

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 2446 OF 2024

MUSTAFA SEIF NGANE (Suing as Administrator of the Estate

Of the late Seif Ngane) PLAINTIFF

VERSUS

NG'WILABUZU NDATWA LUDIGIJA.... 1ST DEFENDANT

GRION EDGAR LUSHAIJA.... 2ND DEFENDANT

ANNA MAGAMBO.....3RD DEFENDANT

DR. GATAMBWA DENNIS MUKANDALA.....4TH DEFENDANT

HONEST KESSY.....5TH DEFENDANT

RULING

10/5/2024 & 28/5/2024

A.MSAFIRI, J

This is a Ruling on the preliminary objections raised by the herein above defendants while filing their written statements of defence pertaining this suit.

The 1st defendant raised four points of objection as follows;

- 1. That, the plaintiff herein has no locus standi to sue in the capacity he sues the 1st defendant.*
- 2. That, the plaintiff has no cause of action against the 1st defendant who purchased the suit land since the 20th October 2013 and*

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started construction therein since 2015 before the death of the said Seif Ngane who is alleged to have died on 12th October 2017.

- 3. That the suit is bad in law for containing a verification clause which does not decipher matters of belief, information and those facts in the own knowledge of the plaintiff.*
- 4. That, the suit is hopelessly bad in law for contravening Order VII Rule 9 of the CPC R.E 2019*

On his part, the 2nd defendant also filed the preliminary point of objection to the effect that;

- a) The plaintiff sued the 2nd defendant vide Land Case No. 251 of 2022 (Hon. Hemed,J) on similar cause of action and disputed land the suit which is pending in the Court of Appeal of Tanzania.*

The 3rd defendant also filed his WSD and along with it filed two points of objection as follows;

- i. The suit is bad in law for contravening Order VII Rule 1(e) of the Civil Procedure Code, Cap 33 R.E 2019.*
- ii. The suit is bad for contravening Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019.*

The 4th defendant also raised two points of objections to the effect that;

- A. The suit is bad in law for contravening Order VII Rule 1(e) of the Civil Procedure Code, Cap 33 R.E 2019.*
- B. The suit is bad for contravening Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019.*

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The 5th defendant also filed his defence and raised preliminary objections that;

- I. The suit is bad in law for contravening Order VII Rule 1(e) of the Civil Procedure Code, Cap 33 R.E 2019.*
- II. The suit is bad for contravening Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 (herein the CPC).*

The preliminary objections were argued by way of written submissions and I have gone through the whole submissions in support of and opposition of the objections and I commend the parties with their learned counsels for the well-researched and articulated submissions which have greatly assisted this court in determining whether the preliminary objections have merit or not.

Taking into consideration the submissions of the parties, I will combine the whole objections of the 3rd, 4th and 5th defendants and the fourth ground of objection of the 1st defendant because they are similar. They all round on the incompetency of the suit for contravening Order VII Rules 1(e), 3 and 9 of the CPC.

In the submissions, the 1st defendant was represented by Mr Benedict Bagiliye, learned advocate, Mr Godfrey Gimeno, learned advocate represented the 2nd defendant, Mr Michael John Nyambo, learned advocate appeared for the 3rd defendant, the 4th defendant and 5th

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defendant had legal services of Mr Emmanuel Makungu, learned advocate while the plaintiff was represented by Mr. Denice Tumaini, learned advocate.

The defendants through their advocates stated that the plaint contravenes Order VII Rule 1(e) of the CPC as it does not disclose when the cause of action arose between the plaintiff and the 3rd defendant, the 4th defendant, and the 5th defendant. That the plaintiff claims that between 2019 and 2022 he learnt of the defendants' intrusion onto his farm. That the issue is when did the defendants intrude to the alleged farm? Was it on 2019, 2020, 2021 or 2022? That this question is not answered in the plaint. They submitted further that the cause of action between the plaintiff and the defendants did not raise all at once, the plaintiff should have disclosed when did the 1st, 2nd, 3rd, 4th and 5th defendants separately and/ specifically intruded into his alleged farm. That in the absence of that, the plaintiff wants the court to guess when the cause of action arose.

They pointed that the provisions of Order VII Rule 1(e) of the CPC makes it mandatory for the plaint to disclose the time the cause of action arose between the parties.

The defendants submitted further that the plaint does not describe the boundaries of the land/farm which he alleges that the defendants have

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invaded and occupied. That the description has been partially and generally done by the plaintiff and is not sufficient to identify the pieces of disputed land.

To cement this, the defendants cited the case of **Daniel Dagal Kanuda vs. Mashaka Ibeho & 40 others**, Land Appeal no. 26 of 2015 which was cited with approval in the case of **Khamis Ramadani Mgalu vs. Attorney General & others**, Land Case No. 164 of 2021 which explained the rationale behind Order VII Rule 3 of the CPC that is to avoid chaos and controversies in the long run especially at the time for execution.

