

TANZANIA / JUDGMENT

johari ibrahim chata another vs mpanda district council 3 others 2023 tzhc 21228 20 september 2023

COURT
TZHCDECIDED
20 September 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF SUMBAWANGA AT SUMBAWANGA LAND CASE NO. 4 OF 2021 JOHARI IBRAHIM
CHATA.....1st PLAINTIFF DAVID KAGOMA
BAHANGAZA.....'2nd PLAINTIFF VERSUS ' MPANDA DISTRICT
COUNCIL;... 1st DEFENDANT DONALT LESSERY
TARIMO.....2 nd DEFENDANT THE ATTORNEY GENERAL, ZONAL
OFFICE- RUKWA.....3rd DEFENDANT 21/8/2023 & 20/9/2023 :

RULING

MWENEMPAZI, J: The 1st- plaintiff filed a suit against the defendants for a piece of land measuring % of an acre located at Kawajense which she alleged to have bought from one Margret Baragula and the latter sold to Daudi Kagoma Bahangaza on the 7th day of December, 2015. Upon serving the plaint to the defendants, the journey on the suit had not been smooth. There has been a i number of preliminary objections raised by the defendants. The first objection was filed on the 15th April, 2021 with four points of objection. It was heard and the objections were overruled by this Court. The copies are in the record, I see no need to go into details at least for now. This time around the defendants, in particular the 1st and 3rd defendant has -Vs -. raised again, for the third time, a new set of objections by the notice of objection which was filed on the 21st June, 2023. The points of objection are: 'W.

1. That the plaintiff filed an amended plaint without leave of this honourable Court.
2. That, the second plaintiff has sued without issuing 90 days statutory notice of intention to sue. , In hearing of the preliminary objection was by way of written submission subject to leave of this Court granted on the 17th July, 2023. Both parties complied to the scheduling order of the Court issued on the date. The 1st and 3rd defendants were being represented by Mr. Fortunatus Mwandu, State Attorney and the plaintiffs and the 2nd defendant were unrepresented. 2 The 1st and 3rd defendant have submitted through their attorney that on the first point of objection it is a requirement under Order VI Rule 17 of the Civil Procedure Code, [Cap 33 R.E 2019] that in any amendment of the pleadings, leave of the Court must be

sought and duly granted. The same reads as follows: "C. "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in : such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties": '-.j It is the argument by the 1st and 3rd defendant that the second amendment of the plaint made by the plaintiffs was filed in this Court in breach of the law as cited above. An application for leave is a mandatory requirement of the law. The counsel for the 1st and 3rd defendant cited the case of Equity Bank (Tanzania) Limited Vs. Abdulrahman Mohamed Kwadu t/a Kwadu Mikome Enterprises and Yano Auction Mart & Company Ltd, Misc. Civil Application No. 369 of 2021, High Court of Tanzania at Dar es Salaam Registry (unreported). In that case my learned brother Honourable Judge Kakolaki cited the case of Mohamed Ameir Muhidini Vs. People's Bank of Zanzibar and two Others [1999] TLR 28 High Court - Zanzibar where the Court affirmed the principle in the application for leave to amend the plaint that "Both in law and in equity an advocate is required to take proper steps at the earliest time to apply for leave to amend pleadings" That position was illustrated in the case of Peter Wegesa Chacha Timasi, Mwita Chacha Timasi and Ibrahim Timas Vs. North Mara Gold Mine Limited, Civil Appeal No. 49 of 2020, Court of Appeal of Tanzania at Mwanza (unreported) that: "It is a settled law that a pleading can be amended at any "■ stage of the proceedings only to the extent allowed by the Court on such terms as may be just and such amendments should be limited to what will be necessary for determining the real questions in dispute between parties. See Order VI Rule of Civil Procedure Code, [Cap 33 R.E 2019]". 4 On the 2nd point of objection the counsel for the 1st and 2nd defendant has submitted that on the 13th May, 2022 this honourable Court ordered the 2nd plaintiff to be joined, But in the notice of intention to sue dated 16th April, 2020 issued by the 1st plaintiff the 2nd plaintiff is not included. Hence the 2nd plaintiff wrongly instituted a suit against the 1st and 3rd defendant without a mandatory statutory notice of intention to sue. That is according to section 6(2) of Government Proceedings Act, [Cap 5 R.E 2019] which provides that: "A suit against the government shall be instituted and heard unless the claimants previously, submit to the Government Minister, department, or office concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claims against ■ the Government, and he shall send a copy of his claim to

