

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**LAND CASE NO 02 OF 2022**

**LWERU ENTERPRISING CO LTD .....PLAINTIFF**

**Versus**

**MANSOOR OIL INDUSTRIES LIMITED..... 1<sup>ST</sup> RESPONDENT**

**MWANZA CITY COUNCIL.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**SOLICITOR GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

*1<sup>ST</sup> & 22<sup>ND</sup> April 2022*

***Kahyoza, J:.***

**Mansoor Oil Industries Limited**, the first defendant filed the Written Statement of Defence (WSD) and raised a preliminary objection to the effect that-

1. the claim is time barred; and
2. the first defendant is non-existing person capable of being sued.

**Mwanza City Council, the Attorney General and Solicitor General** filed a joint WSD and raised a preliminary objection with two limbs, thus-

1. the suit is unmaintainable for being time barred; and
2. the suit is bad in law for contravening statutory requirement envisaged under section 25(a) of the Written Laws(Miscellaneous Amendments) Act No. 1 of 2020 and section 10 of the Government Proceedings Act, [Cap. 5 R.E. 2019].

The preliminary objection raised three issues; **one** whether the suit is time barred; **two**, whether suit is bad in law for misjoinder of the Solicitor General as party; and **three**, whether the first defendant is a person capable of being sued. Parties' representatives argued the preliminary objection orally.

### **Is the suit time barred?**

Ms. Subira, the Senior State Attorney, submitted the suit land was allocated to the plaintiff in 1988, the offer revoked in 1989 and the plaintiff notified. Thus, from 1989 the plaintiff was not a recognized owner of the suit land. The cause of action accrued in 1989. The allegation that the Plaintiff was paying land rent is not a proof that the suit land was his property.

Citing the case of **Stephen M. Wasira v. Joseph Sinde Warioba & AG** [1999] TLR. 334, Ms. Subira prayed the suit to be dismissed under section 3 of the **Law of Limitation Act**, [Cap. 89 R.E 2019].

Mr Kisigiro, the first defendant's advocate rejoined the submission of Ms. Subira, State Attorney that the suit was time barred.

Mr. Akram, the plaintiff's advocate, replied that the suit is not time barred as the plaintiff knew that the disputed land was reallocate to another person in 2011. For that reason, the plaintiff's advocate contended that the cause of action accrued in 2011 and not 1989. The plaintiff's advocate added that the plaintiff did not know that the second defendant revoked the offer. He referred this Court to the case of **Baralia Karangirangi v. Asterial Nyalwambwa**, Civil Appeal No. 237 of 2017 CAT (unreported).

It is clear from rival submissions that the issue whether the suit is time barred or not is centered on the question when did time start running. The defendants' argument is that it started running in 1989 when the plaintiff's offer was revoked and the plaintiff was informed. The plaintiff's contention is that time started ticking in 2011 when she received information that she was no longer owning the suit land. For that reason, the suit is not time barred.

To respond to the question when did the cause of action accrue, I considered the submissions and the Plaint. The submissions did not extend any assistance as they were contradicting assertions without any concrete proof. At the preliminary hearing stage, parties are not required to tender evidence to ascertain the alleged fact. A preliminary objection must be a *pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct*. See the case of **Mukisa Biscuit Co. V. West End Distributors Ltd** [1969] EA 696 at 700, 701.

I resolved to examine the pleadings. It is settled law that the court may look at the pleadings when determining the preliminary objection. The Court of Appeal in **Moto Matiko Mabanga v. Ophir Energy Plc and 6 Others**, Civ. Appeal No. 119/2021 re-affirmed its position in **Ali Shabani and 48 Others v. Tanzania National Roads Agency and The Attorney General**, Civil Appeal No. 261 of 2020, thus-

*"Going by the above authorities, it is clear that an objection on account of time limit is one of the preliminary objections which courts have held to be based on pure point of law which touches on the jurisdiction of the court and whose determination does not require ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the complaints and its annexures without any further facts or evidence to be ascertained*

*in determining as to whether the suit is time barred. In the case of **Ali Shabani and 48 Others** (supra) when we were faced with an akin situation, at page 8 of our Judgement, we stated that: -*

***"It is dear that an objection as it were on account of time bar is one of the preliminary objection which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."***

Also, the Court of Appeal in **Tanzania National Road Agency and Another v. Jonas Kinyagula**, Civil Appeal No. 471/2020 examined the pleadings while determining the preliminary objection.

