

**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 EUGEN MUSHI** ..... **2<sup>ND</sup> DEFENDANT**

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

*Date of last Order: 24/05/2023*

*Date of Ruling: 02/06/2023*

**RULING**

**I. ARUFANI, J**

Under normal circumstances an objection raised in a case is not countered by an objection. It is countered by arguments and submissions. However, there are some exceptional circumstances where an objection raised in a case may be countered by an objection where it seems the objection raised in a case cannot be entertained by the court. It is under the stated exceptional circumstances the court has found itself in a task of entertaining objection raised in the case at hand against the notice of preliminary objection filed in the court by the counsel for the defendants.

When the suit at hand came on 25<sup>th</sup> April, 2023 for proceeding with hearing the evidence of fourth defendants' witness the court was informed by advocate Anindumi Jonas Semu who was engaged by the defendants

to replace advocate Emmanuel Kessy who was representing the defendants in the suit in partnership with advocate Wilson Ogunde that, on 21<sup>st</sup> April, 2023 he filed in the court the notice of preliminary objection and prayed to be allowed to argue the points raised therein by way of written submission. The stated prayer was strongly objected by advocate Gideon Opanda who is representing the plaintiff in the matter. The counsel for the plaintiff raised various reasons to show the preliminary objections raised by the mentioned counsel for the defendants are not maintained.

The matter was adjourned and the court required the counsel for the parties to come to the court on 16<sup>th</sup> May, 2023 to address it on propriate and merit of the notice of preliminary objection filed in the court by the counsel for the defendants. When the matter came for hearing the counsel for the parties on the stated propriate of the notice of preliminary objection filed in the court by the counsel for the defendants the plaintiff was represented by Mr. Gideon Opanda learned advocate and the defendants was represented by Mr. Anindumi Jonas Semu and assisted by Mr. Wilson Ogunde, learned advocates.

The counsel for the plaintiff told the court that, the notice of preliminary objection filed in the court by the counsel for the defendants is in respect of **Land Case No. 193 of 2023** and the parties are **Abdul**

**Rajabu Zahoro versus Kuringe Real Estate and Others** and he has prayed the suit to be dismissed with costs. He argued the case before the court is not Land Case No. 193 of 2023 but Land Case No. 193 of 2021 and the parties in Land Case No. 193 of 2021 are not the parties mentioned in the notice of preliminary objection. He stated the parties in the Land Case No. 193 of 2021 are **Abdul Rajabu Zahoro** (suing as Administrator of the Estate of the late **Rajabu Zahoro**) as a plaintiff and the defendants are Kuringe Real Estate Company Limited, Edward Eugene Mushi and Hilda Raphael Soka.

He argued that shows the notice of preliminary objection filed in the court by the counsel for the defendants is not in respect of the suit before the court but in respect of a totally different case as the number of the case and the parties cited in the notice of preliminary objections are quite different from the number of the case and parties in the suit before the court. He submitted that, as the number of the case cited in the notice of preliminary objections is totally different from the number of the present case and the notice shows the plaintiff is suing in his personal capacity as a plaintiff while the plaintiff in the case at hand is suing as an administrator of the estate of the late Rajabu Zahoro the notice of preliminary objection is unmaintainable.

He went on arguing that, even if it will be assumed the number of the case intended to be cited in the notice of preliminary objection is 193 of 2021 and not 193 of 2023 and the parties are the one involved in the suit at hand but the similar points of preliminary objections raised in the notice of preliminary objections filed in the court by the counsel for the defendants were raised in the suit and withdrawn without leave to refile and there is no order made by the court to vacate the order of withdrawn the former points of preliminary objections. He stated under that circumstances the court is functus officio and stated to refile the same objection in the court is an abuse of the court process. He supported his argument with the case of **Steven Masato Wasira V. Joseph Sinde Warioba**, [1999] TLR 334 where it was held that, litigation has to come to an end.

