

TANZANIA / JUDGMENT

Draft Ruling Yessaya Obed Dillu

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA LAND CASE NO 26612
OF 2024 BETWEEN YESAYA OBED DILU PLAINTIFF VERSUS
MAKUNDA VILLAGE COUNCIL 1ST DEFENDANT IRAMBA DISTRICT
COUNCIL 2ND DEFENDANT THE ATTORNEY GENERAL
..... 3RD DEFENDANT

RULING

Date of the Last Order: 24/02/ 2025 Date of the Ruling: 13/03/ 2025 LONGOPA, J.: The Plaintiff one Yesaya Obedi Dillu instituted a Land Case against the Defendant claiming he is a legal owner of ninety-five (95) acres of land at Makunda Village which he obtained through clearing the bush since

1983. The Plaintiff alleges to have been using the land since then, built in the land and has been living in the land until 2023 when the 1st Defendant interfered with such land as the Executive Officer of the 1st Defendant 1|Page required him to vacate the land without any colour of right and without adhering to any legal procedures. The Plaintiff claims for declaration that disputed land is lawfully owned by the Plaintiff; order payment of special damages for the loss amounting to Shillings two million five hundred thousand (TZS 2,500,000/=); an order restraining the defendants from intended development activities planned on disputed land and orders for general damages. The 1st, 2nd and 3rd Defendants in their Joint Written Statement of Defence raised a Notice of Preliminary Objection to the effect that:

1. That the suit is incompetent for contravening section 6(2) of the Government Proceedings Act, Cap 5 R.E. 2019;
2. That the suit is incompetent for contravening Order VII Rule 1 (i) of the Civil Procedure Code, Cap 5 R.E. 2019;
3. That the suit is incompetent for suing a wrong party contrary to Order I Rule 3 of the Civil Procedure Code, Cap 5 R.E. 2019;

4. The suit is incompetent for containing verification that is incurably defective. 2|Page On 24th February 2025, the parties appeared before this Court for the oral hearing of the Preliminary Points of Objection. The Plaintiff enjoyed the legal services of Mr. Ibrahim Mcharo, learned Advocate while the respondents enjoyed the legal services of Mr. Omary Ngatanda, learned State Attorney. Mr. Omary Ngatanda, learned State Attorney was the first to raise up and argue in favour of the preliminary objections. He argued that on the first ground, the law requires a notice of ninety (90) days' notice to be served to the government entities complained against and copied to the Attorney General and the Solicitor General. The instant Complaint indicates that the notice was issued to Makunda Village alone leaving out Iramba District Council unserved. This contravenes section 6(2) of the Government Proceedings Act, Cap 6 R.E. 2019. On the 2nd ground, it was submitted that it is the legal requirement that a plaintiff must disclose the value of subject matter for purposes of jurisdiction and assessment of the court fees. The instant complaint is silent as it does not disclose the value of the subject matter in question. There is nothing from paragraph 1 to 17 of the Complaint on value of the subject matter 3|Page thus contravening Order VII Rule 1(i) of the Civil Procedure Code, Cap 33 R.E. 2019. According to the respondents, such omission is fatal for failure to adhere to mandatory legal requirements. On the 3rd ground, it was submitted that Iramba District Council stands wrongly sued. The Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 amended the Local Government (District Authorities) Act, Cap 287 whereby section 30 of the Written Laws amended section 26 of the Local Government (District Authorities) Act by categorically stating that the District Executive Director shall be the person to be joined in the suit where the concern relates to district authorities. In the instant matter, there is Iramba District Council who is sued and not District Executive Director as required by the law thus it is against the law governing the local government. Mr. Ngatanda reiterated that on the 4th ground of preliminary objection, it was submitted that there is defectiveness of verification as against Order VI Rule 15(2) of the CPC which imposes the requirement to verify the pleadings by referring to all paragraphs including those on the party's own knowledge or information obtained from others. In the instant 4|Page suit, Paragraphs 3-6 of the complaint inclusively are not verified thus contravening the Order of CPC. It was at this juncture that Mr. Omary Ngatanda prayed that this court be pleased to find out that the Complaint is defective thus strike it out with costs. On the other hand, Mr. Ibrahim Mcharo learned advocate for the Plaintiff seriously opposed the preliminary objection. With regard to the first ground, it was submitted by the Counsel for the Plaintiff that Iramba District Council was served as it was received by the District Executive Director Iramba District Council. This ground has no merits. On the second ground, it was submitted that the purpose of disclosing the value of subject matter is to ascertain the jurisdiction of the court. The Plaintiff's advocate reiterated that the Plaintiff has disclosed about the jurisdiction of the Court in Paragraph 17 of the Complaint thus it was the Plaintiff's view that though the value is not disclosed but the court's jurisdiction has been stated in the Complaint. 5|Page Regarding the 3rd ground on suing a wrong party, it was submitted by the Counsel for the Plaintiff that it is correct that there might be nonjoinder / misjoinder of parties. But the provisions of Order 1 Rule 9 of the CPC can cure the anomaly.

