. 110 of 2018, HC Land Div. at DSM (unreported) where it was stated one of the administrators can institute a suit in court alone and not necessarily that he must bring the suit with his co-administrator.

He stated that the argument by the counsel for the defendants that Amani is a co-administrator of the estate of the deceased is an argument which need evidence to prove the same. He said the stated Amani has testified in the court as a witness and in the joint amended written statement of defence of the defendants there is an affidavit annexed thereto which shows Amani has denied to be administrator of the estate of the late Rajabu Zahoro. He submitted the issue as to why Amani is not a party in the suit is an issue which need evidence to prove the same. He submitted further that, where it appears an administrator is not showing co-operation to his co-administrator, the co-administrator cannot be restrain to defend the estate of a deceased.

As for the third preliminary objection the counsel for the plaintiff argued the court stated in the case of **Maureen George Mbowe Jiliwa & Another V. Twiga Bancorp Ltd & 5 Others**, Land Case No. 27 of 2018 that, locus standi is not a pure point of law and stated the plaintiff has locus standi to institute the instant suit in the court.

He argued in relation to the issue of revocation of the letters of administration granted to the plaintiff that, the counsel for the defendants is misleading the court. He argued that there is nobody involved in the revision made by the Ilala District Court as an administrator of the estate of the late Rajabu Zahoro. He said the parties in the said revision were **Ramadhani Zahoro V. Abdul Rajabu Zahoro and Amani Hassan Zahoro** and added there is nowhere in the drawn order of the District Court stated the letters of administration of the estate of the deceased granted to Abdul Rajabu Zahoro and Amani Hassan Zahoro were revoked or annulled. He submitted it is not certain that the proceedings of 20<sup>th</sup> August, 2020 referred in the stated revision was for which case. He stated more evidence is needed to ascertain the same.

He went on arguing that, the counsel for the defendant relied mostly on evidential facts and an advocate cannot adduce evidence in a case of his client. He referred the court to the cases of **Moses Gilbert Kitiime & Four Others V. The Registered Trustees of EAGT**, Revision No. 07 of 2023, HC Labour Div. at DSM and **Said Salim Hamduni & Two Others V. The Administrator General**, Misc. Civil Application No. 267 of 2022, HC at DSM (Both unreported) where it was stated advocate cannot step into shoes of his client and depone on matters which are not within his knowledge.

He argued that the document brought to the court is not in the pleadings filed in the instant suit but it has been brought to the court to show the plaintiff is not administrator of the estate of the deceased. He referred the court to the case of **Yara Tanzania Limited V. Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019, CAT at DSM (unreported) where it was stated document which has not been pleaded or brought to the court under the list of the additional documents to be relied upon cannot be used in determination of a case.

He also referred the court to the case of **JV Tangerm Construction Co. Limited V. Tanzania Ports Authority & Another**, Commercial Case No. 117 of 2015, HC Com. Div. at DSM (unreported) where it was stated when documents can be filed in court. He submitted that shows the decision of the District Court brought to the court by the counsel for the defendant was not properly brought to the court. He argued that, even if it will be said the court is required to take judicial notice of the stated decision of Ilala District Court but as stated in the case of **Ibrahim Abdallah V. Seleman Hamisi**, Civil Appeal No. 314 of 2020, CAT at Arusha (unreported) that is an evidential issue which need to be proved by evidence.

In conclusion he stated the matter brought to the court is purely an abuse of the court process as there is a matter pending for determination

in the court on the issue of locus standi of the plaintiff to bring the suit to the court. He submitted that, as there is no leave sought from the court to bring the decision brought to the court by the counsel for the defendants, the preliminary objection be dismissed because when the suit was filed in the court the plaintiff was the lawful administrator of the estate of his late father.

In his brief rejoinder the counsel for the defendants argued that, they have brought to the court the decision of the Ilala District Court to enable the court to take judicial notice of the stated decision. He stated the issue of the court to take judicial notice is provided under section 59 (1) of the Evidence Act. He submitted that the new development brought by the revision made by the District Court in Revision No. 07 of 2022 has affected the locus standi of the plaintiff to sue in the instant suit.