He argued that, as the similar preliminary objections were raised in the matter and withdrawn the court cannot allow the same preliminary objections to be refiled in the same case. He referred the court to the case of **Kuringe Real Estate Company Ltd V. Bank of Africa & Three Others**, Misc. Com. Application No. 18 of 2020, HC Com. Div. at DSM (unreported) where it was stated that, withdrawal of a matter precludes subsequent preference of application of a similar nature by the same parties. He also referred the court to Order XXIII Rule 1 (3) of the Civil

Procedure Code, Cap 33 R.E 2019 which bars refiling of a suit from the court without leave from the court to refile the same in future.

He cited in his submission the case of **Halma Hamisi Rajabu Budda V. Abubakari Hamisi**, Misc. Civil Application No. 34 of 2022, HC at Arusha (unreported) where it was stated that, withdrawing a matter does not change the fact that it was once filed in the court. He argued the principle laid by the court in the foregoing cited case is that once matter is withdrawn from the court it cannot be refiled without leave of the court.

He stated they are aware that preliminary objection on point of law can be raised in a matter at any time. He however submitted that, as the preliminary objections raised in the notice filed in the court by the counsel for the defendants were raised in the written statement of defence filed in the court by the defendants and withdrawn the notice of preliminary objection filed in the court should be struck out and prayed the court to strike the same out with costs.

In his response Mr. Anindumi Semu told the court that, what they filed in the court on 21<sup>st</sup> April, 2023 is a notice that the defendants intend to raise the points of preliminary objections listed in the notice they have filed in the court and if they will be given chance by the court, they will argue them. He stated what they have filed in the court is a notice and

not preliminary objections. He argued that, the counsel for the plaintiff has not stated is using which law to object the notice they have filed in the court. He argued the law does not provide for how a notice of preliminary objection is required to be brought to the court.

He argued that, the issue of arithmetic error in the case number is a typographical error which can be cured by way of amendment through Order VI Rule 17 read together with section 95 of the Civil Procedure Code as the error does not go to the merit of the case. He argued that, the court can also rely on section 3A of the Civil Procedure Code to cure the stated error. He stated the court is required to see the rights of the parties in the matter are protected. He stated the court is required to be guided by what will be argued by both sides in relation to the points of preliminary objections contained in the notice and not otherwise.

He submitted it is true that there were preliminary objections which were raised in the matter and were withdrawn from the court. He argued the said preliminary objections were raised in the written statement of defence in respect of the plaint which was before the court but now they are no longer in existence in the present suit. He argued the stated pleadings were amended and the notice of preliminary objection he has raised in the matter is in respect of the amended plaint which has never been challenged by any preliminary objection.

He argued the various cases cited to the court by the counsel for the plaintiff were dealing with withdrawal of suit and application from the court. He submitted the preliminary objection withdrawn from the court were not part of the proceedings and were never heard and determined. He stated the preliminary objections intended to be argued in the notice they have filed in the court is that the plaintiff's claim is time barred. He submitted that, section 3 (1) of the Law of Limitation Act, Cap 89 R.E 2019 states a case filed in the court out of time ought to be dismissed notwithstanding the that limitation of time has been raised as a defence or not.

He bolstered his submission with the case of **Elibariki Malley V. Salim Karata**, Civil Appeal No. 27 of 2022, CAT (unreported) where it was stated that, court cannot keep quiet when there are irregularities in a matter which need clarification. He stated it was held in the same case that; the issue of law can be raised at any stage of the case. He stated the issue of defective verification of the amended plaint has never been raised in the matter and the issue of plaintiff to lack locus standi to sue are points of law which go to the merit of the case. Finally, he prayed the court to allow their preliminary objections to be heard.

