

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 188 OF 2022

ASALEA LUJABI KO KIHUPI.....1ST PLAINTIFF

ELESIA A. KIHUPI.....2ND PLAINTIFF

ELDA G. MSENGI.....3RD PLAINTIFF

CAROLINE S. MLAWA.....4TH PLAINTIFF

VERSUS

KISONGOI TIKWA MORETO.....1ST DEFENDANT

GEORGE SIMON KIFUKO.....2ND DEFENDANT

RULING

Date of Last Order: 28/11/2022

Date of Ruling: 16/02/2023

A. MSAFIRI, J

While filing their written statement of defence, both defendants presented a notice of preliminary objection on points of law to *wit*;

1. That, the suit is incompetent for mis-joinder of the parties as the defendants have been wrongful joined in this suit.
2. That, the plaintiffs have no cause of action against the defendants.

By the consent of this Court, the parties argued the preliminary objections by way of written submissions.

In support of the first limb of objection, Mr. Faraji Mangula, learned advocate for the defendants contended that, the land in dispute belongs

Alls

to Kigoda Village and the defendants are leaders of Kigoda Village, thus the plaintiffs by suing the defendants makes this suit unattainable in law and even if the plaintiffs attain a decree that decree will not be enforceable in any Court of law and thus wastage of time and energy as the land belongs to the Government.

He stressed that, there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential. He concluded that, the misjoinder of the Attorney General, Kibaha Municipal Council, and Kigoda Village Council is fatal and goes to the root of the case.

To buttress his contention, he cited the cases of **Braison Kaneja vs. Pilly Bwire Mkama Changuru**, Land Appeal No. 29 of 2020 (HCT-MUSOMA), (Unreported) and **Godfrey Nzowa vs. Selemani Kova & Another**, Civil Appeal No. 183/ 2019 (CAT-ARUSHA), (Unreported).

On the second limb of objection, the learned counsel for the defendants asserted that, it is of no dispute that the land claimed by the plaintiffs belongs to Kigoda Village and not the defendants. He submitted that, the plaintiffs have sued the wrong parties in this case and hence making them to have no cause of action against the defendants. Fortifying his submission, he cited the case of **John B. Byombalirwa vs. Agency Maritime International (T) Ltd** [1983] TLR 4.

To that end, the learned counsel for the defendants urged this Court to sustain the preliminary objections with costs.

In reply thereto, Mr Roman Selasini Lamwai, learned counsel for the plaintiffs stated that, the preliminary objections raised does not qualify to be preliminary objection which has to be on a pure point of law as per

Alls

the principle set in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors** [1969] EA 696 at page 70. He contended that the objections raised cannot be treated as preliminary objections as they require proof of the claims raised thereto.

On the first limb of objection, Mr Lamwai submitted that at this stage the Court cannot decide on the raised objection until it hears evidence on how and why the defendants have been sued in the present case and not the Attorney General, Kibaha Municipal Council and Kigoda Village as it was submitted by the defendants.

He contends that at this stage the plaintiffs knows the defendants are the one who trespassed to their property and defendants have to-date never served the plaintiffs with any notice from the government, municipal or any executive agency which claim to own the said property or authorize the action and even if the plaintiffs were served, they maintains the same to be subject to the evidence available, and thus does not qualify to be raised as preliminary objection as it is not certain.

He further submitted that, there is no contested dispute between the plaintiffs, Attorney General, Kibaha Municipal Council and Kigoda Village Council, as the former are unaware of the latters' involvement on the defendants' action of trespass. Therefore, the aforesaid do not have *locus standi* to be joined as parties in this suit and neither does the decree obtained can be executed against them.

Arguing on the second limb of objection, the plaintiffs' advocate asseverated that as far as paragraph 4 and 8 of the Plaint are concerned, the plaintiffs asserts that the defendants are the trespassers to the suit land the facts which has been denied by the defendants via paragraphs 2 *Alls.*


and 6 of their written statement of defence. He contended that, it is clear that there is a contest between the parties so as to give rise to a suit and that give rise to a cause of action. To bolster his submission, he cited the case of **John B. Byombalirwa vs. Agency Maritime International (T) Ltd (supra)**.

He submitted further that, the case of **Braison Kaneja** and that of **Godfrey Nzowa (supra)**, are distinguishable in the circumstances and prayed that the so-called preliminary objections be overruled with costs and the case be allowed to proceed with the hearing on merit

In his brief rejoinder, the defendant's counsel reiterated his submissions in chief. Stressing on the point of misjoinder of parties, he argued that it is of essence and for the sake of justice for this Court to refer to annexure KV-2 annexed in the joint written statement of defence, mostly the minutes of the meeting of the village dated 15/05/2020 which proves that the village land claimed by the plaintiffs belongs to Kigoda Village, and thus the Attorney General, Kibaha Municipal Council and Kigoda Village Council are necessary parties to this case, as the decree that will be issued by this Court will affect them and to avoid multiplicity of cases it is good that these parties be joined in.


He reiterated his prayers.

I have given careful deliberation to the rival arguments in support and opposition as to the preliminary objection advanced by both learned counsels. Having done so, the main issue for determination is whether the preliminary objections are meritorious.

Order I, Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] herein as the CPC, provides to the effect that: 

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise".

I have gone through the Court records and submissions by the counsel for the plaintiffs and noticed that, the non-joinder of the Attorney General, Kibaha Municipal Council and Kigoda Village Council and misjoinder of the defendants to this suit as highlighted by the counsel for the defendants is not an accidental omission/ error rather it was for a purpose for reasons well known to the plaintiffs advocate and his clients. Normally, the plaintiffs are the one who knows who to sue and not to sue. That is why, I stoutly stand with the submissions by the counsel for the plaintiffs that, the Court cannot decide on the raised preliminary objections until it hears evidence on how and why the defendants have been joined in the present suit and not the aforementioned and consequently, that said, does not qualify to be raised as preliminary objection and thus overruled.

The contention by the counsel for the defendants that, the decree cannot be effective without the absent parties, so to say, is going further in determining the tenable or untenable of this matter and not the preliminary objection as presented by him. For the foregoing reasons, I find that the first limb of preliminary objection has no merit and is hereby overruled. 

On the second limb of objection, let it be known that, cause of action is a creature of law under Order VII, Rule 1 (e) of the CPC which makes it mandatory for a plaint to constitute a law action.

Upon examining the submissions for and against by the counsels for parties herein and the pleadings filed before this Court, it will be difficult at this stage for the Court to determine whether the plaintiffs have cause of action against the defendants or not because in doing so, the Court shall require evidence in support or against the claim and this disqualifies this point of objection as a preliminary objection and so, this limb of objection is also overruled.

In view of what I have expressed above, I find and hold that the preliminary objections on points of law which was raised by the defendants lacks merits and, in the result, are overruled with costs.

It is so ordered.



A. MSAFIRI

JUDGE

16/02/2023