IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]

AT ARUSHA

LAND CASE NO. 9 OF 2023

BETWEEN

MOIVARO INVESTMENT

AND TRADING COMPANY LIMITED _____PLAINTIFF

VERSUS

AQUATECH LIMITED _____1ST DEFENDANT

ALBERT JACOB VAN AARST _____2ND DEFENDANT

RULING

23/02/2024 ***&*** *01/03/2024*

BADE, J.

This is a Ruling on the preliminary objection raised by the Defendants couched as:

> *The suit is bad in law for contravening the mandatory provision of Section 102 (1) of the Land Registration Act, [CAP 334 R.E 2019].*

The court had ordered that the said objection be argued by way of written submission. Both parties enjoyed legal representation, Ms. Ikoda Kazzy for the Defendants and Rogers Mlacha for the Plaintiff. They both filed their submission as ordered.

To put matters in context, I briefly reviewed the facts that gave rise to the suit and eventually the present plea *in limini litis*. Plaintiff claims against the Defendants that the transfer of Farm No. 109/2/3 located at Nduruma

Arumeru District comprised under Title No. 17165 from Plaintiff to the 1st Defendant is null and void.

According to the counsel for the Defendants who had the ball rolling, she contended that the filing of the suit by the Plaintiff contravenes the provision of the law which requires a party aggrieved by a decision, act, or order of the Registrar may appeal to the High Court, rather than institute a fresh suit; this being the requirement of section 102 (1) of the Land Registration Act, [CAP 334 R.E 2019].

From the Plaint and its annexures, she referred to paragraphs (a) and (b) of the relief sought by the Plaintiff herein:

a) A declaration that he is the lawful owner of the suit land Farm No. 109/2/3 located at Nduruma Arusha District comprised under Title No. 17165;

b) A declaration that the alleged transfer of Farm No. 109/2/3 located at Nduruma Arumeru District comprised under Title No. 17165 from Farm No. 109/2 located at Nduruma, Arumeru District comprised under Title No. 13707 owned by the Plaintiff to the 1st Defendant is null and void.

She contends further that the transfer of the suit land which is Farm No. 109/2/3 was affected and approved in 2003 by the Registrar of Titles and

reading closely the paragraphs of the Plaint specifically paragraph 12, the Plaintiff made it clear that they became aware of the transfer since 2015 and did nothing based on the alleged illegal transfer.

She explained that the Plaintiff raised the Registrar of Titles attention in January 2023 for purposes of rectifying the Land Register and found out that the Registrar of Titles had already issued another Certificate of Title to the 1st Defendant, which prompted the Plaintiff to demand the defendant to surrender the new Certificate of Title of the suit land without success.

She maintains that the Plaintiff's case as pleaded and the reliefs sought are all sought against the Registrar of Titles since the suit land is a registered land, but more importantly, the fact that the Plaintiff had already sought to move the Registrar of Titles to rectify the Register in January 2023 which makes it imperative that they should be obliged as per the legal provision to lodge an appeal and not file a fresh suit before this Court, cementing her position relying on this Court's decision in the case of **Imtiaz Hussein Banji vs Dilshad Hussein Banji,** Land Case No. 101 of 2022, (Unreported), where her lordship Mgeyekwa J, (as she then was) held that:

> *"Conversely, following the same section of the law, the parties who have any grievance in land matter involving registered land are required to settle the matter at the Registrar of Title and not lodging*

a suit at the High Court. The aggrieved party in accordance with section 102 of the Land Registration Act, CAP 334 [R.E 2019] can challenge the Registrar of Title's decision by way of an Appeal before this Court against the decision or order of the Registrar of Title within the time specified under the Act. The essence behind this is that the Registrar of Title is the one who authorize the issuance of a Certificate of Title, hence, he is in a better position to solve the dispute related to a registered land."

The counsel for the Defendants insists that all the complaints by the Plaintiff are against the Registrar of Titles alleging the transfer of the suit property was fraudulently done by the Defendants (as per the Plaint's annexure 'M-5' where the Statutory Declaration made under section 78(2), is explicit that the Registrar of Titles registered the said title back in the year 2003 and the Plaintiff complains that he was not aware of the transfer of the property until 2015).