On the 1st defendant's fourth limb of objection, he submitted that the suit is hopelessly bad in law for contradicting Order VII Rule 9(1) of the CPC R.E 2019. He said that it is clear from the law above that the plaintiff was required by the law to endorse on the plaint or annex thereto, a list of documents filed with the Plaintiff. That this Plaintiff has not been annexed with any single document as the Plaintiff did not file any annexures together with the Plaintiff which is contrary to the law. That the law above is mandatory and thus the Plaintiff ought to have mandatorily annex the documents he relies upon in his claims. He argued that failure to comply with such a mandatory law the suit becomes fatally defective and need to be struck out with costs. *Alle*

In reply, Mr Tumaini for the plaintiff submitted that the raised points of objection by the defendants have been brought out of a misconception of the law. He said that paragraphs 7,8 and 9 of the plaint show the act which is complained of by the plaintiff which is a fundamental cornerstone of the suit as it refers to all defendants. He said that the essence of Order VII Rule 1(e) of the CPC is *"the facts connecting the defendant with the act which is subject of the suit is mandatory"*. That the facts in the above mentioned paragraphs are attributed to the defendants which led to the rise of this claim by the plaintiff.

In regard to the objection that the suit is bad for contravening Order VII Rule 3 of the CPC, the counsel for the plaintiff stated that the essence of Order VII Rule 3 of the CPC was well stipulated in the case of **Hamisi Salum Kizenga vs. Moses Malaki Swendo & others**, Land Appeal No. 51 of 2019 HC Land Division, where it was held that *"in order to identify the suit land, it is either by stating its size, location, address and or boundaries if any."*

The counsel submitted that paragraph 21 of the plaint provides for the measurement for the disputed land.

On the requirement of Order VII Rule 9 as raised by the 1st defendant, that this plaint has not been annexed with any single document as the

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plaintiff did not file any annexures together with the plaint which is contrary to the law, Mr Tumaini responded that this is curable under Order VII Rule 18(1) of the CPC. He argued that the provision requires that the plaintiff shall endorse or annex a list of the documents (if any) which he has produced along with it. That the plaintiff has an option to endorse or annex a document and when he endorse without annexing it is not an omission. He argued that all the documents in the plaint have been endorsed, and that endorsement means declaring. He argued that in the plaint all the documents have been declared. He prayed for the raised preliminary objections to be overruled with costs.

Determining the objections, Order V11 Rule 1(e) provides that;

"The plaint shall contain the following particulars- the facts constituting the cause of action and when it arose."

At paragraph 16 of the Plaint, it is stated that on different occasions between the years 2019 and 2022, the plaintiff learnt of the intrusion by the defendants on his farm. By this fact, I am of the view that it is clear from the plaint that the cause of action arose from 2019 when the plaintiff first learned of the intrusion of the defendants in the disputed land and the discovery went on to 2022. I find the issue of specific year when each of the defendants was allegedly intruded in the disputed land to be a

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matter of evidence. As long as the plaint shows the time upon which the cause of action arose, then the requirement of Order VII Rule 1(e) of the CPC has been met. I overrule this objection.

On the objection about the requirement of Order VII Rule 3 of the CPC, the defendants argued that the plaint does not describe the disputed property. I find that there is a description of disputed land at paragraphs 10 and 12 of the plaint. The plaint went further and described and even estimated the size of the pieces of land which is claimed to be encroached by each of the defendants. The same is clearly seen at paragraphs 17, 18, 19, 20, 21 and 22 of the plaint. By this, I find that the plaint has met the requirement of Order VII Rule 3 of the CPC. And I overrule this objection.

There was an objection raised by the 1st defendant about the non-compliance of Order VII Rule 9 of the CPC whereby the plaintiff did not annex the documents with the plaint.

Indeed, the plaint shows that there are some documents attached with the plaint but those documents were not attached. This is reflected under paragraphs 12 and 13 of the plaint where it shows that there are annexures attached and marked but they were actually not attached. Mr Tumaini argued that the omission is curable and does not cause for rejection of the plaint as the omission does not fall within the threshold

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listed under Order VII Rule 11 of the CPC. He prayed that the court may make the order for the amendment.

I agree with the submissions of Mr Tumaini that the omission of not attaching the pleaded documents within the plaint is curable and does not call for the striking out the entire plaint or suit. I therefore will allow this objection to the extent that the plaint to be amended to attach all documents which has been pleaded in the said plaint.

Having determined the objections of the 1st, 3rd, 4th, and 5th defendants who were all on the requirements of Order VII of the CPC, now I will tackle the first point of objection by the 1st defendant which states that the plaintiff has no locus standi to sue in the capacity which he has sued the 1st defendant.

The 1st defendant has submitted that the plaintiff have no locus standi to sue the 1st defendant as he is not the administrator of the estates of the late Seif Ngane. He said that it is only the administrator of estates dully appointed by the court and granted with the letters of Probate and Administration of Estates dully sealed with the Court seal who have powers to sue over the estates of the deceased person. That, in this case the plaintiff has not annexed any letters of the administration of estates of the deceased Seif Ngane in his plaint and neither said if the same is

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under possession or power of any other person. If the plaintiff was appointed the administrator of the estates of the late Seif Ngane, then he would have annexed the letters of administration of estates from the court which appointed him but he has not.

