

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

LAND CASE NO. 9 OF 2019

FINN CONSTRUCTION COMPANY LIMITED.....1ST PLAINTIFF

FINNAGRI LIMITED.....2ND PLAINTIFF

FINN VON WURDEN PETERSON.....3RD PLAINTIFF

VERSUS

MASHINDA ELIAPENDA MTEI

(By virtue of a power of Attorney of Edwin Mtei).....1ST DEFENDANT

MANGWEMBE 2011 COMPANY LIMITED.....2ND DEFENDANT

RULING

25/04/2024 & 28/05/2024

NDUMBARO, J

I am compelled to compose this ruling following preliminary objections raised by the plaintiffs who are defendants in the counterclaim on the following points;

1. The counterclaim is hopelessly time barred.
2. That the power of attorney for the plaintiff is incurable defective for being witnessed by the counsel on record representing the

same plaintiff in the counterclaim contrary to the requirement of law.

3. That the power of attorney is incurably defective for being given to the plaintiff prior to the court order dated on 29th September 2023 hence bad in law.

4. This Court lacks jurisdiction to entertain the counterclaim.

Since the practice demands that, whenever a party raises preliminary objections, the main suit halts and the court proceeds with the hearing of the objections first as I hereunder do;

Under the lead of their learned counsel **Mr. Innocent Mwanga** and **Mr. John Mushi** respectively, the preliminary objection was disposed of orally. Nevertheless, it should be noted that more preliminary points of objection other than those listed above were raised by Mr. Mwanga in the course of his submission.

Mr Mwanga was the first to kick the ball, whereby he began his submission by faulting the jurisdiction of this court in determining the counterclaim. It was his submission that it is the special damages which gives a court pecuniary jurisdiction, however, in the counterclaim raised by Mr. Mushi in paragraph 20 the special damages claimed do not fall

under the pecuniary jurisdiction of this court. Moreover, the counsel submitted that special damages when determining the jurisdiction of the Court cannot be lumped together with general damages and interest.

On the second preliminary objection that the claims are time-barred. Expounding on this, the learned counsel submitted that the counterclaim does not state categorically when exactly the cause of action arose. The learned counsel went further to state that the plaintiff in the counterclaim admits that the breach occurred way back in the year 2012 as the lease agreement was extended to 2015 and 2018. According to him if the breach occurred prior to 30th October 2015 and the counterclaim was filed on 6th October 2023, it is apparent that the 6 years time limit has lapsed which also makes the plaintiffs' claims in the counterclaim to be time-barred and thus prayed for the same to be dismissed with costs.

Coming to the 3rd point of objection, Mr. Mwanga challenged the power of attorney appointing the plaintiff in the counterclaim on the following grounds; first, that the power of attorney appears to have been created way back on 26th November 2019 before the order of this court allowing the 1st defendant in the main suit one Edwin Mtei to engage a recognized agent. The order of this court was issued on 29th

September 2023. Second, the power of attorney does not authorize the donee of the power of attorney to defend the donor of the power of attorney in this case. Third, the power of attorney was registered under section 96 of the Land Registration Act instead of being registered under the Registration of Documents Act Cap 117 R.E 2002. He supported his argument with the case of **Rayah Salum Mohamed & Another vs Registered Trustees of Masjid Sheikh Albani** (Civil Application 340 of 2019) [2019] TZCA 432 (22 November 2019).

In another point to challenge the power of attorney Mr. Mwanga submitted that the power of attorney was witnessed by the counsel Mr. John Mushi who is now representing the plaintiffs in the counterclaim. According to him if the said advocate proceeds to represent his client in this suit there will be a conflict of interest. Mr Mwanga supported his argument with the provision of law under section 7 of the **Notary Public and Commissioner for Oaths Act, Cap 12 R.E 2002.**

Lastly, Mr. Mwanga submitted that the defendants' counsel in the main suit amended paragraph 17 of the amended WSD without the permission of the Court which is contrary to the orders of this court issued on 29th September 2023. The counsel supported his stand with the case of **Peter Wegesa Chacha Timas & Others vs North Mara**

Gold Mine Limited (Civil Appeal No. 49 of 2020) [2023] TZCA 30 (17 February 2023). Mr. Mwanga therefore prayed the court to sustain the preliminary objections raised.

