

TANZANIA / JUDGMENT

bernadetha kyabwani rweyendera vs zainab juma kaswaka 2 others 2023 tzhclandd 16632 30 june 2023

COURT
TANZLIIDECIDED
30 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 38 of 2023 BERNADETHA KYABWANI
RWEYENDERA.....PLAINTIFF VERSUS ZAINABU JUMA KASWAKA & OTHERS.....
1st DEFENDANT SIWEMA HAMIS ALI..... 2nd DEFENDANT KCB BANK
TANZANIA LIMITED.....3rd DEFENDANT

RULING

28/6/2023 & 30/6/2023 A.MSAFIRI J. The plaintiff Bernadetha Kyabwani Rweyendera instituted the suit against the three defendants namely therein above. The dispute is on ownership of Plot No. 239 Block "B" Title Deed No 110335 measured at 30x25 meters (750 sqm) at Tegeta Area-Kinondoni Municipality, within the city of Dares Salaam, (herein the suit property). The defendants filed their written statements of defence. Along with it, the 1st and 2nd defendants raised a preliminary objection on point of law to the effect that; Afl I n- i

1. That the plaint is defective for amending the cause of action without the leave of this court. The 3rd defendant also raised preliminary objections to the effect that;- 1 The plaintiff has no cause of action against the 3d defendant 2 The suit contravenes the provision of Order I Rule 3 of the Civil Procedure Code [<.Cap 33 R.E2019] by joining the 3d defendant who is neither a necessary nor a proper party. On 30.05.2023, this Court ordered the preliminary objections to be disposed of by way of written submissions. The order was complied with by parties whereby the submissions in chief and rejoinder to support the raised preliminary objection was drawn and filed by Mr Kennedy Steven Sangawe, learned counsel for the 1st and 2nd defendants, and Mr Albert Lerna, learned counsel for the 3rd defendant. The reply submissions by the plaintiff were drawn and filed by Ms Esther Shedrack learned counsel for the plaintiff. Submitting on the above preliminary objection, Mr Kennedy Steven Sangawe contended that this suit is brought after the plaintiff's prayers to withdraw Land Case No 25 of 2022 whereby there is no proof that the Court granted leave to refile. 2 That, the plaintiff in this current case added the 2nd defendant who was not party to the previous suit. He further argued that the plaintiff added a new cause of action and the Court order in Land

Case No 25 of 2022 was not attached by the plaintiff. He prayed the matter to be struck out with costs. In reply, Ms Esther Shedrack argued that it is a well settled principle that it is the plaintiff in the suit who has to bring the parties against whom he has any dispute and to prosecute them as the defendants in the particular suit. She referred the provisions of Order 1 Rule 3 of the Civil Procedure Code (supra) which provides that all persons may be joined as defendants. She further argued that the 2nd defendant herein is an important part to the suit since in order to prove the plaintiff's transaction as the contract for the sale of land involves both the 1st and 2nd defendants. She stated that misjoinder is applicable in our laws when the right and interests of the parties are actually involved. The counsel for the plaintiff further invited this Court to do away with technicalities and apply the principle of overriding objective as provided under Section 3 of the Civil Procedure Code. She prayed for the dismissal of the preliminary objection and the suit to proceed on merit. A/L. 3 Mr Albert Lema for the 3rd defendant submitted in support of the preliminary objection. On the first point of objection, he argued that the plaintiff has no cause of action against the 3rd defendant and that the Plaint does not disclose cause of action against the 3rd defendant. He further argued that it is important to determine if the plaintiff has a right which was infringed by the 3rd defendant and if there is any relationship between the plaintiff and the 3rd defendant. He insisted the plaintiff does not have the cause of action against the 3rd defendant. To bolster his point, the counsel referred to string of cases among them the cases of Anthony Leonard Msanze & another v. Juliana Elias Msanze & 2 others, Civil Appeal No. 76 of 2012, CAT (unreported) and Mashado Game Fishing Lodge Ltd & 2 others v Board of Trustees of Tanganyika National Parks (t/a TANAPA), [2002] TLR 321&322. On the second limb of the preliminary objection, Mr Arbert Lema argued that with regards to Order 1 Rule 3 of the Civil Procedure Code, the plaintiff has no right against the 3rd defendant or any relief that they transacted or anything that creates a relationship between them. Thus, the plaintiff offended the provision of Order 1 Rule 3 of the Civil Procedure Code. He prayed the names of the 3rd defendant to be struck out with costs. 4 In reply to the 3rd defendants' submissions, Ms Esther Shedrack submitted that the plaintiff has the cause of action against the 3rd defendant due to the existence of the mortgage which is the root cause of this matter, as the facts were established in the Plaint that the land in dispute was mortgaged to the 3rd defendant before the plaintiff bought it and that this fact needs to be established by evidence. She further argued that the case cited by the counsel for the 3rd defendant of Antony Leonard Msanze(supra), states clearly that in deciding whether or not the Plaint discloses a cause of action, the Court should not go far into a written statement of defence. Thus, the 3rd defendant is necessary to establish that the disputed property is mortgaged and the recovery process is underway. In regards to the second limb of the preliminary objection, the plaintiff's counsel argued that the plaintiff rightly sued the 3rd defendant and he did not contravene Order 1 Rule 3 of the Civil Procedure Code. She submitted that the presence of the 3rd defendant is necessary in order to enable the Court to settle all the questions involved in this suit. She prayed the Court to dismiss the preliminary objections raised. Having gone through the submissions by the parties, the centre issue for my determination is whether preliminary objections raised have merits. 5 The preliminary

