

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**LAND CASE NO. 01 OF 2022**

**WINFRIDA PATRICK KIBUTA .....1<sup>ST</sup> PLAINTIFF**

**JANETH PATRICK KIBUTA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RHODICE SIMON MOSHI .....DEFENDANT**

**RULING**

**TIGANGA, J;**

This ruling is in respect of the oral application made on 15<sup>th</sup> May 2023 by Mr. Benjamin Tenga, learned Advocate for the defendant in which he was asking for leave of this court to amend the written statement of defence filed by the defendant. The purpose of such amendment is to join the other third party, in particular the Commissioner for Lands or Registrar of Titles and to plead the counterclaim against the plaintiffs and the third party. The basis of the application is that the title deed was obtained by the plaintiffs fraudulently using a third party. When such a prayer was made, it was objected by Ms Yusta Winny Vitalis, Learned Advocate for the Plaintiffs on the ground that, first, the application is against the scheduling order, secondly, that the allegation of fraud has been raised in

paragraph 8 of the written statement of defence, however; there is no mention of the involvement of the Plaintiffs in that fraud. In her view, the matter could be dealt with by way of bringing evidence in defence.

She further submitted that, in the additional list of documents to be relied upon by Plaintiff, there are a number of documents justifying how Plaintiff acquired the suit land. On these grounds, she urged the Court to reject the application as it aim at delaying justice.

In rejoinder submission, Mr Benjamini Tenga submitted that Order **VI Rule 17 of the Civil Procedure Code [Cap 33 R.E 2019]**, allows an amendment to be done at any time for purposes of enabling the court to decide the issue in dispute.

He submitted that, in the written statement of defence filed in opposition to the claim, particularly in paragraph 8, of the written statement of defence, the defendant claims that the Title deed was obtained fraudulently, so if the court is to do justice, the amendments of the pleadings are necessary so that the defendant can plead the particulars of fraud and raise the counterclaim after joining those who participated in the said fraud.

In support of his prayers, he relied on the decision of the Court of Appeal of Tanzania in the case of **Amina Maulidi Ambali and others vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 CAT,

In his view, justice will not be done if they will not join those who gave the title deed fraudulently. He in the end asked the Court to allow the amendment so that they can join the third party and raise the counterclaim, for the sake of justice.

From the submissions, I find only one issue calling for determination, that is, whether the application for amendment on the ground advanced by the counsel for the defendant is grantable.

The prayers were made under Order **VI Rule 17 of the CPC (Supra)** the rule provide thus.

*"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"*

The condition precedent for the court to allow the amendment is that, the amendment should be necessary for the purpose of determining the real question in controversy between the parties. That

means, a person seeking amendment, must satisfy the court that the amendment is necessary for the purposes of determining the real question in dispute.

In the case at hand, the counsel for the defendant said that, in paragraph 8 of the defence, he pleaded that the Title Deed issued by the issuing authority was fraudulently obtained. Therefore, the amendment intends to raise the counterclaim and join the third party who is the title deed issuing authority. On the other part, the counsel for the Plaintiff objected to the application on the ground that, on the ground that, the amendment cannot be allowed in the circumstances where the scheduling order has already been made, and that, the pleadings which are already on record are enough without necessarily amending the written statement of defence and raising the counterclaim.

As earlier provided herein, the guiding principle on amendment of the pleadings is under Order VI Rule 17 of the CPC, and should only be for the purpose of determining the real question in controversy between the parties but without causing injustice to the other side see **Dr Fortunatus Lwanyantika Marsha vs Dr William Shija and**

**Attorney General, Misc. Civil cause No. 15 of 1995 HC –  
Mwanza.**

The law provides that the amendment can be made at any stage of the proceedings, there is no condition that it should not be allowed where the scheduling order has already been made. However, Order **VIII Rule 23** prohibits the amendment of the scheduling order or a departure from it, unless the court finds that, the amendment is necessary in the interest of justice and the party in favour of whom such departure or amendment is made, shall bear the costs of such departure or amendment, unless the court directs otherwise.

I have listened to the reasons advanced by the counsel for the defendant supporting the application for amendment. I find the reasons sound and necessary for the determination of the real question in dispute which is the ownership of the suit land.

While so doing I am also aware that, the said amendment is sought after the court, on 08/06/2022, had conducted the 1<sup>st</sup> PTC where a scheduling order was made. It is also sought after the mediation of the case had been conducted and has been marked to have failed on 04/07/2023. Further to that, the amendment is sought after the final

PTC had been conducted and issues framed on 06/09/2022 and a case had been scheduled for hearing on 17/10/2022.

All these procedures were conducted while the defendant was represented by Advocate. It should be noted that, the issue of fraud, was pleaded in the written statement of defence which was filed on 07/02/2022, therefore, it is not a newly emerging issue. It has been there, in the pleading and was so pleaded in paragraph 8 of the written statement of defence. The issue of raising the counterclaim and joining the other party sought to be done through amendment would have been applied for at the earliest stage before the First PTC, Mediation, and Final PTC had been conducted.

The fact that, it was not so asked makes the same an afterthought, which should not pass without consequences, that being the case and based on the conditions provided under Order **VIII Rule 23** of the CPC in amending or departing from the scheduling order, I thus find that, although I find the amendment to be necessary and in the interest of justice, nevertheless I find the defendant to be entitled to the blame for his late action. And since the amendment will take us back to square one as far as the 1<sup>st</sup> PTC, Mediation, and Final PTC is

concerned, I find in the interest of justice that, the defendant should pay the costs of conducting 1<sup>st</sup> PTC, Mediation and Final PTC.

That said, I allow the amendment; the defendant should amend the written statement of defence within seven days from the date of this order, the Plaintiffs should file their necessary responses within 14 days from service, and if the Defendant will be having a right to file any reply (depending the nature of the content of the WSD) that be done in seven days from the date of service of the response from the Plaintiff.

As earlier ordered the costs of 1<sup>st</sup> PTC, Mediation, and Final PTC as well as all appearances made after Final PTC be paid by the defendant. The order for costs is in terms of order **VIII Rule 23** of the **CPC (Cap 133 R.E 2019)**.

It is accordingly ordered.

**Dated** and delivered at **Arusha** on the 22<sup>nd</sup> day of May 2023.



**J. C. TIGANGA**

**JUDGE**