Responding to the above submission, Mr. Mushi started with the objection that this court lacks jurisdiction. On this point of objection, the counsel maintained that this court is vested with pecuniary jurisdiction to determine the counterclaim on the reason that in paragraph 20 the plaintiffs in the counterclaim itemized the claims as follows; USD 61,496 as an outstanding cost to renovate the lease property and USD 101,315 as an outstanding rental charge for the period of the defendants in the counterclaim had in possession of the property. Mr Mushi faulted the interpretation of paragraph 20 by his learned counsel by stating that the said paragraph should be read together with paragraph 28 of the counterclaim. In that regard Mr. Mushi insisted that this court has pecuniary jurisdiction to determine the counterclaim.

On the second point, that the claims of the plaintiffs in the counterclaim are time-barred. Mr. Mushi submitted that this point is misplaced on the reason that the suit of nonpayment of rent is continuous mainly because the agreement between the parties was continuous in nature from the date of commencement to the expiry

date. According to him during the subsistence of the parties' agreement, the parties' duties and obligations continued until the respective relationship came to an end. The counsel went further to state that the agreement between the parties started on 20th May 2010 and then supplemented with another agreement on 21st January 2015 and the last agreement was executed on 7th July 2018 which expired on 31st March 2019. The counsel was of the view that all these facts show that there is a continued breach and that the cause of action arose whenever the defendants in the counterclaim had an obligation to pay the rent until 2019 he thus faulted the contention of Mr. Mwanga that the cause of action arose in the year 2015. To support his argument, the counsel cited the decision of this in the case of **Lindi Express Ltd vs Infinite Estate Limited** (Commercial Case 17 of 2021) [2021] TZHCComD 3313 (13 August 2021).

In addition to that, the counsel went on to state that the claims on the counterclaim are not time-barred on the reason that on 7th July 2019, the parties signed an addendum which formed part and parcel of the previous two agreements where the plaintiff in the main suit agreed on the said default which justifies the arose of the cause of action. The counsel invited this court to be persuaded by the decision of the High

Court of Kenya in the case of **Telkom Kenya Limited vs Kenya Railways Corporation**, Civil Case No. 621 of 2016, Commercial and Tax Division at Nairobi. Having said so, the counsel urged this Court to disregard the submission of Mr. Mwanga with regard to this point of objection.

Coming to the 3rd point of objection where the defendants in the counterclaim which challenge the power of attorney. Submitting on this point, the counsel began by disqualifying this point on the reason that the same is not a point of law as provided in the case of **Mukisa Biscuits Manufacturing LTD vs Westland Distributors LTD** (1969) EA. The counsel went further to state that a preliminary objection must be on the pure point of law and if argued it can dispose of the case. With regard to the complaint that the said power of attorney was registered two years back, it is the submission of the counsel that Mr Mwanga has not cited the provision of the law that prohibits the donee of the power of attorney from using the power of attorney which is already registered and neither did he show how the said power of attorney prejudiced the interest of his clients. As to the claim that the power of attorney did not authorize the donee of the power of attorney to represent the said Edwin Mtei in this suit, Mr. Mushi argued that the

said power of attorney is very clear whereby it is stated that the donee was authorized to make follow up of all lease agreement, rent and all other things in connection thereof in respect to Plot No. 93 Block E Unga limited Arusha. Mr. Mushi went on to state that the fact that the said Mr. Edwin authorized his son to deal with another issue, includes the filing of the case before this court.

Submitting with regard to the objection that the power of attorney was witnessed by the same counsel who is representing the plaintiffs in the counterclaim, Mr. Mushi admitted the said anomaly nevertheless, he contended that such an act does not waive his right to represent his client on the reason that he is not intending to testify in support of his client. However, the counsel argued that, even if the court decides to consider this issue the remedy available is for him to disqualify from representing his clients and not to struck out the counterclaim.

Moreover, the counsel also submitted on the objection that the power of attorney was registered under the Land Registration Act instead of the Registration of Documents Act. In countering this objection, Mr Mushi submitted that the power of attorney was properly registered under the Land Registration Act and went on to challenge the decision

cited by Mr Mwanga stating that the said decision is distinguishable in all aspects from the facts of this case.

