IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 21 OF 2014

KILEMPU KINOKA LAIZER ..... PLAINTIFF

VERSUS

HAI DISTRICT COUNCIL ..... 1ST DEFENDANT

MWANANCHI ENGINEERING & CONTRACTING COMPANY (MECCO) ..... 2ND DEFENDANT

RULING

28/07/2023 & 17/08/2023

SIMFUKWE, J.

The plaintiff herein is claiming against the 2nd defendant mesne profits at the tune of Tzs 4,800,000/= per annum from 2005 the year they are alleged to had unlawfully trespassed to 6 acres of land (suit land) of the plaintiff, located at Sanya Station Village within Hai district in Kilimanjaro Region.

In their Written Statement of Defence, the 1st defendant raised preliminary objections on point of law as follows:

1. That, this application (sic) is premature and bad in law, as it contravenes mandatory requirement of **section 190 of the Local Government (District Authorities) Act (Cap 287)** as amended by the **Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.**
2. That the amended plaint is incompetent and bad in law for no-joinder of the Attorney General as the mandatory requirement of the law.
3. That the amended plaint is incompetent and bad for contravening mandatory requirement of **Order VII R. 3 of the Civil Procedure Code** [CAP 33 R.E 2019].
4. That the Plaintiff has no cause of action against the 1st Defendant.

The 2nd defendant also raised the following preliminary objections on point of law:

(a) That, the amended plaint is untenable and bad in law for contravening mandatory provision of **Order VII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019.**

(b) That, the suit is bad and incompetent in law for non-joinder of the Attorney General as required by the law.

The raised preliminary objections were ordered to be argued by way of written submissions. Mr. John Lundu and Stephano James learned counsels contested the preliminary objections for the plaintiff. Ms Blandina learned State Attorney argued the preliminary objections for the 1st defendant, while Mr. Gwakisa Sambo learned counsel argued the preliminary objections for the 2nd defendant.

In her written submission in support of the raised preliminary objections, the learned State Attorney prayed to abandon the 1st and 4th preliminary points of objection.

On the 3rd point of objection to wit, the amended plaint is incompetent and bad for contravening mandatory requirement of **Order VII R. 3 of the Civil Procedure Code** (supra); on the outset reference was made to **Order VII Rule 3 of the Civil Procedure Code** (supra) which states that:

> *"Where the subject matter of the suit is immovable property, the plaint SHALL contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number."*

It was submitted that failure to comply with the above quoted provision renders the suit incompetent and denies the court jurisdiction to entertain the matter. The learned State Attorney cited the case of **Athuman Salehe Magogo and 14 Others vs. Gabius Edger Maganga and Another, Land Case No. 206** (sic), HC at page 4 and 5 where it was held that:

> *"The logical basis of the provision of Order VII R. 3 supra can be simply be said that, the purpose of proper description of the subject matter is to just distinguish a suit land from other pieces of the land in the same area."*

It was insisted that throughout his amended plaint, the plaintiff failed to describe the disputed land with the material particulars sufficient to identify it. That, the plaintiff has not stated whether the suit land is

registered, demarcations of the suit land and the description of the neighbouring properties. The said particulars are necessary for the purpose of determining whether the disputed land was a subject of a previous litigation and to preclude future litigation in respect of the same property. That, since the amended plaint contravenes the provisions of the law, the suit is legally incompetent and ought to be strike out with costs in favour of the 1st defendant.

On the 2nd point of objection that the amended plaint is incompetent and bad in law for non-joinder of the Attorney General as the mandatory requirement of the law; it was argued that **section 6(3) and (4)** of amendment of the **Government Proceedings Act, Cap 5 of 2019** as amended by **Written Laws (Miscellaneous Amendment) Act No. 1 of 2020** provides that:

> *"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party.*
>
> *(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)."*

The learned counsel for the 1st defendant also cited **section 31 (1) of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020** which provides that:

"(1) No suit shall be commenced against a local government authority: -

(a) Unless a ninety days' notice of intention to sue has been served upon the local government and a copy thereof to the Attorney General and Solicitor General."

