IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 72 OF 2023

REBECCA JOHN GENYA ..... PLAINTIFF

VERSUS

TANZANIA AIRPORTS AUTHORITY ..... 1ST DEFENDANT

MWIJUMA SEKE ..... 2ND DEFENDANT

MARIAM MLYANGA ..... 3RD DEFEDANT

THE ATTORNEY GENERAL ..... 4TH DEFENDANT

Date of last order: 06/09/2023.
Date of Ruling: 19/10/2023.

RULING

I ARUFANI, J

This ruling is in respect of the points of preliminary objections raised in the matter by the defendants. The first and fourth defendants jointly raised the points of preliminary objections which read as follows: -

1. *The suit is time barred.*
2. *The suit is untenable in Law for contravene (sic) S. 6 of the Government Proceedings Act (CAP 6 R. E 2019).*
3. *The suit is untenable for suing a wrong party such as the 2nd and 3rd Defendants.*

The second and third defendants raised in their written statement of defense a similar point of preliminary objection which states the suit is bad in law for wrongly suing them instead of suing Ilala Municipal council. When the matter came for hearing the above stated points of preliminary

objections the plaintiff was represented by Mr. Mathew Ngaga, learned advocate and while the first and fourth defendants were represented by Ms. Lilian Machagge, learned State Attorney, the second and third defendants appeared in the court in persons.

Before hearing of the points of preliminary objections raised by the defendants commenced, the court suo moto raised another point of law and required the parties to address it along with the points of preliminary objections raised by the defendants. The stated point of law is whether the plaint is in compliance with the provision of Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33 R.E 2019 which requires the plaint to contain facts showing when the cause of action accrued. The court ordered the points of preliminary objections raised by the defendants and the point of law it raised suo moto to be argued by way of written submissions.

The counsel for the first and fourth defendants opted to abandon the second and third preliminary objections and argued only the first point of preliminary objection. She stated the facts asserted in the plaint shows the plaintiff is claiming for payment of compensation of the land measuring 4806 sqm located at Kipunguni "A" Area within Ilala Municipal Council in Dar es Salaam Region. She argued that, annexure RG 2 to the plaint shows the plaintiff is relying on Valuation Report conducted from

1997 and concluded in 2014 and the suit at hand was filed in the court on 23rd March, 2023 which is after the elapse of 26 years.

She argued that, the position of the law as provided under item 1 of Part I of the Schedule to the Law of Limitation Act, Cap 89 R.E 2019 is very clear that claim for compensation for doing or for omitting to do an act alleged to be in pursuance of any written law is supposed to be filed in court within one year from the date of accrue of a cause of action. She submitted that, a suit filed in court beyond the time allowed by the law is time barred. To support her submission, she referred the court to several cases which one of them is **Yussuf Vuai Zyuma V. Mkuu wa Jeshi la Ulinzi TPDF & Others**, Civil Appeal No. 15 of 2009, CAT at Mwanza (unreported).

She further submitted that, it is a principle of law that parties' negotiation or communication cannot waive limitation of time prescribed by the law. To support her submission, she referred the court to the case of **M/S P & O International Ltd V. The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020, CAT at Tanga (unreported) where it was stated pre-court action negotiations have never been a ground for stopping the running of time. She submitted that, as the plaintiff filed the present suit in the court after the elapse of 26 years

then as provided under section 3 (1) of the Law of Limitation Act the suit is supposed to be dismissed for being hopelessly time barred.

She argued in relation to the point of law raised by the court suo moto that, the plaint has not disclosed when the cause of action brought to the court arose. She stated that, the word used in Order VII Rule 1 (e) of the Civil Procedure Code is the word "shall". She submitted that being the word used in the cited provision of the law, then as provided under section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019 it is imperative for the function conferred in the cited provision of the law to be complied with.

She argued further that, the omission to show when the cause of action arose in the plaint cannot be cured by oxygen principle or overriding objective principle as the same touches the mandatory legal procedure which ought to be adhered. To support her submission, she cited in her submission the case of **Mondorosi Village Council & 20 Others V. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2917 CAT at Arusha (unreported) where it was stated that, overriding objective principle cannot be used blindly against the mandatory provisions of the procedural law which goes to the very foundation of a case. Finally, she prayed the suit be struck out with costs.

The second and third defendants argued in relation to their preliminary objection that, the plaintiff is well aware that they are public servants working in the Local Government. The second defendant said he is Kipunguni Street Chairman and the third defendant said she is an Executive Officer for Kipunguni Village Council. The second defendant argued that, he has been sued in the matter contrary to section 12 (2) of the Local Government (Urban Authority) Act, R.E 2009 which states urban authority is a body corporate capable of suing or being sued in its own name. The second defendant submitted that, the suit lodged in the court by the plaintiff against him in person is incompetent and untenable in law for suing a wrong party and prayed the suit to be struck out for being incompetent.