The paragraphs 7 and 8 of the Plaintiff narrated facts establishing the cause of action without stating when it accrued. The plaintiff averred that-

*"7. That after being allocated the said plot the plaintiff submitted drawing and request(ed) to make constructions in the plot and made compensations over the exhaustive improvement that were developed on the land so as to have a fully occupation, Copies of letter dated 11<sup>th</sup> May, 1990 with Ref. No.LWEGO/1/2 and the agreement for payment of compensation with ref. no. MMC/VAL/013/21/JM DATED 14/01/1989 are hereby annexed and*

*collectively marked as annexure ONL-2 leave of the Court is craved the same to form part of this Plaint.*

*8. That the plaintiff was making follow up over the use of the said property for making development of the same, however, came to be surprised with the copied letter with ref. No. MCC/L/170/16/HUK written by 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant whereby was inquiring him to explain at time of allocation did pay compensation to the plaintiff."*

It is clear that the plaintiff requested for a building permit in 1990 vide his letter referred to in paragraph 7 of the plaint. It seems she got no reply. She does not state her reaction for the second defendant's failure to grant her the building permit or replying to the request. I presume the second respondent's silence or reply ought to have been a cause of action. The plaint does not show that it was the cause of action. I further considered facts under paragraph 8 which clearly provide for a cause of action. While making follow up for a permit to develop the suit land, the Plaintiff was *surprised with the copied letter with ref. No. MCC/L/170/16/HUK written by 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant.*

The record shows that on 13.2.2008 the second defendant wrote the letter with Ref. No. MCC/L/170/16/HUK to the first defendant and copied it to the plaintiff. If the Plaintiff had not received the letter revoking her offer

in 1989, then, the letter with Ref. No. MCC/L/170/16/HUK dated on 13.2.2008 was a cause of action. The letter reads-

*"Kumbukumbu zetu zilizopo zinaonyesha kuwa kiwanja tajwa kilimilikishwa kwa LWERU ENTERPRISING CO. LTD wa S.L.P. 280 Mwanza kwa milki ya miaka 66 kuanzia tarehe 1.4.1988. Wamilki hawa walilipa fidia yaa maimarisho yaliyokuwepo. **Baadaye kiwanja hiki na viwanja vya ziwani vilifutwa kutokana na sheria ya fukwe (Public Beach Order of 1989).***

*Hata hivyo baada ya kamupuni yako kupewa gati walalamikaji wanadai sehemu uliyojenga gati ndipo palikuwa kiwanja chao na hawakulipwa fidia." (Emphasis added)*

The plaintiff was informed through letter with Ref. No. MCC/L/170/16/HUK dated on 13.2.2008 that she was no longer owing the suit plot. Thus, if the plaintiff did not received the revocation letter, then the cause of action accrued upon receipt of the letter with Ref. No. MCC/L/170/16/HUK dated on 13.2.2008. It is possible that the plaintiff got the letter in 2008 because she was making follow up to develop the disputed land or anytime later. The plaintiff had a duty to plead facts establishing cause of action and for a suit, which on the face of it seems to be time barred, to plead facts showing that it is not time barred. The Plaintiff does not disclose facts showing when the Plaintiff got a copy of the letter with Ref. No. MCC/L/170/16/HUK dated on 13.2.2008. The Plaintiff's

advocate submitted that the Plaintiff got the letter in 2011, hence the cause of action accrued in 2011. Submission from the bar is neither pleadings or evidence, it cannot be relied upon. The Court of Appeal of Tanzania in **Tanzania National Road Agency and the Attorney General v. Jonas Kinyagula** Civil Appeal No. 471/2020 CAT (Unreported) observed that-

*"The Complaint is mandatorily required to contain among others **the facts constituting the cause of action and when it arose.** This is important to enable ascertainment of issues of jurisdiction of the court including time limitation."*

The Plaintiff did not disclose facts showing when the cause of action accrued. It is settled that the Plaintiff is mandatorily required to contain among others, **the facts constituting the cause of action and when it arose.** The Court of Appeal relied on rule 6 of Order VII of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the CPC), which stipulates that-

*"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed."*

If the party does not provide facts in the plaintiff, which exempt the applicability of the Law of Limitation, the suit is rendered time barred. The plaintiff knew that the second defendant re-allocated the disputed land to



the first defendant when she got a copy of the letter with Ref. No. MCC/L/170/16/HUK dated on 13.2.2008. According to the plaintiff, the cause of action accrued on the date he got the letter which is different from the year indicated on the letter. The plaintiff did not indicate the date she received the letter, thus, the plaintiff did not plead facts to exclude the application of the Law of Limitation. Failure to plead facts showing when the cause of action arose which would have excluded the Law of Limitation, renders the suit time barred.

The Court of Appeal in **Tanzania National Road Agency and the Attorney General v. Jonas Kinyagula** (supra) cemented its position in **Ms. P & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020 (unreported) where it adopted with approval a High Court decision in the case of **Alphons Mohamed Chilumba v. Dar es Salaam Small Industries Cooperative Society**, [1986] TLR 91 which stated as follows:-

*"Order 7 rule 6 provides that where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show the ground upon which exemption from such law is claimed. In other words, where but for some ground of exemption from the law of limitation a suit would prima facie be barred by limitation, it is necessary for the plaintiff to show in his*

*plaint such grounds of exemption. If no such ground is shown in the plaint, it is liable to be rejected under Rule 11 (c) of the same order." According to the above cited position of the law, **if the party does not advance any such ground, it renders the suit instituted time barred.** (Emphasis added)*

I uphold the first limb of the preliminary objection that the suit is time barred for the plaintiff's failure to plead facts showing when the cause of action. Since the plaintiff did not disclose the date he received the copy of the letter addressed to the first defendant, I take it that she received it in 2008 when the second defendant authored it. For that reason, the suit is time barred.

