

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL CASE NO. 89 OF 2019

FARIDA RASHID APPLICANT

VERSUS

HONEST MARANDU RESPONDENT

RULING

12th December, 2022 & 10th February, 2023

KISANYA, J.:

The plaintiff, Farida Rashid claims to be the lawful owner of a parcel of land known as Plot No. 896, Msasani Beach, Mwai Kibaki, Mikocheni, Dar es Salaam (the suit land). It is her case that from 2002, the defendant, Honest Marandu, trespassed into the suit land and erected a two storey building for let. Upon evicting the defendant in March, 2019, the plaintiff instituted a suit against the defendant praying for the following reliefs:

- i. That, this *Honourable Court be pleased to order the defendant to pay the Plaintiff a sum of Tshs. 297,670,000...as special damages for loss of use of parcel of land known as Plot No. 894 Msasani Beach, Mwai Kibaki Road, Mikocheni Dar es Salaam and Tshs. 32,500,000/= as special damages for tortuously trespassing into the said parcel of land*

and carried his activities therein without first seeking and obtaining the Plaintiff's approval.

- ii. *That this Honourable Court be pleased to order the Defendant to pay the Plaintiff general damages to the tune that this Honourable Court shall deem fit and just to grant for tortuously trespassing into the said parcel of land and carried his activities therein without first seeking and obtaining the Plaintiff's approval set aside its order dated 23rd May, 2022 which struck out the Applicant's written statement of defence and counter-claim in Civil Case No. 88 of 2019 and allow the hearing of the suit to proceed inter-parties.*
- iii. *... interest on (i) above at 24 % commercial rate from date of filing this suit to the date of judgment and 12% on the decretal sum from the date of judgment to full payment.*
- iv. *Costs of this suit be borne by the Defendant.*
- v. *Any other reliefs or order that this Honourable Court deems fit and just to grant.*

The defendant denies the plaintiff's claim. Pursuant to the amended written statement of defence, the defendant claims to be the lawful owner of the suit land. It is his averment, that the defendant sold him the suit land on 8th October, 1999. Therefore, the defendant admits to have erected the building and collected rent from the tenants. He alleges that he was illegally evicted by the plaintiff through her agents namely, **Richard**

Paul Nkanyemka, Mathias George Mashukra and Marcas Debt Collectors and Auctioneers (T) Ltd. In that regard, the defendant raised a counter-claim against the plaintiff in the main case and the said **Richard Paul Nkanyemka, Mathias George Mashukra and Marcas Debt Collectors and Auctioneers (T) Ltd.** In the counterclaim, the defendant prays for the following reliefs against the plaintiff and the other defendants, jointly and severally:

- i. Declaration that the Plaintiff is the lawful owner of landed properties on Plot No. 894 and 896 respectively (the suit property)*
- ii. An order for permanent injunction restraining the defendant, their agents, assignees and whoever under instruction from evicting, trespassing, interfering in any way with the suit property.*
- iii. Payment of specific damages against the Defendants severally and jointly amounting to USD 107,000 being the amount of rent payable under the tenancy agreement due to the frustration caused by the Defendants' acts; Tshs. 60,000 per day for hotel accommodation, Tshs. 100,000 per day for transport while in Dar es Salaam, Tshs. 30,000 per day for food, and travelling expenses to and from Arusha for the days spent by the Applicant in Dar es Salaam in following up the dispute.*

- iv. *Payment of general damages to be assessed by the Honourable Court for inconvenience suffered.*
- v. *Costs of this application (sic) and any other reliefs this tribunal (sic) deems fit to grant.*

The plaintiff in the main case who is the 1st defendant in the counter claim filed a notice of objection on a point of law:

"the counterclaim filed by the Defendant against the Plaintiff herein is based on a different subject matter (ownership of land) as opposed to that which is subject of Plaintiff's suit (tort of trespass), the counterclaim ought to be disposed of by a separate suit as per Order VIII Rule 12 of the CPC."

With leave of the Court, the preliminary objection was disposed by way of written submissions. The plaintiff was represented by Mr. Jeremiah Mtobesya, learned advocate, whereas the defendant was represented by Mr. David Chilo, learned advocate. Both counsel filed their respective submissions in accordance with the schedule fixed by the Court.

