

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 267 OF 2023

JUMA GOME 1ST PLAINTIFF

ALLY GOME 2ND PLAINTIFF

VERSUS

MURIA TANGWESI 1ST DEFENDANT

SWAUMU SAIDI ABDALLAH 2ND DEFENDANT

MARIA LANGWA 3RD DEFENDANT

MFAUME RAJABU GOME 4TH DEFENDANT

16/11/2023 & 24/11/2023

RULING

A. MSAFIRI, J

In this suit, the two brothers (herein the plaintiffs) are claiming from the four defendants, among other things, declaration that the plaintiffs are the lawful owners of the entire suit land measuring four hundred and fifty (450) acres located at Ndwati Village, Gwata Ward, Kibaha District, in Pwani Region. That the said unsurveyed land belonged to their father the late Gome for a very long time ago even before the formation of Tanzania, that is to say the then Tanganyika.

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The plaintiffs' claims were opposed by the defendants, and while filing their joint written statement of defence on 29/09/2023, the 1st , 2nd , and 3rd defendants also rose four points of preliminary objections against the plaintiffs' claims as follows;-

1. *That, the suit is bad in law as the same land in dispute unsurveyed land Located in Ndwati Village, Gwata Ward, Kibaha Vijijini District, in Pwani/Coast Region, which is bordered with the land owned by Daudi Abiria and Motokauzeni on the North, Oda Maliyatabu and Zeba on the South, Miraji Kifo and Sultan Mussa on the East, Gombela and Miraji Kifo on the West was heard determined on merit and in Land Case Number 308 of 2022 where the same was heard ex parte and dismissed for wants of merits on 17/05/2023. Where the Fourth Defendant was the Plaintiff hence instituting new case instead of challenging the said decision to the Higher Court and it is a complete abuse of Court process.*
2. *That, the suit is incompetent for failure to follow procedure and failure to join The Ndwati hamlet Chairman the Local Government Authority who authorized First, Second and Third Defendants into the alleged disputed land as pleaded under paragraph number 12 of the plaint.*
3. *That, the suit is bad in law as the Plaintiffs have no cause of action against the Fourth Defendant as the same land in dispute was determined on merit in Land Case Number 308 of 2022 and the plaint does not state plaintiffs order against the Fourth Defendant as they aim to mislead the court as this is a completely new case while it is not.*
4. *That, the Plaintiffs have no locus standi to sue after demise of the Late Gome in 1990 per paragraph number 9 of the Plaint without first being appointed as personal legal Representative of the Late Gome.*

Alls.

The hearing of the preliminary objection was by way of written submissions, whereas the plaintiff was represented by Mr. William Yohana Fungo, learned advocate while the 1st, 2nd and 3rd defendants were represented by Mr. Faraji Mangula, learned advocate.

In support of the raised preliminary objections, Mr Mangula submitted on the first point of objection that the dispute over the suit property had already been determined by the competent court in Land Case No.308 of 2022 whereas the same was heard ex-parte and dismissed for want of merit and that the Judgment was delivered by this Court on 17/05/2023 whereby the 4th defendant was the plaintiff.

He further stated that the changes of the parties and area measurement is the abuse of court process intending to make it different, however that it is the same suit. He added that the proper remedy for the plaintiffs was to file revision since they were not party to the previous case and not to file a fresh suit like this suit at hand. To bolster the above points he cited the case of **Efrasia Mfugale vs Andrew J. Ndimbo and another**, Civil Application No. 38/10 of 2017, Court of Appeal of Tanzania at Iringa. He prayed that this suit be dismissed.

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On the second point of objection, Mr Mangula submitted that the plaintiff failed to follow the procedure for failure to join the Ndwati hamlet Chairman who allocated the 1st, 2nd and 3rd defendants the suit property. He was of the view that the suit is incompetent before this Court.

On the third point of objection, Mr Mangula argued that the plaintiffs have no cause of action against the 4th defendant, as the same suit was determined in Land Case No. 308 of 2022 and that the plaint does not state the plaintiffs' order against the 4th defendant.

Mr. Mangula submitted on the fourth point of objection that the plaintiffs having being not appointed the administrators of the estate of the late Gome who died in 1990, they have no locus standi to sue the defendants. He prayed that this suit be rejected with costs.

