

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

**LAND CASE NO. 212 OF 2022**

**SMX LIMITED.....PLAINTIFF**

***VERSUS***

**EQUITY BANK (TANZANIA) LIMITED.....DEFENDANT**

**RULING**

10-14 July, 2023

**E.B. LUVANDA, J**

The First and Second Defendant raised the preliminary objections on point of law that: one, the amended plaintiff does not disclose any justifiable cause of action against the both First and Second Defendant. Two, the amended plaintiff is incurably defective for violating the order of this court dated 02/11/2022 which directed the Plaintiff to file amended plaintiff only including the Second Defendant and to incorporate the cause of action against the second Defendant (raised by the First Defendant alone).

Mr. Emmanuel Daniel Saghan learned Advocate filed a joint submission for Defendants, submitted in respect of the first point thus, the Plaintiff has failed to show any justification to the claimed reliefs before the court that, the plaintiff has also claimed for payment of specific damages without clearly

showing how does it arrive to such damages against the Defendants. He submitted that the First Defendant has already lawfully exercised his statutory right vested to it in accordance with the banking facility and mortgage deeds and has already possessed the property. He submitted that, the Plaintiff who is the defaulter does not have any claim of right over the property. He submitted that the Plaintiff has failed to disclose cause of action against the Second Defendant who is not a party to the banking facility documents and the mortgage over the property, therefore wrongly included the Second Defendant in the amended plaint. He cited order VIII rule 5(e) Civil Procedure Code Cap 33 R.E 2019, **Jowitt's Dictionary of English Law**, (2<sup>nd</sup> Edition) 1977 by Earl Jowitt, Sweet & Maxwell Limited Volume 1 page 297, the case of **Musangang'andwa vs. Chie Japhet Wanzagi & Others** (2006) TLR 35, page 357, **N. S. Bindra's and Practice** (8<sup>th</sup> Edition), Allahabad 1997, page 221, for a proposition that facts must be specifically pleaded and stated in the plaint. He submitted that looking at the facts of this case, it is clear that the amended plaint lacks cause of action against both Defendants. He cited order VII rule II (a) Cap 33 (supra), **Auto Garage & Others vs. Motokov**, 1971 EA 514, **Consolidated Holding Corporation vs. Rajani Industries Limited & Other**, Civil Appeal No.

2/2003 C.A.T. at Dar es salaam, **Jerad Sheriff & Co. vs. Chotai Fancy Stores**, 1960 EA 374.

On the second point of objection, the learned Counsel submitted that the Plaintiff changed the plaint instead of confining itself to the extent of the amendments allowed by the court to add the Second Defendant and facts constituting cause of action against the second Defendant. He submitted that the Plaintiff substituted the plaint by bringing a new one instead of amending it. He cited the case of **Karoli Chogoro vs. Waitihache Merengo**, Civil Appeal No. 164 of 2018 CAT, **Stick Kinza & Another vs. Republic**, Criminal Appeal No. 106/2019, regarding importance of respecting court orders. He submitted that all paragraphs of the former plaint including reliefs sought have been amended. He submitted that the Plaintiff brought completely new suit against Defendants.

In reply, Mr. Senen Mponda learned Counsel for Plaintiff, alluded to a list of authorities cited by the Defendants on a definition of a cause of action, he added **Mulla on the Code of Civil Procedure** by Sir Dinshaw Fardunji Mulla, Updated 18<sup>th</sup> Edition, BM Prasal Manish Mohan, page 402. He submitted that a complaint by the Defendants that the Plaintiff has failed to show justifications for the claimed declaratory reliefs and that the Plaintiff

claims payments without showing how it arrived such damages against both the First and Second Defendant, should be reserved for trial through cross examination of the Plaintiff witnesses. He submitted that the argument of the Defendants have been pleaded in their defence, which are rival issues raised in pleadings by both parties and demonstrate that the plaintiff's claim raised a cause of action following the forceful entry by the Defendants in the Plaintiff's office premises and locking her valuable properties including cash. He submitted that by its nature preliminary objection cannot deal with merits of the rival factual issues arising from both claim and defence. He submitted that the second Defendant is an agent of the First Defendant and her wrongful actions against the Plaintiffs' properties give the Plaintiff a right to sue for special and general damages. He submitted that the Plaintiff's amended claim discloses a cause of action against the Defendants.

