

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND CASE NO. 13 OF 2019

ROMUALD ANDREA

@ ANDREA ROMUALD

@ ROMUALD A. MATERU

PLAINTIFF

VERSUS

1. MBEYA CITY COUNCIL1ST DEFENDANT

2. LAZARO GEORGE2ND DEFENDANT

3. SARAH GEORGE MWANDOLA3RD DEFENDANT

4. NSAJIGWA KYEJO @ BAMBO4TH DEFENDANT

5. USWEGE MWAMELO @ EPHRAIM5TH DEFENDANT

6. GILEARD LUVANDA @ KIBACHE6TH DEFENDANT

7. FANNY KALIATH @ DEBORA MWAMSOJO.....7TH DEFENDANT

8. FLORA MGINA8TH DEFENDANT

9. NTULI KIPUTA@ BABA BROWN.....9TH DEFENDANT

10. JOYCE MWASELELA10TH DEFENDANT

11. NEEMA MZENA11TH DEFENDANT

12. STEVEN MFURUKI12TH DEFENDANT

13. HADIJA R. MOHAMED13TH DEFENDANT

14. ISABELA KAONGA14TH DEFENDANT

15. DEOGRACIA KINYEJILE15TH DEFENDANT

16. LILIAN KIMARIO.....16TH DEFENDANT

17. PILI ILUNDA DAUDI @MRS. MWAIPAJA.....17TH DEFENDANT

18. ROSEMARY HAULE18TH DEFENDANT

RULING

14/05 & 12/08/2020.

Utamwa, J.

In this land case, the plaintiff, ROMUALD ANDREA @ ANDREA ROMUALD @ ROMUALD A. MATERU sues the eighteen defendants namely:

Mbeya City Council, Lazaro George, Sarah George Mwandola, Nsajigwa Kyejo @ Bambo, Uswege Mwamelo @ Ephraim, Gileard Luvanda @ Kibache, Fanny Kaliath @ Debora Mwamsojo, Flora Mgina, Ntuli Kiputa@ Baba Brown, Joyce Mwaselela, Neema Mzena, Steven Mfuruki, Hadija R. Mohamed, Isabela Kaonga, Deogracia Kinyejile, Lilian Kimario, Pili Ilunda Daudi @Mrs. Mwaipaja and Rosemary Haule, hereinafter called the first, second up to the eighteenth defendant respectively.

The suit is based on a claim over a piece of land (henceforth the suit land) to which the plaintiff referred (under paragraph 20 of the plaint) as "forty (40) plaintiff's business rooms (vibanda) located at Forest Maghorofani Market, room numbers A11/C4; C5; C8; B2; C48; C62; D63; D70; D73; D75; D80; E19; E23; E24; E25; E26; E27; E29; D11; D17; D18; C45; B3/B16; C28; C25; C24; C23; C22; C19; A18; A15; B14; B18; B25; B26; B28 and B29."

The plaintiff thus, sought the following reliefs against all the defendants jointly and severally;

- a) An order that the disputed land/ (40 rooms) belongs to the Plaintiff.
- b) An order that the Defendants are trespassers to the plaintiff's land/ (40 rooms).
- c) An Order that the 1st and 2nd Defendants be compelled to compensate the Plaintiff Tanzanian Shillings (Tshs.) Three Hundred and Four Million only (Tshs.304,000,000/=) as specific damages (being the value of the 40 claimed rooms).
- d) An order that the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants be ordered to pay the Plaintiff a total sum of Tshs. One Million and Sixty Four Thousands only (Tshs.1,064,000/=) as specific damages as claimed under paragraph 21 above

- e) The 1st and 2nd Defendants be compelled to pay the Plaintiff Tshs. One Hundred Million Only (Tshs.100,000,000/=) as general damages.
- f) The 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th Defendants be compelled to pay the Plaintiff Tshs. Three million only (Tshs.3,000,000/=) per each room trespassed as GENERAL DAMAGES.
- g) The 1st and 2nd Defendants together with those invited by them to occupy the Plaintiff's rooms illegally namely 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, and 18th Defendants be compelled to pay the money as *mesne* profit (arrears of rent) from their due rent payment dates in 2018 and 2019 till payment in full as claimed under paragraph 30 and 31 of this Plaint.
- h) Permanent injunction to restrain the Defendants from using and or interfering the plaintiff in the disputed land/rooms.
- i) Costs of the suit be paid by the Defendants.
- j) Any other or further relief this Honourable Court deems fit and just to grant.

When the suit came before me for necessary orders, and upon going through the record, I found it important to make some orders before the matter could proceed further.