On the last objection that the plaintiffs' counsel in the counterclaim amended the WSD. Mr. Mushi strongly opposed this objection and stated that paragraphs 6, 12 and 17 which are alleged to have been changed are the same and if one makes a comparison to the original copy, one will note that the said paragraphs are the same and nothing has been changed. The counsel maintained that the court order to amend WSD was duly complied with and no injustice was occasioned. On the allegation that the plaint was signed by two different persons. It is the submission of the counsel that the advocate who originally signed the documents no longer represents the defendants in the main case and even in the counterclaim, therefore, to him, the signing of Edwin Mtei and his son Mashinda Mtei is not fatal. That said, the counsel prayed for the preliminary objections to be dismissed with costs.

In rejoinder, Mr Mwanga maintained his submission in chief and went on to add that the points of objections he raised are points of law and that the power of attorney which is challenged is a very important document which gives the plaintiff in the counterclaim and defendant in the main case locus. The counsel also maintained that the power of

attorney did not authorize the donee to appear before this court. Again, Mr. Mwanga challenged the argument of Mr. Mushi on the issue that since he admits to have witnessed the power of attorney, therefore, he ought to have disqualified himself from the conduct of this case. On whether the power of attorney was properly registered or not, Mr. Mwanga maintained his submission in chief that the said document ought to have been registered under the Registration of Documents Act and since it was not properly registered it ought to have been struck out. On the issue of non-compliance with court orders, Mr. Mwanga maintained that court orders must be respected and if a party wishes to add anything he ought to seek the permission of the court to do so.

Having heard the rival submissions of the party's advocates, it is now time for determination of the preliminary points of objections as follows;

On the first point of objection, Mr Mwanga contended that this court lacks jurisdiction to entertain the counterclaim on reasons that the special damages disclosed under paragraph 20 of the counterclaim do not fall under the pecuniary jurisdiction of this court. It has been the position of the law that the pecuniary jurisdiction of the court is determined by the substantive claims and not the general damages, since general damages are awarded where the court when exercising its

discretion finds it is warranted upon consideration of the circumstances pertaining to the claims. See the decision of the Court of Appeal in the case of **Mwananchi Communications Limited & 2 others vs Joshua K. Kajula & 2 others**, Civil appeal No. 126/01 of 2016 CAT at DSM. In this case, the Court of Appeal of Tanzania went on to state that;

"...that every plaint has to state the value of the subject matter for two purposes, jurisdiction and court fees."

I have perused the counter claim filed by the plaintiff in the counter claim and his claims are found at paragraph 20 of the plaintiff's counter claim which states as follows;

"The plaintiff in the counterclaim (Plaintiff) claims against the defendants in the counterclaim (Defendants) for payment of a total sum of USD 162,811 (equivalent to Tshs. 407,190,311/= at the current exchange rate of TZS 2,501/=) whereas USD 61,496 being outstanding costs to renovate the leased property described as Plot No. 93 located at Unga Limited Area, Arusha Municipality in Arusha Region, and USD 101,315 being outstanding rental charges for the period the Defendants occupied the leased

property, general damages, interest at the commercial rate and costs.”

From the above quoted paragraph, it is clear that the total amount claimed by the plaintiff in the counterclaim is USD 162,811 (equivalent to Tshs. 407,190,311/= being the claimed costs for renovation of the leased property and the outstanding rental charges. Pursuant to section 13 of the Civil Procedure Code Cap 33 R.E 2022 which provides that for every suit to be instituted in the court of the lowest grade competent to try it and in line with section 40 of the Magistrate Courts Act, Cap 11 R.E 2019 I am inclined to hold that this court has pecuniary jurisdiction to entertain the counterclaim. This point of objection is therefore overruled.

On the second point of objection, Mr. Mwanga argued that the counterclaim is time-barred. Expounding on this point, Mr Mwanga submitted that according to the plaintiff's counterclaim, the breach of rent arrears and costs of renovation occurred way back on 30th October 2015 and therefore since the counterclaim was filed on 6th October 2023, it is practically that the six (6) years have already lapsed which marks the claims time-barred.

I have thoroughly gone through the agreements that were entered by the parties; initially, the parties entered into a lease agreement on 4th

May 2010 whereby among others it was agreed that the defendants in the counterclaim to pay a monthly rate of USD 3,750 for the 1st 30 months of the lease period and USD 4,500 for the remaining 30 months. Moreover, it was also agreed that upon taking possession of the demised premises, the tenant at his own costs was to carry out renovations and alteration and the total costs of the renovations and alteration were agreed to be USD 169,404. This agreement was followed by a supplementary agreement that was executed on 31st January 2015. In this agreement, the parties basically expressed the terms of payment of the rent upon expiration of the main agreement. Again, on 7th July 2018, the parties entered into another agreement named addendum to the lease agreement. In this agreement, in clause 6.1 it was agreed that the construction of the residential flats of the demised premises by the tenant shall be completed on 31st December 2018, in accordance with architectural drawings supplied by the landlord. The landlord shall inspect the quality of the renovations and give final approval and that the tenant shall start working on the renovations from the date of signing of an agreement and a grace period of three months was to be added till 31st March 2019.

