

TANZANIA / JUDGMENT

CHEN ZUBING Ruling

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
MWANZA AT MWANZA CIVIL CASE NO. 182 OF 2025 CHEN ZUBING

..... PLAINTIFF VERSUS HENRY NTINDA MATATA
..... DEFENDANT

RULING

19th & 28th March, 2025 CHUMA, J. In the written statement of defence, the defendant raised a preliminary objection built on two grounds. He contends that the suit is founded on a claim based on an unregistered lease exceeding five years on registered land is unenforceable in terms of sections 2 and 41 (2) of the Land Registration Act. It is also the defendant's argument that in view of annexure CK3, the suit is incompetent for failure to implead a necessary party. On the date fixed for the hearing of the preliminary objection, Mr. Mruma Shabib, learned counsel, appeared fending for the plaintiff while the defendant had the services of Mr. Chama Matata, also learned counsel. 1 Commencing on the first ground of objection, Mr. Matata submitted that the lease agreement subject to the suit is invalid for it was not registered pursuant to section 8 (2)(h) of the Registration of Documents Act, Cap. 117. He also beseeched the Court to be guided with section 62 (2) of the Land Act, Cap 113, and section 8 (1) of the Land Registration Act, Cap 344, which provides for compulsory registration of lease agreement and failure of which renders the agreement inoperative. Supporting his point, Mr. Matata cited the case of Farah Mohamed V Fatuma Abdallah [1992] T.L.R 205 TZHC 21 (18 August 1992) and Princes Nadia (1998) Ltd V Remency Sikusiry Tarimo and 2 others, Civil Appeal No. 242 of 2018 Concerning the second ground of objection, the defendant's counsel argued that according to annexure CK3 to the plaint, Ilemela Municipal Council should be impleaded for being a necessary party. To him, there exists a right of relief against the municipal in respect of the matters involved in the suit. It was also the counsel's observation that without impleading it the court may not be in a position to pass an effective decree. While believing that none joinder is fatal, he invited the Court to have a glance at the case of Leonard Peter V Joseph Mabao and 2 Others (Land Case 4 of 2020)

[2021] TZHC 7527 (4 November 2021) where the court cited with approval 2 the case of Abdullatif Mohamed Hamis V Mohamed Yusuf & Another. Civil. Revision No. 6 of 2017 CAT (unreported). On the strength of his submissions, Mr. Matata asked the Court to find that this suit is unmaintainable and is liable to a dismissal with cost. Not surprisingly, Mr.

Mruma did not purchase Mr. Matata's line of argument. He was obstinate that issues on the validity or otherwise of the lease agreement and questions arising from annexure CK3 are points that require evidential proof hence lacking threshold tests for a preliminary objection. The counsel had no qualms about the laws and court decisions cited but he was of the view that they have been prematurely applied. Distinguishing the pronouncement in the cited case of Leonard Peter V Joseph Mabao and 2 Others (supra), the learned counsel stated that going by the plaintiff's reliefs sought nothing suggested the involvement of Ilemela Municipal Council. Bolstering his point, the learned advocate cited the case of Mohamed Enterprises Tz Limited V Masoud Mohamed Nasser Civil Application No 33 of 2012. Rejoining, albeit, briefly, Mr. Matata reiterated that the two grounds are points of law as they emanate from the pleadings. He added that the 3 Municipal is the one who can state if the construction was viable without drawings. I have carefully examined the rival submissions of the parties for and against. Central to the disagreement is whether or not the two grounds of objection are founded on matters of law capable of disposing of the suit. Before further ado, it is significant to revisit the carding rules governing preliminary objections. The defunct Court of Appeal for East Africa in Mukisa Biscuits Manufacturing Company Ltd V West end Distributors Ltd,

[1969] E. A 696, defined a preliminary objection as one that is like what used to be a demurrer, it raises a pure point of law capable of disposing of the whole matter. Later, in the case of Tanzania Telecommunications Co Ltd V Vedasto Ngashwa & Others, Civil Application No. 67 of 2009 when reaffirming its earlier decision in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd, [1966] EA 696, the Court of Appeal held that a preliminary objection must satisfy three conditions viz; one, the point of law raised must either be pleaded or must arise as a clear implication from the proceedings; two, that it must be a pure point of law which does not require close examination or scrutiny of the affidavit and counter affidavits and three, the determination of such a point of law in issue must not depend 4 on the court's discretion. In The Soitsambu Village Council V Tanzania Breweries Ltd and Another, Civil Appeal No. 105 of 2011 (unreported), this Court stated: "A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits". I will be guided by the above legal stance in resolving the points of controversy between the parties. For a start, it seems parties are not in dispute that the issues of an unregistered lease agreement and non-joinder of the parties arise from the clear implication of the pleadings. Their point of departure is whether those are points of law fitting on all fours to the legal tests of preliminary objection. With the ground related to the unregistered 5 lease, I agree with