I then, made an order to the following effect: that, Since in the suit at hand the first defendant Mbeya City Council, through her Solicitor Mr. Braison Ngulo, had raised a preliminary objection against the suit in the joint Written Statement of Defence (WSD) of the 1st and 2nd defendant, and since Mr. Braison had also questioned the competence of this suit on the ground that there is another pending matter before the Mbeya District Land and Housing Tribunal (Application No. 245 of 2019) between the first

defendant (Mbeya City Council) and some of the defendants in the case at hand, which said matter relates to the same subject matter, and since there is another application before Dr. Mambi, J in this court (Application No. 90 of 2019), and since the court had sniffed some irregularities in the plaint (especially the lack of a proper description of the location of the suit land), then the parties (defendant No.1 and 2 together with the Plaintiff) were directed to address the court on the following issues:

- (1) Whether or not the plaint is defective for misjoinder of parties as contended in the notice of the preliminary objection raised by the 1st and 2nd defendants in their joint Written Statement of Defence.
- (2) Whether or not this suit at hand is competent following the existence of the application No. 245 of 2019 before the District Land and Housing Tribunal and another application No. 90 of 2019 before this court.
- (3) Whether or not the plaint properly discloses the description of the suit land as required by the law.
- (4) Whether or not the notice to sue the 1st defendant is proper in law following a suspicion that there are amendments of law setting a requirement that, a suit against the 1st defendant should be filed after expiry of 90 days from the date of issuing the notice to sue.
- (5) Which orders should this court make following the answers that will be provided to the issues posed herein above?

Parties were directed to argue the issues by written submissions. The defendants No. 3 – 18, were also invited to answer/argue issues No.3 – 5 only since they had not raised any preliminary objection.

In this ruling, I will first consider and determine the third and fifth issues. In case the third issue will be answered affirmatively I will test the rest of the issues. This adjudication plan is based on the fact that, the third

issue is, in law, capable to dispose of the entire matter if answered negatively.

Regarding the third issue of *whether or not the plaint properly discloses the description of the suit land as required by the law*, the defendants No. 1, 2, 3 and 6 unanimously contended that the plaint did not provide the description of the suit land sufficiently and authentically enough to identify it. They argued that, it offended the mandatory provisions of Order VII rule 3 of the Civil Procedure Code, Cap. 33 R. E. 2002 (now R. E 2019), henceforth the CPA. In answer to the fifth issue (of *which orders should this court make*), the above mentioned defendants submitted that, the plaint has to be declared incompetent. They supported their contentions by a decision of this court in **Daniel Dagala Kanunda (as Administrator of the estate of the late Mbalu Kushaba Buluda) v. Masaka Ibeho and 4 others, Land Appeal No. 26 of 2015, High Court of Tanzania (HCT), at Tabora** (unreported). The four defendants mentioned above were represented in the following pattern: the first and second were represented by Mr. Triphone Kisiga, the Solicitor of Mbeya City Council. As to the third and sixth defendants, they enjoyed the services of Mr. Amani Angolwisye, learned counsel.

On his part, Mr. Simon Mwakolo, learned counsel for the plaintiff basically maintained in his replying submissions and regarding the third issue, that, since paragraph 20 of the plaint gave the description of the suit land as shown above, it sufficed for the purposes of the law. The numbers of the shop rooms provide sufficient description and the market mentioned above is only one in Mbeya City. As an answer to the fifth issue, the plaintiff's counsel contended that, the court should consider the suit as competent and proceed to determine it on merits.

I have considered the record, the arguments by the parties and the law. In fact, I tend to agree with the above named defendants that, Order VII rule 3 of the CPA provides mandatorily as follows, and I quote it for a readymade reference:

'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.'

In my view, the law did not make these obligatory provisions for cosmetic purposes. Its intention was to ensure that, the court determines the controversy between the two sides of a suit related to landed property effectively by dealing with a specific and definite piece of land. The law further intended that, when the court passes a decree, the same becomes certain and executable. I underscored the importance of the requirement mentioned above in various cases including the **Daniel Dagala case** (supra) and I repeat the same in the case at hand as a means of emphasis on the importance of the requirement.

The legal requirement highlighted above is indeed intended for the purposes of an authentic identification of the land in dispute so as to afford courts make certain and executable orders. It is the law that, court orders must be certain and executable. It follows thus that, where the description of the land in dispute is uncertain, it will not be possible for the court to make any definite order and execute it. I also once underscored in **Ramadhan Omary Humbi and 58 Others v. Aneth Paulina Nkinda and another, HCT Land Case No. 99 of 2013, at Dar es salaam** (an unreported ruling) and **William Minyampi v. Yohana Anania, HCT Land Case Appeal No. 21 of 2016, at Tabora** (unreported) on the significance of a definite identity for a piece of land under dispute of ownership or possession. I had also made some remarks relating to this aspect in another case of **Masincha Nyamhanga v. Magige Ghati Gesabo and two others, HCT Land Appeal No. 20 of 2008, at Mwanza** (unreported), and I will reproduce the pertinent passage for purposes of a swift reference;

