

TANZANIA / JUDGMENT

village amani limited another vs whet company limited 2 others 2023 tzhclandd 17164 24 november 2023

COURT
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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 103
OF 2023 BY WAY OF COUNTER CLAIM VILLAGE AMANI

LIMITED..... Ist PLAINTIFF RUPINDER SINGH
SANDHU..... 2nd PLAINTIFF VERSUS WHET COMPANY
LIMITED..... 1st DFEFENDANT BILHA NECHESA
HERING..... 2ndDEFENDAN ERASMUS MATHIAS
TARIMO..... 3rdDEFENDA

RULING

12/10/2023 to 24/11/2023 E.B. LUVANDA, J On 12/10/2023 after overruling a preliminary objection raised by Mr. Killey Mwitasi learned Counsel Plaintiff (to the counter claim) named above, the learned Counsel for Plaintiff to the counter claim made a prayer under Order I rule 10(2) read together with Order VI rule 17 of the Civil Procedure Code, Cap 33 R.E. 2019, for amending the counter claim to withdrawal the Second Plaintiff and remain with one Plaintiff who is the First Plaintiff, for reasons of mis-joinder. i Cpt. Ibrahim Mbiu Bendera learned Counsel for Defendants opposed the prayer for reasons that the Plaintiff failed to justify the requirement stipulated under Order I rule 10(2) Cap 33 (supra). He cited Sarkar's The Law of Civil Procedure 10th Edition, page 763. He submitted that if the Counsel for Plaintiff is saying the Second Plaintiff was not in the main suit, then also the Second and Third Defendants were not Plaintiffs to the main suit, were just added by the Plaintiff to the counter claim for definite reason. He submitted that reasons used to pierce the veil applies to the Second Plaintiff to the counter claim. He submitted that by withdrawing the Second Plaintiff, the available right to the Defendants will be removed. He argued that this will make the matter took longer. On rejoinder, the learned Counsel for the Plaintiff to the counter claim, submitted that it is a kind of surprise that the Defendants who did not initiate the case is limiting the Plaintiff as to who would be the parties to the case. He submitted that the provision of the law which he cited to wit Order I rule 9 provide that no suit should be defeated for misjoinder or non-joinder. He submitted that counter claim is regulated by Order VIII rule 9. He submitted that the right to file a counter claim is only to who was the Defendant to the main suit. He submitted that Village Amani Company Limited was alone, and 2

was the only one to appear in the counter claim. He submitted that putting the Second Plaintiff is a mis joinder. He cited Order X rule 2, that it empowers the court on suo motto to add or remove the Plaintiff who was improperly joined to the case. He submitted that the provision of Order VIII rule 10 does not limit as to who will be the defendants in the counter claim, only limit who will be the plaintiff. He submitted that it is wonderful for the Counsel for Defendants lamenting additional for Second and Third Defendant to the counter claim, arguing that he ought to raise a formal objection. He submitted that even if the objection could be raised, the result could be the same of joinder and misjoinder. He submitted that the Second Plaintiff ought to be removed under Order I rule 9. I second to the argument of the learned Counsel of the Plaintiffs to the counter claim that the provision of Order VIII rule 10 does not limit as to who will be the defendants in the counter claim, only limit who will be the plaintiff. In the case of Azania Bank Limited vs SMX Limited and Two Others, Civil Case No. 8/2020 HC Dar es Salaam District Registry, at page 2 I propounded that the provisions of sub rule (1) of rule 10 to Order VIII Cap 33 (supra) allow the plaintiff to a counter claim to sue in the counter claim any person whether or not was made a party to the main suit. The 3 same position was taken in the case of Said Ally Athuman & Three Others vs The Administrator General & Another, Land Case No. 107/2019 HC at Dar es Salaam, at page 6, "... Maiapa Inn Limited is a stranger in the original suit. She can only be added as defendant and not a plaintiff in a counter claim in question. That is logically because the plaintiff in the suit never had claim against him which he can validly counter in a counter claim. It is dear therefore that, on the face of it, the amended counter claim offends Order VIII rule 9(1) and 10(1) of the Civil Procedure (supra). The same is not maintainable " Therefore, there was nothing wrong for the Plaintiff in the counter claim to sue the Second and Third Defendants who were not parties to the main suit. However, there is no room for a stranger in the suit to sue as a plaintiff in the counter claim. This is because the catchword in Order VIII rule 10(1) Cap 33 (supra) make reference only to the defendant to the suit as the one who is eligible to set up a counter claim, in exclusion of any other person. In other words, strangers are precluded by the law to sue in a counter claim. In view of the above, the Second Plaintiff to the counter claim is debarred by the express provisions of the law to sue. When the learned Counsel for the Plaintiff to the counter claim was staging a prayer to amend, only 4 grounded mis joinder. There are no tenable reasons as to why a stranger to a suit found it is way as a second plaintiff in the counter claim. According to Sarka's (supra), at page 763, the author said, 'The principle of r 10 is to save honest and bona fide plaintiffs from being non-suited on technical ground. There are however limitations on the power: (i) institution should have been under a genuine mistake' Order I rule 10 Cap 33 (supra) with marginal wordings suit in name of wrong plaintiff, provide and I bold portion of my interest, 'Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may at any stage of the suit, if satisfied that the suit has been so instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just' For the provision of sub rule (2) to rule 10 of Order I Cap 33 (supra) to come into play, the Plaintiff to the counter claim ought to satisfy the court that the impleadment of the Second Plaintiff to the counter claim was through bona fide mistake. In his submission there is no any

grounds advanced by the learned Counsel for the Plaintiff showing that the inclusion of the name of the Second Defendant in the counter claim was by bona fide mistake. Indeed, it could not be said that it was by bona fide mistake where the law precludes strangers to sue in the counter claim on the first place. Therefore, I nod with the learned Counsel for Defendants to the counter claim that there is no justification for the Plaintiff for seeking striking out the name of the Second Plaintiff. In the premises, a prayer for amending the counter claim is disallowed. In lieu thereof, a counter claim is defeated for impleading a stranger as a plaintiff. In other words, after declining a prayer for amending or removing the name of the Second Plaintiff, the counter claim remains to be incompetent and unmaintainable. The counter claim is struck out. However, I make no order for costs for reasons that the ground for disposal of the counter claim was not formerly raised by the defence side. Ruling delivered through in the presence of Mr. Killey Mwitasi learned Counsel for Plaintiff to the counter claim and Ms. Nuru Jamal learned Counsel 7

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