

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND CASE NO. 11 of 2021

ANERI MICHAEL @ LINDA MICHAEL KISAMO.....PLAINTIFF

VERSUS

1. THE REGISTERED TRUSTEES OF EVANGELICAL

LUTHERAN CHURCH IN TANZANIA KONDE DIOCESE1ST DEFENDANT

2. MBEYA CITY COUNCIL2ND DEFENDANT

3. THE ATTORNEY GENERAL3rd DEFENDANT

RULING

Date of last order: 02.08.2022

Date of ruling: 26.08.2022

Ebrahim, J.:

This is the second ruling in respect of the same case. This case was first filed by the Plaintiff on 4th July 2021 suing the 1st Defendant alone, a religious institution claiming Tshs. 350,000,000/- as compensation for trespassing, alienating, deforming and constructing a new structure (church) in her land. The 1st Defendant raised two points of objection on non-joinder of a necessary party and locus- standi. At the end, this court,

in terms of **Order 10 Rule 4 of the Civil Procedure Code, Cap 33 RE 2019** ordered Mbeya City Council be joined as a defendant being a necessary party in accordance to the laws and procedure.

The Plaintiff, filed an amended plaint and accordingly joined Mbeya City Council as the 2nd Defendant on 21.03.2022. Upon service, Counsel for the 2nd Defendant filed a notice of preliminary objection raising four points of preliminary objection as follows:

1. That, the suit is time barred for contravening with **section 3(1) of the Law of Limitation Act, Cap 89 RE 2019** read together with **item 6 Part 1 and item 1 part 1 of the schedule to the Law of Limitation Act.**
2. That, the suit is unmaintainable in law for contravening **section 106(1) and (2) of the Local Government (Urban Authorities) Act Cap 288 RE 2002 as amended by section 33 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.**
3. That, the suit is unmaintainable in law for contravening **ORDER VI Rule 14 and Rule 15 of the Civil Procedure Code, Cap 33 RE 2019.**

4. That, the amended plaint does not disclose cause of action against the 2nd Defendant.

In this case, the Plaintiff is represented by advocate Alfred Chapa whilst the 1st Defendant is represented by advocate Pomboma assisted with advocate Zege. The 2nd Defendant is represented by Mr. Hija Chande and Mr. Mbuwa Jibu learned State Attorney; and the 3rd Defendant is represented by Mr. Joseph Tibaijuka, learned State Attorney.

The points of preliminary objection were argued by way of written submission as per the schedule set by the court. Parties duly filed their respective submissions. The 2nd defendant's submissions were crafted by Mr. Davis Mbembela, learned counsel who abandoned the 4th limb and argued the rest in seriatim.

I shall consider the preliminary objection as argued by the counsels for the parties and shall be referring to their submissions in the course of determining each limb of preliminary objection.

Starting with the 1st limb of preliminary objection, the issue for determination is whether the suit is time barred. Supporting the 1st limb, Mr. Mbembela argued that the suit is time barred since the causes of action

on trespass and compensation arose in 2016 as per paragraphs 5(a), 9 and 10 of the amended plaint. According to Mr. Mbembela the time limitation in instituting the claim for trespass is three years as per **item 6, Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019**; and a suit on compensation is one year as per **Item 1, Part I of the same law**. He also cited the cases of **Denis Alberty Malembeka vs Kibaha Town Council & another**, Land case No. 14 of 2020 HCT at Dar es Salaam (unreported) and **James Olimo t/a Victoria Sec. School vs Makunja Madede Tang'ana**, Land Appeal No. 80 of 2010 HCT at Mwanza (unreported) where it was held that time limit for compensation is one year. He further submitted that this suit should be dismissed as per section 3 of Cap. 89 and the case of **Tanzania Dairies Ltd vs. Chairman Arusha Conciliation Board & Issack Kirangi** [1994] TLR 33.