"...land is in fact, a natural immovable solid part of the earth or its surface (and some of its contents) extending globally with some various manmade divisions, sub-divisions, sub-sub divisions etc. such as Continents, States, Countries, Regions, Districts, Villages etc. For purposes of ownership or possession of land, it is the specific demarcations and the location

(geographical, political or otherwise) of a piece of land that differentiates it from another piece of the same earth or its surface. Admittedly this may not be the very professional way of describing land, but at least these are the practical and common attributes exemplifying land, and I am entitled to presume them as true under S. 122 of the Evidence Act (Cap. 6 R. E. 2002). It is for this truth I believe, my brother (**Moshi, J.** as he then was) remarked to the effect that land can only be allocated when distinct and determinable; see the case of **Asumwike Kamwela v. Semu Mwazyunga, High Court, Civil Appeal No; 13 of 1997, at Mbeya...**"

Owing to the above reasons, it cannot be argued that the appellant in the matter at hand followed the law when he made the blanket description of the land in dispute by merely numbering the business rooms under paragraph 20 of the plaint as shown earlier, without mentioning the title of the land or their boundaries.

Actually, the plaintiff did not come out clearly to show whether or not the business rooms were in a surveyed and registered land. Had the land been surveyed and registered the law would expect him to disclose the plot number and the block number (or the title) in which the business room were located. In case the land was not surveyed and registered, the law would expect the plaintiff to describe the boundaries surrounding all the business shops. It could not suffice for him to barely declare that the business shops are at Forest Maghorofani Market.

Indeed, the plaint did not also plead that the business shops are the only structures at the Forest Maghorofani Market area so as to show that the business shops have been sufficiently identified. Indeed, the clear understanding of the allegation in the plaint is that, the numbers assigned to the business shops at issue are only for purposes of differentiating each shop from another, and not for differentiating the land in which the shops are situated from other pieces of land surrounding them.

The description of the disputed land in the matter at hand was thus, not sufficient enough for identifying it so that this court can effectively resolve the controversy between the parties. I therefore, answer the third issue

negatively that, the plaint at issue does not properly disclose the description of the suit land as required by the law.

In answering the fifth issue, I am of the settled view that, for the reasons shown in considering the third issue, the suit at hand is incompetent. The irregularity committed in the plaint is lethal and goes to the root of the matter, it is not thus, a technical matter. Courts of law, including the one I am presiding over, do not have jurisdiction to entertain incompetent matters like the one under discussion.

In fact, for the reasons shown above, the abnormality at issue cannot be saved by the doctrine of “overriding objective.” This doctrine has been recently underlined in our law vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). The doctrine/principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice; see section 6 of Act No. 8 of 2018 that amended the CPA. The amendments added new sections 3A and 3B to the statute. The principle was also underscored by the Court of Appeal of Tanzania (CA)T in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).


Nonetheless, the above mentioned principle of overriding objective cannot be applied mechanically to suppress or bulldoze other significant legal principles the purposes of which are also to promote justice and fair trials. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure.

Indeed, in the said **Mondorosi case** (supra) the CAT categorically held at pages 14-15 that, the principle of “overriding objective” cannot be applied blindly against the mandatory provisions of procedural law which

go to the very foundation of the case. In so deciding, the CAT followed its previous decision in **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017** (unreported). It thus, distinguished the **Yakobo Magoiga case** (supra) which had applied the Overriding Objective principle. I am therefore, settled in mind that, the principle must work in tandem, and not in friction with such other legal principles like the one under discussion, which are vital for justice dispensation. I consequently, distinguish the said **Yakobo Magoiga Case** (supra) from the case at hand for the reasons shown above.

Owing to the reasons shown above, I am of the view that, the proper order for this court to make is to strike out the suit for, this is the legal remedy for an incompetent matter. This particular finding makes it unnecessary in law to test other issues listed above for, it suffices for disposing of the entire matter. I therefore, strike out the suit for the reasons given above. Each party shall bear his own costs since the matter has been put to an end for a legal point raised by the court *suo motu* as demonstrated above. It is so ordered.




J.H.K. Utamwa
Judge
12/08/2020

12/08/2020.


CORAM: HON. P. R. KAHYOZA, Deputy Registrar.

Plaintiff: present.

Respondents: present Mr. Mohamed Mgemwa, Solicitor, 9th, 11th 13th
and 17th defendants.

BC: Mr. Patrick, RMA.

Court: Ruling delivered.


P. R. KAHYOZA, DR.
Deputy Registrar.

12/08/2020.