

TANZANIA / JUDGMENT

# ligera village council and 2 others vs vodacom tanzania and others 2023 tzhc 21990 25 october 2023

COURT  
TZHCDECIDED  
25 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF  
SONGEA AT SONGEA CIVIL CASE NO. 13 OF 2022 LIGERA VILLAGE COUNCIL  
..... 1ST PLAINTIFF NAMTUMBO DISTRICT COUNCIL  
..... 2ND PLAINTIFF THE ATTORNEY GENERAL  
..... 3RD PLAINTIFF VERSUS VODACOM TANZANIA LIMITED  
..... DEFENDANT HTT INFRACO LIMITED .....  
1ST THIRD PARTY BENJAMINI ALFONSI NCHIMBI ..... 2ND THIRD PARTY

## RULING

10th and 25th October, 2023 KISANYA, J.: In this suit, the plaintiffs are praying for judgment and decree against the defendant, Vodacom Tanzania Limited, as follows:-

- (i) A declaratory order that the 1st plaintiff is the lawful owner of the disputed land. (ii) A declaratory order that the defendant is a trespasser, intruder and illegal occupier of the plaintiff's land. (iii) A declaratory order for eviction of the defendant and any other person or institution relating to the defendant into the disputed land (iv) A declaratory order for payment of the specific damages of 500,000,000/=.
- (v) A declaratory order for the payment of general damages of an amount to be determined by the court. (vi) Costs of this suit. (vii) Any other reliefs that this Honourable Court shall deem fits and just to grant. The plaint was served upon the defendant who filed a written statement of defence. In addition, the defendant obtained leave to file a third party notice against HTT Infraco Limited, the 1st third party herein. Upon filing her written statement of defence, the 1st third party sought and was granted leave to file a third party notice against, Benjamin Alfonsi Nchimbi, the 2nd third party. Further to this, the 1st third party filed a notice of preliminary objection on the following points of law:-
  1. That to the extent that the Plaintiffs are seeking declaratory orders of the Court, the suit in terms of the provisions of item 22 of the Law of Limitation Act, Cap. 89, R.E. 2019, is time-barred.

2. That in the alternative, the suit, to the extent of being violative of Order VII Rule 5 of the Civil Procedure Code, Cap. 33, R.E. 2019 is incompetent and defective. On 18th September, 2023, the suit was called on for mention for orders. As a practice in this jurisdiction to start with hearing of preliminary objection before dealing with other stages, this Court was inclined to call the parties to address it on the points of law raised by the 1st third party. It was ordered 2 that the preliminary objection would be disposed of by way of written submission. In that regard, parties were given a schedule within which to file their respective written submissions. Subsequent to that order, Mr. Malick Hamza, learned advocate and Mr. Emmanuel Bakari, learned State Attorney filed the written submissions for and against the preliminary objection, respectively. Arguing the first limb of preliminary objection, Mr. Hamza was firm that this suit is time barred. His submission was based on the ground that the time within which to file a suit for declaratory orders sought for by the plaintiffs is not specified. He went on to argue that, in view of item 24, Part 1 of the Schedule to the Law of Limitation Act, Cap. 89, R.E. 2019 (the LLA), this suit ought to have been lodged within six years from the date of the cause of action. To cement his argument, he cited the case of CRDB Limited vs Boniface Chimya [2003] TLR 413. It was his further argument that, since paragraph 6 of the plaint shows that the cause of action arose in 2014, the deadline to institute this suit ended on 31st December, 2020. He thus, urged this Court to dismiss the suit under section 3(1) of the LLA. To support his prayer, the learned counsel referred me to the case of Obetto Werema Joseph @ Obeto Joseph Werema vs CATA Mining Limited, Land Case No. 20 of 2020, HCT at Musoma (unreported). 3 On the second limb of preliminary objection, Mr. Hamza's contended that Order VII, Rule 5 of the CPC has been interpreted to mean that the plaint must disclose a cause of action against the defendant. Fortifying his argument, he referred me to decision of this Court in the case of Mamu Yasson Mamu t/a Best Cleankuku Bora Food Processors vs Hussein Togolo and 3 Others, Land Case No. 125 of 2020, HCT Land Division at DSM. As for the case at hand, he contended that the plaintiffs had neither pleaded to have a cause of action against the defendant nor stated whether the defendant had any interest in the suit premises. He went on submitting that a person cannot maintain a suit unless he has an interest in the subject matter. To buttress his submission, he cited the case of Lujuna Shubi Balonzi Senior vs The Registered Trustees of Chama cha Mapinduzi

[1996] TLR 203 in which this Court held that: "...locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court". As to what is a cause of action, Mr Hamza referred me to the case of Edna John Mgeni vs National Bank of Commerce Limited and Another [2016] TLS ER 446 wherein it was stated that: "...every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 4 judgment of the court. Negatively put, it would mean that everything, which if not proved, give the defendant an immediate right to judgment. Thus, a plaint does not disclose a cause of action should be rejected. Referring further to the case of J.B. Shirima and Others Express Bus Service vs Humprey Meena t/a Comfort Bus Service [1992] TLR

