

TANZANIA / JUDGMENT

Faina Thasian Bandora vs Lugonesi Village Council 4 Others

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) AT SUMBAWANGA LAND CASE NO 4 OF 2023 FAINA THASIAN BAN DORA PLAINTIFF VERSUS LUGONESI VILLAGE COUNCIL.....&.3fesw... 1st DEFENDANT TANGANYIKA DISTRICT COUNCIL.....^.....V2ND DEFENDANT THE ATTORNEY GENERAL ' W OF THE UNITED REPUBLIC OF TANZANIA.....3rd DEFENDANT EMMANUEL SEMULA^ 4™ DEFENDANT JACOB ARON 5th DEFENDANT W jrBinW Vs. MWENEMPAZI/J. “V . -v¥ The plaintiff has'^fije^a^sujt^agaihst the defendants claiming for seven (7) Sy 'W. W., acres of the farm land at Logonesi Village valued at Tshs. 3,500,000/= ■V WL acquired since 1973 which now is occupied and or being used by Emmanuel Nsemula and Aron Jacob respectively as their premises under the order of the Lugonesi Village Council. At first the decision was made in Mwese Ward Tribunal whereby the plaintiff was declared the lawful owner. She could not however successfully execute i the orders of the Ward Tribunal, in the application No. 277 of 2021, as they met an opposition. The nature of the objection was that the claims involved the Lugonesi Village Council and a notice was not issued according to law;. It was argued that the plaintiff ought to have served a notice to Lugonesi Village Council and District Council as well. That is iri line with the Local Government (District Authorities) Act, (Cap. 287) as amended by the Written Laws (Miscellaneous Amendment) Act, No.1 of 2020. TheDistrictLand and Housing Tribunal therefore after consideration of the law found that the award by the Ward Tribunal is nonexecutable for failure to join necessary parties. ? The counsel for the pjaintiff filed this suit therefore asserting that the requirement has now been complied with, is therefore praying for this court

77. ■ to approve what wais decided by Mwese Ward Tribunal. "W.. The plaipitff believes this court has jurisdiction and prays for the orders: trespassers to be ordered to leave vacant possession of the dispute land: order payment of Tshs. 21,000,000/= for loss of nonuse of the land and also L costs of the suit. 2 The plaintiff's claim has met an opposition and also objection by the defendants. The 1st, 2nd and 3rd defendants jointly have filed a written statement of defence and also, they have raised a preliminary objection raising five grounds as follows:

