

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 33 OF 2022

SEVERINA LIBENT KANYABURUGO PLAINTIFF

VERSUS

ATTORNEY GENERAL 1ST DEFENDANT

THE KINONDONI MUNICIPAL COUNCIL 2ND DEFENDANT

TATU THEOPHILY UCHUNGU 3RD DEFENDANT

MUSTAFA MRINGO 4TH DEFENDANT

BENYANI BASUSU BABEL 5TH DEFENDANT

FAUSTINE MASAWA 6TH DEFENDANT

SALUM MAZOE 7TH DEFENDANT

RULING

13/6/2022 & 28/6/2022

A. MSAFIRI, J

This ruling pertains to preliminary objection on point of law raised by the 3rd defendant to the effect that:

- i. The formatting of the pleadings hopelessly contravenes Section 106 (1) (a) of the Local Government (Urban Authorities) Act, Cap 288 as amended by Act No. 1 of 2020.
- ii. That the suit is hopelessly time barred. *ALLs.*

The preliminary objections were raised in objection of a land suit filed by the plaintiff against the seven defendants, claiming among other reliefs, to be declared a lawful owner of the suit premises as described in the plaint.

With the leave of the Court, the preliminary objections were argued by way of written submissions. On the 3rd defendant, submission in chief and rejoinder were drawn and filed by Mathew Kabunga, learned advocate, whilst the reply by the plaintiff was drawn and filed by Nkonoki Itumbagija, learned advocate.

In support of preliminary objection, Mr. Kabunga submitted on the first ground of preliminary objection that, among the defendant in this suit is Kinondoni Municipal Council. That once the Kinondoni Municipal Council is among the defendants, the plaintiff was duty bound to comply with section 106 (1) (a) of the Local Government (Urban Authorities) Act, Cap. 288 as amended. The provision requires the plaintiff to issue ninety days notice of intention to sue the Local Government. That the present suit is a new one which was filed on 21/2/2022 after the amendment of the cited law, so the plaintiff was bound to comply with the new requirement of law.

On the second ground of preliminary objection, the learned advocate submitted that, the dispute in hand arose way back in 1991 at the time when the Criminal Case No. 1266 of 1991 was filed in Court at Kivukoni District Court. In that case the plaintiff was charged for criminal trespass in Plot No. 322 Fundikila Street, the property of the 3rd defendant.

Atts.

He argued that, the suit in hand was filed before the Court on 21/2/2022 which is 31 years from the date which the cause of action arose. That, the Law of Limitation Act, Cap 89 R.E. 2019 specifically at paragraph 22 of the First Schedule, specifies the period for suit for recovery of land to be twelve years (12 years). That, according to Section 4 of the Law of Limitation Act, the period of limitation begins to run from the date on which the right of cause of action arises.

In response, Mr. Itumbagija for the plaintiff stated that , the plaintiff has complied with section 106 (1) (a) of the Local Government (Urban Authorities) Act, Cap 288 as amended by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020, where it requires the plaintiff to give 90 days' Notice of intention to sue the local Government. He submitted that it was an oversight on the part of plaintiff not to annex the said Notice. He prayed for the Court to invoke the principal of overriding objective and allow the plaintiff to attach the statutory notice marked as annexure 'S' 11.

On the second ground of objection, he admitted that, Criminal Case No. 1266 of 1991 was filed by the 3rd defendant at Kivukoni District Court for Criminal trespass, where the plaintiff's husband was acquitted. That, since 1991 there was no conflict between the plaintiff and 3rd defendant until sometime in November 2013, when the 3rd defendant emerged and claimed the land in dispute to be hers.

He argued that, in this matter, the cause of action arose in 2013, hence the suit is within the time. He prayed for the preliminary objection to be dismissed with costs. In rejoinder, the 3rd defendant reiterated his submissions in chief.

Having gone through the submissions of both parties, the main issue for my determination is whether the preliminary objections have merits.

