

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND CASE NO. 03 OF 2021

THE REGISTERED TRUSTEE OF

ANSAAR MUSLIM CENTRE.....PLAINTIFF

-VERSUS-

ABDULLAH M. AHMED.....1ST DEFENDANT

NURIA MAHMOUD MOHAMED (*Administrator of the*

Estate of the late SAID MOHAMED AHMED).....2ND DEFENDANT

RULING

Date of last order: 30/05/2022

Date of Ruling: 01/06/2022

AGATHO, J.:

This is a civil suit where the Plaintiff claims against the Defendants for the following orders:

1. A declaration that the Defendants are trespassers at the Plaintiff's Hospital namely (Shifaa Charitable Hospital) and are operating the same illegally.
2. An eviction order against the Defendants who are trespassers and permanent injunction restraining them from interfering with the

operations and running of the Shifaa Charitable Hospital activities permanently located at Plot No. 5 Block "146" Street No. 18 at Tanga City.

3. A declaration that the Plaintiff is the sole operator and owner of the hospital
4. Payment of the general damages as may be assessed by the Honourable Court.
5. Payment of Tshs 150,000,000/= as cash collected from the hospital services from 1st December, 2020 to the filing of the suit.
6. Costs of the suit to be borne by the Defendants.

On the 27th of July 2021, the Plaintiff prayed for an amendment of paragraph 5 and 25 of the plaint. The prayer was not objected by the Defendants. On 9th August, 2022 the Plaintiff filed an amended plaint where paragraph 5 and 25 were amended as per the order of the Court. In the amended plaint however, the following were the prayers:

- (a) A declaration that the Defendants are trespassers at Plaintiff's Hospital (Shifaa Charitable Hospital) and are operating the same illegally.
- (b) An eviction order against the Defendants who are the trespassers and permanent injunction restraining them from interfering with

the operations and running of Shifaa Charitable Hospital activities permanently, located at Plot No.5, Block "146" and Plot No.7, Block"137" Ngamiani, Tanga City, Tanga region.

- (c) A declaration that the Plaintiff is the sole proprietor and owner of the Hospital.
- (d) Payment of general damages as may be assessed by the Honourable Court.
- (e) Costs of the suit be borne by the Defendants.
- (f) Any other relief(s) that this Honourable Court may deem fit and just to grant.

Before the hearing, the Defendants jointly raised preliminary objections as follows;

- 1. That the suit is misconceived and incompetent as the plaint is endorsed by an unauthorized person.*
- 2. That the suit is misconceived and incompetent as the amended plaint vitiated the order of the Court dated the 27th day of July 2021.*
- 3. That the suit is misconceived and incompetent as the plaintiff does not have cause against the defendants.*

The Court preferred that the objections raised be disposed by way of written submissions. Whereas the plaintiff was represented by Mr. Nehemia Nkoko, the Defendant was represented by Mr. Tumaini Bakari (Advocates).

On the first preliminary objection, the Defendants submitted that the Plaintiff's name is supposed to include the words "*Registered Trustees*" as per Section 6 (1) and (2) of the Trustees Incorporation Act, Cap 318 R.E 2002. The Defendants further stated that the Plaintiff's name is "*Registered Trustee*" and that the same does not exist and apart from that, the Plaintiff has not attached a Certificate of Incorporation to prove its existence.

In response thereto, the Plaintiff submitted that the Defendants raised more preliminary objections from the above listed preliminary objections and those are; the non- attachment of the Certificate of Incorporation, that the plaintiff is a non- existing party and the objection that the Plaintiff is not the owner of Plot No. 5, Block "146" and Plot No. 7, Block 137 located at Ngamiani, Tanga City.

It was therefore the Plaintiff's submission that the objections were contrary to Order VIII Rule 2 of the Civil Procedure Code [Cap 33 R.E 2019] which essentially requires the defendant to raise in pleadings all matters which show that the suit is not maintainable and that if they are not raised, the opposite party is considered to be taken by surprise.

The counsel further referred the case of **M/S Majembe Auction Mart vs Charles Kaberuka, Civil Appeal No. 110 of 2005 (unreported)** which required that a reasonable Notice of Preliminary Objection to be given to the

other party within a reasonable time and the case of **George Anagnastou & Another vs The Honourable Attorney General and two Others, Civil Application No. 210 /01 "B" of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported)** at page 6 which provided a rationale of issuance of notice of the intended preliminary objection which is to give the opposite party notification of the nature and scope of the grounds of objection so as to allow sufficient preparation pending hearing and to avoid a party being taken by surprise.