She referred to this Court's decision in the case of **The Registered Trustees Dawat-E- Islami-Foundation vs the Registered Trustee of Madrasatul Daaru Munadhamat Dawatil Islami Foundation and 5 Others**, Land Case No. 7 of 2021, (Unreported) in relation to the contention that the Plaintiff is trying to trick their way to court while the

law has prescribed on how such a matter should be dealt with where this court through his lordship Arufani, J. ruled:

> *"However, the court has found in the circumstances of the case at hand that the averment of double allocation as a cause of action in the suit at hand is just a trick of finding a way of challenging the decision or act of the Registrar of Title to refuse to issue a certificate of occupancy to the plaintiff and in lieu thereof issued the same to the first defendant. To the view of this court and as rightly argued by the counsel for the first defendant the said decision or act of the Registrar of Title was supposed to be challenged by way of appeal and not by way of lodging a fresh suit in the court as it was done by the plaintiff".*

She urged this court to sustain the preliminary objection raised and struck out the case with costs.

Responding in opposition the counsel for the Plaintiff retorted that he not only found the PO without any merit but also faults the Defendant's counsel's mode of raising the preliminary objection as contravening the provisions of Rule 2 of Order VIII of the Civil Procedure Code [Cap 33 R.E. 2019] (hereinafter "the CPC") in the manner in which

the objection was pleaded, as he argues the law requires the preliminary objection to be pleaded.

In his view, the provision is mandatorily prescribing the manner in which to plead an objection as the word ***"must"*** that is used denotes mandatory compliance. And since Rule 2 of Order VIII of the CPC is in *parimateria* with Rule 4 (1) of the Kenyan Civil Procedure Rules, he relied on the Kenyan Court of Appeal case in ***Achola & Another vs Hongo & Another*** *[2004] 1 KLR 462* which held:

> *"The provisions of the Civil Procedure Rules Order VI rule 4 (1), (2) required the second respondent to specifically plead the statute on whose provisions he relied in seeking to defeat the appellant's claim. The respondents were obliged to specifically plead limitation based on statute before being allowed to use it as the basis of preliminary objection."*

Counsel for the Plaintiff insists that the provisions of Rule 2 of Order VIII of the Civil Procedure Code enjoined the Defendants to specifically plead the alleged contravention of section 102 (1) of the Land Registration Act by the Plaintiff's suit, which they failed to do in the joint defence since there is no paragraph specifying the alleged contravention of section 102 (1) of the Land Registration Act. Consequently, the Defendants are not entitled

to rely on the alleged contravention of section 102 (1) of the Land Registration Act and base a preliminary objection on it pressing that on such basis the preliminary objection is bad in law and incompetent attracting a dismissal with costs.

In further argument, the counsel complements the interpretation of Rule 2 of Order VIII of the Civil Procedure Code, as a principle that a preliminary objection must consist of a point of law that has been pleaded or which arises by clear implication out of the pleadings as per Law, JA in the much-celebrated case of **Mukisa *Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*** *[1969] E.A. 696.*

On another argument that seems to be taken in the alternative, the plaintiff's counsel maintains that the Defendants' preliminary objection fails the test laid out in *Mukisa Biscuit (Supra)* and lacks merit since in his view, there is nothing in its body of pleadings to suggest that the Plaintiff is aggrieved by a decision of the Registrar of Titles or that the suit is founded on a decision of the Registrar on hand, neither is there a plea on the joint defence that suggests that the Plaintiff is aggrieved by a decision of the Registrar of Titles nor that her suit is founded on a decision of the Registrar of Titles.

He insists that the Plaintiff suit as per paragraphs 8 through 12 of the plaint, is based on the allegation that the 2nd Defendant, while serving as a director

of the Plaintiff, fraudulently transferred the suit property from the Plaintiff to the 1st Defendant company which is wholly owned by him and his wife.

In pressing his point further, the learned counsel took the view advanced as per the holding of *Sir Charles Newbold, P.* in the ***Mukisa Biscuit (supra),*** that a preliminary objection should be argued on the assumption that all facts pleaded by the other side are correct, arguing that If the Defendants' objection is let to proceed this way, it will be out of context since the counsel for the Defendants has failed to show how the pleaded facts in the plaint contravene the provisions of section 102(1) of the Land Registration Act, neither has she pointed out any paragraph of the plaint that was specifically pleading the decision of the Registrar of Titles over which the Plaintiff ought to have preferred an appeal, and arguing further that the averments in the singled-out paragraphs of the plaint submitted by the counsel for the Defendants i.e. paragraphs 12,15 and 17 hinges on the Defendants actions, not those of the Registrar of Title's.

He fortified his point further that his clients are claiming ownership of the suit property against the Defendants and are seeking against them declaratory orders, including a declaration that they are the lawful owner of the suit property, noting that registration in a land register is not ipso facto a proof of title referring to the case of **Jacqueline Jonathan Mkonyi and another vs Gausal Properties Limited,** Civil Appeal No.