1. That, this suit is incompetent and bad in law as this Honorable court in its capacity of exercising original jurisdiction/ has no jurisdiction to approve the judgment of the Mwese Ward Tribunals
2. That, this suit is incompetent and bad in law for failure to describe the disputed land. Wa. 'W&.
3. That, this court is incompetent and bad in law for failure to disclose cause of action against, first, second and third defendants.
4. That, this suit is incompetent and bad in law for failure to issue statutory .notice to the first and second defendant.
5. That the plaintiff have sued a wrong party (second defendant) the counsel for 1st, 2nd and 3rd defendant pray that the suit be struck out. At the hearing parties prayed to proceed by way of written submission. For >1 the 1st plaintiff Mr. Gadiel Sindamenya, Learned Advocate appeared and for 3 the 1st, 2nd and 3rd defendant was Mr. Fortunatus Mwandu, Learned State Attorney. The 4th and 5th defendant were absent. As a matter of procedure, the 1st, 2nd and 3rd defendants are the ones who raised the preliminary objection. Thus they had the first right of audience. Submitting on the first point of the preliminary objection the counsel for the 1st, 2nd and 3rd defendant has stated that the dispute was first filed at the Mwese Ward Tribunal and was determined. However, the decision was unexecutable although the plaintiff is, praying for an approval of the order by this court. The counsel for the 1st, 2nd and 3rd defendant has submitted and argued that this court has no jurisdiction to approve the decision of the Ward Tribunal. It is wrong and against the procedure. The counsel has argued that it is a settled law that decision of the Ward Tribunal is referred to the District Land and Housing Tribunal for enforcement in all matters relating land or appeal under section 19 of the Land Dispute Courts Act, [Cap 216 R.E 2019]. The counsel argued further that not only this court has no jurisdiction but also the District Land and Housing Tribunal cannot approve the said decision, but the decision of ward 4 tribunal can only be enforced by the District Land and Housing Tribunal, although that was the position before the change of law. On the second ground of objection, that the plaintiff has failed to sufficiently describe the suit land being a legal requirement as per Regulation 3(2) (b) of the Land Dispute Courts (The District and Housing Tribunal) Regulation, 2003 (G.N. No. 174 of 2003). (I will add that this requirement is provided for under Order VII Rule 3 of the Civil Procedure Code, [Cap 33 R.E.2022]) The learned Counsel submitted that the plaintiff before this court did not describe the suit land sufficiently as seen in paragraph 7 of the plaint; the same reads: W; . '■ W?-. 'That the plaintiff claim against the defendants 7 acres of ■ ; ■ T: 'A;j''') "'4q.a < • f land at Lagonesi Village valued at Tshs. 3,500,000/= acquired since 1973 which now used by Emmanuel Nsemuia and Aron Jacob respectively". The description is insufficient to identify the suit property. The counsel has cited the case of Daniel Dagala Kanuda, the Board of Trustees of F.P.T.C Church Vs. The Board of Trustees of Pentecostal Church, 5 Miscellaneous Land Appeal No. 3 of 2016 (unreported) at page 5 where it was held: "For un-surveyed land, as it is the case here;

permanent features surrounding the land at issue are very important particulars for the purpose of identifying the land from other pieces of land". The particular must be properly articulated in the application itself. In the case of Lupembe Village Government v. Kalo Ward Kyeala District and Another Versus Betheiehamu Mwanda and 5 Others, Civil Appeal No. 377 of 2020, Court of Appeal of Tanzania at Mbeya (unreported) at page 16 it was: "We are aware of the provisions of Order VII Rule 3 of the Civil Procedure Code, the emphasis being where the involved subject matter in a suit is immovable property, the emphasis must be such details of the requisite property in the plaint to sufficiently enable it to be identified... 6 The case of Martin Fredrick Raja Vs. Ilemela Municipal Council and Another, Civil Appeal No. 197 of 2019 Court of Appeal of Tanzania (unreported) where the court of appeal emphasized the need to plead the size, neighboring owners of piece of land among others. The counsel submitted that under Order VII Rule 3 of the Civil Procedure Code the description of the suit land in immovable property is for the purpose of identifying and effectively distinguishing it from other land adjacent to it. That will allow authentic identification of the land in dispute so as to afford a court of law to make certain and executable order and decree. In absence of the sufficient description the suit land cause uncertainty of the subject matter to the extent of unclothing the court with jurisdiction to entertain. The counsel has concluded by praying this court to uphold the objection. Submitting on the third ground of preliminary objection, that the plaint fails to disclose a cause of action against the first, second and third defendant. He has submitted that when determining the suit disclosing the cause of action against the defendants is very important. In the case of John M. Byombalirwa Vs. Agency Maritime International (Tanzania) Ltd TCA 13 [1983] TLR the cause of action is defined as facts which give a person a right to judicial redress or relief against another as found on the plaint and its annexure. A cause of action is the heart of the complaint in the pleadings that initiate a lawsuit. According to the counsel looking at paragraphs 7 and 8, the plaint does not disclose a cause of action against the 1st, 2nd and 3rd defendant. On the fourth ground of preliminary objection the counsel submitted that the 1st, 2nd and 3rd defendant has argued that the suit is bad in law or incompetent for failure to issue statutory notice to the first and second defendant. Section 6(2) of the Government Proceedings Act, [Cap 5 R.E 2002] requires the person who intends to sue a Government to first issue a statutory notice to the relevant Government Officer or institution and a copy of the said notice be sent to the Attorney General. This was not done by the plaintiff in this suit. Section 6 of the Government Proceedings Act, [Cap 5 R.E 2022] provides that: 4; "No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government, Minister, Department or Officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government and he shall send a copy of his claim to the Attorney General". In this case a notice was issued only to the Attorney General, who is the 3rd defendant leaving away the first defendant and second defendant who are the Lugonesi Village Council and Tanganyika District Council to whom the notice must be issued. For the argument the counsel has cited the case of Aloyce Chacha Kenganya Vs. Mwita Chacha Wambwa and Others, ST; 1999 High Court, (Civil Case No. 20K9 202g TZHC) 90