**Is the first defendant is a non-existing person capable of being sued?**

The first defendant's advocate submitted that the first defendant was registered in 1993 as Mansoor Industries Limited and not as Mansoor Oil Industries Limited. He tendered a copy of the certificate of incorporation No. 23049.

The plaintiff's advocate replied that the preliminary objection raised to the effect that the first defendant is non-existing person capable of being sued, was not a preliminary objection in law. It required evidence to

prove it. He added that if the first defendant is non-existing person, she should not have appeared to this Court.

I totally agree with the Plaintiff's advocate that a preliminary objection is pure point of law which does not required evidence to prove it. The first defendant tendered a certificate of incorporation to prove the preliminary objection. It is clear that a preliminary objection is not pure point of law. It is a mixture of law and fact. It required evidence to prove it. It is trite law that issues which would require a court to take evidence or examine the facts in order to determine them, do not qualify to be raised as points *in lamine*. See **Citibank Tanzania Ltd V. Tanzania Telecommunication Co. Ltd and 4 others**, Civil Application No 64 of 2003, (CAT, unreported).

I dismiss the first defendant's second limb of preliminary objection that the first defendant is non-existing person capable of being sued.

### **Is the suit bad in law for misjoinder of Solicitor General?**

Ms. Subira, the State Attorney appearing for the second, third and fourth defendants submitted that the suit was bad in law and prayed this Court to strike it out for contravening statutory requirement envisaged under section 25(a) of the Written Laws(Miscellaneous Amendments) Act No. 1 of 2020 and section 10 of the Government Proceedings Act, [Cap. 5

R.E. 2019]. She contended that the Plaintiff joined the Solicitor General as a party to the suit against the law.

Mr. Akram, the plaintiff's advocate conceded that the Solicitor General was wrongly joined as a party. However, he was quick to submit that the remedy for misjoinder is not to strike out the suit but to order amendment. To support his submission, he cited rules 9 and 10(2) of Order I of the CPC. The rules stipulate that-

*9. A **suit shall not be defeated by reason of the misjoinder or non-joinder of parties**, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.*

*10.-(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may at any stage of the suit, if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.*

Rule 9 of Order I of the CPC states in no uncertain terms that no suit shall be **defeated by reason of the misjoinder or non-joinder of parties**. I have no reason to depart from that position. I am aware of the

decision of the Court of Appeal in **Abdulatif Mohamed Hamis v Mehboob Yusuf Osman & Fatna Mohamed**, Civ. Revision No. 6/2017 where the Court was of the view that if a necessary party is not joined the court may strike out the suit for non-joinder. The Court of Appeal held that its position to be an exception to the general rule under rule 9 of Order I of the CPC. It observed-

*"Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff."*

The Court of Appeal took a similar position in **Stanslaus Kalokola v. Tanzania Building Agency and Mwanza City Council**, Civil Appeal No. 45/2018 (CAT unreported). It held-

*"Our decision on this point is that there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential. Commenting on this aspect, Mulla, Code of Civil Procedure, 13th Edition Volume I pg. 620 writes;*

*"As regards non-joinder of parties, a distinction has been drawn between non-joinder of a person who ought to have been joined*


*as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because O. 19 is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed. "Kenya shares this position [See **Attorney General v. Kenya Bureau of Standards & Geo-Chem Middle East**, Civil Appeal (Application No. 132 of 2017 Court of Appeal Kenya)], and similarly Uganda as we shall later see."*

I find the position of the Court of Appeal in **Abdulatif Mohamed Hamis v Mehboob Yusuf Osman & Fatna Mohamed** and **Stanslaus Kalokola v. Tanzania Building Agency and Mwanza City Council** (supra) not applicable in the present case as there is no non-joinder of the parties in the present case but misjoinder of parties.

There is no dispute that the plaintiff wrongly joined the Solicitor General, there is misjoinder. However, the remedy for misjoinder is not to strike out the suit but to order removal of the mis-joined party by amendment. I partly allow the second limb of preliminary objection raised by holding that the plaintiff wrongly joined Solicitor General as a party to this case. I decline to strike out the suit nor to order amendment, for reason of upholding the first limb of preliminary objection.


In the end, I uphold the preliminary objection that the suit is time barred and dismiss the suit under section 3 of the Law of Limitation Act, [Cap. 89 R.E. 2019]. The defendants, except the first defendant who alleged that she was a non-existing person capable of being sued, are awarded costs.

I order accordingly.



**J. R. Kahyoza**  
**JUDGE**  
**22/04/2022**

**Court:** Ruling delivered in the presence of Mr. Akram Adam, advocate for the plaintiff and Mr. Deogratias Daniel. Mr. Sahele advocate held Mr. Kisigiro's brief for the first respondent while Ms. subira, State Attorney appeared for the first, second, third and fourth respondents. B/C Ms. Martina (RMA) present.



**J. R. Kahyoza**  
**JUDGE**  
**22/04/2022**