After considering the rival submissions from the counsel for the parties, the court has found proper to start by saying I am in agreement with the counsel for the plaintiff that, it is a long-established principle of law that preliminary objection is supposed to be raised on pure point of law and it cannot be raised if any fact has to be ascertained by requiring evidence to be adduced in the matter. The stated position of the law was laid in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) and followed in number of cases which one of them is the case of

**Hammers Incorporation Co. Ltd** (supra) cited to the court by the counsel for the plaintiff.

While following the position of the law stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd** the Court of Appeal of Tanzania stated in the case of **COTWU (T) OTTU Union & Another V. Hon. Idd Simba, Minister of Industries and Trade & Others**, Civil Application No. 40 of 2000, CAT at DSM (Unreported) that: -

*"A preliminary objection must, first, raise a point of law based on ascertained facts not on evidence. Secondly, if the objection is sustained, that should dispose of the matter."*

While being guided by the above stated principle of the law the court has found it is proper to start with the first point of preliminary objection which states the suit is hopelessly time barred hence the same is to be dismissed with costs. The court has found as argued by the counsel for the defendants the stated point of preliminary objection is based on the facts averred at paragraph 6 and expounded at paragraph 10 of the amended plaint.

The court has found the counsel for the defendants argues the claim of the plaintiff as averred at paragraph 6 of the amended plaint is for payment of damages to the tune of TZS 374,400,000/=. The stated damages are alleged to have arisen from loss of revenue the plaintiff was



expecting to earn from the agreement of developing the house in dispute in the suit at hand upon which this ruling is arising.

He argued the stated development agreement was entered by the first defendant and the plaintiff together with the dependants of the late Rajabu Zahoro dated 20<sup>th</sup> August, 2008 which the plaintiff alleged was breached by the defendants. He argued the stated claim is also reflected in paragraph 10 and in the reliefs sought in the amended plaint. He argued that, as the suit at hand was filed in the court on 09<sup>th</sup> September, 2021 it is time barred and is bound to be dismissed for being time barred.

After going through the stated paragraphs of the amended plaint the court has found it is true as argued by the counsel for the defendants that, one of the claims of the plaintiff against the defendants jointly and severally is for payment of damages for loss of revenue to the tune of TZS 374,400,000/=. The court has found the plaintiff is also claiming in the same paragraph for vacant possession of the house in dispute in the case pending before this court. For clarity purpose the court has found apposite to reproduce in this ruling the stated paragraph 6 of the amended plaint which read as follows: -

*"The plaintiff claims from the defendants jointly and severally for **vacant possession of House** No. 23 Plot No. 5 Block "B" Aggrey Kariakoo Dar es Salaam Dar es Salaam comprised under Certificate of Title No. 84804 (the Property), the return*

*of the said certificate of title and **payment of damages for loss of revenue** to the tune of TZS 374,400,000/= (say Tanzanian Shillings Three Hundred Seventy-Four Million)."*  
[Emphasis added].

The wording of the above quoted paragraph and specifically the bolded part shows the claims of the plaintiff against the defendant are two. The first claim of the plaintiff is for vacant possession of the house in dispute and his second claim is payment of damages for loss of revenue. Elaboration of the source of the stated claims and when they arose as argued by the counsel for the defendants are provided under paragraph 10 of the amended plaint which states as follows: -

*"That the terms and conditions of the said development agreement dated 20<sup>th</sup> of August, 2008 were never fully adhered to by Kuringe Real Estate Company Limited as agreed as follows;*

*(i) The 1<sup>st</sup> defendant was to construct a building with a ground floor and a first and second floor, but the first defendant only built a ground floor and a first floor. The second floor was to carter two apartments to be used by the plaintiff and relatives of which each apartment would have fetched rental revenue of TZS 700,000/= and therefore depriving our client of TZS 1,400,000/= per month since 2008 making a total amount to the date of filing this plaint to be TZS 218,400,000/= (say Tanzanian Shillings Two Hundred Eighteen Million Four Hundred Thousand Shillings).*

(ii) *The plaintiff and his siblings and dependants of the late Rajabu Zahoro were to get one shop in the front of the building and two shops in the back of the building but were only given two shops in the back of the building. To make it worse, Kuringe Real Estate Company Limited through your key man who is the 2<sup>nd</sup> defendant forcefully and illegally took over the two shops since June of 2013 and therefore depriving the plaintiff and his siblings and other dependants a loss of revenue averaging TZS 500,000 per month from June, 2013 and the one in the front was never given to them therefore depriving them of TZS 1,000,000/= per month from August 2008 making a total amount to the date of filing the plaint to be TZS 156,000,000/= (say Tanzanian Shillings one Hundred Fifty Six Million)."*

