

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE NO.20 OF 2021

ZAINABU HUSSEIN LARUSAI

*(As a guardian of said Hussein,Abdu Hussein, Halima Hussein,
Hanifa Hussein, Ally Hussein and Hussein Hussein).....***PLAINTIFF**

Vs

THE REGISTERED TRUSTEES OF AHLUL-BAIT CENTRE

AND TWO OTHERSDEFENDANTS

RULING

Date of last order:14-2-2023

Date of Ruling:16-3-2023

B.K.PHILLIP,J.

On the 28th July 2022, this Court allowed the amendment of the plaint following the prayer that was made by the advocate for the plaintiff, the learned Advocate Wilbald Massawe in which he prayed for amendment of the plaint. The amendments sought by Mr. Masawe were for the purpose of adding a prayer in the plaint in alternative to the prayers that were pleaded therein and accommodating the "better and further" particulars in paragraph 16 of the plaint which were submitted in court by the plaintiff by way of an affidavit following the concern that was raised by the senior learned advocate Alute Mughwai, the defendants' advocate, that "better and further " particulars were required to be provided by the plaintiff pertaining to her claim that there was fraud

committed by the defendants. The aforesaid prayer for amendment was not contested by Mr. Mughwai. The amended plaintiff was filed as ordered. Upon being served with the amended plaintiff, Mr. Mughwai filed a written statement of defence to the amended plaintiff together with a counter claim and three points of preliminary objections. The same reads as follows;

- i) That the amended plaintiff pleaded facts that went beyond the clear and limited terms of the court Order dated 28th July 2022 that granted the plaintiff leave to amend her plaintiff.
- ii) That the amended plaintiff changed the character of the plaintiff's case by anticipating and adopting the defendants' defence and then attacking it.
- iii) The clause verifying the amended plaintiff is defective , contrary to Order VI Rule 15 (2) of the Civil Procedure Code (Cap 33 R.E 2019).

However, Mr. Mughwai withdrew the 3rd point of preliminary objection.

Thus, this ruling is in respect of the 1st and 2nd point of preliminary objections mentioned herein above. The same have been disposed of by way of written submissions.

With regard to the 1st point of preliminary objection, Mr. Mughwai's arguments were as follows; that the plaintiff made a specific prayer for amendment of the plaintiff. The court order was granted for the specific prayer made by the plaintiff .It was not a general Order. Contrary to the

court order, the Advocate for the plaintiff amended paragraphs 6,9,12, and 14 of the original plaint by pleading new and inconsistent allegations of the facts in the corresponding paragraphs of the amended Plaint. Mr. Mughwai contended that the amendment made by the plaintiff's advocate contravened the mandatory provisions of Order VI rule 7 of the Civil Procedure Code (Cap 33 R.E. 2019) (Henceforth "the CPC") since they were made without the leave of the Court.

With regard to the 2nd point of preliminary objection, Mr. Mughwai submitted as follows; that this court should take a judicial notice that in the original plaint, the plaintiff alleged that the transfer of the suit property was fraudulently obtained on the strength of annex ZH-3 whose signature was forged. In the original written statement of defence the defendants had stated that the property was obtained legally on the strength of annex ID9. In the amended plaint the plaintiff abandoned her own case and purported to anticipate and then attacked the defendants' defence. Under the guise of amending paragraph 16 of the original plaint the plaintiff changed the character of her case by adding or substituting thereof a new and inconsistent cause of action namely; that the transfer of the suit property was a sham.

Moreover, Mr. Mughwai argued that what can be deduced from amended plaint is that the plaintiff is telling this court that if she cannot succeed on the strength of her annex ZH-3 then, she has to succeed on the weakness of the defendants' annex ID9 which now is annex ID2 to the amended written statement of defence. He invited this court to invoke the legal maxim; "*secundum allegata et probate*" which means that a party

can only succeed on what was alleged in his own pleading and proved by him. He was emphatic that the plaintiff was not obliged to anticipate the defendants' defence and then challenge it in her amended pleadings. To cement his arguments, he cited that case of **John Byombalirwa Vs Agency Maritime Internationale (T) Ltd (1983) TLR 1.**

In addition to the above, citing the text book titled Mogha's Law of pleadings, 14th Edition , page 92-94, Mr. Mughwai contended that it is a general rule that the plaintiff cannot , legally, be allowed to abandon her case, adopt that of the defendants and obtain relief on that footing , except in the following situations;

- i) Where the defendant has admitted in her/his pleading the plaintiff's allegation without reservation or
- ii) Where the Court finally finds that the facts pleaded by the defendant legally entitle the plaintiff the relief.