In the course of composing the ruling, I found it appropriate to recall the parties and probe them to address the Court on the following issues; whether the plaintiff's case is also not related to a land dispute; if the answer is in affirmative, whether the it was properly filed as a civil case in

this Court; and whether the issue of ownership of land in the counterclaim arises from the suit filed by the plaintiff in the counterclaim.

Having considered the competing submissions of the learned counsel for the parties, I will proceed to determine the point of objection and the issue raised by the Court.

As hinted above, the Court preliminary objection hinges on the issue whether the counter claim meets the requirement of Order VIII, Rule 12(1) of the CPC. The cited provision provides:

*"Where a defendant has set up a counterclaim the court may, if it is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of by a **separate suit**, order the counterclaim to be struck out or order it to be tried separately or make such other order as may be expedient."*

It is clear that the above provision provides for recourse to be taken by the trial court which is of the opinion that the subject matter subject of the counter-claim ought to be determined in a separate suit. That being the case, the objection is determined by considering whether the subject matter of the counter claim is required to be disposed of in a separate suit.

Submitting in support of the objection, Mr. Mtobesya argued that the main case is based on trespass to land whereas, the counter claim is based on land dispute. He went on to submit that the counter claim is a land case

and while the main case is a normal civil case. Contending that there are specialized courts established to deal with land dispute as per section 3(2) of the Land Disputes Courts Act, Cap. 216, R.E. 2019 (the LDCA), the learned counsel urged this Court to strike out the counter claim.

In response, Mr. Chilo argued that the counter claim meets the requirement under Order VIII Rule (1) and (2) of the CPC. His argument was based on the contention that the main case is based on trespass to land and thus, intertwined with the counter claim. Citing the case of **Chibinza Kulwa vs Amosi Kibushi** and Others (1980) TLR 36, he was of the view that determination of the counterclaim will not prejudice, embarrass or cause delay to the plaintiff case. The learned counsel went on to argue that the issue of tort of trespass cannot be determined without establishing first the issue of ownership. To support his argument, he cited the case of **Avit Thadeus Masawe vs Isidory Asenga**, Civil Appeal No.6 of 2017 (unreported).

It was also his further argument that filing the suit before another court would encourage multiplicity of suits and not serving the spirit of section 3A of the CPC. Referring the court further to Article 108(1) of the Constitution, section 5 of JALA and the case **National Bank of Commerce Ltd vs National Chicks Corporation Limited and Others**,

Civil Appeal No. 129 of 2015, the learned counsel implored the Court to determine the counter claim.

Rejoining, Mr. Mtobesya submitted, among others, that the defendant had failed to distinguish “an issue” and “a subject matter” in tort of trespass. He was of the view that tort of trespass is different from criminal trespass and land trespass.

In the light of the foregoing, it is clear that the preliminary objection is based on the contention that the counter claim is based on ownership of land while the main case is premised on tort of trespass. The defendant does not dispute that the counter claim is premised on land dispute. It is settled law that counter claim is a separate suit. Since the counter claim is based on a land dispute, one may be tempted to hold that it may be conveniently disposed of by a separate suit related to land and not the civil case at hand.

However, before arriving to that conclusion, it is necessary to determine the issue raised by the Court, *suo motu*. Is the main suit a civil case or land case founded on a land dispute? Mr. Mtobesya conceded that the crux of the matter is to the effect that the defendant trespassed to the plaintiff’s land, built the buildings thereon and collected rent from tenants. Further to this, the learned counsel conceded that the plaintiff has asked

the Court to grant damages for the loss of profit during the time when the defendant trespassed to the land. However, he was of the firm view that the plaintiff's suit is purely a civil case founded on tort of trespass and not land. His argument was grounded on the reason that the plaintiff has not prayed for declaration or possession of land.

On his part, Mr. Chilo contended that the main suit is based on a land dispute. The learned counsel premised his contention on the reason that the main suit cannot be resolved without addressing the issue whether the plaintiff is the lawful owner of the land subject to tort of trespass. He was of the further view that the reliefs sought by the plaintiff suggest that his case is founded on land.

In his short rejoinder, Mr. Mtobesya responded that determination of the issue of ownership of land does not render the subject matter of the suit to be land case.