the defendant's counsel that under section 8 (2)(h) of the Registration of Documents Act, section 62 (2) of the Land Act as well as section 8 (1) of the Land Registration Act, the law sanctions unregistered estates that no instrument effecting any disposition shall operate to sell or lease until it has been registered under the laws. However, as correctly submitted by Mr. Mruma, to be satisfied that the lease agreement was either registered or not, it will require evidence to ascertain that fact. In other words, compulsory registration of a lease agreement is not free from facts for, it calls for proof or needs evidence to be adduced for its substantiation. It could have been a pure point of law if the plaint and its annexure (CK3) were sufficient to ascertain those facts without a need for investigation or proof to that effect. The law is settled that where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law. In *Olais Loth (Suing as an administrator of the estate of the late Loth Kalama) V Moshono Village Council*, Civil Appeal No. 95 of 2012 (unreported), the appellant through his advocate faulted the High Court for relying on annexure which the appellant annexed in the plaint as a basis for computing time limitation. The basis of the advocate's contention 6 was that the annexure was not yet exhibited as evidence, it could not be relied on to apply the limitation period against the appellant. Upon scrutiny of the contending arguments, the Court of Appeal held that there can be no pure point of law where there are facts that require proof by evidence. It went on expressing the following: "From submissions of the two learned counsel on whether from bare pleadings we can conclude that the appellant is barred by limitation period, it appears to us that the question of when the 12-year limitation period began to run against the late LOTH KALAMA and his estate which includes the disputed land, still requires further proof and cannot be determined at the preliminary stage as pure point of law. We are minded to note that the third paragraph of the Plaint with its annexure "A" suggesting that limitation period begun to run from 1978 was merely noted by the respondent in the fourth paragraph of the written statement of defence. This leaves open to proof the allegation of facts contained in the third paragraph of the Plaint." See also: *Babito Limited V Freight Africa NV- Belgium & others*, Civil Appeal No. 355 of 2020. In light of the above excerpt, the argument advanced by Mr. Matata that the issue of the validity of the lease agreement is a point of law as it 7 emanates from the pleadings is misconceived. The ground raised cannot be ascertained from the bare pleading rather it attracts investigation and brings proof of it. Moving to the second ground of objection, whether failure to implead Ilemela Municipal Council as per annexure CK3 is a point suitable to be ground of preliminary objection. It is obvious that the joinder of parties in civil litigation is a legal requirement under Order I rules 2 and 3 of the Civil Procedure Code, Cap. 33 when it is established that there is a right to relief in respect of or arising out of the same act or transaction. However, given the nature of the controversy at hand, whether or not Order I rules 2 and 3 have been complied with is not relevant at the moment. The question is whether the non-joinder of parties can be ascertained from the bare pleadings and annexure so that it can be qualified to be a point of law. After going through the claims along with the reliefs sought, there is no point at which the plaintiff has shown having any complaints against the municipal council. Only the defendant is

being complained about, and the court has been asked to issue an order against him. My glance at the annexure CK3 has revealed that it was merely communication by the Municipal to the defendant giving him instructions on how to carry out the 8 refurbishment of the disputed premise and not otherwise. From the plain wording of that letter, it cannot be established that the plaintiff has a claim against the Municipal. It calls for further investigation or proof to that effect which cannot be determined at the preliminary stage as a pure point of law. Needless to say, going by that, such an exercise of looking at the evidence as a basis for determining a preliminary objection would offend the principle enunciated in the Mukisa Biscuit Case. In any event, under Order I rule 9 of the CPC, a suit cannot be defeated by reason of the misjoinder or non-joinder of parties. Instead, the court is required to deal with the matter in controversy and resolve the rights and interests of the parties before it. Considering what I have endeavored to demonstrate, I find the preliminary objection unwarranted and hence hereby overruled. Costs follow the event. I so order. DATED at MWANZA this 28th day of March 2025. W.M. CHUMA JUDGE 9 Ruling delivered in court in attendance of Mr. Kelvin Mutatina holding brief for Mr. Mruma and Matata both Learned counsels for the plaintiff and defendant this 28th day of March 2025. C. MWALIMU AG DEPUTY REGISTRAR 10

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