For the second point of objection, the learned Counsel submitted that the amended claim is within the terms of the court order dated 02/11/2022 because facts pleaded in the first claim have merely been rephrased to include the Second Defendant, the appointed agent of the First defendant. He submitted that losses occasioned by the Second Defendant forceful entry to the Plaintiff's premises were not pleaded in the first claim, therefore the

style of pleading will change also the prayer will change. He submitted that the Defendant have not singled out any such new cause of action which cannot be covered by the order dated 02/11/2022. He submitted that no factual presentation has been made outlining matters which have been included in the plaint which ought to be excluded. He submitted that, the Defendants have not told the court which prayers (s) are out of the scope of the order for amending the plaint.

On my part, I have failed to appreciate the argument by the Counsel for Defendants in support of the first point of objection. The argument fronted by the learned Counsel for the Defendants clearly suggest that their complaint is typically hinged on factual proposition. This is because the argument that the Plaintiff has failed to show any justifications to the claimed reliefs or that the plaintiff claim for payment of specific and general damages without clearly showing how does it arrive to such damages against the Defendants, are matters of facts, and worthy for cross examination as opined by the Counsel for Plaintiff. Similarly an argument that the first Defendant lawful exercised his statutory rights in accordance with banking facility documents or mortgage deed, including a fact that the first Defendant has already possessed the property, are proposition of facts which on the face

of it cannot be said legally on the state of affairs, encompasses non disclosure of a cause of action. As alluded by the Counsel for Plaintiff, the cause of action is premised on action following the alleged forceful entry by the Defendants in the Plaintiff's premises. Now, the issue as to whether the possession was done by force or whether was lawful, is a matter of evidence and to my view, they cannot be ascertained by way of preliminary objection. Equally an argument that the Second Defendant is not a party to the banking facility document and mortgage over the property, to my respectful view are misconceived. Because the Plaintiff's complaint is on the alleged forcefully and unlawful possession by the Second Defendants alleged acting as agent of the First Defendant. Therefore, it cannot be said that the Second Defendant was wrongly impleaded or joined.

On the second point, too is unmerited. This is because the alleged scope of amendment suggested by the counsel for Defendant that it was confined to add the Second Defendant and facts instituting cause of action against the Second Defendant solo, are not reflected in the court order which allowed amendment. The order of the court read briefly that "the prayer to amend the plaint is granted within the context stated". Now in order to know the scope and extent of amendment, it is imperative to read short that what the

learned Counsel for plaintiff had submitted in his prayer, I quote for appreciation,

*"We pray to amend the plaint, the reason are that: (i) when the plaint was filed the facts were that the defendants had threatened to take possession and manage the suit property. Subsequent to filing the plaint, the defendant took the possession and engaged an agent, one Prolaty Consult Ltd. Now the plaintiff seeks to **implead the agent and has issues to raise as to the manner of taking possession performed by the agent.** Based on the above **we will seek necessary reliefs against the defendants and her agent.** I make the prayer under Order VI rule 17 CPC Cap 33. If permitted, we intend to file the amended plaint within 14 days".*

When the learned Counsel for First Defendant was invited to address or respond to the above prayer, he was recorded to have said no objection. Now looking on a prayer, it is in a blanket statement prone to overhauling a plaint and vague so to speak. The Counsel for first Defendant did not bother to raise a concern for the scope, terms and extent of intended amendment. Now bringing it by way of objection is surely an afterthought. This is because

no safeguard were made to limit the scope of intended amendment. Again, the Counsel for Defendants made a general complaint that the plaintiff made a substitution by bring completely new plaint and suit, instead of amendment. As alluded by the learned Counsel for Plaintiff, the Defendants did not outline matters which have been included in the plaint which ought to be excluded, neither mentioned a prayer or relief made outside the scope of the order for amending the plaint.

That said the objection are overruled. Costs for this ruling will be aligned to the outcome of the main suit.



E.B. LUVANDA  
**JUDGE**  
14/07/2023