On his part the third defendant argued that, being an Executive Officer, she was a Secretary to the Village Council which is a body corporate capable of suing and being sued pursuant to section 26 (2) (b) of the Local Government (District Authority) Act, Cap 287 R.E 2009. She argued that, as provided under section 56 (2) of the Local Governments (District Authority) Act, Cap 287, R.E 2009 she is a public servant who could have not been sued in her own capacity.

She argued that, the plaintiff has no cause of action against her and referred the court to Order I Rule 10 (2) of the Civil Procedure Code which

states a name of a party improperly joined in a suit should be struck out. She referred the court to the case of **Tabora Municipal Council V. Philibert Rwegashora**, DC Civil Appeal No. 14 of 2009 HC at TBR (unreported) to support her submission. In her conclusion she prayed the preliminary objection she has raised be upheld and the plaintiff's suit be struck out as she is improperly joined in the suit.

In his reply the counsel for the plaintiff stated in relation to the point of preliminary objection raised and argued by the counsel for the first and fourth defendants that, it is not in dispute that one of the claims of the plaintiff is compensation. He argued that, although it is averred at paragraph 17 of the plaint that the process of assessment of claims and payment of compensation for the initial phase was completed, but the process is still going on for those who were ousted or incorrectly omitted. He referred the court to annexure RG 3 to the plaint which is letter showing valuation and assessment exercise was continuing. He argued the stated letter negate the defendants' submission that the process was concluded in 2014 and the argument that 26 years have lapsed since when the cause of action accrued.

He went on arguing that, paragraph 10 of the first and fourth defendants written statement of defense shows there was ongoing process of verification of compensation resulting from compulsory land

acquisition to which the plaintiff is a victim to. He argued the stated assertion is supported by annexure SG 2 which shows there were meetings which were continuing until 5th September, 2021. He submitted the parties are bound by their own pleadings and referred the court to the case of **James Ngwagilo V. The Attorney General**, [2004] TLR 161 to support his submission. He stated the defendant cannot claim the process was concluded in 2014 and still continue to hold meetings in 2021.

He submitted that the cause of action in the present suit arose on 16th July, 2022 after the plaintiff's letter of identity being rejected by the first defendant and denied the plaintiff's right of claiming compensation from evaluation and verification process of her land. He submitted the suit was filed in the court on 20th March, 2023 it is within one year from the date of accrual of the cause of action. He referred the court to the case of **Jaraj Sharif & Sons V. Chatal Fancy Stores**, [1960] EA 375 which states cause of action is determined by looking at the plaint and the attachments forming part of it.

He argued that, by drawing an inference from the afore cited case and by looking into the plaint and its annexure RG 3 the cause of action arose on 16th July, 2022 after the plaintiff's last attempt to seek redress from the first defendant being denied. He submitted that all cases cited in the submission of the first and fourth defendants are distinguishable

from the case at hand as their circumstances were not similar to the circumstances of the case at hand. He submitted it was stated in the case of **Moto Matiko V. Ophir Energy PLC & Six Others**, Civil Appeal No. 119 of 2021, CAT at DSM that, in determine preliminary objection the court needs only to look into the plaint and its annexures and not more.

Coming to the point of law raised by the court suo moto which states whether the plaint has complied with Order VII Rule 1 (e) of the CPC he admitted that, the requirement provided under the cited provision of the law is clear and one of mandatory in nature. He argued the essence of the requirement to state when the cause of action arose is to enable the court to ascertain the suit was filed in the court within the time prescribed by the law.

He argued that, skimming through the plaint and specifically paragraph 3, 10, 11, 12 and 13 of the plaint disclose when the cause of action against the defendants arose. He added that, paragraph 13 and annexure RG 3 to the plaint discloses when the cause of action arose after the stated annexure which was an introductory letter being rejected on account that it was not proof of ownership. He stated the letter was issued on 16th July, 2022 and the cause of action arose immediately thereafter.

He submitted that, in determination of the issue of whether the plaint discloses when the cause of action arose, the court is required to examine

the plaint together with annexure RG 3 and supported his submission with the position of the law stated in the case of **Moto Matiko Mabanga** (supra) that court is required to look into the plaint and its annexures. He prayed the court to find the suit is tenable and properly filed before the court and the preliminary objections be dismissed.

He argued in relation to the preliminary objections raised by the second and third defendants that, the preliminary objections raised by the mentioned defendants are *res judicata* and the court is *functus officio* to entertain them. He argued the same preliminary objections were raised and determined by Hon. Mgeyekwa, J (as she then was) in Misc. Land Application No. 474 of 2022 between the same parties in the present suit. He referred the court to section 9 of the Civil Procedure Code which provides for the principle of *res judicata*.