290, he argued that the instant suit does not disclose any right or interest that has been breached by the defendant in relation to the plaintiffs. Replying, Mr. Bakari prefaced his submission by pointing out the 1st third party's written submission was filed on 29th September, 2023 in lieu of 28th September, 2023 which was ordered by this Court. Based on the position stated in the cases of Shafa Agro vs Issa Kavimbi and 14 Others, Land Revision No. 10 of 2021 [2022] TZHC and Olam Tanzania Limited vs Halawa Kwilabya, DC Civil Appeal No. 17 of 1999 which was cited with approval in the case of Famari Investment T Limited vs Abdallah Selemani Komba, Misc. Civil Application No. 41 of 2018 [2020] TZHC 386, he submitted that failure to file written submission on the date scheduled by the Court is as good as non-appearance on the date fixed for hearing. Therefore, the learned State Attorney argued that the 1st third party had failed to prosecute the preliminary objection. He called upon this Court to dismiss the preliminary objection for want of prosecution. 5 Responding to the first limb of preliminary objection on time limitation, Mr. Bakari contended that this is a suit in which the plaintiffs are Government institutions. It was his submission that the time limitation in respect of the suit by or on behalf of the Government is sixty years as provided for by item 23, Part I of the Schedule to the LLA. On that account, the learned State Attorney contended that this suit is not time barred because it was instituted 8 years from the cause of action which arose in 2014. Furthermore, the learned State Attorney impressed upon me to find that the time limitation for the suits to recover land is twelve years. He also quoted section 38(c) of the LLA which provides that a suit by or on behalf of the Government for recovery of land shall not be dismissed on ground of that the time limitation has expired. On the second limb of preliminary objection, Bakari was brief and to the point that the plaintiffs have a cause of action against the defendant. He cited the case of Stanbic Finance Tanzania vs Giuseppe Trupia and Chiara Malavasi [2002] TLR 221 in which the term cause of action was defined to mean: "facts which give a person a right to judicial redress or reliefs against another as found on the plaint and its annexures." 6 The learned State Attorney went on to contend that the plaintiffs had pleaded that the 1st plaintiff is the legal owner of the suit premises situated at Ligera Village within Namtumbo District and that the defendant had trespassed into the said land. It was his contention that the said facts and Annexure LNO to the plaint disclose the cause of action against the defendant. He also urged this Court to consider that the 1st and 2nd third parties were brought to this case by the defendant under Order 1, Rule 14(1) and 17 of the CPC. Therefore, he was of the view that the second limb of preliminary objection lacks merit. In view of the foregoing, Mr Bakari, moved this Court to dismiss both limbs of preliminary objection with costs. Rejoining, Mr. Hamza conceded to the fact that the written submission in support of the preliminary objection was filed on 29th September, 2023 instead of 28th September, 2023. However, he was quick to point out that 28th September, 2023 happened to a public holiday namely, Maulid Day. Relying on section 60(1)(e) and (h) and (2) of the Interpretation of Laws Act, Cap. 1, R.E. 2019 (the ILA), he submitted that, 28th September, 2023 was to be excluded in computing the time limitation and thus, the time within which to file the submission expired the next working day which was 29th September,

2023. Based on that stance, he contended that the 1st third party's written submission was not filed out of time. 7 With respect to the response to the first limb of objection, Mr. Hamza submitted that section 38(c) of the LLA is not applicable to the present suit. His argument was premised on the contention that the plaintiff's suit is not based on recovery of land. He reiterated his submission that the suit is time barred under item 24, Part I of the Schedule to the LLA. As for the plaintiff's argument on the second limb of objection, Mr. Hamza reiterated his submission in chief that, the plaint does not disclose cause of action against the defendant herein. His submission was based on the ground that the plaint does not disclose any right or interest that has been breached by the defendant in relation to the plaintiff. I have considered the rival submissions by the learned counsel for the parties. The main issue that I am invited to address is whether the objections have merits. Before venturing into determination of the merit of the preliminary objection, I find it appropriate to address first, the issue whether the 1st third party failed to prosecute the preliminary objection. This issue arises from the argument of the learned State Attorney that, the written submission in support of the preliminary objection was filed out of time which was ordered by this Court. 8 It is common ground that the 1st third party was ordered to file her written submission in support of the objections on or before 28 th September, 2023 and that she filed the same on 29th September, 2023. Was the written submission filed out of time? I have taken a judicial notice that 28th September, 2023 was a public holiday. This implies that the time limited for filing the written submissions in support of the preliminary objection expired on a public holiday. In terms of section 60(2) of the ITA, a public holiday is an excluded day in computing time limitation. Based on the provision of section 60(1)(e) of the ITA, the 1st third party was inclined to file her written submission on the next day that was not an excluded day. In view of the undisputed fact that the 1st third party's written submission was filed on 29th September, 2023, I agree with Mr. Hamza that, it was not filed out of time. I, accordingly, find no merit in the point of law raised against the 1 st third party's written submission. Turning to the substance of the preliminary objection, first for determination is the first limb of the preliminary objection. It hinges on the issue whether this suit is time barred. As stated earlier on, this point of law was premised on the contention that, the suit was filed out of time set out by item 22, Part I of the Schedule to the LLA. However, the argument in support of the objection is based on item 24, Part I of the Schedule to the LLA, which provides for time limitation 9 in respect of any suit not otherwise provided for by the law. Now, the question is whether the time limitation for this suit is not provided for by the law. At the outset, Mr. Hamza does not dispute the learned State Attorney's argument that, this is a suit by or Government. Indeed, pursuant to section 10 of the GPA, any civil proceedings by the Government must be instituted by the Attorney-General. The plaint at hand bears it out that, the 1st plaintiff is Ligera Village Council of Namtumbo District Council. It is stated in paragraphs 2 of the plaint that, the 2nd plaintiff, Namtumbo District Council is a Government Authority established by the Local Government (District Authorities) Cap. 287, R.E.

