

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 171 OF 2023**

**SUNDAY ALEX LONDOISKA ..... PLAINTIFF**

**VERSUS**

**UPENDO SALAMA JUMBE** (*sued through her Attorney*)

**JAMILA MWINJUMA JUMBE ..... DEFENDANT**

*Date of last order: 09/11/2023.*

*Date of Ruling: 14/12/2023.*

**RULING**

**I. ARUFANI, J.**

This ruling is for the points of preliminary objections raised by the counsel for the defendant against the claims of the plaintiff which read as follows: -

- (1) *The court has no jurisdiction to entertain the plaintiff's suit.*
- (2) *That the Plaintiff suit is incompetent for suing a wrong defendant herein.*

With leave of the court the above stated points of preliminary objections were argued by way of written submissions. While the submission of the defendant was drawn and filed in the court by Mr. Hance Mrindoko, learned advocate, the submission of the plaintiff was drawn and filed in the court by Mr. Ansbert Rugaibura, learned advocate.

The counsel for the defendant stated in relation to the first limb of the preliminary objection that, the plaintiff's cause of action against the

defendant is for recovery of rent arrears. He argued that, the plaintiff has stated that the cause of action in the present suit arose sometime in 2015. He argued that, although the plaintiff has not specifically stated when the cause of action arose but his claim on recovery for rent arrears arose from 2015 while the present suit was instituted in the court in 2023 which is after the elapse of more than seven years.

He submitted that, the law governing limitation of time for institution of various suit in the court is the Law of Limitation Act, Cap 89 R.E 2019 in which item 13 of Part I of the Schedule provides that, the time for instituting a suit for recovery of rent arrears in court is 6 years. He argued that, from 2015 till when the instant suit was lodged in the court more than 8 years had lapsed and no leave was sought to institute the suit in the court out of time. He submitted that, as the suit is out of time, the court has no jurisdiction to entertain it for being time barred.

He stated in relation to the second limb of preliminary objection that, the plaintiff's suit is incompetent for suing a wrong defendant. The counsel for defendant submitted that, once a suit has been brought against or by a representative capacity the instrument of giving him power to bring a suit is required to be filed in the court. He stated that, the plaintiff in the instant case is suing the defendant through representative

capacity while one can be appointed legal representative of someone at one instance and be removed at any moment.

He argued that, the plaintiff was required to sue the defendant in person and the defendant could have opted whether to continue with the suit in person or in a representative capacity. He submitted that the plaintiff is incompetent for suing a wrong defendant or suing the defendant without placing the instrument that appointed the representative of the defendant. He finalized his submission by praying the instant suit be dismissed with cost for being time barred and for being incompetent.

In his reply the counsel for the plaintiff stated in relation to the first limb of preliminary objection that, it is trite law that jurisdiction is a sacrosanct of the court and it goes to the root of the suit. He submitted that this court is vested with requisite jurisdiction to entertain the present suit. He added that the provision of the law cited by the defendant is distinguishable to the suit at hand as the cause of action in the present suit is originating from the consent judgment which its limitation of time as provided under item 16 of the schedule to the Law of Limitation Act is twelve years. He went on arguing that, as paragraphs 3 and 7 of the plaintiff shows the suit is founded on the consent Judgment and the cause of action accrued from consent judgment then the preliminary objection raised by the counsel for the defendant be dismissed.

He argued in relation to the second point of preliminary objection that, the plaintiff is at liberty and knows better to whom the claims he has raised lies against. He submitted it is trite law that preliminary objection must be on point of law and if the defendant raised a preliminary objection must specifically plead the law which is offended or not complied with. He added that the second preliminary objection is incompetent as it is not specific as to which law is offended. To support his argument, he referred the court to the case of **Cosmas Mwaifani V. Attorney General & Two Others**, Civil Appeal No. 312 of 2019, CAT at DSM (Unreported). He concluded his submission by praying the preliminary objections raised by the counsel for the defendant be dismissed with costs.

Having dully considered the rival submissions from the counsel for the parties the court has found the issue to determine here is whether the preliminary objections raised by the counsel for the defendant deserve to be sustained. I will start with the first limb of preliminary objection which states the court has no jurisdiction to entertain the plaintiff's suit. The court has decided to start with the stated preliminary objection because the issue of limitation of time to institute a suit in court is paramount and when raised by parties the court is compelled to determine it in the earliest possible opportunity for the reason that it touches jurisdiction of the court to entertain the matter. The stated position of the law can be seeing in

the Case of **NBC Limited @ IMMMA Advocates V. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 CAT at Mbeya (unreported) where it was stated that: -

*"...courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which litigation period has expired."*

While being guided with the position of the law stated hereinabove the court has found the argument by the counsel for the defendant that the court has no jurisdiction to entertain the plaintiff's suit is based on ground that the plaintiff's cause of action is for recovery of rent arrears. The counsel for the defendant argued that, that being the claim of the plaintiff then as provided under item 13 of Part I of the Schedule to the Law of Limitation Act, the plaintiff's suit ought to be filed in the court within six years. He submitted that, as the plaintiff avers in the plaint that the cause of action arose sometimes in 2015 and the suit was filed in the court on 31<sup>st</sup> May, 2023 the court has no jurisdiction to entertain the suit as it was filed in the court after the elapse of about eight years which is out of the period of time prescribed by the law cited hereinabove.

