

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 66 OF 2014

BETWEEN

ELIFARAJA LEONARDO TUMMINO(SUING  
THROUGH THE ATTORNEY OF LEONARDO TUMMINO).....PLAINTIFF

*VERSUS*

ASILE SLEYUM MASOUD .....1<sup>ST</sup> DEFENDANT

AMRAN MOHAMED TALIB ..... 2<sup>ND</sup> DEFENDANT

MPS OIL TANZANIA LIMITED ..... 3<sup>RD</sup> DEFENDANT

APEX ATTORNEYS (ADVOCATES) ..... 4<sup>TH</sup> DEFENDANT

CITIBANK TANZANIA LIMITED ..... 5<sup>TH</sup> DEFENDANT

RULING

Date of the Hearing : 6/3/2015  
Date of the Ruling 16/3/2015

**SONGORO,J**

On the 16/3/2014, Elifaraja Leonardo Tummino, the plaintiff through his attorney, Leonardo Tummino, instituted a suit against, Asile Sleyum Masoud, Amran Mohammed Talib, MPS Oil Tanzania Limited and Citibank (T) Limited, defendants seeking several reliefs and court declarations to the effect that;

1. defendants are in breach of the Contract of purchase of the plot No 60, Block A Kimbiji, Temeke Municipality, registered under the Certificate of Title No 59143.
2. defendants, wrongly colluded to mortgage the above mentioned plot, to the fifth defendant's bank, while knowingly that, the agreed consideration has not been fully paid, and
3. That, the mortgage created by the defendants on the above-mentioned plot is null and void.

In response to the plaintiff claim defendants also filed their Written Statements of Defence opposing all plaintiff claims .

In addition to that, the fourth defendants also filed Preliminary Objections on points of law stating that;

- (a) *That, the Plaintiff has no locus standi to sue under the said Power of Attorney.*
- (b) *That, the Plaint contravenes the provisions of Order VI Rule 14 of the Civil Procedure Code Act. [Cap. 33 R.E. 2002]*
- (c) *That, the plaint contravenes the provisions of Order VI Rule 15(1) and (3) of the Civil Procedure Code Act. [Cap. 33 R.E. 2002].*

Also, the fifth defendant raised the following preliminary objection on points of law that, ;

- (a) *That, the Honourable Court has no jurisdiction to determine this matter.*
- (b) *The power of attorney attached to the Plaint does not entitle the Plaintiff to institute this suit.*
- (c) *The Plaintiff is suing through a party who is neither a registered owner of the property in dispute nor has ever been registered owner; as such he has no locus stand to sue the 5<sup>th</sup> Defendant.*

In view of the above stated preliminary objections on point of laws, defendants prayed that, the plaintiff suit be dismissed, or struck out with costs.

Thus on the 6/3/2015 before the hearing of the suit, the court started to hear defendants preliminary objections on the points of law.

At the hearing of preliminary objection on points of law, Mr Nuhu Mkumbwa and Mr Muganye, Learned Advocates, appeared for the plaintiff, whereas Mr Muhozya, the Learned Advocate appeared for the 4th defendant, and Mr Kamala, the Learned Advocate appeared for the fifth defendant. The second, and third defendants were absent and un-represented though they were served with court summons. It appears that, the two have no interest to pursue the objections raised by other defendants.

To start with the Learned Advocate for the 4<sup>th</sup> defendant who raised three objections, first informed the court that, they have filed

skeleton submission to support his objections and he fully adopted, and relied on them

Explaining on his first objection on point of law, the Learned Advocate pointed out that, going by what is stated in the plaint, "Leonard Tummino" is suing under the powers of Attorney, but in reality is a stranger to the claim, and has no "locus-standi" to sue under the Power of Attorney.

On the Power of Attorney which was annexed to the plaint, the Learned Advocate pointed out that, it allowed Leonard Tummino to sue on a land case, and not in the present case. For that reason the suit is not proper before the court, and ought to be dismissed.

On the second preliminary objection on the point of law, the Counsel for the fourth defendant said going by Order VI Rule 14 of the Civil Procedure Code, Cap 33 [R.E 2002] pleadings which includes plaint, must be signed by the plaintiff. He then pointed out that, since the plaint was not signed by the plaintiff as required by law, it contravened the cited Rule 14 of Order VI of Cap 33 cited above. and ought to be dismissed.

