

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 231 OF 2023

SALUM JOKONO 1ST PLAINTIFF

MSHAMU ABDALLAH 2ND PLAINTIFF

HASSAN MOHAMED 3RD PLAINTIFF

VERSUS

**KHALID SAID KIBINDA (Administrator of Estate
of the late Maulid Nassoro Mkasi) 1ST DEFENDANT**

TEMEKE MUNICIPAL COUNCIL 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

Date of last Order: 02/11/2023

Date of Ruling: 02/2/2024

RULING

I. ARUFANI, J

This ruling is for the preliminary objections on points of law raised in the written statement of defence of the second and third defendants in the matter which read as follows: -

- 1. The suit is incompetent on account of non-joinder of Registrar of Titles and Commissioner for lands as necessary parties.*
- 2. The plaint is defective for lack of locus standi.*

The plaintiffs who are also defendants in the counter claim raised in the written statement of defence of the first defendant raised an objection in their written statement of defence to the counter claim that *the plaintiff in the counter claim has no cause of action against them*. By consent of the parties and their counsel the stated points of preliminary objections were argued by way of written submissions. The written submission by

the second and third defendants were drawn and filed in the court by Ms. Frida Mollel, learned State Attorney representing the second and third defendants in the matter and it was replied by the submissions drawn and filed in the court by the plaintiffs in person. As for the submissions of the defendants in the counter claim was drawn and filed by the defendants in person and it was replied by the submission drawn and filed in the court by Mr. Mluge Karoli Fabian, learned advocate for the plaintiff in the counter claim.

Starting with the first point of preliminary objection raised by the second and third defendants in the main suit the court has found the counsel for the second and third defendants stated that, Order I Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 states all persons may be joined as defendants against whom any right to relief in respect of any act or transaction is alleged to exist. She argued that, the plaintiff did not join the Registrar of Titles and Commissioner for Lands as necessary parties in the present suit. She submitted that failure to join the mentioned parties make the suit to be incompetent and prayed the suit be struck out.

She stated the claims of the plaintiffs as appearing at paragraphs 5, 7 and 9 of the plaint relates directly to the Registrar of Titles and Commissioner for Lands who are responsible with planning, granting and registration of all lands in Tanzania including the suit property. She stated

the plaintiff avers at paragraph 9 of the plaint that the second defendant failed to register their title while the authority responsible with registration of the land title is the Registrar of Titles. She stated registration of the land located on Plot No. 518 Block "I" Sandali in Temeke Municipal Council, Dar es Salaam was done by the authorities which are not parties in the matter.

She referred the court to the case of **Abdullatif Mohamed V. Mahboob Yusuph Osman & Another**, Civil Revision No. 6 of 2017 (unreported) where the term necessary party in a suit was defined to mean a person in whose absence no effective decree or order can be passed. She argued that, as the plaintiffs are claiming for ownership over the registered land without including the authority that granted and registered the same there is non-joinder of necessary parties in the suit which may lead to failure to issue effective decree in the suit.

She argued that, although Order I Rule 9 of the CPC states no suit shall be defeated because of misjoinder or non-joinder of parties but as stated in the case of **Ilala Municipal Council V. Sylvester J. Mwambije**, Civil Appeal No. 155 of 2015, Court of Appeal (unreported), Order I Rule 9 of the CPC is good in respect of misjoinder and non-joinder of non-necessary parties and not necessary parties. She also cited in her submission Order 1 Rule 10 (2) of the CPC which states the court has power to order a party who was not joined in a suit as a plaintiff or

defendant be joined in a suit to enable the court to adjudicate effectively and completely and settle all the questions involved in the suit. She also referred the court to the case of **Chinese – Tanzania Joint Shipping Company V. Richard Gordon Musika** (Administrator of Estate of the late **Edna Nsambe Thom Mwakambuke**) & **Two Others**, Land Case No. 271 of 2022, HC Land Div. at DSM (unreported) where it was held failure to join necessary party in a suit is fatal and the court struck out the suit.

She stated in relation to the second preliminary objection that, the plaintiffs are representing other members of Umoja wa Magenge Sandali and they have filed the suit in the court without seeking leave of the court to represent the other 19 members of their association. She argued Order I Rule 8 of the CPC states where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit on behalf of or benefit of all persons so interested.