311 of 2020 (Unreported). He also contends that it is a Civil Court, not the Registrar of Titles, that can conclusively determine a dispute over ownership of land referring to section 167 (1) of the Land Act (Cap 113 R.E. 2018) and the case of **Melchiades John Mwenda vs Gizelle Mbaga (Administrator of the Estate of John Japhet Mbaga - deceased) and 2 Others,** Civil Appeal No. 57 of 2018 (Unreported), while vehemently disputing the presence of anything either in the plaint or the Defendants' joint defence to suggest that the Plaintiff's claim as presented in the plaint has been determined by the Registrar of Titles to bring into play the provisions of section 102 (1) of the Land Registration Act.

Finally, the counsel for the Plaintiff disparaged the cases cited by the learned counsel for the Defendants for only being persuasive as decisions of this Court are not only not binding upon this court but also not good authorities in that they conflict with the cited decisions of the Court of Appeal of Tanzania which are binding on this court.

The Defendant's counsel made a rejoinder reiterating her position and adding, in response to the assertion that the suit is not founded on the Registrar's decision, that the relief sought from the suit that the transfer of Farm no 109/2/3 comprised in CT no 17165 from the Plaintiff to the 1st Defendant being null and void is a relief against the Registrar of Titles.

Having considered the arguments by both parties, the question that begs is whether the preliminary objection has merits and is tenable, and in its determination, I find it prudent to start with the raised issue over the 'how' the preliminary objection has been raised. The contended provision of Rule 2 of Order VIII of the Civil Procedure Code, Cap 33 R.E. 2022, has it that:

> *"The defendant must raise by his pleading all matters which show the suit is not maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense as, if not raised, would be likely to take the opposite party by surprise or would raise an issue of fact not arising out of the plaint, as for instance, fraud, limitation, release, payment, performance, or facts showing illegality."*

The counsel impressed the court that the above provision should be accorded meaning as implored in the Kenyan case ***Achola & Another vs Hongo*** (supra). With due respect to the learned counsel, and on a contextual and fair reading of Rule 2, I am unpersuaded by the learned counsel for the Plaintiff that a case has been made out, let alone a convincing one that would make me depart from the customary and ordinary way that preliminary objections have been pleaded in our jurisdiction. And this, for the sake of understanding, is without pointing to

the absurdity of adopting such practice when for instance, one would be raising a preliminary objection, say for an affidavit that falls short of the legal prescriptions for deponing on law instead of facts or for wanting to raise a point of objection on jurisdictional issue which can be raised at any time during the pendency of the proceedings before the conclusion of the matter. I respectfully decline the invitation to give the said provision a different functional meaning than the one that has been obtained within our jurisdiction time and again on ***how*** preliminary points of objections are introduced and or notified, which is on the body of the Written Statement of Defence before one pleads their defence, or by a separate notice. Not necessarily as part of the assertions in the paragraphs forming the statement of the defence as purported to be impressed by the counsel for the Plaintiff. And I am not saying that is a bad practice, just that it is not how it is practiced in this jurisdiction.

My curious research has not yielded much on the endorsement of such practice here at home, or in other jurisdictions to form a persuasive traction and I will give it a rest at that. No wonder the learned counsel could not come up with any authority from our jurisdiction despite the fact that the practice of raising preliminary objections is as old as the Civil Procedure Code itself. In any case, I think it is a frowned-upon practice to raise another preliminary objection over an existing preliminary objection.

Now moving to the point of whether the raised preliminary objection is tenable. It is unfortunate in my view, that the counsel for the Plaintiff has cited out of context the case of ***Jacqueline Jonathan Mkonyi's case*** *(supra)* stating that:

> *"The main proof of ownership is the legality of ownership ....."* *without qualifying that registration of land would not ipso facto prove title in the absence of evidence establishing how one got the title. In this case, there is evidence of PW1, PW2, and PW4 showing how ownership of that land changed hands from one person to the other till it was sold to the respondent. There is also documentary evidence as earlier demonstrated."* Emphasis mine.

My understanding of the point made on the submission by the counsel for the Plaintiff is that their choice to bring the matter to the court is to ensure there is an investigation of the process of how the defendants got their title, despite what has been recorded on the land register, with a finding resulting into nullification of what has been entered into the Land Register, which makes an appeal under section 102 not a necessarily tenable avenue to bring the desired end.

On the other hand, the defence counsel while arguing why the Plaintiff has chosen to file a fresh suit instead of appealing the Registrar's decision, has taken the view that the plaintiff's action constitutes a pre-emption or a

circumvention of the legal requirement, a contention that has been valiantly opposed by the plaintiff's counsel.

The latter's view is that there is no pending action that has been asked of the Registrar of Titles that would be preempted by the plaintiff's filing of the suit in court, neither is there any action left in respect of which the danger of pre-emption would be perceived, a view that is convincing to me as well.