He cited in his submission the definition of the term *res judicata* given in the **Black's Law Dictionary**, Revised 4th Edition at page 1470. He also referred the court to the principle of verdict estoppel defined at page 1473 of the same dictionary and stated the second defendant is estopped from litigating the same issue against the plaintiff as it has already been adjudicated upon by the court.

He argued in relation to the preliminary objection raised by the third defendant that, the case of **Tabora Municipal Council** (supra) is

different from the suit at hand as it was about detention of the Municipal Director as a civil prisoner and it was not about suing an Executive Officer in his own capacity. He submitted that, the immunity from being sued at an individual capacity is not a blanket immunity. He stated it applies for acts that are done bona fide within the execution of the legal mandates and duties prescribed under the law.

He argued that, the acts complained of by the plaintiff under paragraphs 10 and 11 of the plaint are not within the duties of Local Government Authorities, particularly to determine the rights related to compensation from land acquisition. He stated section 120 (1) of the Local Government Act maintains that, immunity from personal liability only extend to bona fide acts that are within the mandate and legal function of the Local Authorities.

As for the point of lack of cause of action which he stated was raised in the submission of the second defendant while it was raised in the submission of the third defendant the counsel for the plaintiff argued that, Order VIII Rule 2 of the Civil Procedure Code make it expressly that point of preliminary objection must be stated in the written statement of defense. He submitted that, as the stated point of law was not raised in the written statement of defense it is bound to suffer a natural death. At

the end he prayed the preliminary objections raised by the second and third defendants be dismissed with costs.

In their rejoinder the counsel for the first and fourth defendants reiterated what she argued in her submission in chief. She added to what she stated in relation to the first preliminary objection relating to limitation of time that, annexture RG 3 is a mere introductory letter from the Local Government Chairman and it does not establish the time within which the cause of action arose. She stated that, the process of compensation is conducted after the process of valuation and assessment for compensation is completed. She submitted that, valuation process for compensation claimed by the plaintiff was conducted from 1997 to 2014 and the plaintiff has never complained about being left out on the process of valuation until 2022.

On his side the second defendant stated that, the allegations of the plaintiff against him, is for exclusion and denial of assessment, valuation and compensation in the process of compulsory acquisition of the landed property. The second defendant stated the mandate to determine who is entitled to get compensation and who is not entitled is vested to the first defendant. He reiterated his submission in chief that it was improper to sue him in his personal capacity. As for the issue of res judicata raised by the plaintiff, the second defendant stated he has never raised such a

preliminary objection in a matter. Finally, he prayed his preliminary objection he has raised be sustained and his name be struck out of the plaint as he was improperly joined in the suit.

On her side the third defendant reiterated her submission in chief that she was improperly sued in the matter as she is employed as an official of the Dar es Salaam City in the position of Executive Officer. She argued under section 56 (2) of the Local Government (district Authority) Act she is a public servant. She referred the court to section 147 of the Local Government Act which provides for the functions of the Village Council. She submitted that even the prayer sought against her through paragraph 11 (c) of the plaint of compelling her to cooperate in aiding the valuation process of the plaintiff's plot was not properly brought against her in person as the order to compel the public servant to act or do certain act has its own procedures to be followed. At the end she prayed her preliminary objection be upheld and her name be struck out of the suit.

After painstakingly considered the rival submissions from both sides the court has found proper to start with the point of law raised suo moto by the court because of the reason which I will state later on. The stated point is whether the plaint filed in the court by the plaintiff is in compliance with order VII rule 1 (e) of the CPC. The cited provision of the

law requires the plaint to contain the facts showing when the cause of action arose and for clarity purpose it read as follows: -

> *"The plaint shall contain the following particulars-*
> *(e)* ***The facts constituting the cause of action and when it arose."*** [Emphasis added].

The court has found as rightly argued by the counsel for the parties, compliance with what is provided in the above quoted provision of the law is mandatory because the word used thereon is the word "shall". The court has come to the stated finding after seeing section 53 (2) of the Interpretation of Laws Act Cap 1 R.E 2019 states clearly that where the word "shall" is used in any written law conferring function to be performed, compliance with performance of that function is mandatory. For clarity purpose the stated provision of the law states as follows: -

> *"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

The use of the word "Shall" in the above quoted provision of the law shows it is a mandatory requirement for a plaint filed in court to comply with what is provided in the afore cited provision of the law. The importance of showing the time when the cause of action arose in a plaint or applicant has been emphasized in number of cases which one of them is **Juma B. Kadala V. Laurent Mnkande** [1983] TLR 103 where Hon. Sisya, J (As he then was) stated as follows: -

"I have, time and again, emphasized the importance of indicating in the plaint or application the time when the facts on which the claim is based arose. The basis of this requirement is that it is from the time shown or given that the Court can determine whether or not the suit is time barred. It must be the aim of every court of law to ensure that there is an end to litigation..."