In reply, the plaintiff's counsel, Mr. Chapa submitted that the 2nd defendant's counsel has missed the point as the plaintiff's claims are neither trespass nor compensation, but ownership of land. He referred this court to paragraphs 7, 8, 9 of the Plaint and the prayers made under item (a) of the plaint where the Plaintiff claims to be the lawful owner of the suit land and prays to be so declared by the court. He contended that the 2nd

defendant counsel has chosen to pick some paragraphs in the plaint and try to convince this court that the suit is tort instead of ownership of land. He also stated that the cited cases by Mr. Mbembela are distinguishable.

I have passionately followed the submissions by counsel from both sides. I have also keenly read the amended plaint. For quick and easy reference, I quote para 5 (a) of the plaint. It reads that:

"That the plaintiff claims against the 1st defendant for:

- (a) *A total of Tshs. 350,000,000/= (THREE HUNDRED AND FIFTY MILLION) as compensation for trespassing, alienating, deforming and constructing a new structure (church) **on the plaintiff's land.**"*
(emphasis added)

I also have to quote paragraph 9 of the same plaint because it was referred by the 2nd defendant counsel. It reads as follow:

*"9. That surprisingly in early 2016 the 1st Defendant herein above mentioned without any color of right or justifiable cause trespassed to the said plot and forcefully started to develop the plaintiff's plot by erecting a church building ignoring the fact that the **Plaintiff is a lawful owner of the said plot.**"*

In her prayer; the Plaintiff prays for Judgment and Decree against the defendants and:

(a) *An order for declaration that the **Plaintiff is a lawful owner of the suit land.***

Lucidly, the plaintiff's claim is not a pure civil tort of trespass nor compensation. I am at one with the arguments by the plaintiff's counsel that the gist of cause of action cannot be grasped by depicting some words or phrases in the plaint. In reading the plaint there are more than one paragraphs in which the plaintiff describes the cause of action; see paragraphs 7, 10 11,12, 14 and the prayer in (a) above. It is my findings therefore that, the gist of the cause of action can be grasped by reading the whole paragraphs constituting the cause of action in its context. The plaint at issue when read as a whole it is understood that the plaintiff claims ownership of the suit land. He is complaining against the 1st Defendant for trespassing into it and erect a structure. In my view the word trespass used by the plaintiff does not connote that the matter is a normal civil tort of trespass but it is used semantically in lieu of other words such as 'invade', 'encroach' or 'infringe'.

Mr. Mbembela has referred to this court decisions on trespass and compensation. Firstly, I concur with the counsel for the plaintiff that the circumstances in the **Denis Alberty Malembeka case** (supra) are distinguishable with the facts and the circumstances of the instant case. In cited case, the plaintiff was claiming compensation after the land has been acquired by the Government under the Land Acquisition Act, Cap. 118 R.E 2019. On the other hand, the facts, in the **James Olimo case** (supra) served it own purpose and circumstances as they are also different. It is my view therefore that each case is determined according to its facts, circumstances and purpose. In the event, the 1st limb of preliminary objection is overruled.

Coming to the 2nd limb of preliminary objection, the issue for determination is whether the 2nd respondent was served with statutory notice as per the requirement of the law. Submitting in support of that limb, Mr. Mbembela contended that the 2nd Defendant was not served with a statutory notice as per the provision of **section 106 (1) and (2) of the Local Government (Urban Authorities) Act, Cap. 288 R.E. 2002** as amended by **section 33 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020**. He argued that the 2nd Defendant was

served with notice in respect of **Lutheran Church in Tanzania Dayosis ya Konde** whereas in the amended plaint the 1st defendant is **the Registered Trustees of Evangelical Lutheran Church in Tanzania Konde Diocese**. Also, that the plaintiff was Aneri Michael @ Linda Michael Kisamo but the suit has been instituted by Anery Michael @ Linda Michael Kisamo. According to Mr. Mbembela, the suit is unmaintainable for lack of statutory notice. He relied on the case of **Arusha Municipal Council vs Lyamuya Construction Company Limited** [1998] TLR 13 to cement his argument.

