

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 28323 OF 2023

JACOB NEHEMIAH MUSHI.....PLAINTIFF

VERSUS

THE COMMISSINER FOR LANDS.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

THUWEBA OMARY KILEMBA.....3RD DEFENDANT

MUSSA HUSSEIN KHAMIS.....4TH DEFENDANT

JOHN MWONDOKA GUDABA.....5TH DEFENDANT

RULING

06/05/2024 to 19/06/2024

E.B. LUVANDA, J

The Third, Fourth and Fifth Defendant raised preliminary objection embedded into their joint written statement of defence, asking for dismissal of the suit on the ground that: One, this Court does not have jurisdiction to determine this matter as per section 7(2) of the Civil Procedure Code, Cap 33 R.E. 2019; Two, the suit is *res judicata* as per section 9 Cap 33 (supra); Three, the suit is bad in law as it contravene section 3(5) of the Government Proceedings Act, Cap 5 R.E. 2019.

Meanwhile, the Court invited parties to address as to whether the suit was filed on time.

Mr. Claud Msando learned Counsel for Third, Fourth and Fifth Defendant abandoned ground number one. He submitted that the Plaintiff filed a plaint in this Court claiming against the Defendants jointly and severally for reliefs inter alia for a declaration that the Plaintiff is the lawful owner of the landed properties o wit Plot No. 82, 83 and 84 Block "C" Ununio, Kinondoni Municipality within Dar es Salaam Region alleged valued Tsh 600,000,000; payment of Tsh 50,000,000 as punitive damages. He submitted that on 28/03/2018 Bunju Ward Tribunal issued the judgment in Land Case No. 123 of 2017 whereby the Third Defendant herein was the Applicant therein and the Plaintiff herein was the Respondent therein, over a claim centered on the original ownership of the disputed landed properties Plot No. 82, 83 and 84 Block "C" Ununio, Kinondoni Municipality and judged in favour of the Third Defendant. He submitted that the Plaintiff lodged an appeal vide Land Appeal No. 38 of 2018 to the Kinondoni District Land and Housing Tribunal faulting the Ward Tribunal for not declaring him as the lawful owner of the suit plots which are subject of this suit, arguing the District Tribunal ruled in favour of the Third Defendant. He submitted that the Plaintiff filed Misc. Land Application No. 357 of 2022 before this Court, for a prayer for extension of time to file an appeal out of time against the decision of the District Tribunal, which was dismissed by this Court.

He submitted that in law, once the matter has been adjudged by the court, such matter cannot be adjudged again, arguing become *res judicata*, citing section 9 of Cap 33 (supra); **Mulla** the Civil Procedure Code by Sir Dinsh Farduji Mulla, page 182; **Peniel Lotta vs Gabriel and Others** [2003] TLR 312, for a proposition that the doctrine of *res judicata* bar multiplicity of suit; **Black Law Dictionary**, by Henry Campbell Black, M.A. of 1968 for a definition of a phrase privy.

He submitted that the nature of claim and relief in this suit lies over suits plots; between the Plaintiff against the Third, Fourth and Fifth Defendants who were the same parties in the previous suits where the Third, Fourth and Fifth Defendants had mutual and successive relationship to the same rights of property; the same has been determined by the Tribunal with competent jurisdiction under Land Case No. 123 of 2017 Bunju Ward and Land Appeal No. 38 of 2018 District Land and Housing Tribunal which was not invalidated by any high court.

He submitted that the nature of this suit has nothing to do with the Commissioner for Lands or the Attorney General, arguing that for one to be declared as lawful owner of a certain property must prove his/her original ownership before the Commissioner for Lands would issue a certificate of title. He submitted that the issue of original ownership was already determined by

the competent forum, arguing joining the First and Second Defendant is the misuse of the court process.

Mr. Urso Luoga learned State Attorney for First and Second Defendants prefaced his submission by highlighting the legal requirement on the preliminary points of law raised should be purely points of law, citing **Mukisa Biscuits Manufacturing Company Ltd versus West End Distributors LTD** (1969) EA 696; **Ernest Sebastian Mbele Versus Sebastian Sebastian Mbele and Two Others**, Civil Appeal no 66 of 2019, CATat Iringa (unreported), for a proposition that parties are bound by their own pleadings. The learned State Attorney cited section 3 and item 22 of (sic, Schedule to) the Law of Limitation Act Cap. 84 (sci, 89) R.E 2019, for a proposition that a suit which is instituted after the period of limitation shall be dismissed and that a suit to recover land is twelve years, respectively. He submitted that the subject matter of the suit involves landed properties with Plot No. 82, 83 and 84 Block "C" Ununio, Kinondoni Municipality within Dar es Salaam Region, with the alleged value estimated to be 600,000,000/= in which the Plaintiff claims to be the lawful owner. He submitted that going closely to the contents of paragraph twelve of the plaint together with annexure J-4 , the Plaintiff admits that the cause of action started in 1998 and under paragraph thirteen of the plaint the Plaintiff also stated that they had another meeting in 2004 and he never initiated any

efforts to recover the disputed landed properties in any competent court of law, arguing suddenly the Plaintiff instituted this case on 15th December, 2023, that is twenty-five years later while the law of limitation provides only for twelve years. He submitted that the suit of this nature, satisfy what the provision of section 3(1) and item 22 (sic. Schedule to) Cap. 89 (supra) which requires this type of suits to recover land is twelve years. He cited the case of **Moto Matiko Mabanga Versus Ophir Energy PLC and Six others**, Civil Appeal No. 119 of 2021, Court of Appeal at Dodoma, t page 14, for a proposition that in determining such issue need only to look into plaint and annexures without further facts or evidence.