Ms Blandina submitted that according to the above cited provisions, the law requires that any party who wishes to file a suit against the Government is required to serve notice of 90 days and to join the Attorney General as a necessary party and non-joinder of the Attorney General shall vitiates the proceedings of any suit. It was noted that it is settled principle of law that whenever the word 'shall', is used in a provision, it has got the meaning that the provision is mandatory. It was observed that since the above noted amendment is in respect of procedures, it applies to all actions whether commenced before or after the enactment of the Act. Ms Blandina subscribed to the case of **Lala Wino v. Karatu District Council, Civil Application No. 132 of 2018**, Court of Appeal of Tanzania at Arusha, which at page 8 and 9 held that procedural laws shall act retrospectively.

The learned State Attorney prayed that the suit be strike out with costs in favour of the 1st defendant.

The submission of Mr. Gwakisa Sambo in support of their two raised preliminary objections, corroborated the submission of the 1st defendant due to the fact that they raised similar objections on point of law. Buttressing the first preliminary objection, Mr. Gwakisa cited the case of **Martin Fredrick Rajabu v. Ilemela Municipal Council and Another,**

Civil Appeal No. 197 of 2019, Court of Appeal of Tanzania at Mwanza at page 13 where it was stated that:

> *"From what was pleaded by the appellant, it is glaring that the description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint. This was not proper and we agree with the learned trial judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]."*

It was submitted further that from paragraph 4 of the plaint and annexure L1 to the amended plaint, the boundaries of the disputed land were not stated.

On the 2nd preliminary objection, Mr. Gwakisa apart from **section 6 (3) and (4) of the Government Proceedings Act** (supra), he made reference to section 10 of the same Act which was in place even before the filing of this matter and it provides that the Attorney General is mandatorily to be joined as party in any case which involves the local government authority. That, it was a mandatory obligation by the plaintiff to join the Attorney General in these proceedings because the 1st defendant Hai District Council is the local government authority.

It was concluded that failure to join the Attorney General as necessary party, renders the entire amended plaint and proceedings incompetent for non-joinder of Attorney General, which is fatal and cannot be cured by the Oxygen Principle. That, the only remedy is to strike out the suit with costs.

In his reply to the preliminary objections raised by both defendants, Mr. Lundu commenced with the 2nd preliminary point of law. He submitted among other things that when the amended plaint was filed on 22nd March 2023 as ordered by the court, it was not being instituted against the Local Government for the first time as the matter was ordered to be tried de novo by the Court of Appeal. That, retrospective principle of procedural law cannot apply to a matter which has been instituted, determined, appealed against and ordered for retrial, otherwise disputes will not come to an end.

Concerning the cited authorities, Mr. Lundu was of the view that the same were distinguishable to the case at hand. Thus, the second preliminary objection has no merit.

Mr. Lundu conceded to the first preliminary point of objection which is in respect of incompetency of the amended plaint for contravening the mandatory requirement of **Order VII Rule 3 of the CPC** (supra). However, he contended that the defect is curable under **section 3A (1)** and **(2), 3B (1) (a), (b) (c)** and **3(2) of the CPC** (supra) which provides for Overriding Objective principle commonly known as Oxygen Principle. That, instead of striking out this case on such technicality, this court should apply the Overriding Objective and order amendment of the plaint to include such descriptions.

The learned counsel for the plaintiff explained that, the Overriding Objective principle requires courts not to be strict in technicalities rather, courts should be lenient to make sure that cases are heard on merit as the only way to resolve the disputes of parties. That, striking out this case will invite a lot of costs in terms of money, time and the dispute between

the parties will remain unresolved. For interest of justice and the circumstances of this case, he prayed this court to order amendment of the plaint.