On the third objection, the Counsel for the fourth defendant briefed the court that, he is withdrawing that objection because it involves issues of facts. He then rested his submissions by praying that, on

the basis of his first, and second objections he pray's that, the suit be dismissed or struck out.

On his part, Mr. Kamala Advocate for the 5<sup>th</sup> defendant, he supported the objections raised by the fourth defendant, and explained that, under Order III of the Civil Procedure Code, Cap 33, [R.E 2002] it empowers a recognized agents to act on behalf of the plaintiff to the suit. But a copy of a Power of Attorney annexed to the plaint, empowered Leonardo Tummino to sue on a land case which is referred in the instrument , and not sue at the Commercial Court or in this case

Turning to his preliminary objection on point of law, Mr Kamala explained that, going by the plaintiff claims in the plaint, and reliefs prayed the suit is purely a land matter. And under Sections 3 of the Courts (Land Disputes Settlement) Act, 2012 there are established forums of Tribunals and Court for hearing and determination of land disputes, but Commercial Court is not one of them. He then submitted that, the Commercial Court has no jurisdiction to hear and determine the present suit because it is a land case. Finally, he prayed for the dismissal of the suit.

In response to the defendant's preliminary objection on point of law, Mr Nuhu, the Learned Advocate for the plaintiff pointed out that, the plaint has been annexed with the Power of Attorney-Annexure

MLC-1 , it follows therefore Leonardo Tummino, the appointed agent has locus standi to appear before the court and pursue the plaintiff's case.

He then added that, it is Elifaraja Leonardo Tummino, the plaintiff who has allowed Leonardo Tummino to represent him and appear on her behalf in court.

On the copy of Power of Attorney, - Annexure MLC- 1 he said on its cover there is a reference to the Land Court, but the 3<sup>rd</sup> paragraph of the copy of Power of Attorney allows the agent to represent the plaintiff in any matter or case including in the present case.

On the jurisdiction of the Court, the Plaintiff` s Counsel replied that, before 2010, only the High Court Land Division had exclusive jurisdiction over land matters. But that, exclusivity was removed and other High Court including the Commercial Court has jurisdiction on land matters.

He then added that, indeed the present suit is on breach of the contract of sale, and not on land matter per-se. In the light of his submission Mr Nuhu prayed that, the preliminary objection's raised by defendants be dismissed for lack of merit.

The court has carefully considered defendant's objections, and submissions of the parties and find the first issue for determination is if Leonardo Tummino who is suing on behalf of the plaintiff has a Power of Attorney to do so.

Secondly, if the plaint was duly signed and verified by the plaintiff as required by law.

Thirdly, if the commercial court has jurisdiction to hear and determine the plaintiff case which defendants says it is a land matter.

For convenience purpose the court first started to consider if Leonardo Tummino has a powers of Attorney to sue on behalf of the plaintiff.

In addressing the above the court the court noted that, as stated by both parties, in the present suit it is Leonardo Tummino who is suing on behalf of Elifaraja Leonardo Tummino.

In other words Leonard Tummino is saying is an agent of the plaintiff. The key issue on the first objection is if Leonardo Tummino has requisite legal instrument, to sue on behalf of the plaintiff as her recognized agent.

From legal point of view, I revisited the provision of Order III of the Civil Procedure Code , Cap 33 [R,E 2002], and easily noted that, Rule 1 of the said Order, allows any person properly appointed by an instrument to be a recognized agent of a party and to make appearance, or to do any act which the law requires on behalf of a party .

Further, the court revisited Rule 2 of the above cited Order and noted it defines who "recognized agent" as a person who hold a Powers of Attorney.

Next, the court revisited Rule 6 (2) of Order III of the Civil Procedure Code Cap 33 [R.E 2002] and find it states that, " an appointment Instrument of recognized agent may be either "Special" or "General", but has to be in writing signed by the principal. The same provision of Rule 6(2) of Order III of Cap 33 set a condition that, such instrument, or certified copy of it must be filed in court as a proof of an appointment of recognized agent. The issue now whether there is any "appointment instrument" or its "certified copy" was filed in this court.

Reverting back to the plaintiff plaint, pleading and documents which are in court, to find there was a "Power of Attorney" or it "Certified Copy" which was filed in Court explaining that, Leonardo Tummino is "recognized agent" authorized to sue on behalf of the plaintiff.

