

TANZANIA / JUDGMENT

mtemi naluyaga vs mussa hussein khamis

2023 tzhclandd 17151 23 november 2023

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23 November 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISCELLANEOUS
LAND APPLICATION NO. 522 OF 2023 (Originating from Land Case No. 69 of 2023) MTEMI
NALUYAGA..... APPLICANT VERSUS MUSSA HUSSEIN
KHAMIS.....RESPONDENT

RULING

Date of last Order: 15/11/2023 Date of Ruting: 23/11/2023 A, MSAFIRI, J, The applicant Mtemi Naluyaga has filed this Application seeking for the Court's order to set aside its ex-parte order issued on 16th August 2023 in Land Case No. 69 of 2023. The Application is filed under Order VIII Rule 14(2) of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). It is supported by an affidavit sworn by the applicant himself. The respondent also through his advocate Mr. Benito Mandele filed a counter affidavit contending the Application. Along with the counter affidavit, the respondent raised preliminary objections to the effect that; TV /I}, i

1. The Application is defective and bad in law for not being supported by a proper affidavit Thus the affidavit is at variance with the chamber summons.
2. The affidavit is defective for containing prayers and legal conclusions.
3. The Application is incompetent and bad in law for want of orders sought to be set aside.
4. The affidavit is bad in law for containing ties in paragraph 4 and 5.
5. The Application is defective for non-joinder of parties. The hearing of the preliminary objections was conducted by way of written submissions. Submitting in support of Application, Mr. Benito Mandele, learned advocate who was appearing for the applicant started by submitting on the first limb of objection that the application is defective for not being supported by proper affidavit. He said that the affidavit is at variance with the chamber summons whereby the chamber summons was made on 25th August 2023, while the affidavit was made on 23th August 2023. That it is clear that the affidavit was made two days before the chamber summons. He cited Order XLIII Rule 2 of the CPC which provides

that every Application to the court made under the Code shall be made by chamber summons supported by affidavit. He contended that it is the chamber[^]/[^]. 2 application which has to be prepared first and then should be followed by an affidavit. The counsel argued that this is contravention of said Order XLIII Rule 2 of the CPC, hence the Application should be struck out. On the second limb, Mr. Mandele submitted that, the affidavit supporting the Application contains prayers and legal conclusion. That it is the requirements under Order XIX Rule 3 of the CPC that the affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. That paragraph 15 of the Applicants affidavit contains the prayers which read as "If the application is not granted... " and "I will suffer an irreparable loss". He prayed the Application to be struck out. On the third limb, Mr. Mandele submitted that the Application is bad for want of the orders sought to be set aside. That the Application which was filed in Court and served to the respondent was not accompanied by an order/ruling which the applicant is seeking to set aside. That the law requires that the copy of the decision sought to be challenged must be attached to the application short of which the application becomes incompetent and should be dismissed. On the fifth limb of objection, Mr. Mandele submitted that the Application is defective for non-joinder of parties. That it is the legal requirement that the names of the parties should be maintained in all I 3 subsequent matters. That in the original proceedings, i.e. Land Case No. 69 of 2023, the parties are Mussa Hussein Khamis vs. Mtemi Naluyaga and Tanganyika Auction Mart Co. Ltd. That in the present Application, the applicant has not included Tanganyika Auction Mart Co. Ltd. That joining all parties is the requirement of the law as it was held by the Court of Appeal in the case of Isaack Wildred Kasanga vs. Standard Chartered Bank Tanzania Ltd, Civil Application No. 453/01 of 2019 at pages 9 and 10. Mr. Mandele prayed to abandon the fourth limb of objection and proceeded to pray for the Court to strike out the Application with costs. The applicant reply submissions were drawn and filed by Mr. Abraham Hamza Senguji, learned advocate for the applicant. He submitted that the preliminary objections raised by the respondent are without merit. On the first limb, Mr. Senguji submitted that the person required to sign the chamber summons is the Registrar or Deputy Registrar and that the chamber summons shows that it was signed during the filing of the Application which is on 25th August 2023. That there is no evidence that the applicant signed the chamber summons and affidavit on two different dates i.e. on 23rd August for affidavit and 25th August for chamber 4 summons. He insisted that there was no variation on the two documents and the objection lacks merit and it should be dismissed. On the second limb of objection, Mr. Senguji argued that there is no prayers and conclusions in the applicant's affidavit. That paragraph 15 of the affidavit contains neither prayers nor conclusion as the applicant simply meant that if the Application is not granted he will suffer irreparably. He added that even if the Court will find the words to be prayers then the remedy is to expunge the offending paragraphs and not striking out the whole Application. On the third limb of objection, Mr. Senguji submitted that this is an Application to set aside the ex-parte order hence there is no necessity to attach the said order as it may be made orally, there is no ruling or drawn order which was issued. He urged the Court to dismiss this objection for lack of merit. The fourth limb was abandoned hence Mr. Senguji

submitted on the fifth limb of objection that the respondent is the one who request this Court to issue an ex-parte order and not the Tanganyika Auction Mart. That Tanganyika Auction Mart is also a defendant in the main case and has no complain on the matter to proceed against the applicant, hence it is not necessary to include her in this Application. He prayed for the dismissal of the suit with costs. ftfI Io - 5 In rejoinder, Mr. Mandele mostly reiterated his submissions in chief and prayers. He insisted that the objections raised are substantive. Having gone through the submissions by both parties, the pertinent issue is whether the preliminary objections raised have merit. On the first limb of objection that the chamber summons and the affidavit are at variance, I find that objection to be misconceived and untrue as both the chamber summons and the affidavit were presented in Court for filing and were filed on 25th August 2023. Hence I find no merit in this objection and it is overruled. The second limb of objection is that the affidavit contains prayers and legal conclusion at paragraph 15. I have read the contents of paragraph 15 of the affidavit supporting the Application. It read thus; "if my application is not granted I will suffer an irreparable loss as the respondent's plots are measuring 10 acres". I subscribe with the counsel for the applicants views that those words are neither prayers nor conclusions. It is my finding that those words are not prayers but simply statement of facts which needs evidence to establish them. I also overrule this objection. On the third limb of objection that the order sought to be set aside is not attached, I agree with the submission of the counsel for the applicant < 6 that the ex-parte order which was issued by the Court is not mandatory to be attached to this Application and the omission of not attaching it is not fatal as to render the Application incompetent. I overrule this point of objection. The fourth limb of objection was abandoned hence I will also not determine it. I move to the fifth limb of objection that the Application is defective for non-joinder of parties. I find that Tanganyika Auction Mart Co. Ltd who is the 2nd defendant in the main case i.e. Land Case No. 69 of 2023 is not a necessary party in this Application. Any kind of decision in this Application will not affect her hence her absence is not fatal. Furthermore, even if it could have been necessary to join the said party, then the remedy was not to strike out the Application but the same could have been amended and the necessary party joined accordingly. I also overrule this point of objection. To sum up, I find all points of the preliminary objection to be baseless and devoid of merits, and I hereby overrule them with costs. 23/11/2023 7

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