

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 193 OF 2022**

**MAMBI YUSUFU MZEE.....PLAINTIFF**

**VERSUS**

**DAR COOL MAKERS .....1<sup>ST</sup> DEFENDANT**

**MEM AUCTIONEERS AND GENERAL BROKERS LTD.....2<sup>ND</sup> DEFENDANT**

**UBUNGO MUNICIPAL COUNCIL .....3<sup>RD</sup> DEFENDANT**

**COMMISSIONER FOR LANDS.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....5<sup>TH</sup> DEFENDANT**

*Date of last order: 17/11/2022*

*Date of ruling: 29/10/2022*

**RULING**

**A. MSAFIRI, J.**

This is a ruling on preliminary objection raised by the 1<sup>st</sup> defendant on 13<sup>th</sup> October 2022 to the effect that;

*That the claim of Tsh 607,377,860/= underpinned on the tort of malicious damage to property allegedly committed on 9<sup>th</sup> February 2016 is time barred.*

It is on record that the above named plaintiff instituted the present suit against the defendants jointly and severally for an assortment of reliefs including a declaration that the plaintiff is a lawful owner the land in dispute described as Plot No. KND/UBG/UNH 35/2, Ubungo National Housing Street.



residential licence No. KNDO 28573 as well as payment of Tsh 607,377,860.00 being a specific amount involved in the demolished structures on the disputed land.

At the centre of dispute is the payment of Tsh 607,377,860 which the 1<sup>st</sup> defendant maintained that the same is time barred.

When the matter was called on for hearing of the above preliminary objection Mr. Frank Chundu assisted by Ms. Martha Halfani represented the plaintiff. Ms. Subira Omari learned advocate represented the 1<sup>st</sup> defendant while Ms. Jesca Shengena learned principal state attorney appeared for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

Ms. Omari contended that the plaintiff is claiming for payment of Tsh 607,377,860/= being specific amount involved in the building of the demolished structures in the disputed land as reflected on paragraph (iv) page 8, paragraph 10 page 10 of the plaint in which the plaintiff claimed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants interference amounts to the act of trespass and has caused irreparable loss to the plaintiff.

According to the learned advocate for the 1<sup>st</sup> defendant, the trespass and physical damage is underpinned under the tort of malicious damage of property which is alleged to have been committed on 9/2/2016 as claimed under paragraph 8 of the plaint.

It was submitted that paragraph 6 of Part 1 to the Law of Limitation Act [CAP 89 R.E 2019], (the LLA) provides that the period of limitation for

*Alls.*

instituting suits found on tort is (3) three years which is reckoned from the date the cause of action arose.

It was submitted that the current suit was filed on 10/8/2022 hence the claims are time barred and therefore should be dismissed with costs as provided for under Section 3(1) of the LLA. To fortify her stance the learned advocate has referred to me the decision of the Court of Appeal in **M/S. P & O International Ltd v The Trustees of Tanzania National Parks (TANAPA)** Civil Appeal No. 265 of 2020 (unreported). Ms. Omari contended further that the plaintiff has not pleaded exemption from the period of limitation, she therefore prayed for the suit be dismissed with costs.

On reply Mr. Chundu learned advocate submitted that the preliminary objection raised by the 1<sup>st</sup> defendant is misconceived because the matter before the Court is for recovery of land on which the plaintiff is alleging ownership of land whose time limitation is 12 years.

Mr. Chundu submitted further that the 1<sup>st</sup> defendant has wrongly quoted paragraph 10 of the plaint on which the plaintiff claims to have suffered loss. It was submitted that on paragraph 10 of the plaint, the plaintiff was just informing the Court on the costs she has incurred in building the apartments and is not the cause of action in this suit.

Mr. Chundu submitted further that the cause of action in the present suit is reflected under paragraphs 8 and 7 that the 1<sup>st</sup> defendant is claiming ownership of the disputed land and that is why the plaintiff instituted the present suit to recover the same. *Alle*

On further submission Mr. Chundu was of the view that the prayer for damages will be given at the discretion of the Court upon ascertaining facts and evidence to prove the same.

On the authority referred to by Ms. Omari in **M/S. P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA)** (supra), Mr. Chundu contended that the same is distinguishable with the present suit because the matter in the said authority was about recovery of money, compensation and damages.

On further submission Mr. Chundu contended that a preliminary objection cannot base on unascertained factual matters. To fortify his stance Mr. Chundu referred to me the decision of **Musanga Nangwa v Chief Japhet Wanzagi & 8 others** [2006] TLR 351 as well as book of Civil Procedure with Limitation Act 7<sup>th</sup> Edition at page 132.

Hence Mr. Chundu prayed the preliminary objection be overruled with costs.

On rejoinder Ms. Omari contended that the matter before the Court is not only on recovery of land only. She added that in order to determine cause of action one has to look at the pleadings as a whole. Whereby in the present matter there are two claims by the plaintiff, one of them is trespass to land by which trespass has caused physical damage to the property on which the plaintiff stated that he suffered damages.

Having gone through the parties' submission rival and in support of the preliminary objection, I have keenly gone through the plaint filed in the *Alles*.

present suit. It is not in dispute that the plaintiff is claiming for Tsh 607,377,860.00 being a specific amount involved in the building of the residential apartments on the disputed land. It is also not in dispute that according to paragraph 8 of the plaint, the alleged demolition of the plaintiff's apartment took place on 9<sup>th</sup> February 2016. The issue for my determination is whether such claim is time barred.

Ms. Omari contended that such claim is founded on tort and its time frame for suits arising from such suits is three years as provided for under paragraph 6 of part 1 of LLA. Mr. Chundu in his submission contended that the plaintiff was just informing the Court on the costs she incurred when building the apartments. I am unable to agree with Mr. Chundu that the plaintiff was just informing the Court on the costs she incurred in the construction of the apartments because it has been indicated on the relief section that the plaintiff is seeking for an order of payment of Tsh 607,377,860.00 being a specific amount involved in the building of the residential apartments on the disputed land. It follows therefore that the plaintiff is bound by her own pleadings filed in the present suit.

Now as claimed in the plaint, the alleged demolition of the plaintiff's apartments was done on 9<sup>th</sup> February 2016 hence by filing the present suit on 10<sup>th</sup> August 2022 almost over **six (6) years** had lapsed. Mr. Chundu contended that such claim cannot stand as the cause of action in the present suit is recovery of land. With due respect, I disagree with Mr. Chundu because the claim for the demolished apartment is a distinct relief from the claim of ownership of the land. And the claim of demolition of the alleged apartments is independent of claim of ownership of the land in dispute.

*Alle*

Rightly as submitted by Ms. Omari, demolition of the apartment is founded on tort and time limit for the suits founded on tort is three years. Demolition of the plaintiff's apartments situated on the disputed land is tortious liability under malicious damaged to property.

Therefore, by filing the suit after expiry of more than six years the relief for compensation caused by damage to the plaintiff's apartments in which a sum of Tsh 607,377,860.00/= is being claimed is time barred and therefore the same is struck out.

Consequently, the preliminary objection is sustained however the claim of ownership of the disputed land remains intact. Costs to follow event.

It is so ordered.



**A. MSAFIRI,**

**JUDGE**

**29/11/2022**