On the other hand, the plaintiff's counsel argued that, the plaintiff's cause of action against the defendant originated from the consent judgment entered by the parties which its limitation of time as provided

under item 16 of Part I of the schedule to the Law of Limitation Act is twelve years. The counsel for the plaintiff submitted that the court is well vested with jurisdiction to entertain the matter and the provision of the law cited by the counsel for the defendant to support his submission is distinguishable to the case at hand.

To the understanding of this court, it is a settled position of the law that, an objection on account of limitation of time is one of the preliminary objections which is based on pure point of law and it touches jurisdiction of the court and its determination does not require ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the plaint and its annexures without any further facts or evidence to be ascertained in determining whether the suit is time barred. The Court of Appeal stated in the case of **Ali Shabani and 48 Others V. Tanzania National Roads Agency & Another**, Civil Appeal No. 261. of 2020 (unreported) where it was stated that: -

*"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence.*

From the above stated position of the law, it is crystal clear that, to determine a preliminary objection court needs only to look into pleadings and its annexures without any further facts or evidence to establish the raised preliminary objection. After examine the facts pleaded in the plaint and its annexures the court has found the plaintiff's cause of action is pleaded at paragraph 6 of the plaint which read as follows;

*"6. That the plaintiff's claim against the defendant is the total of Tshs. 300,000,000/= being compensation for mesne profit accrued from the joint property since 2015 in which the plaintiff has solely benefiting from joint property without according stake of plaintiff who is a co-occupant."*

From the wording of the above quoted paragraph of the plaint it is crystal clear that the plaintiff's claims against the defendant is for payment of mesne profit from joint owned property. Section 3 of the Civil Procedure Code Cap 33 R.E 2019 defined the term "mesne profit" as follows: -

*"mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession"*

That being the meaning of the claim of the plaintiff against the defendant the court has found the plaintiff is not claiming for recovery of

land rent arrears which its limitation of time to claim for the same is supposed to be governed by item 13 of Part I of the Law of Limitation Act. To the contrary the court has found the claim of the plaintiff against the defendant as averred at paragraph 6 of the plaint is for payment of compensation of mesne profit accrued from the property the plaintiff alleged is owned jointly by him and the defendant.

The court has also come to the stated finding after seeing it is averred at paragraph 4 of the plaint and stated in annexure A2 to the plaint that, the suit property is under ownership of tenancy in common whereby the plaintiff owns 50% shares and the defendant owns 50% shares. The mentioned paragraph 4 and annexure A2 to the plaint reveals further that, the plaintiff is not a lessor and the defendant is not a lessee on the suit property and there is no lease agreement entered by the plaintiff and defendant to enable the plaintiff to claim for rent arrears from the defendant.

That being the position of the matter the court has found that, as the first preliminary objection raised by the counsel for the defendant was based on item 13 of Part I of the Schedule to the Law of Limitation Act and the court has found the claim of the plaintiff is not governed by the cited provision of the law, then it is crystal clear that the first preliminary objection raised by the counsel for the defendant is devoid of merit.

The court has also being of the view that, even if for the sake of argument it will be said as the claim of the plaintiff is for payment of compensation of mesne profit which limitation of time to file the same in the court as provided under item 1 of Part I of the Schedule to the Law of Limitation Act is one year but as stated at paragraph 7 of the plaint, the plaintiff avers the defendant has leased the suit premises to different tenants from 2015 up to now and is solely benefiting from the suit premises and denied the plaintiff his right.

The stated averment makes the court to find that, although the plaintiff avers his claim against the defendant commenced from 2015 but his claim is a continuing claim which as provided under section 7 of the Law of Limitation Act is continuing to accrue up to now. The cited provision of the law states as follows: -

*"Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."*

The above quoted provision of the law was considered in number of cases including 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. From the wording of the above cited

provision of the law and the cited authority together with all what have been stated hereinabove the court has found the suit filed in this court by the plaintiff is not time barred. In the premises the court has found the first point of preliminary objection raised by the counsel for the defendant that the court has no jurisdiction to entertain the plaintiff suit is devoid of merit.