As emphasized in the above quoted excerpt it is crystal clear a person filing a suit in court is required to make sure the plaint or application, he or she is filing in court contain the facts showing when the cause of action arose. The reason being as stated in the above cited case and as rightly argued by the counsel for the plaintiff that is to enable the court to satisfy itself the matter was filed in the court within the time prescribed by the law for the purpose of ascertaining jurisdiction of the court to entertain the matter.

That being the position of the matter the question to determine here is whether the plaint filed in the court by the plaintiff has complied with the stated mandatory requirement of the law. The court has found while the counsel for the first and fourth defendants argued the plaint filed in the court has no facts showing when the cause of action the plaintiff filed in the court against the defendants arose, the counsel for the plaintiff submitted the plaint filed in the court by his client contain facts showing when the cause of action his client has filed in the court arose.

The counsel for the plaintiff stated that skimming of paragraphs 3, 10, 11, 12 and 13 of the plaint shows when the cause of action in the instant matter arose. The court has gone through paragraph 13 of the plaint which the counsel for the plaintiff submitted it contain the facts showing when the cause of action in the instant matter arose and find it is reading as follows: -

> *"The Plaintiff went further to submit the letter of her identity which was issued by the local government Authorities identifying the plaintiff as a lawfully occupier but still the 1st defendant has not showed any interest to help the plaintiff to get the needfully assistance in the valuation process. (Copy of the said letter is attached hereto and marked as annexure RG 3 we crave leave of the court to form part of this plaint)."*

The court has found there is nowhere in paragraph 13 stated when the cause of action brought to this court against the defendants arose. The position of the law as stated in the case of **Moto Matiko Mabanga** (supra) is that, in determine preliminary objection the court is required to look into the plaint and its annexures. That being the position of the law the court has also gone through annexure RG 3 annexed in the plaint which the counsel for the plaintiff submitted it is disclosing when the cause of action in the present suit arose. The court has found annexure RG 3 to the plaint was a letter of introducing the plaintiff written by Kipunguni Street Chairman dated 16th July, 2022 and it was addressed to the first

defendant. Among the contents filed in the stated letter read as follows:

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"Anaomba Kupokelewa kwako kwa swala la zoezi la tathmini linaloendelea Katika mtaa wa kipunguni Kata ya Kipawa."

After carefully read what is averred at paragraph 13 of the plaint together with what is filled in annexure RG 3 of the Plaint the court has found the wording of the stated paragraph and annexure RG 3 does not show expressly or by implication when the cause of action in the suit filed in the court by the plaintiff against the defendants arose. The court has also tried to examine the entire plaint and all annexures attached thereon but failed to see any paragraph in the plaint together with its annexures which shows when the cause of action in the matter at hand arose. In the premises the court has found the plaint filed in the court by the plaintiff is not in compliance with the mandatory requirement provided under order VII rule (1) (e) of the CPC.

Having found the plaint filed in the court is not showing when the cause of action arose, the court has come to the settled view that, even the preliminary objection raised by the first and fourth defendants that the suit is time barred cannot successfully be determined as there is no facts showing when the plaintiff's cause of action against the defendants arose for the purpose of gauging the suit is time barred or not. The court has come to the stated view after seeing the position of the law as stated

in the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] 1 EA 696 is that, preliminary objection is supposed to be raised on assumption that all facts pleaded by other side are correct. Since there is no fact pleaded in the plaint showing when cause of action in the matter at hand arose, the stated objection cannot be determined successfully.

The above finding caused the court to come to the settled view that, there is no need of going to the preliminary objections raised by the second and third defendants because the point of law raised suo moto by the court suffice to dispose of the matter. Consequently, the plaintiff's suit is hereby struck out for being incompetent and as the point used to dispose of the matter was raised - moto by the court there is no order as to costs. It is so ordered.

Dated at Dar es salaam this 19th October, 2023.

I. Arufani.
JUDGE
19/10/2023

Court:

Ruling delivered today 19th day of October, 2023 in the presence of Mr. Edward Jonathan Chitalula, learned State Attorney holding brief for Mr. Mathew Ngaga learned advocate for the plaintiff and Mr. Edward

Jonathan Citalula is representing the first and fourth defendants. The ruling has also been delivered in the presence of the second defendant in person and in the presence of Mr. Joseph Sang'udi, learned advocate for the third defendant. Right of appeal to the Court of Appeal is fully explained to the parties.

I. Arufani.
JUDGE
19/10/2023