objection raised by the 1st and 2nd defendants is that the suit is incompetent for adding the 2nd defendant and raising a new cause of action without leave of the Court. In the light of the submissions by both the parties, the plaintiff pleads that Land Case No 25 of 2022 was withdrawn with leave to file a fresh suit. In essence when the suit is withdrawn there is nothing left in the court/court registry and the plaintiff/applicant may add or delete the parties, cause of action as he/she wishes, even the case number do differ. This is also supported by the Court of Appeal of Tanzania in the case of Tanzania National Roads Agency (Tanroads) vs Prismo/ BadrJ/V Partnership between Prismo Universal Italiana S.P.A and Badr East African Enterprises Ltd, Civil Appeal 241 of 2019 (unreported) at pages 7 and 8 where it was held that;- "The provision of the law above speaks for itself. The withdrawal of the former appeal left nothing standing in the Court. The essence of that order was a remedial measure to the appellant to lodge a fresh appeal..... " Basing on that legal position, I find that the said preliminary objection has no merit and it is overruled. A/LL>- 6 I move to the first preliminary objection raised by the 3rd defendant that the plaintiff has no cause of action against 3rd defendant. A cause of action means a fact or facts committed or attributed to one person which gives rise to a claim by another. It follows, therefore, that such other person (in this case, a plaintiff) must state those facts and attribute them to the defendant in order to disclose a cause action against the defendant. Having said that, it is my view that the cause of action is stated in paragraphs 12 and 13 of the Plaint and it refers to the 3rd defendant's intention to dispose of the suit property by sale. All these facts contained in the said paragraphs of the Plaint constitute a cause of action. Whether the intention to sell the suit property is there or not, remains to be the subject of proof in the main suit by parties to the suit which cannot be done at this stage. I therefore agree with Ms Esther Shedrack counsel for the plaintiff that indeed the preliminary objection is devoid of merit as it invite the need to prove it by evidence contrary to the principle set in the celebrated case of Mukisa Biscuits. I also overrule this objection as it has no merit. The second limb of preliminary objection by the 3rd defendant is that Order 1 Rule 9 of the Civil Procedure Act (supra) is contravened by joining the 3rd defendant who is neither a necessary party nor a proper party. 7 The provision of law is that all persons may be joined as the defendants against whom any right or relief in respect of or arising out of the same act or transaction. By joining the 3rd defendant, it is necessary as all allegations are linked to the 3rd defendant, as evidenced in the Plaint in paragraphs 12 and 13 that the 3rd defendant intended to sell the plaintiff's house hence joining the 3rd defendant is necessary to secure the right and interest of the parties. I also find this preliminary objections to have no merit and it is overruled. For the foregoing reasons, I hereby overrule all preliminary objections with costs. 30/6/2023 8

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