Under clause 7.1 it was further agreed that the lessee agreed that by October 2018 he will have completed an outstanding rent arrears of USD 21,600.00 which is rent arrears for the period starting from 2017 to October 2018.

Having gone through the terms of the agreements entered by the parties, I am of a different view from that of Mr. Mwanga as reading from the addendum in particular at clause 7.1 it is stated that the defendants agreed to pay the outstanding rent arrears for the period starting from 2017 to October 2018. Equally, this court has also observed that non-payment of the rent by the defendants was a continuous breach on the reason that even at the time the parties were executing the addendum, the defendants were in default to pay the rent as agreed and that since the defendants kept in defaulting payment the rent arrears kept on accruing every day. Section 7 of the Law of Limitation Act Cap 89 R.E 2019 provides clearly for time limitation in continuing breach or wrong as follows;

"7. Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

More recourse is found in the decision of the Court of Appeal of Tanzania in the case of **Zaidi Baraka & 2 others vs Exim Bank (Tanzania) Limited**, Civil Appeal No. 194 of 2016 CAT at DSM. In this case the Court of Appeal of Tanzania quoted the book of **Law of Limitation**, 2nd Ed; 2012 Reprint, Modern Law Publishers, New Delhi which provided for a definition of the expression "to continue". For ease of reference, the quoted part of the book is reproduced hereunder;

"This section speaks of a 'continuing breach of contract' and a 'continuing tort' without defining what those expressions mean. Therefore, one has to resort to the general law, where the expression means nothing more than that the 'breach' or the 'wrong' is not the result of the single positive act but is the result of neglect or default which continues to exist over a number of days so that fresh neglects and defaults are deemed to occur every day giving rise to a fresh cause of action."

Guided by the above positions of law, it is apparent that the breach in the counterclaim was a continuing one and that being the case the cause of action is deemed to occur each time the breach continues. In that regard, this point of objection is also bound to fail as the claims

are deemed to be within time, and the preliminary objection is hereby overruled.

Coming to the third point of objection, in this point, Mr Mwanga argued that the power of attorney issued to one Mashinda Edwin Mtei is incompetent and the same ought to be struck out for the following reasons;

First, Mr Mwanga stated that the said power of attorney was given two years' way back before this court issued an order allowing the plaintiff in the counterclaim to be represented with a power of attorney. According to him the power of attorney was created on 26th November 2019 whereas the order of this court was issued on 29th September 2023.

I have gone through the said power of attorney it appears to have been created on 26th November 2019 nevertheless, Mr Mwanga has not cited any law that is contravened. In fact, I do not see anything wrong with regard to the creation of the power of attorney before the order of the court. Had it been that the power of attorney was presented to the court before the order of the court was issued, that would have been a different case and perhaps the answer would have been different. But, with regard to the circumstances of the case at hand, I find no provision

of the law which is alleged to have been contravened neither are the defendants' rights prejudiced in any way.

On the second limb of this objection, Mr Mwanga contended that the power of attorney did not give the donee powers to defend this case. The first and second paragraphs of the Power of Attorneys say it all, and for ease of reference I wish to quote hereunder;

"I EDWIN MTEI, a natural person living in Arusha with postal office Box 967 ARUSHA (hereinafter known as "the donor") DO HEREBY APPOINT my son MASHINDA EDWIN MTEI, a natural person living for gain in the city of ARUSHA and of postal Office Box 967, ARUSHA to be my attorney and to act as my Attorney in connection with land located at PLOT NUMBER 93 BLOCK 'E' UNGA LIMITED ARUSHA, I hereby grant this Power of Attorney to him since I am old and not capable of following up with tenant therein.

By this Power of Attorney, I hereby authorize him to act on my behalf to make follow-ups of all the lease agreements, rent and all other things in connection thereof in a manner which may be necessary or desirable for me to do in each case in such form as the Attorney shall in his absolute discretion think fit."