Coming to the second point of preliminary objection the court has found the counsel for the defendant argued the plaintiff's suit is incompetent for suing the defendant through her attorney instead of suing her in her personal capacity. He argued that, as someone can be appointed to representative another person in one instance and he can be removed at any time, the current suit is incompetent for suing a wrong party. On the other hand, the plaintiff argued that, the plaintiff is at liberty and knows better to whom his claim is supposed to lie.

He added that a preliminary objection must be on point of law and the defendant must specifically plead the law which is offended thus the second point of preliminary objection is not competent for failure to name the law which is contravened. The court is in agreement with the counsel for the plaintiff's submission that it is a settled position of law that, in determining preliminary objection the court has to look on the pleadings presented by the parties and not evidence out of the pleading to

determine the preliminary objection. The stated position of the law can be seen in the Case of **Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] E.A 696 where it was held that: -

*"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. It cannot arise if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".*

The above stated position of the law was reinstated by the Court of Appeal in the case of **Soitsambu Village Council V. Tanzania Breweries Ltd & Another**, Civil Appeal No. 105 of 2011 (unreported), where it was held that: -

*"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."*

While being guided by the position of the law stated in the above quoted excerpts the court has examined the parties' pleadings together

with the exhibits annexed thereto and find that, apart from being indicated at the title of the suit that the plaintiff's suit is made against the attorney of the defendant but there is nowhere else in the pleadings filed in the suit stated Jamila Mwinjuma Jumbe is an attorney of Upendo Salama Jumbe. The court has also found there is no document attached thereto to establish that Jamila Mwinjuma Jumbe has power to defend the suit on behalf of Upendo Salama Jumbe emanating from the suit premises.

However, the court has found as the counsel for the plaintiff has argued the claims of the plaintiff is emanating from the consent settlement order executed in relation to the suit premises which was entered when Jamila Mwinjuma Jumbe was acting as an attorney of Upendo Salama Jumbe the court has found the issue as to whether Jamila Mwinjuma Jumbe has been authorized to defend the present suit or be sued from matters emanating from the suit premises on behalf of Upendo Salama Jumbe remain contentious issue in the suit.

That being the position of the matter the court has found in order to ascertain whether Jamila Mwinjuma Jumbe is the authorized agent to defend the instant suit requires the court to seek evidence from the parties to ascertain the mentioned attorney was properly impleaded in the matter as attorney of the defendant or not. If evidence is required out of the pleadings and the exhibits annexed thereto to establish the defendant

was not required to be sued through the stated attorney, it is crystal clear that, the second point of preliminary objection cannot be determined as a preliminary objection because it will be contrary to the position of the law stated in the cases of **Mukisa Biscuits Manufacturing Co. Ltd** and **Soisambu Village Council** cited hereinabove.

Sequel to that, the court has found that, even if it will be accepted the defendant was required to be sued in her personal capacity and not through her attorney but that cannot be used as a ground of defeating the claims of the plaintiff against the defendant. The court has come to the stated finding after seeing that, the position of the law as provided under Order I rule 9 of the Civil Procedure Code, the plaintiff's suit cannot be defeated because of non-joinder or misjoinder of the defendant. The court has found as provided under Order I Rule 10 (2) of the Civil Procedure Code the court can order the defendant be sued in the case in her personal capacity if there is a need of doing so for the purpose of enabling it to effectively and completely adjudicate and settle all issues involved in the suit.

That being the position of the law the court has found the second preliminary objection is lacking qualification of being preliminary objection because as stated in the case of **Mukisa Biscuits Manufacturing Company Limited** (supra) it cannot dispose of the suit as there is a room

for the court to order the pleadings be amended to sue the defendant in her personal capacity instead of suing her through her attorney. It is because of the above stated reasons the court has found both points of preliminary objections raised by the counsel for the defendant are devoid of merit and they cannot be sustained.

Consequently, both points of preliminary objections raised by the counsel for the defendant are hereby overruled in their entirety for being devoid of merit and the costs to be within the suit. It is so ordered.

Dated at Dar es salaam this 14<sup>th</sup> December, 2023.

**Court:**



  
I. Arufani.  
**JUDGE**  
14/12/2023

Ruling delivered today 14<sup>th</sup> day of December, 2023 in the presence of Mr. Alfred Rweyemamu, learned advocate holding brief for Mr. Ansbert Rugaibura, learned advocate for the plaintiff and in the presence of Mr. Alfred Rweyemamu, learned advocate for the defendant. Right of appeal to the Court of Appeal is fully explained.



  
I. Arufani.  
**JUDGE**  
14/12/2023