

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC CIVIL APPLICATION NO. 558 OF 2019
(Originating from Land Case No. 43 of 2019)

BERNARD ALWINIA LYIMO.....APPLICANT

VERSUS

VERONICA MWALUBUNJU.....RESPONDENT

RULING

19th November 2020 & 11th February 2021

Rwizile. J

The applicant herein has been sued under summary procedure in Land Case No 43 of 2019 for trespassing into the respondent's land Plot No. 156 Block H Tabata, Dar es Salaam. In the plaint the respondent alleged that she is the lawful owner of the said plot since 1988. She then started developing the suit premises by building a house until 2002 when the applicant trespassed to her land and stayed till today. She therefore filed a summary suit against the applicant. It is due to that suit then; the applicant filed this chamber application seeking for the following orders;

- a) That, this honourable Court be pleased to grant leave to the applicant to appear and defend the suit.*
- b) Any other relief(s) this Court may deem fit and just to grant*
- c) Costs in the event.*

It was averred in the affidavit sworn by the applicant that, he is the lawful owner of the suit premises since he bought the same from one Ramadhan Abdallah Ahungu in year 2002. He averred also that; the respondent lacks locus to sue since she was no longer the owner when she sold the same plot to one Mariagoreth Lukamilwa. These facts were disputed by the respondent in her counter affidavit who averred that the Title Deed No. 58801, Plot No. 156 Block H Tabata has been in her possession to date.

At the hearing, the applicant was represented by Mr. Alfred learned advocate, when respondent enjoyed the services of Mr. Chingote learned advocate. The parties agreed to argue this application by way of written submission.

Supporting the application learned advocate for applicant prayed for applicant's affidavit to form part of their submission. He argued that the applicant is the legal owner of the suit land and he added that the respondent lacked locus standi as per paragraph 4 of the affidavit.

He asserted further that the applicant has reasons for applying for leave to appear and defend the suit. Since he said, he is a rightful owner of the said plot, he has good defence on the matter, he also said the suit is time barred as per Section 3(1) of the Law of Limitation Act, [Cap 89 R.E 2019]. He added that, he has a right to be heard since he claimed that there are triable issues which need court intervention. According to him, the rights of the parties will not be prejudice if leave is granted. He cited O. XXXV r.3(1)(b) of the Civil Procedure Code [Cap 33 R.E 2019] and the case of **African Banking Corporation Tanzania Ltd vs Lake Transport Ltd and 2 Others**, Commercial Case No. 291 of 2002 to support his submission that there are triable issues to be determined by the court and

he has a good defence. He therefore prayed for this application to be granted with costs.

Mr. Muganyizi learned advocate opposed the application by submitting that, the applicant has no defence and there are no triable issues to be determined. He said, the applicant had bought the suit land from a person who was not the owner of the same. According to him, he was a losing party in Civil Case No. 276 of 1996 when the same was dismissed.

He argued further that, the issue of locus is baseless, even if one Mariagoreth could be the owner. That could not make the applicant the owner of the suit land. He asserted as well, that the certificate of title and correspondences from the Ministry of Lands show that the respondent is the owner of the said land.

It was his submission further that, the applicant failed to show sufficient facts to support his application as per O. XXXV r. 3(1) of CPC. He also cited the case of **Nararisa Enterprises Company Limited and 3 others vs Diamond Trust Bank Tanzania Limited**, Misc. Commercial Case No. 202 of 2015 which stated grounds to consider before granting leave, and the same according to learned advocate were not established by the applicant in his submission. He said, the applicant's defence is illusory and a sham. He therefore prayed for this application be dismissed for want of merit.

Having considered the submission by the learned advocates, it is trite that when sues under summary procedure as provided under O.XXXV of the CPC. The defendant has no automatic right of defence. The application was therefore filed for leave to defend.

It is not in dispute that, there is a land case No. 43 of 2019 which was instituted under summary procedure which denied the applicant the right to appear and defend. However, the application for leave to defend, in order to be granted, it has to disclose the facts sufficient to let him defend the case. The same are the dictates of O. XXXV R. 3(1)(b) of the Civil Procedure Code, which for clarity is hereunder reproduced;

3.- (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-

(a) N/A

(b) disclose such facts as the court may deem sufficient to support the application; or

Depending on the provision above the question to be asked is, has this application disclosed facts sufficient to support it.

As it was averred in the applicant affidavit and in his submission that he is the rightful owner of the suit land, Plot No. 156 Block H since he bought the same from one Ramadhan Abdallah Ahungu. He also said respondent has no locus standi to sue since she is not the owner of the suit land, when she sold the same to another person. It is my humble view that, the said facts are the issues that need a trial to be determined and the applicant has a good defence thereof.

As it was decided by this court in the case of **African Banking Corporation Tanzania Ltd (supra)** which appreciated the principles set out in the case of **M/S Mechalee Engineers &**

Manufactures Vs M/S Basic Equipment Corporation 1977 AIR 577.

For the foregoing reason this application is granted. Leave to appear and defend is granted to the appellant unconditionally as per rule 3(2) of O.XXXV of the CPC. The applicant is given 14 days to file a WSD. That is on 25th February 2021.

A.K. Rwizile

JUDGE

11.02.2021



Recoverable Signature

X



Signed by: A.K.RWIZILE

