

IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

LAND CASE NO. 4 OF 2017

JOHN BUZIRE.....PLAINTIFF

VERSUS

SPECIOZA JOHN BUZIRE.....DEFENDANT

Last Order: 06/02/2018

Ruling: 16/02/2018

RULING

MAKARAMBA, J.:

This ruling is on a point of preliminary objection set out in the Written Statement of Defence of the Defendant filed before this Court on the 06/02/2017 that; *this suit is misconceived for challenging the caveat by way of plaint instead of application; in the alternative the suit is bad in law for misjoinder of cause of action.*

Initially the Defendant had raised three points of preliminary objection namely;

- 1. That, this suit is misconceived for challenging the caveat by way of plaint instead of application; in the alternative the suit is bad in law for misjoinder of cause of action.*
- 2. That, the suit having some elements of matrimonial essence has been improperly filed in this Court by way of plaint instead of petition for declaration of what the Plaintiff is alleging.*

3. That, the suit is bad in law for being initiated by the un-properly dated plaint.

However, in the course of making his submissions, Mr. John Edward the learned Counsel for the Defendant, elected to abandon the 2nd and 3rd grounds of preliminary objection, which this Court accordingly marked as to having been abandoned. I shall therefore proceed to determine the 1st ground of appeal on which Mr. John Edward submitted and prayed that, the suit be struck out with costs.

Briefly, on the 18th day of January, 2017 the Plaintiff, **JOHN BUZIRE** brought a suit before this Court against the Defendant, **SPECIOZA JOHN BUZIRE** seeking for an order that, the caveat caused by the Defendant to be registered by the Registrar of Titles of Lake Zone Regions in respect of Plot No. 506 Block "C" Nyegezi Mwanza with the Certificate of Title No. 19268 be removed. The Plaintiff claims to be the sole owner of Plot No. 506 Block "C" Nyegezi Mwanza with a Certificate of Title No. 19268 and that, the Defendant is no longer entitled to that property.

Upon the Defendant being served with the Plaintiff's Plaint that, the Defendant lodged a Written Statement of Defence in which she raised the three points of preliminary objection, out of which only the first one forms the subject of this Ruling, the other two having been marked abandoned.

On the **6th of February, 2018** when the preliminary objection was scheduled for hearing, on the part of the Defendant, Mr. **John Edward**, learned Counsel appeared. However, on the part of the Plaintiff, neither the Plaintiff nor Mr. Dennis Kahangwa, his learned Counsel, appeared to defend the preliminary objection. This Court accordingly, upon prayer by

the learned Counsel for the Defendant granted him leave to argue the preliminary objection disposed of by way of written submissions.

It was the submissions of Mr. John Edward that, the suit before this Court contravenes the provisions of section 78(4) of the Land Registration Act, [Cap.334 R.E. 2002] which provides thus;

*"The High Court, **on the application** of the owner of the estate or interest affected, may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit."*(the emphasis is of this Court).

Mr. John Edward argued that on the basis of the above cited provision, the mode of challenging a caveat entered by a Caveator is by way of application. And as to the manner of preferring such an application, Mr. John Edward further stated that, it is as per Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002, which provides thus;

*"Every application to the Court **made under this Code** shall, unless otherwise provided, be made by a chamber summons supported by affidavit."*

In the instant matter, Mr. John Edward further submitted, since the Plaintiff is in the process of challenging the caveat lodged by the Caveator, the Plaintiff ought to have brought the application by filing a chamber

summons supported by affidavit as stipulated under Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002. In buttressing his submissions on this point, Mr. John Edward referred this Court to the decision in the case of ***Amos Njile v. Mwanza City Council and Others, Land Case No. 58 of 2015 (Unreported)***. This case, however, with due respect is not relevant to the point under consideration since in that case reference was made to section 99(1) of the Land Registration Act [Cap.334 R.E 2002] on rectification of errors in the Land Register by the Registrar of Title, which is not the case at hand.

The law stipulates under section 78(4) of the Land Registration Act, Cap.334 R.E. 2002, in order for a Caveator to be summoned to show cause why a caveat registered by the Registrar of Titles should not be removed, the Court has to be moved by way of application. The law however is silent on the kind or format which that application should take. According to Mr. John Edward, such application has to be made by way of chamber summons supported by an affidavit as provided for under Order XLIII Rule 2 of the Civil Procedure Code, Cap.33 R.E. 2002.

The provisions of Order XLIII Rule 2 of the Civil Procedure Code, Cap.33 R.E. 2002 however concerns "**every application made under the Code**" unless otherwise provided, as the ones to be made by a chamber summons supported by affidavit. Did the law envisage as Mr. John Edward wants this Court to believe, that even an application to show cause under section 78(4) of the Land Registration Act, Cap.334 R.E. 2002 has to be made by way of chamber summons supported by affidavit. Rather unfortunately, Mr. John Edward did not submit on this particular

point to convince this Court that even an application under section 78(4) of the Land Registration Act, Cap.334 R.E. 2002 has to be made by way of chamber summons supported by affidavit. In my considered view if Parliament had intended that to be the case it could have provided so expressly. In the absence of such express provision it will be stretching the law too far to bring under the rubric of section 78(4) of the Land Registration Act, Cap.334 R.E. 2002 that an application under that section has to be made by way of chamber summons supported by affidavit. This being the case therefore the Plaintiff cannot be faulted for electing to bring the application by way of a plaint since there is no express bar for adopting such procedure.

