

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.126 OF 2021

RAYMOND FOCUS MLAY..... PLAINTIFF

VERSUS

KCB BANK TANZANIA 1ST DEFENDANT

DOOREEN HURUMA MAWOLE also known as

DOREEN ALBERT TEMU 2ND DEFENDANT

EVANS GENERAL TRADERS 3RD DEFENDANT

MEM AUCTIONEERS & GENERAL

BROKERS LTD 4TH DEFENDANT

FURAHINI JOSEPH LEMA 5TH DEFENDANT

RULING

Date of Last Order: 02.06.2022

Date of Ruling: 09.06.2022

A.Z.MGEYEKWA, J

The Plaintiff has filed a Land Case No.123 of 2021 against the Defendants claiming that the 2nd Defendant illegally and unlawful took the Plaintiff's Title Deed and created a legal Mortgage with 1st Defendant

without the Plaintiff's knowledge. The Plaintiff also alleged that the 5th Defendant claims to have bought the suit premises on public auction while there was no any auction which was conducted. The Plaintiff is seeking five reliefs as follows:-

- a) *That a Declaration that the Plaintiff is lawful of the suit premise*
- b) *A declaration that the Mortgage of the suit property was null and void*
- c) *A Declaration that the purpose of sale of the Suit Premises was illegal null and void*
- d) *That the 1st Defendant and 4th Defendant be ordered to hand over the original title of the suit property to the Plaintiff*
- e) *Permanent injunction restraining the Defendants or their agents or servants from entering, selling, or evicting the Plaintiff from the suit property.*
- f) *The Defendants jointly and severally pay the Plaintiff TZS 300,000,000/= being general and punitive damages.*
- g) *Defendants to pay costs of the suit*
- h) *Any other relief(s) this Honorable Court shall deem fit to grant*

The Defendants' filed a Written Statement of Defence disputing the claims and the 5th Defendant raised a point Preliminary Objection that:-

1. *The 5th Defendant is seeking this court to order Mr. Ndanu Emmanuel, learned counsel for Plaintiff to withdraw from representing any party to this case.*

When the matter was called for hearing on 20th May, 2022, the applicant enjoyed the legal service of Mr. Ndanu Emmanuel, learned counsel, Mr. Elisa Msuya, learned counsel appeared for the 1st Defendant, Epharo, learned counsel appeared for the 4th Defendant also hold brief for Mr. Vedastus Majula, learned counsel for the 2nd Defendant and Mr. Godwin Mwapongo, learned counsel appeared for the 5th Defendant.

Mr. Mwapongo contended that they is seeking this court to order Mr. Ndanu Emmanuel, learned counsel for Plaintiff to withdraw from representing any party to this case. He argued that the main reason for their request is because there is a document filed in this court by the 5th Defendant on 21st April, 2022 and as part of the 5th Defendant, they intend to call Mr. Ndanu Emmanuel as a witness to testify in court. The learned counsel for the 5th Defendant referred this court to Regulation 69 (b) and (c) of the Advocates Act (Professional Conduct & Etiquette). He stated that the Regulation requires an Advocate should not take the matter when it is known that the Advocate will be required to give evidence. Mr. Mwapongo argued that in the matter at hand it is properly that Mr. Ndanu will be called to give evidence thus it was his prayer that he should not be allowed to represent any of the parties to the case. Supporting his submission he cited the case of **Suluma Ali Badhela v Ali Omari Mohamed & 7 others**, Land Case No. 213 of 2017. It was his submission

that the cited case has a similar situation and the court disqualified the Advocate to handle the matter of either party to the case.

In conclusion, the learned counsel for the 5th Defendant urged this court to sustain the preliminary objection and disqualify Mr. Ndanu accordingly.

Mr. Msuya, Senior learned counsel submitted that the objection raised is premature. He argued that the provision of the law which has been referred by Mr. Mwapompongo shows that the Attorney who appears for the parties to withdraw more likely or probability will be required to give evidence. Mr. Msuya argued that this court will find out whether the Advocate will be required to disqualify himself at the stage of framing issues but now it is unknown. He submitted that is not correct to assume that the document will be relied upon by mere being attached to the pleadings.

The learned counsel for the 1st Defendant distinguished the cited case of **Suluma** (supra) that Locus Attorneys was the 7th Defendant in the case and was appearing or representing a party while on the matter hand Mr. Ndanu, learned counsel is not a party to the proceedings but only appears in a document which is assumed that he will be called to testify.