In his rejoinder the counsel for the plaintiff argued that, the counsel for the defendants is misleading the court by saying what they have

brought to the court is a notice and not preliminary objections. He stated it is not true that the law does not provides for how the preliminary objection is required to be brought in a suit. He went on arguing that, the error on the number of the case is not a typographical error as it is talking of a different case and different parties. He submitted Order VI Rule 17 of the Civil Procedure Code is not relevant in the matter as the notice of preliminary objection is not a pleading envisaged in the cited law. He stated the term pleading is defined under Order VI Rule 1 of the Civil Procedure Code to mean a plaint or written statement of defence.

He argued that, to say the defects in the notice of preliminary objection can be cured by section 3A of the Civil Procedure Code is improper as he has not stated how the principle of overriding objective can be used to cure the stated defects. As for the argument that the withdrawn preliminary objections were in respect of the former plaint, he stated that does not give the counsel for the defendants right to refile in the court the preliminary objection which were withdrawn from the court.

He stated if the issue was to file preliminary objection in respect of the amended plaint, he was required to file the same in their amended written statement of defence and not to file the same at the stage the case has reached. He submitted to file the same at this stage is an afterthought. He prayed the court to take into consideration the stage the



case has reached. He stated withdrawing preliminary objection is one way of disposing of the preliminary objection. He stated the argument that it is not in the record of the matter that the preliminary objections were not raised in the matter is not true as it is in the record of the matter that the preliminary objections were raised and withdrawn.

It was stated by the counsel for the plaintiff that, the issue of withdrawal is in respect of a suit and not preliminary objection, the law is not static and the court has given different interpretation to include every matter withdrawn from the court. He stated the point of limitation of time was raised in the previous notice as it was stated the court had no jurisdiction to entertain the matter.

He submitted the case of **Elibariki Mally** (supra) is not applicable in the matter at hand. He stated all the points raised in the notice of preliminary objection were raised in the preliminary objection which were withdrawn from the court. He complained the preliminary objections have been raised in the matter he does not have instruction to represent the plaintiff. He ended his submission by praying the court to struck out the notice of preliminary objection filed in the court by the counsel for the defendants with costs.

After giving keen consideration to the arguments fronted to the court by the counsel for the parties in respect of the notice of preliminary

objection filed in the court by the counsel for the parties and after considering the objections raised by the counsel for the plaintiff the court has found the issue to determine in this matter is whether the notice of preliminary objections is maintainable and can be entertained by the court. In determine the above issue, I will start with the first ground of the objection raised by the counsel for the plaintiff which states the notice of preliminary objection is unmaintainable.

I will begin with the argument that, the notice of preliminary objection filed in the court by the counsel for the defendants is in respect of a totally different case from the case before the court. The court has found it is true as rightly argued by the counsel for the plaintiff that, the notice of preliminary objection filed in the court by the counsel for the defendants is in respect of totally a different land case number and different parties from the one in the case at hand.

The court has found the notice filed in the court by the counsel for the defendants is in respect of Land Case No. 193 of 2023 and the parties cited in the notice of preliminary objection are **Abdul Rajabu Zahoro versus Kuringe Real Estate Co Ltd & Others**. The stated citation is quite different from the case at hand which is Land Case No. 193 of 2021 and the parties are **Abdul Rajabu Zahoro** (Administrator of the estate of the late **Rajabu Zahoro**) as a plaintiff versus **Kuringe Real Estate**

**Company Limited, Edward Eugene Mushi and Hilda Raphael** as the first, second and third defendants respectively.

The court has found the counsel for the defendants has not disputed the notice of preliminary objection he has filed in the court has the stated defects. He just argued the defects are typographical errors which can be cured by way of allowing the notice to be amended. He stated the defects can also be cured by using overriding objective principle provided under section 3A of the Civil Procedure Code. The court has considered the suggestion made by the counsel for the defendants and find it is true that there are some circumstances where typographical errors or defects in a pleading or document filed in court can be cured by way of allowing the pleading or document to be amended or corrected.

