

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA

MISC. LAND APPLICATION NO 11 OF 2022

(Originating from Land case no. 1 of 2020)

INVOCAVIT ZAKAYO MUSHIAPPLICANT

VERSUS

TANZANIA PORTS AUTHORITY


AND 3 OTHERS.....RESPONDENTS

RULING

Muruke, J

Applicant filed application under order 8 rule 23, order 13 rule 1, together with section 95 of the Civil Procedure Code Cap 33 R.E 2002, requesting this court to depart from scheduling order, dated 20 July 2021, and vacation of orders dated 23 December 2021, in Land case no 1/2020, between the parties herein. Application is supported by an affidavit sworn by Hussein Mtembwa counsel for the applicant. Respondents filed joint counter affidavit sworn by Getruda Songoi, Learned State Attorney, in opposition.

Gist of this application is an order dated 20 July 2021 in Land Case no 1/2020 in which applicant is the plaintiff and Respondents are defendants. On that day, when matter came for first pre – trial conference, it was ordered that parties to file list of other documents to be relied by both parties, before Final Pre – Trial conference. Prior to, parties showed interest to settle the dispute amicably, thus, respondent

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requested Government Surveyors to survey the disputed area, and through round table meeting on 22 February 2022, a report was shared to the applicant. Invocavit Zakayo Mushi did not agree with Government Surveyors report, thus formed an opinion of engaging a Private Land Surveyor. Finally, Land Cover Treasurer Company, was procured and engaged to survey farm number 19, Mnawene, Mtwara District. Private report was shared to the applicant on 10th March 2022 in the evening time, while Final Pre – Trial conference was conducted on the morning of 10th March 2022, in the presence of applicant counsel, Hussein Mtembwa. It was then followed with applicant becoming seriously sick, thus admitted to JAKAYA KIKWETE CARDIAC INSTITUTE on 23 March 2022.

According to Paragraph 13 of affidavit in support of the application, applicant intends to rely on the Survey Land Cover Treasurer Company Report, that was prepared and issued after issues in Land case number 1/2020 were framed and registered.

On the date set for hearing, respondents were represented by Getruda Songoi, Abubakar Msangi, Ramadhani Ngongo, Omar Kipingu and Mpoki Mwalufunda, both State Attorneys, while applicant was represented by advocate Hussein Mtembwa. Apart from adopting affidavit in support of the application, it was submitted that, applicant cannot rely on the survey report without court first departing from scheduling order, then vacation of the orders dated 23 December 2021. Applicant counsel insisted that, orders sought to be granted is for applicant to be heard on merits in Land case no 1/2020, between the parties.

Respondents counsel lead by Getruda Songoi, vigorously contested application on account of lack of seriousness by the applicant counsel, because on first pretrial conference applicant counsel said he had no

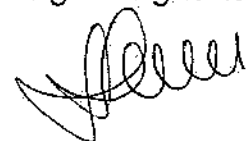


any list of document to be relied, by plaintiff now applicant. He is now stopped from complaining on the same, citing Misc. Commercial application number 87/2020, Kenya Kazi Security Limited Vs. Car General Trading Limited, where Commercial Court refused to grant an order sought for lack of sufficient cause. More so if application is allowed, applicant will destruct the pleadings, which will then require amendments of issues, argued respondent counsel.

In rejoinder, applicant counsel insisted that, there will be no prejudice if applicant is allowed to file Private Survey Report. He insisted that, issue to be determined is ownership of the disputed farm. Document may not be specifically pleaded but should relate to the fact in issue, insisting each case to be considered on its own facts.

Having heard both parties submission, issue for determination is whether, applicant has shown sufficient cause for this court to depart from Scheduling order. According to the pleadings and issue framed there is dispute on the ownership of the Farm no 19 located at Mnawene Mtwara with certificate of title number 36320 issued on 21 February 1988. Plaintiff further claims that in 2014 1st defendant interfered with disputed land under the authority of 2nd and 3rd defendant by fixing concrete on part of the land in dispute. In a joint defence, defendants at paragraph 6, said, Farm No 19 located at Mnawene and plot 1/1 Port Additional area, Msanga Mkuu – Ng’wale area, Mtwara District, owned by First defendant did not affect or involve any part of plaintiff plot. Defendants relied on survey/ planning relocation report that created plot 1/1 Port Additional Area, Msanga Mkuu – Mtwara District.

From the pleading, of both parties issue of Survey Report raised by both plaintiff and defendants are necessary to resolve issues to be determined by this court. What applicant is requesting is right to be



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heard on merits. Right to be heard is one of the fundamental principles of natural justice. Failure to hear a party to the proceedings is to breach principal of natural justice. The right to be heard is safeguarded in the constitution. Article 13(6) (a) of the constitution provides in the Kiswahili version thus;

“(6) Kwa madhumini ya kuhakikisha usawa mbele ya sheria, mamlaka ya nchi itaweka taratibu zinazofaa au zinazo zingatia misingi kwamba;”

“(a) Wakati wa haki na wajibu wa mtu yeyote vinahitajika kufanyiwa uamuzi wa mahakama au chombo kingine kinacho husika, basi mtu huyo atakuwa na haki ya kukata rufaa au kupata nafuu nyingine ya sheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika.”

In the light of issues to be determined in Land case no 1/2020 between the parties. Survey Report intended to be relied by applicant/plaintiff is necessary document, for the same to be compared with Government Survey Report that created plot 1/1 port Additional Area, Msanga Mkuu Mtwara District, being relied by defendants. Thus application to depart from Scheduling order is granted. Order dated 20 July 2021 is thus departed. Equal so, order dated 23 December 2021 is vacated. Applicant to file Survey Report within five days from today on or before 22/08/2022 and serve respondent accordingly.




Z. G. Muruke

Judge

18/08/2022

Ruling delivered in the presence of the Masunga Kamihanda Learned State Attorney for the Respondents and Hussein Mtembwa for the Applicant.




Z. G. Muruke

Judge

18/08/2022