

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
LAND CASE NO. 93 OF 2016**

**NAJMA HASSANALI KANJI (suing through
MOHAMED HASSANALI KANJI, by Power
of Attorney).....PLAINTIFF**

VERSUS

**RAMADHANI HAMISI
NTUNZWE.....DEFENDANT**

RULING

Date of last order: 13/7/2020

Date of Ruling: 04/09/2020

S.M. KULITA J:

This is a ruling for the Preliminary Objection on point of law raised by the Defendant's Counsel Mr. Alphonse Katemi on the following points;

1. That the suit is bad in law and abuses the court process because the very same suit was struck out after the plaintiff conceding the preliminary objection that was raised by the defendant.

2. That the suit offends the legal requirements on power of attorney.
3. That the suit has been improperly filed under summary procedure.

This matter was fixed for the hearing by way of written submissions. The parties complied with the scheduling orders in filing their submissions. Mr. Samson Mbamba, Advocate appeared for the plaintiff while Mr. Alphonse Katemi, Advocate appeared for the defendant.

In his submissions in respect of the first ground of the preliminary objection the Learned Counsel Katemi submitted that the suit is bad in law because the same suit was previously struck out in Land Case No. 60 of 2016 where the defendant raised a preliminary objection that the suit had been improperly filed under summary procedure provisions. He submitted that the Plaintiff's Advocate conceded the preliminary objection and the said suit was struck out by this court on 8th November, 2016. However, on 14th December, 2016 the plaintiff through the person purported to hold power of attorney instituted the instant suit with same defects as in the previous suit which was struck out by this court by Munisi J, as she then was.

Mr. Katemi submitted that the plaintiff is therefore estopped from denying her concession to the preliminary objection in the previous suit which involves the same parties in the present suit. He is of the view that the present suit cannot stand for being *res judicata*.

Expounding on the second ground of preliminary objection Mr. Katemi submitted that this suit offends the legal requirements on the power of attorney due to the fact that the grantor and the person with the power of attorney cannot be allowed to appear in court interchangeably. He submitted that the purported power of attorney is fatally defective because it does not empower the attorney to handle the present suit.

On the last ground of preliminary objection Mr. Katemi submitted that the suit was wrongly filed under summary procedure provisions of Order XXXV of the Civil Procedure Code [Cap 33 RE 2002]. He said that the provision has specifically stipulated the type of suits which can be filed under summary procedure. The plaintiff in this matter seeks for declaration of ownership of the suit land in Plot No. 3 Block 19 with title no. 44547 located at Kariakoo area in Dar es Salaam. It is contrary to the requirement of the said provision. Mr. Katemi is of the view that the plaintiff is wrong to file this suit under the scope of summary procedure.

Mr. Katemi concluded his submission by praying for the preliminary objection to be sustained and suit be dismissed with costs

Contesting the defendant's submissions in respect of the first ground of preliminary objection the plaintiff's counsel Mr. Mbamba submitted that the first ground of preliminary objection is not the pure point of law. He said that the defendant's assertion that the same suit was filed and struck out by this court requires evidence of the said decision to establish that the matter at hand is *res judicata*. He submitted that in that regard it ceases to be a preliminary objection on the point of law. To support his argument Mr. Mbamba cited the case of **Soitsambu Village Council Vs. Tanzania Breweries Ltd, Civil Appeal No. 105 of 2011, CAT at Arusha (unreported)**.

Responding the second ground of preliminary objection Mr. Mbamba submitted that the said power of attorney was registered on the 7th June 1994 but the Land Case No. 60 of 2016 was filed without the power of attorney. He is of the view that the said power of attorney is a mere document for the convenience the plaintiff and her purported attorney. Mr. Mbamba went on to submit that the power of attorney is not a special power of attorney but a general one.

With regard to the last ground of preliminary objection the learned counsel expounded that since the defendant was granted leave to defend the suit it can no longer be a summary suit, thus the raised preliminary objection has been overtaken by event.

Mr. Mbamba concluded his submission by praying for the dismissal of the preliminary objection.

In his brief rejoinder Mr. Katemi maintained his position as per the submission in chief.