The court has found the error or defect of naming a party to a case wrongly which will not mislead the court or the parties as to who is being referred in the pleading or document filed in the court was considered in the case of **Christina Mrimi V. Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011, CAT at DSM (unreported) where by the Court of Appeal endorsed the position stated in the case of **Evans Construction Co. Ltd V. Cherrington & Co. Ltd & Another**, [1983] 1 All E.R 310 where it was held that: -

*"... as the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holding Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued ... it would be just to correct the name of the respondent."*

From what was stated in the above cited cases it is the view of this court that, amendment or correction of a pleading or document can be allowed when the error or defect is not going to the root of the matter and it will not cause injustice to the other side. Now, the question to ask here is whether the errors or defects appearing in the notice of preliminary objection filed in the court by the counsel for the defendants can be cured by allowing the notice to be amended or the court can use section 3A of the Civil Procedure Code to cure the stated errors or defects.

The court has found the error or defect the counsel for the defendants is arguing are curable by way of amendment or by using section 3A of the Civil Procedure Code are not only on the number of the year of the case which is indicated in the notice is Land Case No. 193 of 2023 instead of Land No. 193 of 2021. The court has found the errors or defects are also on the parties cited in the notice of preliminary objection.

The court has found as rightly argued by the counsel for the plaintiff, the plaintiff is referred in the notice in his personal capacity while in the

case before the court is indicated is suing as administrator of the estate of the late Rajabu Zahoro. Sequel to that, the court has found the notice shows the defendants in the suit is Kuringe Real Estate Co. Ltd & Others and names of those other defendants are not disclosed anywhere in the notice of preliminary objection filed in the court by the counsel for the defendants.

To the view of this court the stated defects are not mere typographical errors or defects which can be cured by way of amendment or correction by using section 3A of the Civil Procedure Code as suggested by the counsel for the defendants as they are referring to a totally different case number and different parties from the one involved in the case before the court. The court has come to the stated view after seeing the parties referred as other defendants in the notice can be anybody including even persons who not parties in the case at hand.

Basing on the stated circumstances the court has come to the settled view that, failure to cite the correct year of the case and failure to name the parties in the case correctly are errors or defects which shows the court has not been properly moved. The foregoing view of this court is being bolstered by the position stated by the Court of Appeal in the case of **Quality Laboratory Tanzania Limited V. Shaban Hassan,**

Civil Appeal No. 152 of 2015, (unreported) where it was stated that, failure to cite the case properly renders the court improperly moved.

Although the foregoing finding would have been enough to dispose of the issue before the court but the court has found pertinent to say something in relation to the second ground raised by the counsel for the plaintiff to object the points of preliminary objection raised in the notice filed in the court by the counsel for the defendants to be entertained by the court. The court has found the counsel for the plaintiff stated the preliminary objection raised in the notice filed in the court by the counsel for the defendants were initially raised in the suit at hand but later on were withdrawn without leave to refile.

The court has found without beating about the bush it is proper to say at this juncture the position of the law as stated by our court in number of cases is very clear that, a matter withdrawn from the court cannot be refiled where there is no leave to refile granted by the court. That can be seen in the cases of **Kuringe Real Estate Co. Ltd** and **Halma Hamisi Rajabu Budda** (supra) cited to the court by the counsel for the plaintiff. The similar position of the law was stated in the case of **Kurwa Guchanya & 18 Others V. Grumeti Reserves Limited**, Misc. Labour Application No. 13 of 2021, HC at Musoma (unreported).

The question to determine here is whether the points of preliminary objections contained in the notice filed in the court by the counsel for the defendants have ever been filed in the court and withdrawn without leave to refile so that it can be said they cannot be refiled. The court has found the record of the matter speaks clearly that, initially after the defendants being served with the copy of the plaint, his counsel raised in the written statement of defence he filed in the court on 7<sup>th</sup> March, 2022 a notice of preliminary objection containing the following points of law: -

- 1. This honourable court has no jurisdiction to hear and determine the suit at hand*
- 2. The plaintiff has no locus standi to institute this suit*
- 3. The verification clause is incurably defective as failed to show paragraphs of own knowledge and that of information.*

The record of the case shows further that, when the matter came for hearing the listed points of preliminary objection on 23<sup>rd</sup> May, 2022 the counsel for the defendants prayed to withdraw the listed points of preliminary objection from the court. The prayer was granted and after withdrawing the stated points of preliminary objection, the plaintiff's counsel prayed for leave of the court to amend the plaint. After the prayer being granted the amended plaint was filed in the court on 30<sup>th</sup> May, 2022.