Apart from the requirement of Notice, the Plaintiff however proceeded to respond to the first preliminary objection submitting that the Plaintiff's title merely miss a letter "S" for it to be read as Trustees and that it is just a typographical error which is curable since the missing letter was not prejudicial to the Defendants.

To support his argument, he referred the case of **CRDB Bank Limited vs Issack B. Mwamasika and two others, Civil Appeal No. 139 of 2017, Court of Appeal of Tanzania at Dar es Salaam** where the case of **Christina Murimi vs Cocacola Kwanza Bottlers** was cited.

The counsel also referred the case of **OTTU on behalf of P. L. Asenga and 106 others, Super Auction Mart and Court Brokers, The Royale Orchard Inn Ltd and Amikan Venture Limited vs AMI Tanzania**

Limited on the same position, however in this case there was misdescription of the Court of Appeal Rules and the Court held that it was harmless and curable. With the above authorities, the Counsel for the plaintiff submitted that the Court may grant an order for amendment to be done by inserting the missing words as per Order 1 Rule 10 and Order VI Rule 17 of the Civil Procedure Code [Cap 33 R.E 2019] so as to correct what he stated to be a typing error and which he considered to be curable.

In his rejoinder, the Defendant's counsel submitted that the Plaintiff changed the party to the case without leave of the Court by naming it **THE REGISTERED TRUSTEES OF ANSAAR MUSLIM YOUTH CENTRE** in the Submission in Reply and not **THE REGISTERED TRUSTEE OF ANSAAR MUSLIM YOUTH CENTRE** as it is in the plaint and that since the amendment was not authorized by the Court then the suit is misconceived and incompetent because the plaint is endorsed by an unauthorized person and that the amended Plaint deserves a dismissal order.

Regarding the allegation that the Defendants raised the other objections, the counsel argued that the alleged points were mere argumentations and or explanation with respect to the first preliminary point of law and with respect to the requirement of Notice of Preliminary Objection, the counsel submitted that the alleged preliminary objections can be raised at any stage of the

proceedings. He referred the case of **Anwar Z Mohamed v Said S. Masuka, Civil Reference No. 18 of 1997, CAT at Dar es Salaam (unreported)** and the case of **Cornel Omomo vs Ismail Ahmed Salehe Pamba, Miscellaneous Land Case No. 37 of 2013, High Court of Tanzania at Tanga at page 5.**

The counsel further distinguished the case of **Ottu (supra)** stating that the same is not applicable to the matter at hand because it was about citation of the Court of Appeal Rules while the instant matter is about the requirement of the law, the Trustees Incorporations Act which requires the corporates created to be named as Registered Trustees. He added that there is no certificate of incorporation in the amended plaint to prove that the plaintiff exists.

With regard to the first preliminary objection, before I determine it, there are some factors to be made clear, the fact that the defendants submitted on the issue of non- attachment of the Certificate of Incorporation, that the plaintiff is a non- existing party and the objection that the Plaintiff is not the owner of Plot No. 5, Block "146" and Plot No. 7, Block 137 located at Ngamiani, Tanga City those cannot be regarded as preliminary objections.

I concur with the counsel for the defendant that they are merely arguments with respect to the first preliminary objection and in that regard, the

requirement of notice is not relevant and the nature of the alleged objections for instance on the issue of attachment of a Certificate of Incorporation and ownership of the plots; those in my view do not tally with the principle in the case of **Mukisa Biscuits Manufacturers vs West End Distributors Ltd (1969) EA. 696** which excludes matters which require evidence to be regarded as preliminary objections.

Resorting to the objection that the plaint is signed by an unauthorized person, it is my view that the fact that the plaintiff's name is missing the letter "S" then that is just a typographical error which can be cured by way of an amendment vide Order I Rule 10 of the Civil Procedure Code [Cap 33 R.E. 2019]. Under that circumstance, the first preliminary objection is therefore overruled.

On the second preliminary objection, the counsel for the defendants submitted that on the 27th of July 2021 the Court ordered amendment with respect to paragraph 5 and 25 of the plaint but the plaintiff amended paragraph 4 and paragraph (b) of the prayers in the amended plaint.