The suit cannot be defeated by misjoinder or non-joinder of party. The Government Proceedings Act in section 6(2) of the Act calls for suing the department or institution of the Government which is to be sued. This is also curable. With regard to the 4th aspect, it was submitted that the verification clause is defective for missing some of the paragraphs as there are several numbers of paragraphs which are not verified. It was the submission of the Plaintiff that the oxygen principle be applicable to rescue the same. The court should consider interest of justice without being too tied to technicalities. The Counsel for the Plaintiff cited a principle in the case of Nyusta Peter Kabezi T/A Nyudiah Enterprises versus Herodius Sulusi Mborowe T/A Nyudia Enterprises and Others, Civil Case 153 of 2019

[2020] TZHC 1583 (16 July 2020) DSM, the High Court stated that such anomaly can be cured by Oxygen principle. 6|Page In totality, the counsel for the Plaintiff prayed that preliminary objection should be overruled as the anomalies can be corrected and parties be allowed to be heard on merits. In a short rejoinder, Mr. Omary Ngatanda learned State Attorney reiterated that stating the value of the subject matter is very important to ensure that appropriate court fees are paid. Failure to state the value of the subject matter led to deny the court is assessing appropriate court fees. Having heard the rival submissions of the parties, it is the sacred duty of this court to determine validity of the preliminary objection or otherwise. In order to do so, thorough analysis of the pleadings, applicable legal principles and the submissions are viewed in the light of the raised preliminary objections. It is settled law that preliminary objection must be on point of law. The Court of Appeal of Tanzania has provided a guide in plethora of authorities. For instance, in the case of Salim O. Kabora vs TANESCO Ltd & Others (Civil Appeal No. 55 of 2014) [2020] TZCA 1812 (7 October

2020) (TANZLII), at page 12, the Court noted that: 7|Page While the foregoing decision gave a definition, more elaboration and instances of a preliminary objection, were expounded in the case of Karata Ernest and Others V. The Attorney General - Civil Revision No. 10 of 2010 (unreported) where the Court stated that:- "At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only consists of a point of law which has been pleaded or which arises by dear implication out of the pleadings. Obvious examples include, objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc. " The preliminary objections in the instant suit relate to violation of legal provisions that mandatorily require the compliance by the parties in one way or the other. They are considered to be pure points of law as they are based on violation of the prescribed law. 8|Page For instance, in the case of Razaki Omari & 12 Others v Buseresere Village Council & 6 Others (Land Case No.12 of 2022)

[2023] TZHC 23788 (10 October 2023) (TANZLII), at pages 4-5, the High Court (Hon Robert, J.:) observed that: The statutory provisions cited by the Defendants are clear and unambiguous in their requirement for a 90-days' notice before instituting a suit against the Government or a local government authority. The objection is founded on a pure point of law - the failure to adhere to a statutory prerequisite. The statutory provisions cited by the Defendants are clear and unambiguous in their requirement for a 90-days' notice before instituting a suit against the Government or a local government authority. The omission of the Solicitor General in the list of the served institutions as noted in paragraph 13 of the Complaint and failure to serve the 1st and 6th Defendants as noted on the notice annexed to the Complaint, contravenes the statutory prerequisites. The Court acknowledges the Defendants' reliance on precedents, particularly HC Civil Case No. 28 of 2021, Audacity Intercon (T) Limited v. Bukombe District Council and The Attorney General, and HC Case No. 4 of 2021, Msafiri Makindi Mtigandi v. Mwanza City Council and 3 others. These cases emphasize the 9|Page mandatory nature of the 90-days' notice requirement, and the failure to establish compliance renders the case incompetent. The first ground of the Preliminary Objection relates to violation of section 6(2) of the Government Proceedings Act, Cap 5 R.E. 2019 whereas the learned State Attorney for the Defendants complained that the Plaintiff did not serve District Executive Director for Iramba District. On the other hand, the Plaintiff's counsel was of the view that the District Executive Director was duly served. The specific provision of the law is to the effect that no suit should be preferred against a Government entity unless prior ninety (90) days' notice was served upon such person. In particular, section 6(2) of the Act provides that:

- (2) 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 and the Solicitor General. 10 | P a g e A thorough perusal of the pleadings do not reveal that the District Executive Director nor the Makunda Village Council were duly served. There is no acknowledgement of service from the District Executive Director for Iramba District nor Makunda Village Council. The letter communicating the notice of intention to sue is well acknowledged by the Attorney General and the Solicitor General to have been received. I am in concurrence with the learned State Attorney that there was failure to comply with mandatory legal provisions on service of 90 days' notice to the government entity concerned prior to institution of a suit against such entity(ies). The requirement is of mandatory nature thus failure to adhere to it vitiates the suit. In *Steven G. Malipula & Another vs Tanzania Revenue Authority* (Civil Appeal No. 50 of 2008) [2014] TZCA 239 (26 September 2014) (TANZLII), at pages 10-11, the Court of Appeal observed that: Since the appellants specifically pleaded about the President unlawfully terminating their employment, and the only way in which the President could be joined into the proceeding was through the Attorney General, the 11 | P a g e Attorney General was a proper party for the fair determination of the appellants' suit. The prayer to join him after the plaintiffs' had closed

its case was made too late in the proceedings because the Attorney General could not have been made party without compliance to 6(2) of the Government Proceedings Act [CAP 5 R.E.2002]. Since the procedure of issuing a ninety days' notice to the Government before suing it is a mandatory requirement and that had not been complied with, while at the same time the appellants had pleaded that the President had no power to terminate their employment, the application for joining the Attorney General was rightly refused by the learned trial judge. As there is conspicuous lack of any acknowledgement of receipt of the mandatory notice of intention to sue by the government is violative of the mandatory requirement of the law. The first limb of the preliminary objection has merits therefore I uphold it. Incompetence of the suit on failure to comply with Order VII Rule 1(i) of the Civil Procedure Code featured as the second limb of the preliminary objection. The parties submitted rivalry that failure to disclose the value of the subject matter denied the court to have an opportunity to 12 | P a g e two aspects, one is ascertaining the jurisdiction of the court and two, is assessing appropriate court fees to be charged on the suit. The Plaintiff reiterated that jurisdiction issues was categorically addressed in Paragraph 17 of the Plaint thus no infringement of the legal provisions. Upon perusal of the Pleadings it is lucid that paragraph 17 of the Plaint caters for the jurisdiction of the court generally. It is couched that "...the cause of action arose at Singida region and the orders sought are within the jurisdiction of this Court statutorily and territorially." Essentially, the Plaintiff in this specific paragraph is referring to general jurisdiction of the Court. However, that clause of the Plaint does not address the lamentation raised by the learned State Attorney for Defendants that value of the subject matter was not disclosed thus violating a mandatory provision of the law on pleadings. Indeed, I concur with the arguments of the learned State Attorney that value of the subject matter was different from that stated in Paragraph 17 of the Plaint. The Plaintiff ought to have included the same to comply with the requirement of the law. The specific provision deals with pecuniary value of the subject matter. 13 | P a g e However, this limb does not appear to defeat the suit in itself. It has a leeway for rescuing suits where such value of the subject matter is not disclosed. Order VII Rule 1(i) of the CPC provides that: The plaint shall contain the following particulars- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits. It appears from the framing of the law that it is not always the case that in every sort of the civil suit the value of the subject matter will be readily available. The question of value of the subject matter therefore depends on the circumstances of the case. The Plaintiff managed to describe the size, location and boundaries of the land. Those would suffice in the circumstances. As the drafting of the provision permits that such value of subject matter should be disclosed only where it is possible, the Plaintiff cannot be blamed for failure to include it. Also, the fact that the suit is against the Government namely Makunda Village Council, Iramba District Executive Director and Attorney General would necessarily confer this court with jurisdiction to try the matter despite value of the subject being undisclosed as under the 14 | P a g e Government Proceedings Act, Cap 5 requires that such suits to be instituted at the High Court not otherwise. Furthermore, there is record on Judiciary of Tanzania Electronic Case Management System (JoT-ecms) that on 23rd October 2024, the