In reply, the counsel for the plaintiff submitted that this objection is not on pure point of law as it needs to be ascertained by the evidence on whether the plaintiff was appointed an administrator or not.

I agree with the argument by the counsel for the plaintiff that this point of objection needs evidence to ascertain whether the plaintiff was legally appointed as an administrator of the late Ngane or not. It is through evidence that the capacity of the plaintiff to sue the defendants can be ascertained. Guided with the principle set in the famous case of **Mukisa Biscuits vs. West End Distributors Manufacturing Co. Ltd** [1969] E.A 696, I also overrule the said objection.

On his second point of objection, the 1st defendant claimed that, the plaintiff have no cause of action against the 1st defendant who purchased the suit land since the 20th October 2013 and started construction therein since 2015 before the death of the said Seif Ngane who is alleged to have died on 12th October 2017.

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I also find that this objection cannot stand as pure point of law as it need evidence to prove whether the 1st defendant purchased the suit land in 2013 as he has claimed. This can be determined by the court after having heard and received evidence from the disputing parties. I therefore overrule this point of objection.

On the objection on the defectiveness of the verification clause, I have read the plaintiff's verification clause and I find that it has been correctly verified by the plaintiff as per the requirement of the law. This objection is overruled.

This takes me to the objection raised by the 2nd defendant that the plaintiff has already sued the 2nd defendant in Land Case No. 251 of 2022 (Hon. Hemed,J) on similar cause of action and the disputed land, the suit which is pending in the Court of Appeal of Tanzania.

The 2nd defendant through the counsel Mr Gimeno said that this suit is res subjudice as far as the 2nd defendant is concerned hence it contravenes the provisions of Section 8 of the CPC. That the 2nd defendant has appeared also as the defendant in Land Case No. 251 of 2022 and Land Review No. 324 of 2023. And that there is Notice of Appeal dated 27/9/2023 which is lodged before the Court of Appeal arising from the Land Review No. 324 of 2023. That the subject matter was the same *Allo.*

which is the disputed land located at Kulangwa and Tegeta A streets at Goba Ward, Ubungo Municipality (formally known as Kinondoni Municipality) and the reliefs sought in this suit by the plaintiff are similar to what was sought in Land Case No. 251 of 2022. He pointed that this suit is an abuse of court process and should be dismissed with costs.

In reply, Mr Tumaini for the plaintiff argued that this matter is not res subjudice to Land Case No. 231 of 2022 and Land Review No. 324 of 2024 which were before Hon. Hemed J. He submitted that the subject matter in those cases are different with the subject matter in the current case and that the raised objection contains some facts which attracts evidence and hence it cannot qualify to be an objection on pure point of law as it was set in the case of **Mukisa Biscuits vs. West End Distributors Manufacturing Co. Ltd (supra)**. He added that the 2nd defendant does not have mandate to choose the number of times the plaintiff should sue him when the said defendant has intruded more than once in different one pieces located in different areas although within the same compound. He prayed for the objections to be dismissed.

In the cited case of **Mukisa Biscuits**, it was held that;

".....a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of *ALLs.*

the pleadings, and which if argued as a preliminary point, may dispose of the suit”.

The 2nd defendant has argued that this suit is res subjudice on his part as there were matters before Hemed, J which he was sued on the same subject matter by the same plaintiff. I find that this preliminary objection is on pure point of law as it has been pleaded in WSD of the 2nd defendant. In the said pleading, it shows that the 2nd defendant was sued in Land Case No. 251 of 2022 as 68th defendant. In the plaint of Land Case No. 251 of 2022, the then plaintiff who is also the plaintiff in the current matter claimed that he is the lawful owner of 93 acres situated partly on the ends of Kulangwa Street and partly on the ends of Tegeta A Street (before that the streets were known as Matosa) Street at Goba Ward within Ubungo Municipality. That the defendants have trespassed into the said area.

At paragraph 10 of the current plaint, the description of the suit area is the same as in the Land Case No. 251 of 2022. It is shown further that the defendants in the current suit (the 2nd defendant inclusive) have trespassed into the said suit area.

The Land Case No. 251 of 2022 was struck out on 28/3/2024. It was followed by Land Review No.324 of 2023. Following that the plaintiff have filed Notice of Appeal in the Court of Appeal intending to challenge the decision of Hemed, J in Land Review No. 324 of 2023 in which the 2nd *Alle*


defendant was the 68th defendant. There is no record that the Notice has ever been withdrawn.


It is my finding that this court cannot entertain this suit against the 2nd defendant as there is already the appeal before the Court of Appeal on the same subject matter and same parties i.e. the plaintiff and the 2nd defendant which is yet to be determined. In the circumstances, the objection by the 2nd defendant succeeds and the suit is struck out in his favour.

The court orders that the plaint be amended to reflect the changes which have been brought by the orders of this court.

The costs to follow the events.

It is so ordered.




A.MSAFIRI.
JUDGE
28/5/2024