The plaintiff's counsel disputed that there was disobedience of the Court Order stating that the Court ordered for an amendment of Paragraph 5 of the plaint for a certificate of title be attached so as to have a clear

understanding on the nature of the claim as per the plaint and that it was a matter of prudence to include the descriptions of the property.

The counsel further submitted that the defendants have not stated how the added words in the specified paragraphs prejudiced them and further stated that the defendants merely quoted the paragraphs of the plaint in their submissions without adding any substance to substantiate the allegations and that renders the point of objection to be contrary to the test laid down in the case of **Mukisa Biscuits (supra)**.

In his rejoinder, the counsel for the defendant submitted that the counsel for the plaintiff admitted that the amendments were done without leave of the court and added that amendment of the plaint is a matter of law and not of prudence and that an order of the Court is also law and must be obeyed by the parties to a case.

In this point, it is worth noting that once a point of objection on matter of law has been raised, evidence is not required to substantiate it, but a rather the facts. The defendants quoted what was written in the first plaint and the amended plaint to note the alterations which were contrary to the order of the Court pronounced on 27th of July 2021 where the amendments were with respect to paragraph 5 and 25 of the plaint only. The defendants quoted paragraph 4 and paragraph (b) of the prayers of the first plaint which reads:

"THAT, the Plaintiff's claim against the Defendants' is for the Courts declaratory orders to the effect that, the Defendants have evaded and trespassed into the Plaintiff's property (Shifaa Charitable Hospital located at Plot. No. 5, Block "146" Street No.18 at Tanga City) and they are collecting cash and operating the hospital without any authority or being authorized by the Board of Trustee. Eviction order against the Defendants or restraining order against the Defendants not to interfere with the operations and running of the Hospital activities permanently. Payment of general damages as may be assessed by the Court to among other reliefs. A declaration that the Plaintiff is the sole operator and owner of the Hospital, Payment of Tshs. 150,000,000/= as Cash collected from the Hospital services from December,2020 to the filing of this suit, payment of interests at Court's rate and Costs of the suit."

Whereas with respect to the amended plaint, they quoted the same paragraph as:

"THAT, the Plaintiff's claim against the Defendants' is for the Courts declaratory orders to the effect that, the Defendants' are not the Plaintiff's tenants and they have evaded and trespassed

into the Plaintiff's property (Shifaa Charitable Hospital located at Plot. No. 5, Block "146" and Plot No.7, Block"137" located at Ngamiani, Tanga City, Tanga Region) and they are collecting cash and operating the hospital without any authority or being authorized by the Board of Trustee. Eviction order against the Defendants or restraining order against the Defendants' not to interfere with the operations and running of the Hospital activities permanently.

Payment of general damages as may be assessed by the Court to among other reliefs. A declaration that the Plaintiff is the sole operator and owner of the Hospital, Payment of Tshs. 150,000,000/= as Cash collected from the Hospital services from December,2020 to the filing of this suit, payment of interests at Court's rate and Costs of the suit."

The defendants counsel submitted that the above paragraphs differ and added that even lines number 1,2,3 and 4 of the plaint was amended as it read;

*"THAT, the Plaintiff's claims against the Defendants' is for the Court's declaratory orders to the effect that, **the Defendants are not the plaintiff's tenants** and they have evaded and*

trespassed into the Plaintiff's property (Shifaa Charitable Hospital located at Plot No. 5, Block "146" and Plot No.7, Block "137" located at Ngamiani, Tanga City, Tanga Region)."

The counsel also quoted prayer (b) of the first plaint which reads:

"An Eviction order against the Defendants' who are trespassers, and Permanent injunction restraining them from interfering with the operations and running of the Shifaa Charitable Hospital activities permanently located at Plot No.5, Block "146" Street No.18 Tanga City."

While the same paragraph of the amended plaint reads:

"An Eviction order against the Defendants' who are trespassers, and Permanent injunction restraining them from interfering with the operations and running of the Shifaa Charitable Hospital activities permanently located at Plot No.5, Block "146" and Plot No.7, Block "137" Ngamiani Tanga City, Tanga Region."

With the above quotations, the counsel submitted that the Plaintiff amended the cause of action without leave of the Court since the inclusion of the words **'Defendants are not the plaintiff's tenants'** raised a new, issue a cause of action of tenancy which was not pleaded in the first plaint.