(6 February 2020) where it was held that: SJ “It should be known that the requirement for issuing a statutory notice to the Government before suit is not without good reasons. Giving a statutory notice to the Government before a lawsuit is filed and to investigate the claim so that it can properly defend itself or to correct the conditions or practices that led to the claim. For reasons stated above, I find the suit was prematurely instituted for failure to issue a ninety days' notice of intention to sue to the first and second defendants". According to the case of Thomas Ngawaiya Vs. The Attorney General and 3 Others, Civil Case NO. 177 of 2013 it was held that section 6 of the Government Proceedings Act is mandatory and unambiguous. The court observed that: "The provisions of section 6(2) of the Government Proceedings Act are express, explicit mandatory, admit". The counsel for the 1st, 2nd and 3rd defendant has thus argued that for failure to comply with the law they pray the plaint to be struck out. In reply to the submission in chief the counsel for plaintiff has relied on the following authorities:

- y. a i i j; ■: - 3 £' ■/. <e <W'-x < / x •_.; r; g r> .•'> section 107 A (2)(e) of the Constitution of the United Republic of Tanzania of 1977 which requires Courts to dispense justice without being tied up with technicalities which may obstruct the dispensation of justice and right of parties to be heard in judicial proceedings under the law. He has appealed to the need not to base too much on the procedural rules and technicalities. He has cited the case of South Poritish Insurance Ltd vs. Mohamed Taibje [1973] E.A of 210. The counsel for the plaintiff has argued on the points of objection as follows:- In the 1st point of objection that the suit is incompetent and bad in law as this court in its capacity of exercising original jurisdiction has no jurisdiction to approve the judgment of Mwese Ward Tribunal, he has submitted that this court has power to approve the judgment of the Ward Tribunal Under Section 95 of Civil Procedure Code. On the 2nd ground of objection that the suit is incompetent and bad in law for failure to describe the disputed land, the counsel has argued that description of the land is a matter of evidence and failure to describe does not disqualify the case. He has cited Section 119 of the Evidence Act Cap 6 rr*. RE 2019 which provides that: - F "Where there is a question of ownership of anything, the burden of proving that the other party is not the owner lies on the party who asserts the fact". The counsel has also cited the case of Mwinyikambi Mohamed vrs Rukia Mhamed, Civil Appeal No 37 of 2010 where it was held: - ii "The person who wishes to prove the existence of certain facts the burden to prove shall be upon him". The counsel has thus appealed that if it is so compelling, applying the principle of overriding objective, he prays for this court to order an amendment of the plaint. On the 3rd point of objection that the suit is incompetent and bad in law for failure to disclose the cause of action against the 1st, 2nd and 3rd defendants. The counsel for the plaintiff has submitted that the 1st, 2nd and 3rd defendant have been sued on the requirement of law. Section 26 of the Local Government (District Authorities) Act/ Cap 287 as amended by (Miscellaneous Amendments) Act, No. 9 of 2020 and Section 6(3) of the Government Proceedings Act. The counsel for plaintiffs has prayed that this court should find that paragraph 7 of the plaint caters for all defendants. As to the 90 days' notice, the counsel has submitted that the same was served to the 1st and 2nd defendants and to