In addressing the above, court perused the "case file" plus the documents and find there is no "original instrument or certified copy" of the Power of Attorney which was filed in court, informing it that, Leonardo Tummino is suing on behalf of the "Elifaraja Leonardo Tummino".

What the court noted from case file and plaintiff documents is that, there is a Complaint which was filed on the 15/5/2014, and a Reply to the Written Statements of Defence which was filed on the 20/6/2014.

Then in the filed complaint, the court just noted there is annexure MCL - 1 which is un-certified copy of Power of Attorney which was never filed in court.

It is obvious that, going by statutory instruction contained in Order Rule 6 (2) of Order III of the Civil Procedure Code, Cap 33, one would have expected that, at the moment the complaint was being filed also the original "Power of Attorney" or its Certified Copy would also be filed.

But, since 16/5/2014 when the complaint was instituted to this court up to the moment I am writing this Ruling" which is a period of about 10 months, the original "Power of Attorney" or its Certified Copy,

has not been filed in court as a proof of appointment of recognized agent.

Sincerely, I find none filing of the Instrument or its certified copy in court that, contravened Rule 6 (2) of the Order III of the Civil Procedure Code, Cap 33 [R.E 2002] which statutory instruct that, the Power of Attorney or its Certified Copy must be filed in Court.

Indeed Rule 6(2) of Order III cited above states that,

Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in court.

Since the suit was instituted by Leonardo Tummino on behalf of his principal, without filling in court the "instrument of appointment", or its "certified copy" as required by Rule 6(2) of Order III of Cap 33 cited above, its obvious there is no any instrument or its certified copy which confirms the appointment of recognized agent who instituted the suit. Also, before the court there is no even the instrument or its certified copy which the court may consider if the appointment of the agent was proper or not.

Furthermore the court find all act done, and steps taken by Leonardo Tummino as an agent even of instituting the present suit can not be substantiated in law because no appointment instrument or its certified copy was filed in Court.

It seems to me all action taken by Leonardo Tummino, to verify, sign and institute the suit were done without filing any appointing instrument or its certified copy and in total disregard of Rule 6(2) of Order III of Cap 33 .

It my view there is uncertainty on the part of the defendant and even this court if the appointment of an agent was done because there is no any instrument or its certified copy filed in the Registry which the Court may act, and rely on it, to convince anyone if the recognized agent was appointed by the plaintiff.

None filing of appointing instrument or its certified copy in court as required by law prejudice the rights of defendants and even this court of knowing if the Leonardo Tummino indeed was appointed by "Powers of Attorney" .

Since the court actions of filing a plaint, and subsequent steps were done by Leonardo Tummino, without filing his instrument of appointment, then his actions were legally wrong because the appointed instrument was never filed in court as statutorily required.

its obvious the filing of the plaint by Leonardo Tummino, and subsequent steps of pursuing the suit, contravened Order Rule 6(2) of Order III of Cap 33 [R.E.2002], in the sense that, were legally improper before the court. That, finding is sufficient enough to

disposal of the matter because I find the suit is not proper before court, more it is prejudicial to the defendants and even this court, since there is no proof who is the plaintiff and who is recognized agent. The statement on the plaint and un-certified copy of power of attorney are not sufficient enough to convince the court on the appointment of an agent. In the light of the above, that, alone is sufficient to disposal off this matter, and I see no plausible reasons to pursue other remaining defendant's preliminary objections on points of law.

Consequently, Pursuant to Order VI Rule 16 of the Civil Procedure Code, Cap 33 [R.E 2002] I hereby struck out the plaintiff plaint for reason that, it was instituted, and pursued by so called agent for about 10 months without filing in court original "Power of Attorney" or its "Certified Copy" and that, was legally wrong. Since the fourth and fifth defendants contested the preliminary objection on points of law, I order the plaintiff to pay half of the costs their incurred to pursue the suit.

Dated at Dar es Salaam this 16th day of March, 2015

  
H.T. Songoro  
JUDGE



Delivered at Dar es Salaam this 16th day of March, 2015

  
H.T. Songoro  
JUDGE



The Ruling has been delivered in the presence of Mr Baraka Mgaya, the Learned Advocate for the plaintiff, and Mr Magusu Learned Advocate holding a brief of the fifth defendant.