

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 389 OF 2023**

**GLORIA SILAJA LUGESHA ..... PLAINTIFF**

**VERSUS**

**WILLIAM MANAGHA GIDEME.....1<sup>ST</sup> DEFENDANT**

**LEP AUCTIONEERS COMPANY.....2<sup>ND</sup> DEFENDANT**

*23/4/2024 & 14/5/2024*

**CORRECTED RULING**

**A. MSAFIRI, J**

This is a Ruling on the preliminary objection on point of law raised by the 1<sup>st</sup> defendant.

The plaintiff have instituted a suit claiming against the defendants jointly and severally for declaration that she is the rightful owner of the suit premises which is unsurveyed land landed property situated at Kimele Village, Mapinga Ward, Bagamoyo District in Pwani Region measuring the size of 1500 square meters. The plaintiff also claims for compensation arising from unlawful trespass by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and demolition of a portion of the plaintiff's boundary wall and payment of interests. *Alele*

The defendants have disputed the claims and filed their written statements of defence to that effect. In his written statement of defence, the 1<sup>st</sup> defendant raised a preliminary objection to the effect that; this court lacks jurisdiction to entertain and determine the matter.

By the leave of the court, the preliminary objection was heard by way of the written submissions. The 1<sup>st</sup> defendant's submission in chief in support of the objection was drawn and filed by Mr. Erick Erasmus Bitarohize, learned advocate. He submitted that this court has no jurisdiction to entertain the matter as it has already been determined by the District Land and Housing Tribunal for Kibaha (herein as DLHT) in Land Application No. 16/2008 and execution enforcement in Cause No. 08/2015 which was done on 10/10/2023 as pleaded by the plaintiff in her plaint.

Mr. Bitarohize argued that the plaintiff ought to have exploited revisionary proceedings before this court against the decision of DLHT as she was not a party in those former proceedings instead of instituting a new suit.

To cement his point, the counsel cited the case of **Chief Abdallah Saidi Fundikira vs. Hillal A. Hillal**, Civil Application No. 72 of 2002, CAT at DSM. He said that the principle set in that case by the Court of Appeal was reiterated in the case of **Ajene Donatila Ruambo vs. Evans Benson & Another**, Land Revision No.58/2021 HC (Unreported) where *Adls.*

it was observed that; in the Court of Appeal case of **Chief Abdallah Saidi Fundikira (supra)**, it was stated that it is a settled law that the only recourse to a person who was not a party to the suit that has affected his interest is challenging that decision by way of revision.

The counsel prayed that the preliminary objection be upheld and the suit be struck out with costs.

In reply submission, the same was drawn and filed by Messrs Michael Christopher Lugina and Emmanuel Polyect Hando, learned advocates. They submitted that the 1<sup>st</sup> defendant's preliminary objection is misplaced and misleading because this land dispute has never been determined anywhere, the parties have never registered any dispute in any court or quasi-judicial body.

They argued that, what was pleaded and decided in Land Application No. 16 of 2008 at Kibaha does not affect the plaintiff's landed property as it was never part of that suit. That the plaintiff has filed the instant suit because the 1<sup>st</sup> defendant has invaded and damaged the plaintiff's landed property using the Land Application No. 16 of 2008 and its subsequent execution in Cause No. 08/2015 at Kibaha as a justification for the invasion and damage which is contrary to the law. *Adls.*

They asserted that the proceedings that took place at the DLHT for Kibaha do not concern the plaintiff nor the current suit premises because the current suit premises is distinct from the one asserted by the 1<sup>st</sup> defendant.

To cement this point, the counsels cited the case of **Ukodi International Company Limited vs. J.M Hauliers (t) Ltd & others**, Land Case No. 105 of 2022 (Unreported) at page 11 where the court stated that;

*"Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One, you look at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see as to whether the court has power to grant them and whether they correlate with the cause of action."*

They said further that going by the contents of the plaint, this court is clothed with the jurisdiction as the current case does not relate with the suit which was determined by the DLHT at Kibaha. They prayed that the raised objection be overruled with costs.

The counsel for the 1<sup>st</sup> defendant re-joined and submitted that taking a glance at paragraphs 7,9, 11 and relief (i) of the Plaint, it is plain that the plaintiff's land is within the 1<sup>st</sup> defendant's ownership parameters decreed by the said DLHT. He reiterated his submissions in chief and prayers.

*Alle*

It is trite law that a preliminary objection should be on pure point of law. The one which needs facts and evidence to ascertain it does not qualify to be a preliminary objection.

In the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.** (1969) EA 696, Sir Charles Newbold P had this to say at page 701:-

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

Also in the case of **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported), the Court of Appeal expressed its view on the point in similar terms when it said:-

*"The aim of a preliminary objection is **to save the time of the court and of the parties by not going into the merits of an application** because there is a point of law that will dispose of the matter summarily." (emphasis added).*

*Alle.*



Guided by the above principles, it follows then that the preliminary objection should be on pure point of law and it need not be ascertained by evidence on merit.

Having read the submissions by the rival parties and gone through the pleadings, I have observed that the 1<sup>st</sup> defendant claims that the suit premises which the plaintiff claim to own, was the subject matter in the Land Application No. 16 of 2008 and its subsequent execution in Cause No. 08/2015 at Kibaha. That since the subject matter has been determined in the said DLHT, this court has no jurisdiction to re hear and re determine it. At the same breath, the plaintiff states that the suit premises was not the subject matter before DLHT and that the 1<sup>st</sup> defendant is using the excuse of executing the order in Cause No. 08/2015 to invade and trespass into her land.

In his written statement of defence, the 1<sup>st</sup> defendant has attached some of the decisions and proceedings resulting from Land Application No. 16/2008. I have read the documents but they are not clear on how the suit premises in the instant case is the same or relates to the subject matter which was the suit land in Land Application No. 16/2008.

Guided by the principle set in the famous case of **Mukisa Biscuits (supra)** and the preceding authorities from our jurisdiction, I find that the

*Atls.*

raised preliminary objection needs evidence to ascertain it. This court at this stage cannot ascertain on whether the suit land in the case which was before the DLHT is the same which is the subject of dispute between the parties in the current suit.

Since evidence is needed to ascertain that, the preliminary objection is disqualified from being on pure point of law. For that main reason, I hereby overrule this preliminary objection and order the matter to proceed on merit where the evidence shall be adduced to ascertain on the issue of the suit premises.

The preliminary objection is overruled with costs.

It is so ordered.



  
**A.MSAFIRI**

**JUDGE**

**14/5/2024**