

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 144 OF 2022

WILHELM SILVESTER ERIO.....PLAINTIFF

VERSUS

**THE REGISTERED TRUSTEES OF DAUGHTERS OF MARY IMMACULATE
AND COLLABORATORSDEFENDANT**

Date of last order: 4/10/2022

Date of ruling: 18/10/2022

RULING

A. MSAFIRI, J.

This is a ruling on preliminary objections raised by the above named defendant. It is on record that on 28th day of June 2022, the above named plaintiff instituted the present suit against the defendant for reliefs *inter alia* that; declaration the plaintiff is the lawful owner of the entire suit land measuring about 63 acres located at Mleleguo Village, Visiga Ward in Kibaha District and Coast Region (hereinafter referred as the suit land).

On lodging its written statements defence, the defendant raised a total of four points of preliminary objection to the effect that; *Alls.*

- i. *That the suit is bad in law for non-joinder of necessary party.*
- ii. *That the plaint is bad in law for failure to attach list of documents to be relied upon.*
- iii. *That the plaint is bad in law for mixing two applications in the same suit i.e. main suit and injunction.*
- iv. *That the suit is incompetent for ambiguous description of the suit land and its size.*

This Court on 13th September 2022, ordered the said preliminary objections be disposed of by written submissions, the order was duly complied with by learned advocates for both parties, hence this ruling.

In the course of arguing the preliminary objections raised, the defendant prayed to abandon the 2nd point of objection hence in essence there are three preliminary objections. The defendant argued the said preliminary objections commencing with the third, then fourth and finished with the first preliminary objection hence I will determine them in the manner argued by the defendant.

Adle.

Submitting on the 3rd preliminary objection the defendant contended that the plaint filed in this suit is defective for containing two applications at the same time mostly unrelated contrary to the law. According to the defendant the plaint contains prayers for injunction and prohibitory order which are made under Order XXXVII Rule 1 of the Civil Procedure Code [CAP 33 R.E 2019]. The defendant submitted that the prayers for injunction should have been preferred by a separate application as per the requirements expounded in the decision of **Atilio v Mbowe** 1969 HCD 284. Because the injunction has been preferred in the present suit the plaint is defective.

On reply in respect of the 3rd preliminary objection the plaintiff has submitted that the same lacks merits and should be overruled. The plaintiff contended further that the prayers sought in the plaint are permitted under the law namely Order VII Rule 7 of the CPC and the court can only grant prayers sought by the plaintiff.

On rejoinder the defendant essentially reiterated the submission in chief. It submitted that the plaintiff has failed to justify the mixing of interlocutory order in the main suit.

I have gone through the plaint filed in the present suit particularly on the reliefs section. It is unfortunate that the defendant could not point out specifically which reliefs are prohibited by the law from being included in the suit at hand, that is the defendant could not point out any relief which is of interlocutory nature and whether there is any law or authority barring them from being included in the plaint. In upshot the 3rd preliminary objection is accordingly overruled for lack of merits.

On the fourth preliminary objection the defendant contended the suit is incompetent for ambiguous description of the suit land and its size. On further submission the defendant cited Order VII Rule 3 of the CPC which requires plaint to contain description of the property sufficient to identify. Reference was also made to the decision of this Court in **Norman Zakir Hussein & another v Zakia Fida Hussein**, Land Appeal No. 4 of 2021, HC at Tanga, (unreported).

The defendant claimed that the plaintiff has failed to make a description of the size of the land encroached by the defendant as he has only stated on paragraph 12 of the plaint that the suit land is located at Visiga Ward, Mleleguo Street in Kibaha District-Coastal Region. The

Atls

defendant submitted that there are many areas located at Visiga and the court may issue a non-executable decree.

On reply, the plaintiff contended that the suit land has been sufficiently described as un-surveyed land measuring 63 acres. Similarly the plaintiff has described the borders of the land in dispute as Bi. Tamasha on the South, Hifadhi/the forest reserve on the north, Ally Mohamed on the East and Fateni Said on the west.

To fortify his stance, the plaintiff has referred to me the decision in the case of **Hamis Salum Kizenga v Moses Malaki Sewando and others**, Land Appeal No. 51 of 2021, HC DSM (unreported).

On rejoinder the defendant reiterated his submission in chief contending that the description of the suit land in the plaintiff is not envisaged in the law.