He submitted that the pleadings and its annexures of the plaint clearly show that this dispute started in 1998 but he decided to sit on his right not to prosecute this matter until now. He submitted that even if we assume maybe the Plaintiff was waiting the directives from the authority, still he waived his right to reclaim the alleged property, citing the decision of this Court in **Makamba Kigome and Another Ubungo Farm Implements Limited & PRSC**, Civil Case No. 109 of 2005 HC DSM, for a proposition that negotiations or communications between parties since 1998 did not impact on limitation of time. Also cited **M/S. P &O International Ltd Versus the Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No 265 of 2020 CAT at

Tanga, for a proposition that pre – court action negotiations have never been ground for stopping the running of time. He submitted that herein the cause of action arose in 1998 but the Plaintiff opted to file this suit in 2023 which is hopelessly time barred. He submitted that the Plaintiff failed to show grounds in the pleadings so that the Court can make an exemption from the law of limitation in terms of Order VII rule 6 of Cap 33 (supra) which allows a party who seeks to rely on exemption from time limitation has an obligation to plead grounds for such exemption and those grounds which are permitted for the purpose of exemption have been well specified under section 20, 21, 22 and 23 of the Law of Limitation Act. He submitted that the entire contents and all paragraphs of the plaint there is nowhere the Plaintiff disclose or states the grounds for exemptions so that this Court can consider the exemption under the Law of Limitation. He submitted that, this suit is time barred, argued the Court to uphold his ground of preliminary objection and dismiss this suit with costs.

Mr. Francis Munuo learned Counsel for Plaintiff submitted that the present suit is within time against all Defendants. He submitted that paragraph twelve of the plaint states that the problem started in 1998, arguing both parties have been in negotiations for a very long time for consensus on who should be allocated Plot No. 82, 83 and 84. He submitted that the cause of action against

the Respondents (sic, Defendants) should be counted from the date that the negotiations became futile and the Respondents (sic, Defendants) refused to give vacant possession of the suit land. He submitted that the Defendants were registered as the owners of the suit land in 2022, arguing the Court should consider that the suit is not time barred.

Smutting to the preliminary objections raised by the Third, Fourth and Fifth Defendant, the learned Counsel for the Plaintiff submitted that going by the records of Land Appeal No. 38 of 2018 originally instituted at Bunju Ward Tribunal, the parties before the Ward Tribunal were Thuweba Omary Kilemba vs Jacob Nehemia Mushi who were also parties at the appeal. He submitted that in Land Case No. 28323 of 2023 before this Court parties are Jacob Nehemia Mushi vs The Commissioner for Lands, The Honorable Attorney General, Thuweba Omary Kilemba, Mussa Hussin Khamis and John Mwendoka Gudaba, arguing also the subject matter are different as the issue of Plot No. 83 and 84 were not determined before the Ward Tribunal. He cited section 9 of Cap 33 (supra); **Athanas T. Massinde t/a Abeti Primary School vs National Bank of Commerce**, Commercial Case No. 34 of 2016, HC, Commercial Court; George Shambwe vs Tanzania Petroleum Co. Ltd [1995] TLR 20, regarding the applicability of the doctrine of *res judicata*. He submitted that parties in this application (sic, suit) are different with parties referred by the Defendants in

their submission and the issue of Plot No. 83 and 84 were not determined before the Ward Tribunal, arguing the doctrine of *res judicata* cannot apply.

To my view both points are merited. The point which was raised by the Court is well grounded, according to averments and facts pleaded in the plaint specifically paragraphs twelve, thirteen, fourteen, fifteen and annexures thereto, depict vividly this dispute commenced the way back in 1998, where various meetings and resolution were held on 25/02/1998; 15/01/2004; 3/03/2004. The argument of the learned Counsel for the Plaintiff that the Defendants were registered owners in the year 2022, is a concoct. This is because in the plaint nowhere pleaded that fact.