Reading the above quoted paragraphs of the Power of Attorney it is vivid that one EDWIN MTEI (donor) appointed his son one MASHINDA EDWIN MTEI to act as his attorney in connection with the land subject to this dispute. Moreover, in the Power of Attorney in paragraph two, the donor authorised the donee to act on his behalf to make follow-ups of all the lease agreements, rent **and all other things** in connection thereof. From the contents of the Power of Attorney as demonstrated above this court is not persuaded by Mr Mwanga's objection that the Power of Attorney did not authorise the donee to defend this case since the donor among other things also authorised the donee to act as his attorney in connection with the land which is the subject of the present dispute, and this also includes the case at hand. In that regard, I find no merit in this point of objection and I proceed to overrule it.

I now turn to the third limb of this objection where Mr. Mwanga fault the registration of the Power of Attorney. In his submission, he argued that the Power of Attorney was wrongly registered as it was registered under the Land Registration Act instead of being registered under the Registration of Documents Act. I have gone through the Land Registration Act Cap 334 R.E 2019 in particular on the referred section 96 and it provides as follows;

*"The Registrar shall, on the joint applicant of the donor and the donee of a power of attorney which contains any power to make applications under this Act to effect dispositions of, or otherwise to act in relation **to registered land**, file such power of attorney, and every such application shall be in writing in the prescribed form and shall be executed and attested in the manner required for deeds by section 92 and 93."* (Emphasis is mine).

With the above provision of the law, it is practically that the power of attorney can be registered under the Land Registration Act just the same way it has been registered for the reason that the subject matter of this dispute emanates from a registered land. I am fortified by the decision of the Court of Appeal of Tanzania in the case of **Abdul Rahim Jamal Mohamed (Suing through his lawful Attorney Fauzia Jamal Mohamed) vs Watumishi Housing Company Limited**, Civil Appeal No. 54 of 2021 CAT at Dar es Salaam where the court probed the parties to address it on the validity of the power of attorney in respect of the registered land and after the submission of the parties the Court had the following to state;

"That said, it goes without saying that the donor and donee messed up in registering the power of attorney under the Registration of Documents Act while the

*dispute emanated from the disposition of **the registered land**. That rendered the power of Attorney invalid to the extent it involved the power to dispose of **the registered land**.” (Emphasis is mine)*

Therefore, it is the firm finding of this court that the Power of Attorney was properly registered. This preliminary point of objection is also overruled.

On the last point of objection, Mr Mwanga faulted the Power of Attorney as it has been witnessed by the counsel who is representing the 1st defendant. Basically, this is an undisputed fact on the reason that the document itself shows that it was witnessed by advocate John Mushi who is also representing the 1st defendant in the main suit and the plaintiff in the counterclaim. Nevertheless, guided by the holding of the Court of Appeal of Tanzania in the case of **Rift Valley Co-OP Union & another vs Registered Trustees Diocese of Mbulu**, Civil Appeal No. 12 of 2007 CAT at Arusha. I am of the opinion that much as it is the rule that advocates who witnessed a document cannot act as a counsel of the party but with the principal arrival in the above-cited case, the above rule cannot be violated until the said advocate is called as a witness. In the said case the Court of Appeal cited with approval the case of

Jafferali & Another v. Borrison & Another, [1971] E. A. 165, where it was observed as follows;

"It is a rule of practice that an advocate should not act as a counsel and a witness in the same case, but the rule is not violated until the advocate is called as a witness and that the court cannot make an order to prevent an anticipated violation."

From the above authority, it is the firm view of this court that since it has not been sufficiently established as to how the witnessing of the power of attorney by Mr John Mushi would create a conflict of interest, nor is it established that the said advocate would be called as a witness to testify in respect of the said document or the main suit and that such testimony would create embarrassment on the part of the advocate, I hasten to hold that even if the 1st defendant's counsel witnessed the Power of Attorney, at this stage it is prematurely to recuse him from representing his client unless he will be called to testify on the said matter in the future.

Therefore, the preliminary objections are without merit and are hereby dismissed. The main suit is to be heard on merit.

It is so ordered.

D. D. NDUMBARO
JUDGE
28/05/2024

ORDER: Mention on 4/06/2024 at 10:00
- Parties to appear.



D. D. Ndumbaro
D. D. NDUMBARO
JUDGE
28/05/2024