From the wording of the two paragraphs of the amended plaint quoted hereinabove it is crystal clear that the loss of revenue the plaintiff is claiming to be paid by the defendants is arising from breach of development agreement which was entered by the parties on 20<sup>th</sup> August, 2008. Since the plaintiff's claim of payment of loss of revenue is stemming from breach of the stated development agreement the court has found the limitation period for the stated claim is supposed to be governed by sections 4 and 5 of the Law of Limitation Act. The cited provisions of the law states that, the period of limitation prescribed by the law in relation to any proceeding shall, commence from the date on which the right of

action for such proceeding accrues and the right of action accrued on the date on which the cause of action arises.

That being the position of the law the question to determine here is when the plaintiff's cause of action arose and when the period of limitation for the plaintiff to institute the above stated claims in the court commenced. The court has found in relation to the claims of loss of revenue arising from breach of the development agreement that as the stated claim is arising from breach of contract then as provided under item 7 of the first Part of the Schedule to the LLA it was supposed to be filed in the court within six years from the date when the cause of action arose. As for the claim of vacant possession of the house in dispute the court has found as provided under item 22 of the same Part of the Schedule of the law cited hereinabove the suit was supposed to be filed in the court within twelve years from the date when the cause of action arose.

After reading the whole amended plaint the court has found that, although the plaintiff avers at paragraph 6 of the amended plaint that the claims of the plaintiff is Tshs. 374,400,000/= but paragraph 10 (i) of the amended plaint shows that, the plaintiff is claiming for the sum of Tshs. 218,400,000/= being loss of revenue for the two apartments which were not handed to the plaintiff from 2008. Another claim of the plaintiff as

stated under paragraph 10 (ii) of the amended plaint is for sum of Tshs. 156,000,000/= arising from the act of the first defendant to fail to give the plaintiff and other beneficiaries of the estate of the deceased one shop at the front side of the house in dispute from 2008 and the act of the second defendant of taking the two shops he had given to the plaintiff and his relatives in the house in dispute which was done in 2013.

The court has found the counsel for the plaintiff stated that, although the stated claims of loss of revenue is indicated it arose from 2008 but the stated claims are within the time because the breach of the development agreement done by the defendants was continuing from when the breach occurred for the first time. The court has found it is true that our law and specifically section 7 of the Law of Limitation Act states where there is a continuing breach of contract the limitation of time continued to accrue until when the last breach is committed. However, after looking into the meaning of the term "continuing breach" stated in the case of **Lindi Express Ltd** (supra) the court has found the breach alleged by the plaintiff was committed by the defendants does not fit in the case at hand.

The court has arrived to the above finding after seeing it was stated in an Australian case of **Larking V. Great Western (Nepean) Gravel**

**Ltd (in Liquidation)** (1940), 64 C.L.R 221 (HCA) cited in the *Lindi Express Ltd* (supra) as follows: -

*"If a covenantor undertakes that he will do a definite act and omit to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state of condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the example, the building is out of repair, the life uninsured, or the particular support unprovided."*

From the above persuasive excerpt the court has found that, as the parties development agreement required the first defendant to develop the house in dispute and after developing the same to give the plaintiff and his relatives two apartments and three shops in the house in dispute and it is alleged at paragraphs 6 and 10 of the amended plaint that the first defendant breached the stated development agreement in 2008, it cannot be said his failure to honour the agreement they entered is a continuing breach. To the view of this court that is not a continuing breach

but the first defendant failed to remedy their past breach as stated in the above quoted case.

The counsel for the plaintiff argued further that, the estate of his late father has been administered by many administrators and said one of them was Kitwana Rajabu Zahoro. He said the ownership of the house in dispute was transferred to Kitwana Rajabu Zahoro as the administrator of the estate of the late Rajabu Zahoro and later on the said administrator of the estate of the deceased sold the house in dispute to the first defendant. He went on saying that the stated Kitwana Rajabu Zahoro died in 2012.