Coming back to the position of the law as far as amendment of the plaint is concerned, Order VI Rule 17 of the Civil Procedure Code [Cap 33R.E 2019]

reads;

"The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Turning to the proceedings of the Court, the counsel for the plaintiff prayed to amend paragraph 5 and delete paragraph 25 of the plaint and the Court

so

ordered. In the case of **Tanzania Harbours Authority Vs. Mohamed R. Mohamed [2002] TLR 76** the Court held that:

"Court orders are binding and are meant to be implemented. They must be implemented. If such orders are disrespected, the system of justice will be rendered useless and it will create chaotic that everyone will decide to do anything that is convenient to him, the court is duty bound to make sure that, rules of the Court are observed strictly and it cannot aid any party who deliberately commit lapse."

The Court however is required to ensure that there is a just and expeditious determination of civil disputes. This is according to Section 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019] vide an overriding objective principle.

Now, considering the amendments, the Court has to consider whether they are fatal. Pursuant to the Court Order which allowed an amendment, the prayer was silent as to what exactly was to be amended. The Plaintiff however amended the respective parts, paragraph 5 and 25 of the plaint and other parts stated above.

With respect to paragraph 5 of the amended plaint, there was addition of the Plot of the land in dispute which is Plot No. 7 Block "137" and the attachment of the Copies of the Certificate of Title. Paragraph 25 was deleted as per the prayer made to the Court. Regarding the amendments with respect to prayer (b) it is only the other plot was added as stated above.

Resorting to paragraph 4 of the amended plaint, there is an issue of tenancy which was not included on the first plaint. In my view since the core issue is about ownership of the disputed plots then that is not fatal. They cannot lead to miscarriage justice. The objection is therefore overruled.

Regarding the third preliminary objection, the counsel for the defendants submitted that since there is no certificate of occupancy and or title registered

in the name of the plaintiff and the fact that the plaintiff does not exist, then the plaintiff does not have cause of action against the defendants.

The counsel referred the case of **B. M. Mbaso v. the Attorney General and 2 others, Civil Appeal No. 40 of 2003, CAT at Mwanza** where it was held that under Order VII Rule 11(a) of the Civil Procedure Code, where the plaintiff discloses no cause of action, the court is to reject it.

The counsel also made reference to the case of **Joraj Sharif & Fancy Stores (1960) EA 375 and East African Overseas Trading Co. vs Tansukh Acharya (1963) EA 468** where it was held that:

"the question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of it and upon assumption that any express or implied allegation of fact in it are true."

The counsel also referred the case of **Godfrey Samson v. Principal Secretary and 2 Others, Civil Case No.62, High Court of Tanzania at Dar es Salaam** on the same position.

In reply, the counsel for the plaintiff submitted that the plaintiff has cause of action against the defendants and argued that the objection is not on pure

point of law as it attracts evidence to be adduced with respect to the issue of ownership of the disputed plot.

In rejoinder, the counsel for the defendants submitted what he stated in his submission in chief to strengthen his argument of which I will not restate to save time.

In this preliminary point of law, it is my view that the requirement of the Certificate of Occupancy to prove and the allegation that the plot in dispute is in the name of the plaintiff then that requires proof by evidence, as such it does not qualify to be the preliminary objection. It is therefore overruled.

In finality I find the preliminary objections raised are of no merit. They are as such overruled. I further order the plaintiff to amend the plaint within 14 days from today pursuant to Order I Rule 10 of the Civil Procedure Code [Cap 33 R.E 2019] to rectify the plaintiff's name so that the matter can proceed to the next stage and at the date as shall be fixed by the Court. In the premises no order for costs is given.

It is so ordered.

DATED at **TANGA** this 1st Day of June 2022.



U. J. AGATHO

JUDGE

01/06/2022

Date: 01/06/2022

Coram: Hon. Agatho, J

Plaintiff: Nehemiah Nkoko, Advocate for.

Defendants: Tumaini Bakari Advocate for

B/C: Zayumba

JA: Ms. Husna Mwiula

Court: Ruling delivered on this 1st day of June, 2022 in the presence of counsel for both the Applicant, and the Respondent.



U. J. AGATHO

JUDGE

01/06/2022



Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

01/06/2022