On reply Mr. Fungo submitted on the first point of objection that the current suit is completely different from Land Case No. 308 of 2022 and that the plaintiffs were not parties on the said suit.

To bolster his point, he cited the case of **Jacquiline Jonathan Mkonyi and Another vs Gausal Properties Limited**, Civil Appeal No. 311 of 2020, Court of Appeal of Tanzania at Dar es Salaam (Unreported) at page 15 and 16, whereby the Court of Appeal with approval observed the position in the case of **Isaack Nguvumali vs. Petro Bikulake** *Alls.*

(substituted by Mtalikwa Bikulake) (1972) HCD 139 where the High Court held that in land cases judgment in favour of a party is not always judgment against the whole world so it does not bind those who were not parties, and res judicata cannot apply.

He argued that since no party was declared the lawful owner of the suit property on Land Case No. 308 of 2022, seeking for revision as the counsel for the 1st, 2nd and 3rd defendants have suggested will be a wastage of time. That the plaintiffs' goal of being declared rightful owner of suit property cannot be achieved through revision proceedings.

On the second point of preliminary objection, counsel for the defendant contended that the plaintiffs have the right to choose the part to sue that have cause of action against him/her. He further stated that the plaintiff has no cause of action against the said Ndwati Hamlet Chairman because he has not trespassed on their land. He cited the case of **Hamisi Salum Kizenga vs. Moses Malaki Sewando and Others**, Land Appeal No. 51 of 2021 High Court of Tanzania Land Division at Dar es Salaam.

On the third point of preliminary objection, Mr Fungo contended that the issue of cause of action is not on pure point of law. Supporting the above point he cited the case of **Mount Meru Flowers Tanzania**

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Limited vs Box Board Tanzania Limited, Civil Appeal No. 260 of 2018, Court of Appeal of Tanzania at Arusha (Unreported) at page 7.

Lastly, on the fourth point of preliminary objection, Mr Fungo contended that the customary laws are in a better position on determining the rights of survivals to inherit, own property and protect the same properties like the property at hand. He supported this argument by citing provisions of Section 11(1) of the Judicature and Application of Laws Act, Cap 258 (JALA) and the case of **Asinawi Ramadhani vs Hamis Ally**, Misc, Land Application No. 24 of 2019 (High Court Tanga). He further stated that the plaintiffs are already owners of the suit property on their own after they inherited it customarily from their deceased father.

He concluded by praying that the raised preliminary objections be dismissed with costs.

After a careful consideration of the parties rival submission, in determining the above preliminary objection, I will be guided by the principle established in the case of **Mukisa Biscuits Manufacturing Co. L.T.D versus West End Distributors L.T.D (1969) EA 696 (supra)**, which affirmed a preliminary objection to have the following test;

" A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out

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of pleadings, and which if argued as a preliminary point may dispose of the suit”.

And also, the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women Christians Association of Tanzania, Civil Appeal No. 2 of 2010 (Unreported)** gives a detailed account of what a point of law is. It was observed in the said case that...

*“a point of law must be that of sufficient importance and, I would add that **it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**”(Emphasis supplied).*

Guided by the above established principles, and having gone through the raised preliminary objections, it is my finding that all of the four raised preliminary objections contains points of law and facts which would need long argument and evidence to ascertain.

For example, in the first point of objection, one would need to identify whether the 4th defendant who was the plaintiff in Land Case No. 308 of 2022 is related to the current plaintiffs and whether the subject matter which is said to measure 450 acres in the current case is the same.

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as the one which was said to measure 400 acres in Land Case No. 308 of 2022.

The point on whether the plaintiffs are suing on their individual capacity or as administrator of the estates of their deceased father will also need evidence to ascertain it.

The point of cause of action against the Ndwati hamlet Chairperson and the 4th defendant cannot be determined at this stage as pure point of law because the plaintiffs are at liberty to sue persons within whom they are capable of proving the claims against them. In addition, the 1st 2nd and 3rd defendants are not the legal representatives of the 4th defendant hence they cannot argue on his behalf on whether the plaintiffs has cause of action against him or not.

Having said so, I find all of the four preliminary objections to have no merit and they are hereby overruled with costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "A. Msafiri".

A. MSAFIRI

JUDGE

14/11/2023