He argued that, as provided under sections 71, 99 and 100 of Probate and Administration of Estate Act, a person allowed by the law to institute a suit in court in respect of an estate of a deceased person is an administrator of the estate of the deceased. He submitted that as the plaintiff was granted letters of administration of the estate of his late father on 2020 and the present suit was filed in the court in 2021, then as provided under sections 9 and 35 of the Law of Limitation Act the suit at hand is well within the time.

The court has found the submission by the counsel for the plaintiff which was based on the position of the law stated in the case of **Habiba Bush** (supra) is that, the limitation of time for the instant matter is

supposed to be counted from when Kitwana Rajabu Zahoro died which is in the year 2012. If the time will be counted from that year to when the instant suit was filed in the court, then it will be found the present suit is well within twelve years provided under the law for the claim of recovery of land which was in possession of the deceased before his death.

The court has found the main concern of the counsel for the defendants was not on limitation of time for the plaintiff's claim of loss of revenue which the court has found its limitation of time is six years and it was supposed to be counted from when it was alleged the breach of the development agreement occurred. To the contrary the court has found the submission of the counsel for the defendants was made in respect of the limitation of time for the claim of vacant possession of the house in dispute.

The counsel for the defendants submitted that, as the cause of action for the plaintiff's claims arose on August, 2008 and the suit at hand was filed in the court in 2021, then the suit is hopelessly time barred as it was filed in the court after the elapse of twelve years prescribed by the law for the claim of recovery of land. Since the submission of the counsel for the defendant shows he based on the period of time for recovery of possession of the house in dispute, then the court will direct itself in determination of the issue of whether the suit at hand was filed in the



court after the elapse of twelve years provided by the law for the claim of vacant possession of the house in dispute.

The court has found that, although it is true as rightly argued by the counsel for the defendants that the period for the claim of recovery of land is twelve years from the date of accrue of the cause of action but as stated by the counsel for the plaintiff the issue is whether the right of action for the plaintiff to claim for the stated vacant possession for the house in dispute arose on August, 2008. The court has found that, although it is true that it is indicated in the amended plaint that the claim for vacant possession of the house in dispute is based on breach of the development agreement entered on August, 2008 but it cannot be said the right of action for the plaintiff to claim for vacant possession of the house in dispute accrued on August, 2008 when the development agreement was entered by the parties.

To the view of this court the stated claim is supposed to be claimed from when it was found the defendants had breached the development agreement they entered with the plaintiff and other beneficiaries of the estate of the deceased. The court has found the plaintiff averred at paragraph 11 of the amended plaint that, the development agreement they entered with the first defendant expired on 30<sup>th</sup> May, 2019. The facts averred in the quoted paragraph shows the agreement entered by the

parties in the present suit was continuing up to 30<sup>th</sup> May, 2019 when it is averred it expired.

The court has found it is stated further in the mentioned paragraph that, after the date of expiration of the development agreement stated hereinabove the second defendant was confronted by the plaintiff for the alleged breach of the development agreement and demanded handing over of the house in dispute to the plaintiff and his relatives but the second defendant told the plaintiff that, the house in dispute had already been sold to the first defendant and its ownership had already been transferred into the name of the first defendant.

From the wording of paragraph 11 of the amended plaint it is crystal clear that, although there is an allegation that the defendants breached the development agreement they entered with the plaintiff and his relatives on 20<sup>th</sup> August, 2008 but the plaintiff stated to have become aware that the house in dispute had already been sold to the first defendant on 30<sup>th</sup> May, 2019 and its ownership had already been transferred into the name of the first defendant.

That being the position of the matter the court has found that, if it would have been taken the house in dispute was under the ownership of the late Kitwana Rajabu Zahoro as administrator of the estate of the late Rajabu Zahoro and the stated administrator is the one sold the land in

dispute to the first defendant, then as provided under sections 9 and 35 of the Law of Limitation Act the limitation of time for claiming recovery of the house in dispute was supposed to be counted from 2012 when the late Kitwana Rajabu Zahoro died until when the suit was filed in the court. As the suit was filed in the court on 9<sup>th</sup> November, 2021, the court has found it was filed in the court within twelve years provided by the law.