appreciate it was annexed as LGS/HC - 1 and LGS/HC - 2. 12 On the 5th point of objection that the plaintiff has sued the wrong party (second defendant) the counsel for plaintiff has submitted that it was the 1st and 2nd defendant who applied to be joined in the case. He referred to the copies of the preliminary objection and the ruling in the application No. 12 of 2020. In rejoinder the counsel for the 1st, 2nd and 3rd defendant has submitted that the counsel for plaintiffs has premised his argument on a -Wrbng applicability of principles of justice without complying to the law of the land governing land disputes. The defendants have submitted that there is no any technicality as submitted by the counsel for the plaintiff in the submission in chief. He has insisted that description of the property is a requirement of law and not a technicality. I have had an opportunity to go through the written submission by the parties. Before embarking on the points of objections raised, I think it is important to note and say a little bit on the importance of legal procedures in court. As correctly submitted by the counsel for the plaintiff, procedural rules are hand maiden in the administration of justice, they are made to facilitate the dispensation of justice. The counsel however has submitted 13 against a strict construction of the rules as that may act as an impediment to justice. He suggested that this court should consider Article 107A(2)(e) of the Constitution of the United Republic of Tanzania of 1977 which requires courts to dispense Justice without being tied up with technicalities which may obstruct the dispensation of Justice and right of parties to be heard in judicial proceedings under the law. I would like to draw attention of the learned, counsel for plaintiff to the case of Zuberi Mussa vs Shinyanga Town Council, Civil Application No. 100 of 2004, Court: of Appeal of Tanzania/7/a (Mwanza) where the Court observed that "article 107(2)(e) featured in our Constitution as observed in the case of Hamza Sungura's case, did not do away with all rules of procedure in the administration of justice in the country." The court went further and observed that: "Furthermore, in our decided opinion, article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any Opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of 14 salutary rules of procedure which when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word 'unduly' here should only be taken to mean 'more than is right or reasonable; excessively or wrongfully': See CHAMBERS TWENTIETH CENTURY JOURNAL OF LIT & N at page 1469. One cannot be said to be acting wrongly or unreasonably when he is executing the dictates of the law." I thought it is necessary to quote the above holding of the Court of Appeal of Tanzania because it guides us against blind diversion from the rules of procedure branding them as 'technicalities' while in fact the rules are there to assist courts achieve fairness in the administration of justice. Having referred to the above guidance, I will now proceed to consider the points of objection. 15 The first point of objection is a complaint by the defendants that the suit by the plaintiff is incompetent and bad in law as this court in its original jurisdiction has no jurisdiction to approve the judgment of Mwese Ward Tribunal. Paragraph 12 of the plaint

reads that: "That since the case was lastly decided by the Ward Tribunal in favor of the plaintiff and the problem was to the effect that the Plaintiff did not join the necessary parties to the suit it is our W' humble prayers that this case is brought before your Honorable court for approval of: what was decided by Mwese Ward Tribunal." The counsel for the defendants has submitted that this court cannot approve the decision of the Ward Tribunal because it was wrong and against the procedure. As a matter of law and procedure, the decision of the ward Tribunal is referred to the District Land and Housing Tribunal for enforcement in all matters relating to land. However, with recent amendment, Ward Tribunal has the role of mediating for the purpose of amicable settlement in order to maintain peace in the society. For that 16 matter, I find the objection has merit as this court has no jurisdiction to approve the decision of the Ward Tribunal. On the second point of objection, the defendants argue that the dispute is bad in law for failure to describe the dispute land. The defendants have referred to paragraph 7 of the plaint. They have submitted that the description is not sufficient enough as to comply with the requirement of the law. The description is insufficient to enable identification of the dispute land. Submitting on the point, the counsel for the plaintiff seems to have as his '■-ifj-j. ■ s'^' opinion that the identification will be achieved during hearing as that is the duty of the person who asserts the fact. He has cited section 119 of the Law of Evidence Act, Cap. 6 R.E.2019 and the Case of Mwinyikambi Mohamed vs. Rukia Mhamed, Civil Appeal No. 37 of 2010 for the argument that the burden of proof lies to the one who asserts the existence of the fact. With due respect to the counsel, I think the objection by the counsel for the defendants is meritorious. The paragraph describing the dispute land is scant on the description of the property. For avoidance of repetition the paragraph is quoted at page 5 of this judgment. As it will be appreciated, the paragraph describes the dispute land by size and location. The question is how many 17 pieces of land with the size of seven acres are there at Lugonesi village? Obviously, one must fail to identify the exact property in question. Order VII Rule 3 of the Civil Procedure Code [Cap. 33 R.E 2022] provides as follows: "Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property