It is without dispute that neither under the Land Registration Act nor under the Civil Procedure Code is it expressly stipulated that an application for showing cause why a caveat should not be lifted has to be brought by way of chamber summons supported by an affidavit. Much as a Plaint is normally used to bring a suit before a court of law and a chamber summons supported by an affidavit is usually the preferred mode for seeking for interlocutory orders within a pending suit, the law provides expressly that a chamber summonses supported by an affidavit is for applications brought under the Civil Procedure Code are used in matters falling under the Civil Procedure Code. A caveat is not among the matters covered under the Civil Procedure Code, which as I pointed out earlier in this ruling is conspicuously silent on the mode for bringing an application pertaining to caveats regulated by the Land Registration Act. As I pointed out earlier in this Ruling, Mr. John Edward has completely failed to cite any

express law providing for the format of applications under section 78(4) of the Land Registration Act, Cap.334 R.E. 2002.

In terms of section 22 of the Civil Procedure Code, a suit is to be instituted by a plaint. A suit is defined in the Black's Law Dictionary at p. 1475 to mean "*any proceeding by a party or parties against another in a court of law.*" To pursue a cause of action, a plaintiff pleads or alleges facts in a plaint, the pleading that initiates a lawsuit. A Cause of Action is therefore essential to a suit and thus a plaint must mention the cause of action if it is to be instituted as a suit.

Before this Court, there is a person who has requested this Court for an order that a Caveator (Defendant) to show cause why a caveat lodged with the Registrar of Titles should not be lifted. Clearly, that person (Plaintiff) has not instituted a suit. Rather that person is seeking to request this Court to ask the Caveator to show cause as to why the caveat should not be lifted. The issue is therefore whether it was proper for that person to opt for a Plaint as the mode or form of moving this Court for the orders sought. In the instant matter, the person who has styled herself as the Plaintiff is in every respect an Applicant for she has brought her matter under section 78(4) of the Land Registration Act, Cap.334 R.E. 2002, which stipulates expressly for application as a mode of moving the Court to grant the orders sought.

In my considered view, the law did not envisage that a Plaint, which is the mode for bringing a suit under the Civil Procedure Code, to be the mode for bringing the application section 78(4) of the Land Registration Act, Cap.334 R.E. 2002. And neither was it envisaged that the application

will be by way of chamber summons supported by affidavit. Otherwise if it was to be so Parliament in its considered wisdom would have expressly promulgated so. Since the law provides expressly for an application as a way in which a person seeking to request the Court to cite the Caveator to show cause, in my considered view this cannot by any stretch of imagination, be by way of a Plaint, which as I pointed out above is the mode expressly stipulated under section 22 of the Civil Procedure Code for instituting a suit. The law did not either envisage that it will be by way of chamber summons supported by affidavit, which as I alluded to is the mode for applying for interlocutory orders under the Civil Procedure Code. The law by providing expressly for an application, in my considered view this could take the form of a **petition** in which the applicant would state the grounds and the relief sought thereof, and the Respondent to make a reply, then the matter to be heard and a ruling and order made accordingly. For avoidance of confusion, a petition in this context simply means a written application from a person or persons to some public body or official asking that some authority exercised to grant relief, favors, or privileges.

I should emphasize here that applications are used to ask the court to make an order to resolve issues that come up in a case before the trial of the lawsuit. This I suppose was the gist under Order XLIII Rule 2 of the Civil Procedure Code, Cap.33 R.E. 2002 to state that "**every application made under the Code**" unless otherwise provided, *shall be* by a chamber summons supported by affidavit. However, depending on the type of application one makes, an application can also result in a final decision in a

case. For example, an application for summary judgment may result in a final decision. The term "chambers" is used to describe a type of hearing that is different from a full trial where evidence is given through witnesses. Chamber proceedings differ from trials in that evidence is generally presented in the form of affidavits (instead of by witnesses). All applications are normally heard "in chambers" although this does not rule out for a hearing of an application in open court.

In my considered view, much as there is no law which expressly bars the procedure adopted by the Plaintiff of seeking to lift a caveat entered by way of a Plaint, as I pointed out above, the learned Counsel for the Defendant, Mr. John Edward, has not been able to show this Court the reasons for him arguing that a chamber summons supported by an affidavit would have been the ideal mode over a Plaint for bringing the instant matter before this Court.

In the whole, it is for the above reasons that, the preliminary objection fails. It stands dismissed. Considering that, the Plaintiff never appeared in answer to the preliminary objection, I shall not make any order as to costs. The Defendant shall bear its own costs in this matter. It is so ordered.

.....
R.V. MAKARAMBA

JUDGE

16/02/2018