If it will be said the court cannot rely on the fact that the house in dispute was sold to the first defendant by the late Kitwana Rajabu Zahoro on the mentioned date as the stated fact is not pleaded anywhere in the pleadings filed in the court by the plaintiff, but the court has found it is averred at paragraph 11 of the amended plaint that the development agreement entered by the parties expired on 30<sup>th</sup> May, 2019. It is after expiration of the development agreement the plaintiff was told by the second defendant that the house in dispute had already been sold and its ownership registered into the name of the first defendant.

If you count from 30<sup>th</sup> May, 2019 when the plaintiff said to have become aware the house in dispute had already been sold to the first defendant until when the present suit was filed in the court on 9<sup>th</sup> November, 2021 you find the period of twelve years prescribed by the law for recovery of land had not elapsed. That makes the court to find the

claim for recovery of the house in dispute filed in the court by the plaintiff is not time barred.

The court has found that, although the claim for loss of revenue might have been seeing is time barred because it is averred it accrued on August, 2008 but as the claim for recovery of the house in dispute is not time barred because of the above stated reasons, therefore, the first point of preliminary objection cannot be sustained as it will not disposed of the suit. That is because as stated in the case of **COTWU (T) OTTU Union & Another** (supra) a point of preliminary objection must be able to dispose of the suit and as the first point of preliminary objection cannot dispose of the suit at hand it cannot be upheld.

Coming to the second point of preliminary objection the court has found it states the amended plaint is incurably defective for improper verification of paragraph 10 (i) and (ii) of the amended plaint as it was verified contrary to Order VI Rule 15 (2) of the Civil Procedure Act. The court has found the only argument caused the counsel for the defendants to argue the amended plaint is offending the above cited provision of the law is the word "*the action of the defendants deprived our client*" appearing in the cited paragraphs of the amended plaint.

The court has found the word caused the counsel for the defendants to come to the stated argument is the word "*our client*" which shows the

averment was not made basing on the knowledge of the plaintiff but basing on the knowledge of other persons and the verification of the amended plaint does not show the averment made in the cited paragraph was made basing on the knowledge of other persons and not on the knowledge of the plaintiff. The court has found as rightly argued by the counsel for the defendants Order VI Rule 15 (2) of the Civil Procedure Code requires a person verifying pleading to specify in the verification clause the facts he avers on his knowledge and those he avers basing on information or belief he obtained from other sources.

That being the position of the law the court has found that, although the word captioned by the counsel for the defendants from paragraph 10 (i) of the amended plaint shows the stated averment was not made basing on the knowledge of the plaintiff but from the knowledge of other persons, but the stated word cannot be taken alone to make the court to find the whole case of the plaintiff is supposed to be thrown out. The above view of this court is getting support from the case of **Kiganga and Associate Gold Mining Co. Ltd V. Universal Gold NL** [2000] 1 EA 134 where it was held that: -

*"Even if I held that the clause is defective still this would not have resulted in the throwing out of the whole pleadings save that it would have attracted an order for amendment."*

After taking into consideration the position of the law stated in the above cited case and see the stage the case has reached, which is now at the hearing of the defendant's evidence the court has found that, even if it will be accepted the word appearing in the cited paragraph of the amended plaint shows the amended plaint was not properly verified, but still the court cannot throw out the plaintiff's case. The court has also found it cannot even order the plaintiff to amend the plaint to remove or correct the stated word in the matter which its hearing has reached the stated of hearing the evidence of the last witness of the defendants.

To the contrary the court has found the stated defect can be cured by using overriding objective principle provided under section 3A (1) and (2) of the Civil Procedure Code to ignore the word showing was not properly verified in the verification clause of the amended plaint. The court arrived to the stated view after seeing it has not been told the stated defect has prejudiced the defendants in anyway or caused the defendants to fail to understand what is averred in the amended plaint. In the premises the court has found the second point of preliminary objection raised by the counsel for the defendants cannot be sustained.

As for the third point of preliminary objection I will start with the first limb which states the plaintiff has no locus standi to file the suit in the court without involving his co-administrator namely Amani Hassan Rajabu

Zahoro. The court has found it is true as rightly argued by the counsel for the defendants that the plaintiff has not stated anywhere in his amended plaint that he was granted letters of administration of the estate of late Rajabu Zahoro with Amani Hassan Rajabu to administer the estate of the late Rajabu Zahoro. However, the court has found the copy of the letters of administration granted to the plaintiff and annexed to the amended plaint as annexure ARZ-1 shows the letters of administration of the estate of the deceased were granted to the plaintiff together with Amani as his co-administrator.