She argued the plaintiffs have stated at paragraph 6 of the plaint that, they are remaining founders out of 19 founders of Umoja wa Magenge Sandali who conducted business on the land in dispute but there is no leave or permission from the court allowing them to sue on behalf of the remaining traders. She submitted lack of the stated leave makes the suit incompetent and the remedy is for the suit to be struck out. At

the end she prayed the court to strike out the suit for non-joinder of necessary parties and for lack of locus standi to sue.

In rebutting the submission of the counsel for the second and third defendants the plaintiffs stated in relation to the first point of preliminary objection raised by the stated defendants that, the stated point of preliminary objection lacks merit as the suit land has not been registered by the Registrar of Title or Commissioner for Lands. He stated the Official Search letter issued by the office of the Registrar of Titles dated 9th October, 2019 states clearly that there is no any record of Plot No. 518, Block "I" in their office and directed them to look for the said record in the office of the authorized Land Officer or Commissioner for Lands at Temeke Municipal council. They submitted that shows there is nothing making the mentioned officers to be joined in the present case as necessary parties.

They argued in relation to the second preliminary objection that the raised preliminary objection is devoid of merit because they did not file the instant suit in the court as the representative of other members. They stated that, as averred at paragraphs 1 and 6 of the plaint they filed the instant suit in the court as the remaining founders of the Umoja wa Magenge Sandali, hence there was no need for them to seek for leave of filing the suit in the court. They stated that, initially their association had 19 members but later on other members failed to meet the requirement

of their constitution and caused the association to remain with only three members who are now suing in the instant suit.

They cited in their submission the case of **Peter Mpalanzi V. Christina Mbaruka**, Civil Appeal No. 153 of 2019, CAT at Iringa (unreported) where it was stated locus standi is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. They argued the Court of Appeal stated in the cited case that the plaintiffs had interest in the subject matter as they own and use the same since 1983 and held that they had locus standi to claim over the subject matter. At the end they prayed the preliminary objections raised by the second and third defendants be overruled with costs.

As for the preliminary objection they raised in their written statement of defence to the counter claim that, the plaintiff in the counter claim has no cause of action against them, they stated their preliminary objection is divided into two parts. They stated the first part is about the difference in the subject matter and the second part is about the silence of the counter claim on the acts done by the defendants after invading or trespassed into the land in dispute.

They argued in relation to the first part that, while the land in dispute in their case is in respect of Plot No. 518 Block "I" located at Sandali Ward, Temeke Municipality, Dar es Salaam, paragraph 14 and 16 of the counter claims shows the land in dispute in the counter claim is in

respect of Plots No. 519, 520 and 521 of the late Maulid Nassoro Mkasi, all located at Block "I", sandal Ward, Temeke Municipality. They submitted that, normally counter claim is required to be based on the same subject matter claimed in the main suit and not raising other subject matter. They cited in their submission Order VIII Rule 12 of the CPC and stated it empowers the court to order separate trial of counter claim if it is of the opinion that the subject matter of the counter claim ought to be disposed of by a separate suit.

They stated in relation to the second part of their preliminary objection that paragraphs 14 and 15 of the counter claim states the defendants have invaded and trespassed into the plots of the late Maulid Nassoro Mkasi without stating what was done by the invaders and the trespassers. They referred the court to the case of **Safari Mchuma V. Shaibu Shemdolwa** [1998] TLR 280 where the term trespass was defined to mean unjustifiable intrusion by one person upon the land in the possession of another. They submitted that, the first defendant ought to have stated in his counter claim the manner in which they trespassed on the lands alleged were trespassed by them. They prayed that, as it has not been stated how the lands referred in the counter claim were trespassed, the counter claim be dismissed with costs.