In reply submission Mr. Chapa argued that the 2nd limb of preliminary objection is not a pure point of law since it requires some evidence to prove it contrary to the principle illustrated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors LTD [1969] EA 169** where it was held that preliminary objection should be on pure point of law. According to him, the name of LUTHERAN CHURCH IN TANZANIA DAYOSISI YA KONDE instead of REGISTERED TRUSTEE OF EVANGELICAL LUTHERAN CHURCH IN TANZANIA KONDE DIOCESE is a typing error which does not go the root of the matter in consideration of the fact that the 2nd defendant is not prejudiced. Else, the omission can be served by the

overriding objective principle under **section 3A of the Civil Procedure Code**, Cap. 33 R.E. 2019 he argued.

Having considered the counsel's submission, it is undisputed that the 2nd respondent was served with a statutory notice in respect of LUTHERAN CHURCH IN TANZANIA DAYOSISI YA KONDE. Whereas, the 1st defendant in the plaint (amended plaint) whom the plaintiff is complaining of invading his land is the REGISTERED TRUSTEE OF EVANGELICAL LUTHERAN CHURCH IN TANZANIA KONDE DIOCESE. This court was not told by the plaintiff's counsel if the two are one and same person. He only told this court that it was a typing error. Counsel for the plaintiff also told this court that it needs evidence to prove it, so it is not a pure point of law. However, looking at the two above names without hesitation they are two different entities. Again, I am alive of the position of the law that serving a statutory notice before suing the government is mandatory and a matter of law; see **section 106 (1) and (2) of the Local Government (Urban Authorities) Act, Cap. 288 R.E. 2002 as amended by section 33 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020.**

In the parity of reasoning, this court, Hon. Kahyoza, Judge in **Aloyce Chacha Kenganya vs Mwita Chacha Wambura and others**, HC Civil

Case No. 07 of 2019 observed the essence of statutory notice to the Government before suing it which I fully subscribe. He stated:

"It should be known that the requirement for issuing a statutory notice to the government before suing it is not without good reasons. Giving a statutory notice to the government before filing a suit gives the Government the opportunity to settle the claim before a lawsuit is filed and to investigate the claim so that it can properly defend itself or to correct the conditions or practice that led to the claim."

From the above, it is the finding of this court that serving a notice to the 2nd defendant is a matter of law and it has purpose to serve. Besides, the notice, in my view, should be clear with regard to the cause of action and the relief claimed. This is to enable the Government to prepare her defence or settle the matter out of court.

Therefore, the compliant by Mr. Mbembela that the 2nd defendant was served with a notice claiming another party different to the one impleaded in the plaint, in my view has merit. This is because, the 2nd defendant did not exactly trace the base for cause of action which otherwise she might have decided to investigate and settle the claim out of court or prepare the defence against that claim. However, when the name of the defendant on the notice is different with that in the plaint, the investigation would come

out differently and the prepared defence might also be different. The result of which right to a fair trial would also be in jeopardy. I am of the concerted view thus, the statutory notice bearing a different name of the 1st defendant prejudiced the 2nd defendant and goes to the root of the case.

The plaintiff's counsel argument that the court should invoke the overriding principle to dismiss the 2nd defendant's preliminary objection on the 2nd limb of objection is in my view not tenable. This is because, it has been underscored by the Court of Appeal of Tanzania and this court that parties cannot be allowed to circumvent the mandatory procedural requirements. See the position underscored by the Court of Appeal in **Juma Busiya vs Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020, At Mbeya (unreported) and **SGS Societe General de Surveillance SA and another vs VIP Engineering & Marketing Ltd and another**, Civil Appeal No. 124 of 2017 (unreported). In the latter it was stated that:

"The amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."

In the circumstance, the statutory notice served to the 2nd defendant was in respect of another claim as it beared a different name of the 1st defendant. That being the findings of this court, the 2nd limb of preliminary objection is hereby sustained.

In the end result, considering also the fact that the plaintiff's counsel conceded to the 3rd limb of preliminary objection that the plaint is contravening **Order VI Rule 14 of the Civil Procedure Code**, the suit at hand is incompetent. Consequently, the same is hereby struck out with costs.

Accordingly ordered.




R.A. Ebrahim

JUDGE

Mbeya

30.08.2022