Although the counsel for the plaintiff argued the issue of Amani to be co-administrator of the estate of the late Rajabu Zahoro or not is the issue need evidence to prove the same but the court has failed to agree with him. The court has come to the stated finding after seeing the copy of the letters of administration granted to the plaintiff and Amani as his co-administrator annexed in the amended plaint as annexure ARZ-3 is clearly establishing the plaintiff was appointed together with Amani to administer the estate of the late Rajabu Zahoro together.

The court has gone through the case of **May Mgaya** (supra) which the counsel for the defendants cited to support his submission that the plaintiff has no locus standi to file the case in the court without involving his co-administrator. The court has found that, although it was not stated

in the cited case that one administrator of an estate of a deceased person has no locus standi to institute a suit in the court in respect of an estate of a deceased person without involving his co-administrator but the Court of Appeal stated clearly in the cited case that, an administrator is required to work jointly and together with his co-administrator on everything in respect of the administration of estate of the deceased.

The position of the law stated in the above cited case is similar to what was stated by this court in the case of **Philip Mlay** (As Administrator of the Estate of the Late **Anna Focus Mlay**) **V. Stanbic Bank Tanzania Limited & Two Others**, Land Case No. 201 of 2020, HC Land Div at DSM (unreported) that, since there were two administrators, one administrator can do nothing on the deceased property without the consent of the other co-administrator. The similar position of the law can be seen in the Ugandan case of **Byaruhanga V. Fr. Emmanuel Ruvugwaho & Another**, Civil Appeal No. 09 of 2014 where the Supreme Court of Uganda held that: -

*"Where letters of administration are given to more than one administrator, it is illegal for one single administrator to act without the consent or knowledge of the other co-administrator."*

The court has found the counsel for the plaintiff has argued that, as there is an affidavit annexed in the written statement of defence of the



defendants showing Amani denied to have been appointed administrator of the estate of the late Rajabu Zahoro and he said the stated denial was made before the court when Amani was adducing his evidence in the instant suit, then the plaintiff is not restrained to institute a suit in the court to claim for recovery of the house of the deceased without involving the stated co-administrator.

The court has found it is not true that the evidence adduced before the court by Amani in the case at hand shows he denied to have been appointed administrator of the estate of the late Rajabu Zahoro. To the contrary the court has found Amani stated in the statement of his evidence adopted in the case as his evidence that he was appointed together with the plaintiff to administer the estate of the late Rajabu Zahoro. He stated the plaintiff decided to file the instant case in the court himself without involving him after seeing he is not supporting the claims he has lodged in the court against the defendants.

The court has been of the view that, if the mentioned co-administrator was not co-operative or he denied the appointment of the court which granted him letters of administration of the estate of the deceased with the plaintiff as stated in the present case, then as stated in the case of **In the Matter of the Estate of the late Walji of Geita**, (1971) HCD No. 345 the plaintiff was required to apply for revocation of

the appointment of the said co-administrator from administration of the estate of the deceased so that the plaintiff can proceed himself with administration of the estate of the deceased.

The court has considered the position of the law stated in the case of **Zaria Omari** (supra) cited to the court by the counsel for the defendant but find the stated case is distinguishable from the case at hand. The court has arrived to the stated finding after seeing the co-administrator was joined in the case as a rival party while in the case at hand the plaintiff's co-administrator is not a party in the suit at hand. In the premises the court has found that, as the letters of administration giving the plaintiff locus standi to institute the suit in the court annexed in the amended plaint shows he was appointed together with Amani and the plaintiff has filed the suit in the court himself without the consent of his co-administrator in the suit, then it cannot be said the plaintiff had locus standi to file the suit at hand in the court himself.

Coming to the second limb of the third point of preliminary objection the court has found the counsel for the defendants argued that, as the decision of the Ilala District Court has nullified the proceedings of the case upon which the plaintiff was granted letters of administration of the estate of the deceased, then the plaintiff has no locus standi to continue to prosecute of the case he has filed in the court. The court has found it is

true as argued by the counsel for the plaintiff that the stated decision was neither annexed in the pleadings filed in the court by the plaintiff nor listed in the list of additional documents to be relied upon filed in the court by the plaintiff. The court has also found it is true as argued by the counsel for the plaintiff that, as stated in the case of **Moses Gilbert Kitiime** (supra) an advocate cannot step into the shoes of his client and adduced evidence in a case on behalf of his client.