In response to the submission of the defendants in the counter claim that the plaintiff in the counter claim has no cause of action against them,

the counsel for the first defendant or plaintiff in the counter claim stated that, the term cause of action in our jurisdiction means legal claim that allows a party to seek for judicial relief. He referred the court to **Mulla on Code of Civil Procedure; Act V of 1908** Vol. 2 of 13th Edition at page 144 and the cases of **Lujuna Shubi Ballonzi, Senior V. Registered Trustees of Chama cha Mapinduzi**, [1996] TLR 203 and **Musanga Ng'andwa V. Chief Japhet Wanzagi & Eight Others**, [2006] TLR 351 where the term cause of action was defined.

He argued that, as the claims of the defendants in the main suit is in respect of their ownership to Plot No. 518 Block "I" Sandali Ward Temeke, Dar es Salaam, the claims by the plaintiff in the counter claim that the defendants have invaded and trespassed into his land located on plots No. 519, 520 and 521 Block "I" Sandali Ward Temeke, Dar es Salaam is a different claim from the claims of the defendants in the main suit. He submitted that, a counter claim must concern the same landed property and not a different landed property.

He went on argued that, although the first defendant has claimed in the counter claim that the plaintiffs have invaded and trespassed into his land located on the afore mentioned plots of lands but he has not stated what was done by the plaintiffs to establish how the plaintiffs invaded and trespassed into the mentioned plots of land. He argued that, a counter claim as provided under Order VIII Rule 9 (2) of the CPC is a

cross suit against the original plaint which ought to be treated separately and referred the court to the case of **NIC Bank Tanzania Limited V. Hirji Abdallah Kapikulila**, Civil Application No. 561/16 of 2018, CAT (unreported).

He also referred the court to the case of **Bibiana Limited V. CRDB Bank & Another**, Land Case No. 137 of 2017 where it was stated that, even if the plaintiff in the suit discontinued his suit or the suit is stayed or dismissed, still the counter claim can proceed as contemplated under Order VIII Rule 9 (2) of the CPC. He cited in his submission the case of **Fakurudin Ebrahim V. The Bank of Tanzania** [1978] TLR 45 and **Hans Nargosen V. BP Tanzania Ltd**, [1987] TLR 175 where it was stated that, all what is necessary to be set out in a plaint is the averment which if not traversed would entitle the plaintiff to a judgment.

He argued that, the question of stating the manner of the invasion and trespass will be stated at the time of adducing evidence during hearing of the case. He submitted that suggests the raised point of preliminary objection is not pure point of law and referred the court to the case of **Mukisa Biscuit Manufacturer Company Ltd V. West End Distributors Ltd**, [1969] EA 696 where the term preliminary objection was defined. He stated in the light of what was stated in the above cited case a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding the same.

He submitted that the prayer by the defendants in the counter claims that if it will be found there is no cause of action against them then the counter claim be dismissed is misleading as the remedy available where there is no cause of action in a suit is either to strike out the suit or order for its amendment. He supported his argument with the case of **J. B Shirima & Others V. Humphrey Meena T/A Comfort Bus Service**, [1992] TLR 290 where it was stated the court is required either to strike out the plaint or order an amendment to the plaint.

He went on submitting that, with the advent of overriding objective principle also known as oxygen principle brought by Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018 it requires the court to deal with cases justly and to have regard to substantive justice. He stated the mentioned principle requires courts to ensure cases are decided on merit and without undue delay and costs. he based on the stated principle to pray the court to overrule the raised preliminary objection with costs and proceed with the matter on merit for the interest of justice.

Having carefully considered the rival submissions filed in the court by both sides and after going through the pleadings filed in the court by both sides the court has found the grand issue to determine in the preliminary objections raised in the matter is whether the stated preliminary objections are meritorious. In determine the stated issue I will

deal with the preliminary objections as raised and argued by both sides and I will start with the preliminary objections raised by the second and third defendants.

I will start with the first preliminary objection raised by the second and third defendants which states the suit is incompetent on account of non-joinder of the Registrar of Titles and the Commissioner for Lands as necessary parties in the suit. The court has found as rightly argued by the counsel for the second and third defendants our law and specifically Order I Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 provides for who may be joined in a suit. It states 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.