I have carefully read the provisions of order XXXV, Rule 1 of the Civil Procedure Code [Cap 33 RE 2002] which is concerned with the filing of suits under the summary procedure, the provision states;

"This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to—

(a) suits upon bills of exchange (including cheques) or promissory notes;

(b) suits for the recovery of income tax; and

(c) suits arising out of mortgages, whether legal or equitable, for—

(i) payment of monies secured by mortgage;

(ii) sale;

(iii) foreclosure;

(iv) delivery of possession of the mortgaged property (where such possession is sought otherwise than by foreclosure) to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property;

(v) redemption; or

(vi) retransfer or discharge; and

(d) suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer;

(e) suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority;

*(f) suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the Rent Restriction Act *, and suit for the recovery of rent, mesne profits or damages for*

unlawful occupation in respect of such immovable property, building or premises; and

(g) suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under a financial lease agreement where under such agreement the lessee has no right of ownership over the property leased to him”

In the matter at hand the plaintiff filed this suit under Summary Procedure claiming among other things that she is the owner of the suit landed property, the thing which is still in dispute. For such claim involving immovable property the rule is applicable when the plaintiff is seeking for recovery of possession of the said immovable property. As the issue of ownership is still pending the defendant cannot be regarded a trespasser, hence the summary suit cannot stand. It does not fall under the scope of Order XXXV of the Civil Procedure Code. I therefore concur with Mr. Katemi, Advocate that the plaintiff has brought this suit under the wrong provision of the law.

As for the issue of power of attorney, I have gone through the said document and noticed it being defective on the following points;

- i. The purported power of attorney does not specifically state the special powers to be exercised by the donee.
- ii. It does not state to which courts can the donee prosecute or institute the suits on behalf of the donor.
- iii. It does not state if the donor is out of the country.
- iv. The donor of the power of attorney has not stated the reasons for conferring powers to the donee which is contrary to section 14 of the Registration of Documents Act, Cap 117, which provides;

"Every document presented for registration shall be presented by one of the parties executing or claiming interest under it or by his attorney duly appointed or by an advocate of the High Court or if such party is a minor or of unsound mind, by the guardian, next friend or other person appointed by the court to act on behalf of such minor or person of unsound mind in the matter, or by the duly appointed attorney of such guardian, next friend or other person or by an advocate of the High Court"

In the case of **Property Consultancy & Services Ltd (Suing in its capacity as holder of Power of Attorney Thomas Ndoelwa Muro) Vs. Seemi Probil Co. Ltd & Others, Land**

Case No. 258 of 2008, High Court at DSM, (unreported) it was held;

"It is settled that a person cannot represent another person in a suit if the represented person is present in Tanzania and is physically and mentally fit"

For the above pointed defects that the said power of attorney has it cannot entitle the plaintiff to act on behalf of the grantor.


Mr. Mbamba submitted that the said power of attorney is a mere document for convenience of the plaintiff and her attorney, I am of the settled view that if at all the said power of attorney is a mere document, as submitted by Mr. Mbamba, the plaintiff has no *locus standi* to institute this matter before the court, hence the application is regarded incompetent. In the case of **Raya Salum Mohamed (by virtue of special power of attorney from Sherdel Ghulam Rend V. Registered Trustees of Masjid Sheikh Albani, Civil Application No. 340/18 of 2019 CAT at DSM (unreported)** the court stated;

"The applicant has no locus standi to lodge and prosecute the present application on the purported 'special power of attorney'. Thus, the application is incompetent"

In the circumstance that the defects in respect of powers of attorney are fundamental, it renders the Plaintiff to have no *locus standi* to lodge the present application on behalf of Mohamed Hassanali Kanji, hence the application is declared incompetent.

As for the issue of abuse of court process I have this to say; Upon perusal of the submissions I have not seen the copy of court order for the said Land Case No. 60 of 2016 attached by the Defendant which reveals that the said case was actually struck out after the concession by Mr. Mbamba. I don't see such reasons being given by the court when reaching into the said conclusion, otherwise the page with that statement was not annexed, unfortunately even if that is the case it is not duty of the court to trace it. In that sense I hesitate to declare that the matter at hand is *res judicata*.

From the foregoing reasons I am of the view that the 2nd and 3rd points of preliminary objection can dispose of the matter in its entirety. I therefore struck out the suit with costs.



S.M. KULITA

JUDGE

04/09/2020