In the light of the foregoing, it is common ground that the plaintiff's suit was filed and registered as a civil case. However, reading from the plaint, I am of the considered view that the main suit is not purely a civil suit due to the following reasons.

As it can be gleaned from paragraph 3 of the plaint, the plaintiff claims, among others, for special for loss of use of parcel of land and general

damages for tortuously trespassing into his hand. The relevant part of that paragraph reads:-

"That, the plaintiff's claim against the Defendant is for payment of Tshs. 767,640,000 (Seven Hundred Ninety Seven Million, Six Hundred and Forty Thousand Shillings Only) as special damages for loss of use of parcel of land known as Plot No. 896, Msasani Beach, Mwai Kibaki Road Dar es Salam.... Special damages for expenses incurred by the plaintiff in the course of obtaining vacant possession of the parcel of land above mentioned land, general damages to the tune this Honourable Court may deem fit to grant for tortuously trespassing in to the said parcel of land and carried on his activities therein without first seeking and obtaining the plaintiff's approval..."

The above facts on the nature of the plaintiff's claim are depicted in item (i) and (ii) of the reliefs pleaded in the plaint. It is therefore clear that the facts that the plaintiff prays for *mesne* profit arising from wrongful ownership or possession of land. I am fortified by the case of **Rajan Shan T/A Rajan S. Shah and Partners v. Bipin P. Shah**, Civil Appeal No. 209 of 2011 (unreported) in which the term "*mesne* profit" was defined as follows:

"The term "mesne profit" relates to the damages or compensation recoverable from a person who has been

in wrongful possession of immovable property; The mesne profits are nothing/ but compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession in the very essence of claim for mesne profits and the very foundation of the unlawful possessor's liability therefor. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits." [Emphasis added]

Apart from claim for *mesne profit*, the plaint is clear that the plaintiff's suit is founded on trespass to land. As rightly submitted by Mr. Chilo, the settled law is to the effect that one of the issues for determination in a suit founded on trespass to land, is whether the plaintiff is the lawful owner of land.

I agree with Mr. Mtobesya's argument that the plaintiff is not claiming for land ownership. However, nothing to suggest that land dispute must be based on the claim for land ownership. Sections 33 and 37 of the LDCA are to the effect that, a land dispute determined by the District Land Housing Tribunal and the High Court, may be based on subject matter capable of being estimated at a money value. It is also worth noting that, section 3 of the LDCA defines the word "dispute" under that Act to include

a case in which a person complains of and is aggrieved by the actions of another person. Therefore, given the fact that the plaintiff complains of and is aggrieved by the defendant's action of using his land, I am of the view that the plaintiff's suit is a land dispute and thus, it ought to have been filed as a land case. That is why the defendant raised his counterclaim.

Now, as rightly submitted that by Mr. Mtobesya while addressing his preliminary objection on the counterclaim, there are specialized courts which deal with land cases. As the money claimed in this case exceeds three hundred million shillings, the plaintiff ought to have lodged the matter before the High Court Land Division. It is clear that the defendant was inclined to lodge his counterclaim because the main case was filed in this Court. Considering further that the main case and counterclaim were instituted under the pretext of being normal civil cases, the second issue raised by the Court is answered to the effect that the main case and counterclaim were wrongly filed as civil cases.

I am in line with the position that this Court has unlimited jurisdiction to hear and determine the case. However, its mandate is subject to other written laws. The subject matter of the case at hand is determined by the High Court, Land Division. Had the plaintiff instituted this matter as a land case, it would not have been admitted and registered.

On the foregoing, I am of the considered view that the plaintiff's suit was filed in the wrongly filed in this Court. In the end result, the main case and counter claim are hereby struck out. In lieu thereof, both parties are advised to refer the matter in the proper court. The fresh suit (if any) by either party should not be subjected to the law of limitation during which the matter was pending in this Court if it is instituted within ninety days from the date of this ruling. Given the circumstances of this case, each party is ordered to bear its own costs.

DATED at DAR ES SALAAM this 10th day of February, 2023.



A handwritten signature in black ink, appearing to be "S.E. Kisanya", written in a cursive style.

S.E. KISANYA
JUDGE