The court has found the counsel for the second and third defendants submitted that, the Registrar of Titles and the Commissioners for Lands were supposed to be joined in the plaintiffs' suit as necessary parties because the plaintiffs' claims are direct to the mentioned parties who are responsible with planning, granting and registration of all lands in Tanzania. The counsel for the mentioned parties stated that, registration of Plot No. 518 Block "I" Sandali Area of Temeke Municipal Council which

the plaintiffs are praying to be declared they are lawful owners was done by authorities who are not parties or defendants in the suit at hand.

The court has found the follow up question is whether the Registrar of Titles and the Commissioners for lands ought to be joined in the instant suit as necessary parties. In order to be able to say the mentioned parties ought to be joined in the present suit as necessary parties it is to the view of this court apposite to have a look on who is a necessary party to a suit. The court has found the term necessary party was defined in the case of **Abdullatif Mohamed** (supra) cited in the submissions of the counsel for the second and third defendants to mean one in whose absence no effective decree or order can be passed.

That being the meaning of a necessary party the court has gone through the pleadings filed in the court by the parties with a view of seeing whether the court can pass an effective decree or order in relation to the reliefs the plaintiffs are seeking from the court without the presence of the mentioned parties in the suit as necessary parties. The court has found the plaintiffs have averred at paragraph 5 of the plaint that they are claiming for a declaratory order that they are the lawful owners of the land located on Plot No. 518 Block "I" Sandali Area, in Temeke Municipality, Dar es Salaam which they stated at paragraph 7 of the plaint it was granted to them by the second defendant in 1983 in fulfilment of

the Government agenda of "Nguvu Kazi" and they have been using the same from the stated year.

The court has found the plaintiffs have stated further in the mentioned paragraphs of their plaint that, the stated land is not registered by the Registrar of Titles and the stated averment is supported by the copy of the official search annexed to the plaint as annexure UMS 2. Although it is true that the power to allocate and register land in our country is vested to the Commissioner for Lands and the Registrar of Titles respectively, but as rightly argued by the plaintiffs there is nowhere stated by the plaintiffs that they were granted or allocated the land in dispute by the Commissioner for Lands and the land was registered by the Registrar of Titles as alleged by the counsel for the second and third defendants.

That being the position of the matter the court has failed to see what is making the Registrar of Titles and the Commissioner for Lands to be necessary parties in the present suit. The court has found as the plaintiffs have alleged that they were granted the land in dispute by the second defendant and the land has never been registered in the record of the Registrar of Titles, then it cannot be said the Commissioner for Lands and the Registrar of Titles are necessary parties in the present suit. The court has found the counsel for the second and third defendants has argued that, as the Registrar of Titles and the Commissioner for Lands granted and registered Plots No. 519, 520 and 521 to the first defendant,

then the Commissioners for Land and the Registrar of Titles were supposed to be joined in the suit as necessary parties.

The court has found that, as the claims of the plaintiffs is in respect of Plot No. 518 which the plaintiffs alleged it was granted to them by the second defendant and not in respect of the Plots No. 519, 520 and 521 granted and registered to the first defendant, it can be said the Commissioner for Lands and the Registrar of Titles are necessary parties in the suit filed in the court by the plaintiffs. The court has found that, as the office of the Registrar of Titles stated in the official search letter annexed in the plaint as annexure UMS 2 that they have no record of Plot No. 518 in their office, there is nothing to establish failure to join the Commissioner for Lands and the Registrar of Titles in the present suit will cause the decree or order to be passed by the court to be inexecutable. It is because of the above stated reasons the court has found in the circumstances of the present suit the first preliminary objection raised by the second and third defendants is devoid of merit.

Coming to the second preliminary objection raised by the second and third defendants which states the plaint is defective for lack of locus standi, the court has found the term locus standi is defined in the **Black's Law Dictionary**, (1979) 5th Edition at page 848 to mean a right of appearance in a court of justice, or before a legislative body, on a given question. As the counsel for the second and third defendants has argued

the plaintiffs have no locus standi to appear in the court to represent the other members of their association the question is whether the plaintiffs have locus standi to file the present suit in the court.