However, the court has found the counsel for the defendants prayed the court to take judicial notice of the stated decision of the Ilala District Court pursuant to section 59 (1) (d) of the Evidence Act which states the court is required to take judicial notice of all seals of all the courts of the United Republic duly established by any written law. The stated provision of the law is supposed to be read together with section 89 of the law which states as follows: -

*"89. (1) When a document is produced before a court, purporting to be a record or memorandum of the evidence, or of any part of the record of the evidence given by a witness in judicial proceedings or before any officer authorised by law to take that evidence, and purporting to be signed by a judge or a magistrate, or by any such other officer, the court shall presume-*  
*(a) that the document is genuine;*

*(b) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and*  
*(c) that such evidence was duly taken."*

After reading the provisions of the law cited hereinabove the court has found that, although the decision the counsel for the defendants prayed the court to take judicial notice of the same was brought to the court by the counsel for the defendants but the court is entitled to look at the same and see whether it has affected the locus standi of the plaintiff to prosecute the case before the court. The above finding of the court is getting support from the case of **Craven V. Smith**, 1869 LR 4 Exh. 149 where it was held that: -

*"The court is entitled to look at its own record and proceedings in any matter and take judicial notice of their contents although may not be formerly brought before the court by the parties."*

Therefore, the leaf which the court can draw from the above referred persuasive decision is that, although the decision of the Ilala District Court was brought to the court by the counsel for the defendants and not by the parties but still the court is entitled to have a look on its contents and use the same to determine whether it has affected the locus standi of the plaintiff to prosecute the matter before the court as argued by the counsel for the defendants.

Having gone through the stated decision of the court, the court has found it quashed and set aside the proceedings, decisions and orders given in Mirathi No. 21 of 1981 from 12<sup>th</sup> September, 2018 which includes the order granted the plaintiff letters of administration of the estate of his late father Rajabu Zahoro. The court has also found after the District Court quashing the proceedings, decisions and order given in the stated case, it ordered Ramadhani Rajabu Zahoro to present before the court the original forms No. 6 filled in properly, setting out the deceased's assets value and how he distributed them to all heirs.

The counsel for the plaintiff argued that, as there is nowhere stated in the decision of the District Court that the appointment of the plaintiff as administrator of the estate of the late Rajabu Zahoro was revoked or letters of administration granted to him was annulled, then the plaintiff has locus standi to proceed to prosecute the present suit. The court has found that, as the ruling of the District Court shows the proceedings, decisions and orders which granted the plaintiff letters of administering the estate of the deceased were quashed and set aside it cannot be said the plaintiff has locus standi to continue to prosecute the suit before the court.

The above finding moved the court to the conclusion that, the third point of preliminary objection raised by the counsel for the defendants

has merit as the plaintiff has no locus standi to continue to prosecute the case before the court. As the court has found the plaintiff filed the suit in the court without involving his co-administrator which as stated earlier it is improper and as the appointment of the plaintiff as administrator of the estate of the late Rajabu Zahoro has already been quashed and set aside the court has found the suit filed in the court by the plaintiff is not properly before the court.

Consequently, the court has come to the conclusion that, although the first and second points of preliminary objections raised by the counsel for the defendants have been found have no merit but the third point of preliminary objection is meritorious and is hereby upheld. In the upshot the plaintiff's suit is hereby struck out for want of the plaintiff's locus standi to institute and prosecute the suit before the court. This being a matter arising from administration of estate of the deceased the court has found proper to order each party to bear his own costs. It is so ordered.

Dated at Dar es Salaam this 10<sup>th</sup> day of October, 2023

  
I. Arufani  
**JUDGE**  
10/10/2023

**Court:**

Ruling delivered today 10<sup>th</sup> day of October, 2023 in the presence of Mr. Gideon Opanda, learned advocate for the plaintiff and in the presence

of Mr. Anindumi Semu and Mr. Sylvester Korosso, learned advocates for the defendants. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani  
**JUDGE**  
10/10/2023