In his rejoinder, Mr. Sambo for the 2nd defendant submitted among other things that they strongly object the invoking of overriding objective to cure the pointed defects because doing so will be pre-empting the raised preliminary objections. Furthermore, the overriding objective was not meant to be applied blindly to offend the clear provisions of the law. He cited the case of **Meet Singh Bhachu vs Gurmit Singh Bhachu, Civil Application No. 144/02 of 2018** (unreported) in which the Court of Appeal stated that:

> *"We have given this small but thought-provoking point due consideration in line with the learned arguments, and it seems to us settled that one cannot withdraw an incompetent appeal or application. This is because it has been the practice of this Court, which appeals to logic, that once a preliminary objection has been raised, it must be heard first,* ***and the other party is precluded from doing anything to pre-empt it."*** (Emphasis added)

The learned counsel stated that the above principle applies *mutatis mutandis* to the case at hand, that the plaintiff cannot be allowed to amend the plaint to cure the pointed defects in the amended plaint as the same will pre-empt the raised preliminary objections. He cited another Court of Appeal case of **Swahiba Ibrahim Shaha vs The Registered Trustees of Masjid Quiblatain, Civil Application No. 445/01 of 2019**, at page 6 where it was held that:

"Two, the position of this court as regards application of the principle of overriding objective is that, the principle cannot be invoked blindly in every instance where there is breach of the provisions of the law that require compliance in mandatory terms."

He stressed that, likewise to the case at hand, the overriding objective principle cannot be applied blindly to breach the provisions of **Order VII Rule 3 of the CPC** and **section 10 of the Government Proceedings Act** (supra), because the provisions have been couched in mandatory terms.

On the issue of retrospective application of procedural laws, it was re-joined that **section 10 of the Government Proceedings Act** was in existence even before the filing of this case. Thus, the plaintiff was obliged to join the Attorney General since 2014. That, when the plaintiff obtained leave to amend the plaint, he could have joined the Attorney General.

Having Considered the rival submissions of the parties and the fact that the learned counsel for the plaintiff has conceded to the first point of objection, the issue for determination is whether the plaintiff can be allowed to amend his plaint and whether the second preliminary objection has merit.

On the outset, I am grateful to the useful submissions of both parties in respect of the raised preliminary objections. Without wasting much time, respectfully to the plaintiff and his learned counsel, I subscribe to the recent authorities cited by the learned counsels for the first and second defendants which show the current position in respect of withdrawing matters after the preliminary objection has been raised.

Starting with the first preliminary objection of which the learned counsel for the plaintiff has conceded, the learned counsel was of the view that the remedy is to grant leave to the plaintiff to add the description of the disputed land in the plaint. Pursuant to **Order VI Rule 17 of the CPC** (supra), the plaintiff may be allowed to amend his plaint before the adverse party has raised the preliminary objection. After the opposite party has raised the preliminary objection, the position is as stated by the learned counsel for the 2nd defendant. That is, the remedy is to strike out an incompetent suit.

On the second limb of preliminary objection apart from what has been submitted by the learned counsels for the defendants, I would like to add that the amendment effected to the **Government Proceedings Act** of 2020 expanded the application of **section 10 of Cap 5** to other government/public institutions. Whereas formerly the provision was applicable to the Central Government and Local Government only. Other public institutions could sue and be sued in their registered names without joining the Attorney General. I am of considered opinion that the invasion of **section 6(3) of the Government Proceedings Act** as amended by the **Written Laws (Miscellaneous Amendments) Act, 2020** is for public interest. Meaning that non-compliance to the provision is to the detriment of the general public, as the Attorney General is joined for the sake of defending the interests of the general public.

In the case of **Leticia Mwombeki v. Faraja Safarali and 2 Others, Civil Appeal No. 133 of 2019,** CAT at Dar es Salaam, at page 10 of the judgment stated inter alia that:

"Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasion a failure of justice. See MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS, Civil Appeal No. 66 of 2017 and NJAKE ENTERPRISES LIMITED VS BLUE ROCK LIMITED AND ANOTHER, Civil Appeal No. 69 of 2017."

In this case, I am of considered opinion that the raised defects cannot be cured by invoking the overriding objective principle as they go to the root of the matter and it goes without saying that the same will occasion a failure of justice.

That said and done, I concur with the learned counsels for the defendants that the instant suit is incompetent in law for failure to state the description of the disputed land and non-joinder of the Attorney General as a necessary party. I therefore uphold the raised preliminary objections for being merited and strike out the suit with costs.

It is so ordered.

Dated and delivered at Moshi this 17th day of August 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

17/08/2023