Plaintiff paid TZS 40,000/= as the filing fee for the institution of the suit. The question of the Court failing to assess the appropriate court's fees is out of question as the same was assessed. On those perimeters, I am incline to find out that though the Plaintiff did not disclose the value of the subject matter the violation cannot defeat the suit in question. I shall dismiss the second point of the Preliminary Object for being unmeritorious. The third limb is on suing a wrong party which is contravening Order I Rule 3 of the Civil Procedure Code, Cap 33 R.E. 2019, it is correct that the parties are in concurrence that Iramba District Council as 2nd Defendant was wrongly joined as the law requires that a District Executive Director is the one who should be sued. The Local Government (District Authorities) Act, Cap 287 R.E. 2019 provides in Section 26 (3) that: 15 | P a g e “(3) Notwithstanding subsection (2), the District Executive Director shall have the right to be joined as a party in any suit or matter instituted by or against the Village Council, and for that purpose the Village Council shall have a duty to notify the District Executive Director of any impending suit or intention to institute a suit or matter against the Village Council.”. Thus, it was the District Executive Director for Iramba who should have been made party to the case. The effect of failure to join a proper/necessary party is where the parties differed. The Counsel for Plaintiff is of the firm view that Order 1 Rule 9 of CPC is lucid that misjoinder/ nonjoinder do not impair the suit. The learned State Attorney for the Defendant shares a different view that such contravention has serious implication that renders the whole matter unmaintainable before the Court. Thus, parties differ only on implication of failure to join the District Executive Director instead of the District Council. The defendants are of the view that the suit is defeated for joining a wrong party while the Plaintiff is of the view that such nonjoinder/ misjoinder cannot defeat the suit as per Order I Rule 9 of the CPC. 16 | P a g e It is settled view of this court that failure to join District Executive Director for the Iramba District as party to the case makes the Plaint incurably defective as no decree passed by the Court can be enforced without impleading the District Executive Director who the law considers as necessary/proper party to the case. Though a general principle of law under Order I Rule 9 of the Civil Procedure Code, Cap 33 R.E. 2019 is to the effect that no suit is defeat for misjoinder or nonjoinder of the party, that principle applies only where the party is not proper/necessary party to the determination of the case and passing effective decree. It is settled law that where nonjoinder or misjoinder involves a party whose presence in the suit is crucial for determination of the case then such suit shall not be maintainable for such nonjoinder. This principle was reiterated in the case of Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman & Another (Civil Revision No. 6 of 2017) [2018] TZCA 25 (1 August 2018) (TANZLII), at pages 27-28, the Court of Appeal stated that: Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, 17 | P a g e imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and nonjoinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to

pass a decree which would be of no practical utility to the plaintiff. In the case of Ongujo Wakibara Nyamarwa vs Beatrice Gryson Mmbaga (Civil Appeal No.122 of 2021) [2024] TZCA 74 (20 February

- 2024) (TANZLII), at pages 5-6, the Court noted that: However, we are similarly aware of a settled position of the law that non-joinder of a necessary party is bound to defeat a suit. The learned counsel for the parties were in agreement that the non-joining of the Commissioner for Lands, the Registrar of Titles, the Temeke Municipal Council and the Attorney General rendered the suit unmaintainable. We agree with them. 18 | P a g e As the law categorically requires joining of the District Executive Director for all matters involving the Village Council, the District Executive Director is considered as a proper party for effective decree to be passed. Thus, any failure to join the District Executive Director cannot be condoned. It must have a serious effect of making the suit unmaintainable before the court. This aspect is also upheld for being meritorious. The fourth aspect is on verification of the pleaded namely that Plaintiff contravened the provisions of Order VI Rule 15 (1) and (2) of the CPC. The parties agree that pleadings, in form of the Plaintiff, was not properly verified. In particular, the learned Counsel for the Plaintiff acknowledges the defectiveness of the verification and invited this Court to consider interest of justice by not striking the plaintiff in question. The Civil Procedure Code, Cap 33 R.E. 2019 provides for verification of pleadings. In particular, Order VI Rule 15(1) and (2) state that: 15.-(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. 19 | P a g e
- (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true. On verification of pleadings, the principle is illustrative in *Bansons Enterprises Limited vs Mire Artan* (Civil Appeal No. 26 of 2020) [2023] TZCA 90 (9 March 2023) (TANZLII), at page 12, the Court of Appeal observed that: Where a plaintiff is not duly signed and verified in accordance with the law, there is no suit which the court can legally try. It is also not out of place if we restate that the object of duly signing a plaintiff is not only to prevent fictitious suits but also prevent disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. Finally, we find that in the instant case, the ailment in the plaintiff for not being duly signed and verified go to the root of the plaintiff and vitiates it as well as the whole suit. As we have alluded to above, there was no suit for the High Court to try. 20 | P a g e Further, in the case of *Lisa E. Peter vs Al-hushoom Investment* (Civil Application No. 147 of 2016) [2016] TZCA 902 (20 September 2016) (TANZLII), at pages 8-9, the Court stated that: If I may now single out the verification clause for more clarification, the purpose of the verification of affidavits was persuasively and meticulously laid down by the Supreme Court of India in *A.K.K. Nambiar Vs Union of India* (1970) 35 CR 121 where it was stated: - "The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties.

Allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegation. In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence. Thus, both statutory law and precedents call for the importance of verification of pleadings. It is one of the mandatory legal requirements of 21 | P a g e which failure to adhere to have dire consequences on the party to the case who did not comply with the legal requirement. In the instant case, Paragraphs 3, 4, 5 and 6 are not completely verified in the verification cause of the Plaintiff. These paragraphs relate to description of the 2nd and 3rd Defendants; and the description of the cause of action namely source of ownership of alleged property suit and timing of accrual of the cause of action. These clauses are very crucial to the Plaintiff in particular Paragraphs 5 and 6 which reiterated the basis of the whole claim before the Court. The counsel for the Plaintiff urged this Court to ignore the anomaly of failure to verify some of the paragraphs of the Plaintiff thus called upon this court to invoke the Oxygen principle to salvage the plaintiff. This court do not concur that would be a better approach to undertake. Failure to verify the pleadings cannot be cured by the Oxygen principle as the counsel for the Plaintiff argued. Some of the provisions of are so fundamental that cannot be ignored without legal consequences. The verification clause requirements is one of those mandatory provisions. 22 | P a g e In *Hamis Paschal vs Sisi Kwa Sisi Panel Beating & Enterprises Ltd* (Civil Appeal 165 of 2018) [2020] TZCA 1899 (17 December 2020) (TANZLII), at page 13, the Court of Appeal of Tanzania noted that: Relying inter alia on the case of *Martin Kumaliya & 117 Others v. Iron and Steel Ltd*, Civil Application No. 70/18 of 2018 (unreported), the Court held that the overriding objective principle could not be invoked to condone the inaction. In that case, the Court underscored the need to apply the overriding objective principle without offending mandatory provisions of the law. It observed as follows:-While this principle is a vehicle for attaining substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We wish to emphasize that, since in this case, by virtue of the provisions of Rule 84(1) of the Rules, compliance with the requirement of serving a notice of appeal has a timeline, in our considered view, the appeal cannot be salvaged by invocation of the oxygen principle. This is because the question of limitation is synonym with jurisdiction. The effect of the existence of unverified paragraph is to expunge those paragraphs from the record. This was the principle in the case of 23 | P a g e *Standard Chartered Bank & Others vs VIP Engineering & Marketing Limited & Others* (Consolidated Civil Application No. 76 of

- 2016) [2022] TZCA 302 (7 March 2022) (TANZLII), at page 15, the Court stated that: We equally find that the verification clause was properly verified, except only for paragraphs 17 and 19 where the deponent wrongly indicated that the information contained therein was to the best of his knowledge while the contents of the said paragraphs clearly indicated that the information was the advice he received from his counsel. However, having expunged the said offensive paragraphs, it is our settled view that the verification clause was properly

verified. It is humble view of this court that in case the paragraphs that were not verified are expunged then the whole claim lacks basis as it was demonstrated that the two most important paragraphs on the cause of action are the ones not verified. The whole of the Complaint cannot stand in absence of the cause of action. The suit is therefore unmaintainable before this court for being violative of the laws of this country as demonstrated in the analysis of this 24 | Page ruling. The preliminary objections raised by the defendants are upheld for being meritorious. I shall proceed to strike out the complaint for being preferred in contravening the law. Each party to bear its own costs. It is so ordered. DATED at DODOMA this 13th day of March 2025. E.E. LONGOPA JUDGE 13/03/2025. 25 | Page

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