- i. the Attorney General and the Solicitor General". The 2nd amendment to join the 2nd plaintiff who did not issue a 90 days notice of intention to sue the Government and to serve the same to the Attorney General and the Solicitor General. Even if the second plaintiff was ordered by this Honourable Court to be joined as necessary party the said order did .5 not automatically waive the mandatory requirement of the law of issuing the 90 days notice of intention to sue the Government. The 1st and 3rd defendant pray that the suit be struck out with costs. The plaintiffs are in opposition to the preliminary objections made. Starting with the first point of objection that the plaintiffs have filed amended plaint without leave of this honourable Court they have argued that it is undisputed that leave of the Court must be sought before a party amends his pleadings. That is in accordance to order VI. Rule 17 of the

Civil Procedure Code, [Cap 33R.E2019]. The record is clear that the plaintiffs sought for leave to amend the plaint, which prayer was made on 23rd March, 2023. The amendment was necessary in order to conform with what was ordered by this honourable Court in its ruling delivered on 16th September, 2022 where the plaintiffs were directed to seek leave to amend their pleadings so that it has a proper verification clause. On this time of submission, I have no doubt, as indeed it can be verified from the pleadings, whereby it was ordered as follows: "Leave granted to the plaintiffs to file amended plaint by 13/04/2013. Mention on 15/05/2023. 6 Sgd; Judge 23/03/2023". Thus, though I will give a more detail account, I have confirmed that the amendment was done pursuant to leave of this Court. As to the second limb, the plaintiff-s counsel has submitted the argument by the 1st and 3rd defendant that the 2nd plaintiff who was joined by the order of this Honourable Court on 13th May, 2022, was supposed to appear in the notice of intention to sue issued on 16th April, 2020 is unfathomable and defeats all sense of logic. How possible is it for a party joined in this suit by an order of the Court in year 2022 appear in a notice of intention to sue issued in year 2020? %. This Court has the mandate to order a person to be joined in the case as a plaintiff or defendant so as to enable the Court to effectually and completely adjudicate the matter before it. This is provided under Order 1 Rule 10(3) and (2) of the Civil Procedure Code, [Cap 33 R.E 2019] as quoted below: -

- (1) Where a suit has been instituted in the name of wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the 7 right plaintiff the Court may at any stage of the suit, if satisfied that the suit has been so instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute so to do, order any person to be substituted or added as plaintiff upon such terms as the Court thinks just. j.
- (2) The Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out; and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. 8 The for plaintiff have submitted that the second plaintiff herein was joined by an order of this Court so as to effectually adjudicate the issues before it. The 2nd plaintiff herein had no complaints against the Government to necessitate issuing notice but was rather joined by the trial Court. The counsels for the 1st and 3rd defendant in their submission in chief had submitted that the parties are not allowed to circumvent the mandatory procedural requirement of the law. The law- does not mandate the Court to v.l';-" dispense with the requirement of the statutory notice. They cited the case of the Registered Trustees of the Evangelical Lutheran Church in Tanzania Vs. The Labour Commissioner, Labour Revision No. 120 of 2022, HCT. It is the argument by the plaintiffs that the case is distinguishable with the circumstances in the present case. The defendants, in rejoinder have argued that the plaintiff has failed to show the parameters which the Court ordered so