I agree with the defendant contention that, description of the subject matter is necessary as it will enable the court to ascertain whether it has jurisdiction over the matter as well as to smoothly facilitate execution. It is mandatory requirement that the plaintiff must give a detailed description of

Adls.

the property as provided for under Order VII Rule 3 of the CPC. The said provision reads;

Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by title number under the Land Registration Act, the plaint shall specify such title number.

The issue that needs to be resolved here is whether the plaint has described sufficiently the suit land. The plaintiff and the defendant are at variance on whether the property has been sufficiently described. I have carefully gone through the plaint and I am of the settled mind that the plaint has substantially complied with the Order VII Rule 3 of the CPC. The size of the land has been described to be 63 acres of un-surveyed land, it is situated at Visiga Ward, Mleleguo Street in Kibaha District-Coastal Region. If that is not the end, paragraph 4 of the plaint has even stated the borders of the said land to be Bi. Tamasha on the South, Hifadhi/the forest reserve on the north, Ally Mohamed on the East and Fateni Said on the west.

Alle

It follows therefore that there is sufficient description of the suit land. In the case of **Hamis Salum Kizenga v Moses Malaki Sewando and others** [supra], cited by the plaintiff it was stated that;

"...in my view, the description in this suit suffices to identify the land in question as it contains the size of the land and location. It suffices to identify the suit land by either stating its size, location, address or boundaries if any. It is not mandatory that all features of identification of the suit land should be stated in the plaint".

It follows therefore that there are the minimum details which describe the suit land. It is for that reason, the 4th preliminary objection lacks merits and it is hereby overruled.

Coming to the first preliminary objection, the defendant submitted that the suit is bad in law for non-joinder of necessary party. The defendant stated that plaintiff claimed to have purchased the suit land from Juma Madata but that person has not been joined in the present matter. The defendant submitted that in disputes like the present one the seller must be joined. *Alle.*

To fortify its stance the defendant has referred to me the case of **Juma B. Kadala v Laurent Mnkande** [1983] TLR 103. It argued that, as the seller was not joined in the present suit it will be difficult for the court to adjudge whether the seller had a legal title at the time of selling the suit land to the plaintiff.

On reply, the plaintiff contended that he does not have any cause of action against Juma Madata. The plaintiff contended further that for one to be sued then it must be established that there is a cause of action against that person. The plaintiff referred to me the decision of **Hamis Salum Kizenga v Moses Malaki Sewando and others** [supra]. In which it was stated that;

...in my view such sellers are not necessary parties to this suit as they did not have refute the sale, thus the plaintiff cannot have any cause of action against them. He only have a cause of action against those who are alleged to have trespassed the land they had already sold to him..."

The plaintiff therefore prayed for the first preliminary objection be overruled. *Alle*.

It is not in dispute in the present matter that the plaintiff claimed on paragraph 4 of the plaint that he purchased the suit land from one Juma Madata. There is no dispute that the said person is not a party to the present matter. The issue is whether non joinder of the seller of the disputed land to the plaintiff in the present suit is fatal. I agree with the plaintiff that to institute a matter against a particular person one must have sufficient cause of action against that person. The plaintiff contended that he does not have any cause of action against the seller of the land rather the defendant.

Hence, I am of the settled mind that the plaintiff cannot be compelled to sue a person whom he does not have any cause of action. The case of **Juma B. Kadala v Laurent Mnkande** [supra] referred to me by the defendant is distinguishable with the circumstance of the present case. In that case **Laurent Mnkande** sold a piece of land to one **Omari Kiziwa** hence the former was no longer in occupation of the land in dispute rather it was the latter who was in physical possession. But Juma B. Kadala filed a case against Laurent Mnkande leaving behind Omari Kiziwa.

Adls.

No doubt as Laurent Mnkande was no longer in possession of the land in question the suit for recovery of land could not have been maintained without joinder of Omari Kiziwa. In the present matter the seller of the land to the plaintiff is no longer in possession of the land in dispute hence he is not a necessary party to the present. It is for that reason I hold that the first preliminary objection lacks merits and it is hereby overruled.

In upshot and for the foregoing all the preliminary objections raised by the defendant are hereby overruled with costs.



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A. MSAFIRI,
JUDGE
18/10/2022