Therefore, suing in 2023 is after the suit was long over due and barred by limitation. Arguably at paragraph eighteen of the plaint, the Plaintiff pleaded facts indicating there were ongoing deliberation and resolution up to 16/02/2017 which culminated into the proposal by the First Defendant to offer the Plaintiff with an alternative plot at Pembamnazi within Kigamboni as per annexure J-9 to the plaint, where the Plaintiff bragged to have rebuffed the proposal. However, as alluded by the learned State Attorney, pre-court action negotiations have never been ground for stopping the running of time. In the case of **M/S. P & O International Ltd** (supra), the apex Court commented at page 10,

*'It is trite that pre-court action negotiations have never been ground for stopping the running of time. Our decision in **Consolidated Holding Corporation v. Rajani Industries Ltd & Another**, Civil Appeal No. 2 of 2023 (unreported) cannot be more relevant in this appeal for the proposition that negotiation do not check the time from running. The Court sought inspiration from a book by **J.K Rustomji** on the Law of Limitation, 5th edition to the effect that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties. We draw a similar inspiration from a decision of the High Court at Dar es Salaam in **Makamba Kigome and Another Ubungo Farm Implements Limited & PRSC**, Civil Case No. 109 of 2005 (unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement;*

"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time (at page 16)"

Regarding the objection by the Third, Fourth and Fifth Defendant, too is merited. Herein the Plaintiff is claiming to be declared the lawful owner of the landed properties to wit Plots No. 82, 83 and 84 Block "C" Ununio, Kinondoni

Municipality within Dar es Salaam Region. According to a copy of judgment in Case No. 123 of 2017 before Bunju Ward Tribunal (annexure TMJ-1 to the joint written statement of defence by the Third, Fourth and Fifth Defendant) where the Third Defendant herein was the claimant therein and the Plaintiff herein was the Defendant therein, at page nine the Ward Tribunal made the following decision and order, I reproduce in its original form,

'Hukumu

*1. MDAI: THUWEBA OMARY KILEMBA na wenzake
WAMESHINDA*

2. MDAIWA: JACOB NEHEMIAH MUSHI AMESHINDWA

AMRI

1. Viwanja Namba:-

82 John Mwandoka Gudaba

83 Thuweba Omary Kilemba

84 Mussa Hussein Khamisi

ni mali yao halali

2. Mmiliki wa Asili Wasasa ni Thuweba Omary Kilemba kwa sababu amerithi kwa aliyezuwa na Severini Petro ambaye ni mmiliki wa Asili mwaka 1973.

RUFAA: Ipo wazi nadni ya siku 45 baada ya kusomwa hukumu hii.

HUKUMU: Imesomwa leo 28/03/2018 mbele ya wajumbe...'

The Plaintiff unsuccessful appealed to the Kinondoni District Land and Housing Tribunal vide Appeal No. 38 of 2018, which was dismissed with costs on 17/01/2022, as per annexure TMJ-3 to the joint written statement of defence

by the Third, Fourth and Fifth Defendant. The Plaintiff filed Misc. Land Application No. 357 of 2022 before this Court for extension of time to appeal against Appeal No. 38 of 2018, which was dismissed on 20/10/2022 for failure want of good and sufficient cause for extension of time (as per annexure TMJ-4 to the joint written statement of defence by the Third, Fourth and Fifth Defendant). The Plaintiff filed Misc. Land Application No. 754 of 2022 for review of the decision of this Court in Misc. Land Application No. 357 of 2022, but was dismissed on 28/02/2023 for want of merit, as per annexure TMJ-5 to the joint written statement of defence by the Third, Fourth and Fifth Defendant. Thereafter the Plaintiff filed a notice of appeal against the decision dated 28/02/2023 which dismissing a review, as per notice of appeal pleaded as annexure TMJ-6 to the joint written statement of defence by the Third, Fourth and Fifth Defendant. In fact, the said notice of appeal is dragging the Appellant off road and derailing him far away from challenging the merit of the appeal determined vide Appeal No. 38 of 2018.

Regarding the argument of the learned Counsel for the Plaintiff that Plots No. 83 and 84 were not decided by the Tribunal, is misleading. As per the quotation above, a Plot No. 83 and 84 were adjudged by the Ward Tribunal to be a lawful property of Thuweba Omary Kilemba and Mussa Hussein Khamis, respectively.

In view of the above, the decision of Bunju Ward Tribunal dated 28/03/2018 is still valid. To my opinion, impleadment or additional of more parties to wit the First and Second Defendant does not add any value, nor can change the position. This is because parties are lingering over ownership of the suit plots which were adjudged in favour of the Third, Fourth and Fifth Defendants. In other words, parties in Case No. 123 of 2017 are essentially and substantially the same and the subject matter in issue is directly the same in the former suit. The provision of section 9 Cap 33 (supra) preclude courts to try any suit which is founded to be *res judicata*.

To cement the above position, section 10 of Cap 33 (supra) provides,

'Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies'

Therefore, this suit is barred by the doctrine of *res judicata* as well as time. The preliminary objections are sustained. The Plaintiff will shoulder costs for all five Defendants sued herein.

The suit is dismissed with costs.



E. B. LUVANDA
JUDGE
19/06/2024

Judgment delivered in the presence Mr. Urso Luoga learned State Attorney for First and Second Defendants; in the absence of the Plaintiff, Third, Fourth and Fifth Defendants.



E. B. LUVANDA
JUDGE
19/06/2024