that the plaintiff may conform into, The counsel for defendants has argued that it is a cardinal rule that in every amendment blessed by the Court, the Court will set the parameters within which the alteration or the amendment will be made as clearly stated the case of Salum Abdallah Chande t/a Rehema Tailors Vs. The Loans 9 and Advances Realization Trust (LART) and two Others, Civil Appeal No. 49 of 1997 (unreported) which was also quoted the case of Peter Wegese Chacha and 2 Others Vs. North Mara God mine Limited on the holding that "the Court will set the parameters within which the alteration or the amendment will be made". % Counsels for the 1st and 3rd defendant submitted that the plaintiffs have failed to state the parameters which were set by the Court when granting leave to amend the plaint. They prayed that the objection be upheld and the case be struck out with costs. .. On the second: point, of objection the counsel has submitted that the 2nd plaintiff did not issue a notice of intention to sue to the Government, that is the 1st and 3rd defendant. That is a requirement under section 6(2) of the Government Proceedings Act; [Cap 5 R.E 2019]. Though they appreciate that the Court has power to order a party to be joined so as to enable it to effectively and completely adjudicate the matter, that cannot waive the mandatory requirement of the law under the Government Proceedings Act, [Cap 5 R.E 2019] which requires issuance of ninety days notice of intention to sue. io In this case the counsels for defendants the 1st and the 3rd defendant allege the amendment in particular the second amendment, was not blessed by this Court. And even if it would be said in the positive, but the plaintiff could not substantiate the parameters within which the amendment should be conformed. The plaintiffs have it that the amendment was blessed and it was aimed at conforming to the directives of the Court in ruling of the Court dated 16/9/2022. 'r I have also read the record and find that the defendants are determined to resolve the dispute on technical grounds which is not the position in our jurisdiction. We are in the area where substantive determination of disputes is more preferred to technical one. In the referred ruling dated 16/9/2022 in this very case, this Court had this observation. "7 amoftheview that the plaintiffs may amend their plaint to conform to the law if they so desire by asking the Court tor leave to amend the plaint so that it has a proper verification clause and their counsel signs on the plaint. If they fail to pray for and amend the same, the land case may be struck off the Court Register" 11 Reasonably, the prayer to amend the plaint emanates from the ruling and the relevant part is the except quoted above. I think it serves the parameters set by the Court and there is no need to misuse time on objections as the counsels had the duty to enter appearance on the date of delivery as well as to peruse the Court record before raising the objection. It is advised therefore the defendant to keep tracking their case so that they have a meaningful contribution to the dispute resolutions which will ensure fair and timely justices for litigants. Under the circumstances, the first limb of objection is overruled. On the second limb, the 1st and 3rd defendant argue that the 2nd plaintiff did not issue a ninety days notice of intention to sue. That infringed section 6(2) of the Civil Procedure Code, [Cap 5 R.E 2019]. The plaintiff has argued that the joining of the 2nd plaintiff was by order of the Court. The 2nd plaintiff had no intention to sue the 1st and 3rd defendant but the Court in its wisdom ordered him be added as the plaintiff to enable the Court to effectively and completely determine the dispute at hand. It is however the

argument by the 1st and 3rd defendant that an order of the Court cannot operate to waive mandatory statutory requirement of 90 days notice hence they are praying for the suit to be struck out. That however may be resolved by looking at the essence of notice and seeing if it was necessary in the circumstances of the present case. It should be appreciated that the adding of the 2nd plaintiff was at the instance of the Court and in law it was in compliance to Order I Rule 10(1) and (2) of the Civil Procedure Code, [Cap 33 R.E 2029]. In the case of Claude Roman Shikonyi Vs. Estomy A. Baraka and 4 Others, Civil Revision No. 4 of 2012 Court of Appeal of Tanzania at Dar es Salaam

- [2019] 1 TLR 192 it was held that: "Settled law is to the effect that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, the Court has a separate and independent duty to do so. It is not the duty of the Court to wait until the parties apply to have him added... The essence of issuing a notice is to notify the Government entity of an impending suit and allow the entity to investigate and prepare for defence or settle the claims to save unnecessary costs. Under the circumstances of the present case it is not true that the Government (1st and 3rd defendants) did not know about the claims. However, interest of the 2nd plaintiff may be affected in case the case will be heard in his absence also it may lead to multiplicity of suits in case he is affected and he decides to pursue his rights. Thus, there necessary to avail him a chance to be heard which is the essence of Order 1 Rule 10(1) and
- (2) and also what the grand law the constitution of the United Republic of Tanzania Article 13(6) (a) provides for. obviously it won't be of any benefit for substantive justice to prevail if this suit will be struck out while it is clear the 1st and 3rd defendant had knowledge of the suit. After all, it is an addition of unnecessary costs to the litigants and also protraction of the suit on technical grounds, which against the need to uphold substantive justice to the parties. I therefore find the objection to lack merit and is thus overruled. In final analysis both limbs of the objections are overruled with costs. It is ordered accordingly. Dated and delivered this 20th day of September, 2023. 14

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