He contended that on the face of the pleadings none of the above stated conditions exists/ are available to the plaintiff. He prayed paragraphs 6,9, 12,14, 16 (g) (m) (n) and (o) of the amended pleadings to be struck out pursuant to Order VI Rule 16 of the CPC with costs.

In rebuttal Mr. Massawe submitted as follows; that the prayer for amendment of the pleadings was made in respect of two aspects, to wit; One, addition of an alternative prayer. Two, adoption of the contents of "better and further" particulars , which had earlier on been filed in court by the plaintiff 23rd of March 2022. It is in record that Mr. Mughwai did not object to the prayer for amendment, contended Mr. Masawe. He went on

submitting that Mr. Mughwai's submission cannot hold water on the following grounds. One, he never objected to the prayer for amendment of paragraph 16 of the plaint and adoption of the contents of "better and further" particulars filed by the plaintiff earlier in March 2022 in response to his concern/prayer. Two, the defendants had an opportunity to counter the plaintiff's averment in the amended plaint through their respective defence and replies. Thus, they have never been prejudiced. Three, the plaint as it stands still challenges the legality of the transfer of the disputed property to the 1st defendant. Four, considering the contents of additional paragraphs were in the affidavit deposed by the plaintiff containing 'better and further' particulars and the defendants' counsel never lodged a counter affidavit to challenge the same, the current complaint raised by Mr. Mughwai is an afterthought.

Mr. Massawe prayed for the dismissal of both points of preliminary objection.

In rejoinder, Mr. Mughwai submitted as follows; that the plaintiff's advocate did not pray for amendment of paragraphs 6,9,12 and 14 of the original plaint. Since the plaintiff had alleged fraud and misrepresentation in her plaint, Order VI rule 4 of the CPC required her to give all necessary particulars to substantiate her allegations. The alleged 'better and further' particulars pleaded in the amended plaint are foreign to the allegations of fraud and misrepresentation relied upon in the original plaint, and for which the plaintiff had to substantiate. The plaintiff relied on annex ID9 to the defendants' pleadings (now Annex ID2) instead of Annex ZH3 to the original pleadings.

Moreover, Mr. Mughwai insisted that plaintiff was not supposed to anticipate the defendants' defence and then rely on it to substantiate her case. The issue here is not whether or not the defendants were not prejudiced or that they had opportunity for countering the plaintiff's averment, but the issue is that, it is clearly embarrassing to the defendants where the plaintiff deserts her particulars on fraud and misrepresentation that she took up in her preceding pleadings and resort to a different and inconsistent set of particulars of fraud and misrepresentation in the second plea, contended, Mr. Mughwai. He was of the view that though the plaintiff is still challenging the legality of the transfer of the disputed property, she is constantly moving the goal posts by changing the material facts in an attempt to substantiate the alleged illegality. He pointed out that after filling the reply to the written statement of defence and plaintiff had answered the notice for 'better and further' particulars, the pleadings were complete. According to Order VII Rule 13 of the CPC, the defendants could not have filed any further subsequent pleadings.

Having dispassionately analyzed the rival arguments made by the learned advocates, let me proceed with the determination of the point of preliminary objection, the subject of this Ruling. To my understanding what I am required to determine here is whether or not the amendments of the plaint made by the Mr. Massawe are in contravention of the court order. As alluded at the beginning of this ruling, Mr. Massawe's prayer for amendment of the plaint was in respect of the following aspects;

- i) Addition of an alternative prayer.

- ii) Amendment of paragraph 16 of the plaint so as to include the 'better and further' particulars deponed by the plaintiff in her affidavit.