I am well aware that the Court of Appeal in **Managing Director, Kenya Commercial Bank (T) Limited & Another vs Shadrack J. Ndege** (Civil Appeal 232 of 2017) [2020] TZCA 389 among many others, had reemphasized the principle in Mukisa Biscuit's case underscoring the point that this decision did not provide an exhaustive list of circumstances where pure points of law may arise. The decision listed the objection to the jurisdiction of the court or objection based on a plea of limitation, as examples of when pure points of law are evident.

The Court went to restate approvingly the principle as further elaborated in **Ayubu Bendera and 10 Others vs A.I.C.C. Arusha,** Civil Application No. 9 of 2014 (unreported), noting that after embracing the parameters laid down in in the Mukisa Biscuit's case, what courts in Tanzania have done over the following years, is to expound and add new examples based on those parameters.

I agree with the counsel for the defendants on the point that the requirement as prescribed in section 102(1) of the Land Registration Act Cap 334 can be a pure point of law added onto the parameters as explained above when the situation is right. The provision is prescriptive and it thus reads:

> *"Any person aggrieved by a decision, order or act of the Registrar may appeal to the High Court within three months from the date of such decision, order or act."*

But that said, the real question is whether the appeal that could have been preferred by the Plaintiffs herein would be able to provide all the parties concerned the opportunity to address the issues while canvassing all the parties, including the Registrar of Titles. As gathered from both counsel's submissions, the tussle revolves around the transfer of the title deed and the entry into the register by the Registrar of Titles, whose decision could be appealable if moved under section 99 of the LRA, which is mostly entailed in refusal to **rectify the register.** Granted that the appeal to the high court would have tested the RT decision on its validity, but a fresh suit that involves an investigation of the legality of the title would be more accommodating, even though its actioning might entail the Registrar of Titles being moved. The appeal avenue in my view is not justified at this point, as it will not be possible to provide the parties involved with the

opportunity to interrogate the legality and or propriety of such entries, not just the decision and entries into the Land Register. I say so because an appeal as provided in section 102 of the Land Registration Act against the Registrar of Titles is derived from the actions emanating from section 99 of the Land Registration Act. The matter at hand in my view, calls for answers on how the land was transferred to the defendants to become registrable in their favor from the previous occupier, and since fraud is being alleged, its determination becomes important and decisive. The said issues would need some light as glancing at paragraphs 12, 15, 16, and 17 of the plaint and the reliefs sought are all pointing to the fact that there should be nullification and rectification of the title to the suit farm and the declaration of ownership in the plaintiff's favor. In **Kampuni ya Biashara Umati & Another vs Goodhope Hance Mkaro** (6 of 2021) [2022] TZHC 12435 (14 March 2022), this court (Manyanda, J.) has ruled that:

> *"..... that although the Registrar of Titles can effect rectifications in the Register of Titles, he can only do so without this Court being involved in three scenarios namely, where there is consent of all persons interested; where any memorial has become wholly obsolete; or where by reason that a memorial is made under any error, omission or mistake. He cannot rectify the same where there are contentious issues regarding ownership of the land."*

The provision reads:

99. Rectification of Land Register

(1) Subject to any express provisions of this Act, the Land Register may be rectified pursuant to an order of the High Court or by the Registrar subject to an appeal to the High Court, in any of the following cases:

(a) where the High Court has decided that any person is entitled to any estate or interest in any registered land and as a consequence of such decision the High Court is of the opinion that a rectification of the land register is required, and makes an order to that effect;

(b) where the High Court, on the application of any person who is aggrieved by any memorial made in, or by the omission of any memorial from the land register, or by any default being made, or unnecessary delay taking place in the inscription of any memorial in the land register, makes an order for the rectification of the land register;

(c) in any case and at any time with the consent of all persons interested;

(d) where the High Court or the Registrar is satisfied that any memorial in the land register, has been obtained by fraud;

(e) where any memorial has become wholly obsolete; and

(f) in any other case, where by reason of any error or omission in the land register or by reason of any memorial made under a mistake, or for other sufficient cause it may be deemed just to rectify the land register.

As it can be seen, in this matter, there is a contest of ownership of the suit farm as the facts averred in pleadings make it clear the issues are contentious. In such situations, this Court becomes seized with the requisite powers to adjudicate the suit as guided by the Court of Appeal in **Melchiades John Mwenda vs Gizelle Mbaga** (supra).

Based on the foregoing analysis, the Preliminary objection is overruled. Costs to follow cause.

It is so ordered.

DATED at **ARUSHA** this **01st** day of **March 2024**

A. Z. Bade
Judge
01/03/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **01st** day of **March 2024**

HIGH COURT OF TANZANIA

A. Z. Bade
Judge
01/03/2024