On the strength of the above submission, Mr. Msuya beckoned upon this court to overrule the objection for being premature.

The learned counsel for the 3rd Defendant had nothing to add he conceded the submission made by his Senior learned counsel Mr. Msuya.

Mr. Ndanu strongly concurred with the submission of Mr. Msuya. He argued that the objection is prematurely raised the same can be raised at the stage of framing issues when it will be assumed that the Advocate might be called to testify. He submitted that in the cited case of Suluma (supra) it is stated that if there is a contentious issue of the particulars counsel will be called as a witness. He valiantly argued that the pleading in their Plaint has not mentioned anything with regard to lease agreement even the WSD of the Defendants the said lease is not mentioned. He went on to state that even in the courtier claim there is nowhere the 5th Defendant has raised the lease agreement.

On the strength of the above submission, Mr. Ndanu insisted that the preliminary objection is premature and has no merit the same be overruled with costs since the learned counsel made this court depart from its scheduling order unnecessary so costs are pegged to the 5th Defendant's counsel for delaying the hearing of this case.

In his brief rejoinder, Mr. Mwapongo reiterated his submission in chief. Argued that the rescheduling of this court order was because making or recording the number of the case since the same was improper and in the

cause of that they raised a preliminary objection. He argued that the objection is not prematurely raised since the conduct of the case affects the partiality and his duty to the court. He stressed that the law is clear that the Advocate should not take a case if probably to take the case, he added that the law does not state certain. In his view framing issues is certain. He went on to state that annexures are also pleadings therefore the same are part of proceedings. He claimed that he is not required to explain how he will use the counsel as a witness but it is on the face of records since the annexures show clearly. He urged this court to underline the principle in the case of **Suluma** (supra) not uniformity.

On the strength of his submission, he stated that the objection is timely. He prays for this court to maintained sustain the objection with costs.

Having heard the rival arguments of all learned counsels for the 5th Defendant, 1st Defendant, and the Plaintiff I am in a position to determine *whether the preliminary objection raised by the 5th Defendant's Advocate is meritorious.*

In accordance with Regulation 69 (b) & (c) of the Advocate Act (Professional Conduct and Etiquette) of 2018 GN No. 118 of 2018 provides that:-

1. A conflict of interest is one that would be likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client.

2. An advocate shall not act or continue to act in a matter where *there is or is likely to be at conflict unless the advocate has the informed consent of each client or prospective client for whom the advocate proposes to Act.*

The matter before this court is lodged by the Plaintiff who has enlisted the legal service of Mr. Ndanu Emmanuel, learned counsel. I have read the Plaintiff's Plea the purported lease agreement is not part of the documents to be relied upon.

Again, the intended document to be relied upon is brought by a Defendant who alleges that Mr. Ndanu is the one who prepared the said document. This is just an allegation therefore the issue of likely a conflict might arise does not apply in the matter at hand. I am saying so because the said document is not yet proven and not known if it will pass the admissibility test. Had it been that there are facts related to the said lease agreement in the Plea then one could say likely a conflict might arise.

Therefore I am in accord with Mr. Elisa Msuya, learned counsel for the 1st Defendant and Mr. Ndanu Emmanuel, learned counsel for the Plaintiff that it is too early to request the disqualification of Mr. Ndanu Emmanuel.

It is not correct to assume that the lease agreement will be relied upon by merely being attached to the pleadings.

For the sake of clarity, I have read the case of **Suluma Bahdela** (supra). In **Suluma's** case, the issue for discussion was that the 8th Defendant and Mr. Maringo, learned counsel both practice under the 7th Defendant and the issue was on the face of the record. Unlike the cited case of **Suluma Bahdela** (supra), the Advocate, in this case, is not a party to the case, the lease agreement is not featured in the Plaint and the alleged document is yet to be proven. Therefore the cited case of **Suluma Bahdale** is distinguishable from the circumstances of this case.

In the upshot, I proceed to overrule the preliminary objection with costs.

Order accordingly.

DATED at Dar es Salaam this 8th May, 2022.



A. Z. MGEYEKWA

JUDGE

08.05.2022

Ruling delivered on 8th May, 2022 in the presence Mr. Ndanu Emmanuel, learned counsel for the Plaintiff, Ms. Regina Kiumba, learned counsel for the 1st Defendant, Mr. Vedastus Majura, learned counsel for the 2nd and

3rd Defendants, and Mr. Godwin Mwapongo, learned counsel for the 5th Defendant.



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