Upon perusing the amended plaint I have noted that Mr. Massawe amended paragraphs 6,9,12, 14 of the plaint, contrary to the court order. In his submission Mr. Massawe did not dispute that he amended the aforesaid paragraphs of the plaint. I am inclined to agree with Mr. Mughwai that the order for amendment of the plaint was not a general order. It was specific for the aspects mentioned by the plaintiff's advocate in his prayer. Thus, he was not supposed to change the contents of the aforesaid paragraphs in any way. To the contrary, Mr. Masawe amended those paragraphs by adding more particulars and omitting and /or changing some of the particulars which were in the original plaint. For instance, paragraph 6 of the original plaint reads follow;

" That sometimes in year 2000, the 3rd defendant herein in company of other former and deceased trustees of the 2nd defendant being , Gulam Hussein Okera, Abdallah Salim Abdallah and Abudhar Ali Bakari being the trustee of the 1st an 2nd defendant approached the plaintiff herein with view of finalizing an arrangement which intended to make a conditional Wakf of the disputed property to the 2nd defendant."

(Emphasis is added)

In the amended plaint paragraph 6 reads as follows;

"That sometimes in the year 200, the 3^d defendant herein in company of other people not party to this proceedings who claimed to represent the 1st defendant and 2nd defendant at the time among being Abasi Mohamed Sabuni, Abubakari Salim Magwe, Ali Omary Swalehe and Maulid Hussein Sombi approached the plaintiff herein with view of finalizing an arrangement ,which intended to make a conditional Wakf of the disputed property to the 2nd defendant."

(Emphasis is added)

As it can be seen in the above quoted paragraphs, the plaintiff's advocate amended section 6 of the plaint by omitting some of the names which were in the original plaint, (for example, the name Gulam Hussein Okera has been omitted) and added other names, to wit; Abubakari Salimu Magwe , Maulid Hussein Sombi and Abasi Mohamed Sabuni which were not in the original plaint.

Paragraph 14 of the original plaint reads as follows;

"14- That some beneficiaries named herein in whose favor the disputed land was held by the plaintiff ,never at any time consented to the transfer of the said property to the 1st defendant but rather to the 2nd defendant herein"

In the amended plaint, paragraph 14 reads as follows;

"That the beneficiaries named herein in whose favour the disputed land was held by the plaintiff ,never at any time consented to the transfer of the

said property to the 1st defendant but rather to the 2nd defendant as they were of majority age at the time.

(Emphasis is added)

Again in paragraph 14 of the amended plaint the plaintiff has pleaded on the age of the beneficiaries, something which was not pleaded in the original plaint. Similar amendments have been done in paragraphs 9 and 12 of the plaint without the leave of this Court.

With regard to the contents of paragraphs 16 (g) (m) (n) and (o) of the amended plaint , it is my settled opinion that the same are in line with the " better and further" particulars which were provided by the plaintiff in her affidavit in response to Mr. Mughwai's concern. Thus, they were made with the leave of this court. Mr. Mughwai's contention that the plaintiff has changed the nature of her case is misconceived since what is pleaded in the amended plaint still shows that the plaintiff's claims that transfer of the disputed property was illegal.

Coming to Mr.Mughwai's concern that the plaintiff is moving posts and has anticipated the defendant's defence and challenged it in the amended plaint , I find the same to be misconceived too, since the amended plaint has not changed the gist and nature of the plaintiff's claims. What is pleaded in paragraph 16 of the amended plaint which Mr. Mughwai seems to rely on in substantiating his contention basically, it has been derived from the contents of the affidavit which was filed in court by the plaintiff in response Mr. Mughwai's prayer to be furnished with ' better and further particulars.

The position of the law is that once a plaint is filed in court, it cannot be amended except with the leave of the court. Parties are supposed to comply with the court orders. I have pointed out earlier in this Ruling that Mr. Massawe amended paragraphs 6,9,12 and 14 of the plaint in contravention of the court Order. Thus, I am inclined to agree with Mr. Mughwai that paragraphs 6,9,12 and 14 of the amended plaint have to be strike out. That is the legal remedy available in this kind of situation. [See the case of **Isdory Joseph Mwepongwe and 5 others Vs Ahamed Mohamed Soud (administrator of the estate of Omari Soud, Land case No.167 of 2021** (unreported)].

From the foregoing I hereby struck out paragraphs 6,9,12 and 14 of the amended plaint.

Date this 16th day of March 2023



A handwritten signature in blue ink, appearing to read "B.K. Phillip".

B.K.PHILLIP

JUDGE.