2002. Furthermore, paragraph 3 of the plaint suggests that the third plaintiff, Attorney-General is party to this case by virtue of his powers as a chief legal adviser to the Government. On the foregoing facts stated in the plaint, I agree with the learned State Attorney, that this is a suit by or on behalf of the Government. Now, the time limitation in respect of the suits by or on behalf of the Government is provided for by item 23, Part I of the Schedule to LLA as sixty
- (60) years. Paragraph 6 the plaint shows that the cause of action arose in 2014 when the defendant invaded the 1st plaintiff's land. Given that this suit was lodged on 22nd December, 2022, I am satisfied that it was lodged within 10 time specified by item 23, Part I of the Schedule to the LLA. The provision of item 24, Part I of the Schedule to the LLA and the cases of CRDB (1996) Ltd (supra) and Obetho Werema Joseph (supra) relied upon by the learned counsel for the 1st third party are not applicable to this case. It is for the foresaid reasons that, I find no merit in the first limb of preliminary objection. Moving to the second limb of objection, the issue for determination is whether the suit is incompetent for contravening the provision of Order VII, Rule 5 of the CPC. For clarity, the said provision is reproduced hereunder: "The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand." Flowing from the above cited provision, I agree with Mr. Hamza that the plaint must have facts indicating that the defendant has or claims to have interest in the subject matter of the suit and that he is liable to answer the claim raised therein by the plaintiff. I also agree with him that, it is a trite law that the facts deduced from the plaint and its annexure(s) must give the plaintiff a right to the reliefs against the defendant or adverse party. This stance was stated in the cases of Lujuna Shubi Balonzi (supra), Edna John Mgeni (supra) and Stanbic Finance Tanzania (supra). 11 I was then forced to go through the plaint to find out whether the foregoing legal requirement was met in this case. According to paragraph 5 of the plaint, the subject matter of this suit is a land measuring half acre, situated at Ligera village, Namtumbo District in Ruvuma Region. The plaintiffs aver that the said land is part and parcel of a land which the Village Council allocated to the 1st plaintiff in 1998, for purpose of constructing the village market. I have noted that the facts which indicate that the defendant is or claims to be interested in the land subject to this case are reflected in paragraph 6, 7 and 8 of the plaint in which the plaintiffs state as follows:
6. That, in 2014 the Defendant invaded and trespassed into the plaintiff's land without any colour of right by constructing and erecting the telecommunication tower in the suit land (1/4 acre) an action which violated the rights of the 1st Plaintiff to use and enjoy the usage of the suit land as planned by the Village Assembly.
  7. That, despite the effort of the 1st Plaintiff to settle the matter amicably, the Defendant proved to be futile and in cooperative as he has been remaining mute all the time.
  8. That, the conduct of the Defendant amount (sic) to unlawful interference to the Plaintiffs' right to land, hence the Defendant has trespassed into the 1st Plaintiff's land. It is my considered views that, the fact that the defendant had constructed and erected a telecommunication tower in the 1st plaintiff's land indicates that the defendant is or claims

interest in the suit land. I am of the 12 further opinion that, if the said facts are duly proved against the defendant, the plaintiff may be entitled to the reliefs prayed in the plaint. Being guided by position of law stated afore, I find that the facts stated in the plaint suggest that the plaintiffs have a cause of action against the defendant. Therefore, the second limb of preliminary objection is devoid of merit as well. In the upshot of the above, I hereby dismiss both limbs of preliminary objection for want of merit. Cost shall follow the event. Dated this 25th day of October, 2023. S.E. KISANYA JUDGE 25/10/2023 13

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