The court has found that, although the counsel for the second and third defendants has argued the plaintiffs have no locus standi to represent the other members of their association in the matter but as rightly argued by the plaintiffs there is nowhere stated the plaintiffs are representing the other members of their association in the matter. To the contrary the court has found the plaintiffs have categorically stated at paragraphs 1 and 6 of the plaint that they are the only remaining founders of the Umoja wa Magenge Sandali that means they are suing for their own rights. If they are the only remaining founders of the stated association, it cannot be said they are representing the others who are no longer members of their association.

As the plaintiffs are the only remaining members of the stated association it cannot be said they have no locus standi to institute the suit in the court to claim for what they think is their entitlement on a mere ground that they have not sought for the leave of the court to represent other persons who are no longer members of their association. In the premises the court has found the second preliminary objection raised by the second and third defendants that the plaint is defective for the plaintiff to lack locus standi to sue in the matter is devoid of merit.

With regards to the preliminary objection raised by the plaintiffs against the counter claim raised in the written statement of defence of the first defendant that the first defendant has no cause of action against the plaintiffs the court has found the term cause of action as defined in the book by **Mulla** and in the case of **Musanga Ng'andwa** (supra) cited in the submission of the counsel for the plaintiffs means every facts, which if traversed, it will be necessary for the plaintiff to prove in order to support his right to the judgment of the court. While being guided by the above definition of the term cause of action the court has found it is true as rightly argued by the plaintiffs that counter claim is required to be in respect of the same subject matter.

However, the court has found that, although the plaintiffs' claim in the plaint is in respect of Plot No. 518 and the claims of the first defendant in his counter claim is in respect of Plots Nos. 519, 520 and 521 but the first plaintiff stated at paragraphs 19 and 20 of his counter claim that the plaintiffs have cause the first defendant to fail to distribute the stated land to the heirs of the late Maulid Nassoro Mkasi. The counsel for the first defendant stated the first defendant has failed to distribute the stated plots of land to the heirs of the deceased as the plaintiffs invaded the mentioned plots of land purporting to be Plot No. 518 alleged it was granted to the plaintiffs by the second defendant. The court has found under that circumstances it cannot be said the first defendant cannot raise

a counter claim against the plaintiffs in respect of the mentioned plots of land.

The court has also considered the argument by the defendants that the counter claim is silence on the act done by them after invading or trespassing into the land in dispute but failed to agree with their argument. The court has come to the stated finding after seeing it is not true that the counter claim is silence on what was done by the defendants. The court has found as stated hereinabove the plaintiff stated at paragraphs 19 and 20 of the counter claim that, the invasion of the defendants to the suit land hindered the plaintiff in the counter claim to account for the estate of the deceased, distribute the same to the heirs of the deceased and the effort to require the defendants to give vacant possession of the same and abstain from involving with same proved futile.

Under the stated circumstances it cannot be said the counter claim is silence on what was done by the defendants after the alleged invasion or trespass into the land mentioned by the plaintiff in the counter claim it was invaded or trespassed by the defendants in the counter claim. To the view of this court there are sufficient facts establishing cause of action against the defendants in the counter claims.

The court has found the position of the law stated in the case of **Safari Mchuma** (supra) cited in the submission of the defendants in the

counter claim about unjustifiable intrusion into the land of another is supporting the above finding of this court that the plaintiff in the counter claim has a cause of action against the defendants. It is because of the stated reasons the court has found the preliminary objection raised by the defendants that the plaintiff in the counter claim has no cause of action against them is devoid of merit.

In conclusion the court has found all preliminary objections raised in the matter by the second and third defendants in the main suit and the preliminary objection raised by the defendants in the counter claim are devoid of merits. Consequently, the stated preliminary objections are hereby overruled in their entirety and the costs to be within the suit. Order accordingly.

Dated at Dar es Salaam this 2nd day of February, 2024



I. Arufani

Judge

02/02/2024

Court:

Ruling delivered today 02nd day of February, 2024 in the presence of the first and second plaintiffs in person and in the presence of Ms. Magreth Melkior Kisoka, learned advocate holding brief for Mr. Mluge Karoli Fabian, learned advocate for the first defendant and in the presence of Mr. Frank Kilawa and Mr. Baraka Masaka, learned State Attorney for the second and

third defendants. The ruling has been delivered in the absence of the second defendant. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani
Judge
02/02/2024