- ■ . - 'J J.-JL -2. -I ■ "® J 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." (emphasis mine). % Wk The emphasis for description is to enable anyone identify the property in dispute. This was clarified in the cases of Lupembe Village Government Ikalo Ward Kyeala District and Another Versus Bethlehemu 'Th W ... Mwandafya and 5; Others (supra); Martin Fredrick Raja Vs. Ilemela Municipal Council and Another (supra) and Daniel Dagala Kanuda, the Board of Trustees of F.P.T.C Church Vs. The Board of Trustees of Pentecostal Church (supra). The cases' citations are in the summary 18 of submission by the counsel for the defendants herein above. Under the circumstances the 2nd point of objection is sustained. On the third point of objection, the counsel for the defendants has submitted that the plaint does not disclose the cause of action against the 1st, 2nd and 3rd defendant. In the case of John M. Byombairwa V Agency Maritime Internationale (Tanzania) Ltd [1983] T.L.R. the court held that the expression 'cause of action' means essential facts

which a plaintiff in a Suit has to plead and later prove by evidence if he wants to succeed in the suit. In that case it was also observed that cause of action is discovered by looking at the plaint. I have gone through the plaint, in particular paragraphs 8,9,10 k k, and 11.1 have failed to see the cause of action against the first, second and the third defendant. "F, On the fourth point of objection, the defendants have submitted that the suit \ . :k. "k ■ is bad in law for failure to issue statutory notice to the 1st and second defendant. The counsel for the 1st and 2nd defendant has submitted that the plaintiff failed to comply with the law, section 6(2) of the Government Proceedings Act [Cap. 5 R.E.2019] requires any person intending to sue a Government to first issue a statutory notice to the relevant Government 19 office or institution and copy the said notice to the Attorney General. The section provides as follows: "No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim' against the Government, and he shall send a copy of his claim to the " ' / . -3' A ttorney-Generai andthe SoUcitorGenerai." ft ■»», In this case, the plaintiff issued notice to the Attorney General only who is the third defendant leaving a Way the first defendant and second defendant who are Lugonesi Village Council and Tanganyika District Council who are also Government entities required to be serve with the 90 days' Notice as per the law governing suits against the government. According to the counsel for the plaintiff, he has submitted that the 90 Days' Notice was issued and served to the Solicitor General, Rukwa office and District Executive Director of Tanganyika District. He has attached a copy to the submission. 20 In my understanding, that was not in accordance to the requirement of law but also if at all he served the notice as required, the plaintiff did not implead the same. In the case of The Registered Trustees of the Archdiocese of Dar es Salaam k Chairman Bunju Village Government & 11 Others, Civil Appeal No, 147 of 2006 (unreported) it was held that „, ! submissions are meant to reflect and elaborate on the facts and/or evidence already indicated in the pleadings but not a substitute of the same. Having said all appearing herein above; I find that the objections raised by the counsel for the 1st, 2nd and 3rd defendant are meritorious and sustain the same. I proceed also to hold that the suit is incompetent and is therefore hereby struck out with costs.: 3 It is ordered accordingly. W Dated and Signed at Sumbawanga this 20th day of August, 2024 T.M, MWENEMPAZI JUDGE 21 Ruling delivered in Court this 20th day of August, 2024 in the absence of the counsel for the plaintiff and presence of Mr. Mjahidi Kamugisha, the counsel for the 1st, 2nd and 3rd defendants.

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