Thereafter, the matter proceeded and on 21<sup>st</sup> April, 2023 when the court was continuing with hearing of the evidence of the fourth defendants' witness, the newly engaged advocate for the defendants, Mr. Anindumi Jonas Semu filed in the court the notice of preliminary objection which is the subject matter in the instant ruling. The points of preliminary objection he has raised in the impugned notice of preliminary objection are as follows: -

- i. *This suit is hopeless time barren henceforth the same is to be dismissed with costs*
- ii. *That the plaintiff's complaint is incurably defective and bad in law for want of verification of paragraph 10 (i) and (ii) therein contrary to Order VI Rule 15 (1), (2) and (3) respectively.*
- iii. *That the plaintiff has no locus to sue in this matter."*

After carefully considering the two sets of preliminary objections quoted hereinabove the court has found that, although there are some similarities in some of the points of law raised in both notices of preliminary objection but there are also some dissimilarities in the two sets of the notices of preliminary objections. The court has found while the first point of preliminary objection in the first notice of preliminary objection was stating the court has no jurisdiction to entertain the suit at hand, the first



point of preliminary objection in the current notice of preliminary objection states the suit is time barred.

Although it is true as argued by the counsel for the plaintiff that the issue of limitation of time relates to the jurisdiction of the court to entertain the matter but there is nothing material available to establish the jurisdiction of the court intimated in the first notice of preliminary objection was in respect of the limitation of time. Under that circumstances it cannot be said the first point of law raised in the current notice of preliminary objection has ever been filed in the court and withdrawn. The court has also found that, although the second point of preliminary objection in both notice of preliminary objections states verification clause was defective but the point in the second point of preliminary objection in the first notice of preliminary objection states the defect of the verification clause was about non-disclosure of the paragraphs verified on the information and the paragraphs verified or own knowledge.

The court has found it is only the third point of preliminary objection which is almost similar in both notice of preliminary objections. However, the court has found that, while the first notice of preliminary objection was filed in the court in respect of the original plaint which has already being amended, the current notice of preliminary objection is supposed

to be considered in relation to the amended plaint which is moving the court to entertain the case at hand.

It is also the finding of this court that, although the impugned notice of preliminary objection is required to be considered in relation to the amended plaint but the second point of preliminary shows is challenging the verification clause of the plaint and not amended plaint which is another ground which is making the impugned notice of preliminary objection to be defective. Although as alluded hereinabove the points of preliminary objections raised in the impugned notice of preliminary objection could have been entertained by the court because they have never been raised in respect of the amended plaint and withdrawn so that it can be said they cannot be refiled in the court but the defects observed in the notice which is carrying the said points of preliminary objection makes the court to find it has not been properly moved.

Consequently, the court has found the objection raised by the counsel for the plaintiff that the notice of preliminary objection filed in this court by the counsel for the defendants on 21<sup>st</sup> April, 2023 is defective and has not properly moved the court to entertain it is meritorious and deserve to be upheld. In the upshot the stated notice of preliminary objection is hereby struck out for being incurably defective and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 30<sup>th</sup> day of March, 2023.



I. Arufani

**JUDGE**

02/06/2023

**Court:**

Ruling delivered today 02<sup>nd</sup> day of June, 2023 in the presence of Mr. Gedion Opanda, learned counsel for the plaintiff and in the presence of Mr. Anindumi Jonas Semu and Mr. Sylvester Korosso, learned counsel for the defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

**JUDGE**

02/06/2023