On the first ground of objection, the 3rd defendant stated that, the plaintiff was obliged to issue 90 days Notice to the 2nd defendant, Kinondoni Municipal Council. The plaintiff averred that, she was in compliance of mandatory provisions, but by oversight, the 90 days' notice was not attached with the pleadings. She prayed for the court to invoke the principle of overriding objective and allow the said Notice to be attached.

I have seen the copy of the said Notice which is named as "S" 11, and is titled; "Statutory Notice to sue Kinondoni Municipal Council". The Notice was served to the Municipal Director and it shows it was received on 30/9/2021.

On the last part of the said Notice, it is stated that;

*"We intended to file a suit against you after the expiration of the requisite **Notice of one month "(30 days)"**.*

(Emphasis supplied).

Alle.

However the provisions of Section 106 of the Local Government (Urban Authorities) Act (supra) as amended by the Written Laws (Miscellaneous Amendment) act No. 1 of 2020, requires that a 90 days' Notice of intention to sue has to be served upon the urban authority and a copy thereof to the Attorney General and Solicitor General.

In this current matter, the plaintiff has issued a 30 days' Notice and gave a copy of the Attorney General and Solicitor General. It is obvious that the plaintiff has used the provisions of the Local Government (Urban Authorities) Act, before the amendments of 2020. The important question in this circumstances is whether the issuing of 30 days Notice instead of 90 days Notice, fatal to this proceedings?

Before the introduction of the principal of overriding objective, this could have rendered the whole suit a nullity. However, with the said principle I am of the view that this situation is curable. I say the situation is curable because first, the plaintiff has complied with the mandatory procedure i.e. issuing a Notice of Intention to sue to the relevant authority and copying the Attorney General and Solicitor General. The plaintiff made mistake of citing the old provision which has already been amended, but as I already said, it is curable. Second, the 3rd defendant has not shown how the issuing of the 30 days Notice has prejudiced her, being an individual. The Notice was served to the 2nd defendant and copied to the 1st defendant. This Court has failed to see how this has affected or prejudiced the rights of the 3rd defendant in this matter. *Alles*

For these reasons and for purpose of expediting and dispensing justice, I hereby invoke the principal of overriding objective and find the omission is curable. Hence, I overrule the first ground of objection.

On the 2nd ground of objection, the 3rd defendant is arguing that the cause of action arose in 1991 while the plaintiff maintains that, the cause of action arose in 2013. In the famous case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) CA. 696 at page 701 it was held that;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion".

Upon going through the 2nd ground of objection, I have noted that the same raises mixed point of law and facts as such it would be premature to determine them at this stage of proceedings.

My view is supported also by the case of **Soitsambu Village Council vs. Tanzania Breweries Ltd and Tanzania Conservation Ltd**, Civil Appeal No. 105 of 2011 (unreported), where the Court of Appeal held that;

"A preliminary objection should be free from facts calling for proof or requiring evidences to be adduced for its verification. Where a Court

Alle.

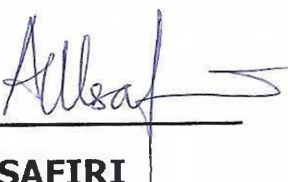
needs to investigate facts, such an issue cannot be raised as preliminary objection on point of law"

Guided by the above principles, I am of the view that the second point of objection does not qualify as a preliminary objection which should be on pure points of law. This is for reason that, there is argument between the plaintiff and the 3rd defendant on when the cause of action arose. The plaintiff is saying that it was in 2013 while the 3rd defendant is arguing that it was in 1991. This attracts evidence, where the court will be required to go through the evidence of both parties to verify the truth. For this reason, this 2nd ground of objection also is hereby overruled.

In view thereof, I find no merit in the preliminary objections raised and I overruled them with costs.

Dated and Signed at Dar es Salaam this 28th day of June, 2022.





A. MSAFIRI
JUDGE