

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 118 OF 2022**

*(Arising from Land Case No. 62 of 2019)*

**MUBELWA JAMES MUTABIILWA** *(as administrator of the estate of the late FERDINAND MUTAGWABA MUTABIILWA.....***APPLICANT**

**VERSUS**

**M/S RIZIKI LULIDA..... 1<sup>ST</sup> RESPONDENT**

**THE IMPERIAL ROAD HAULAGE LIMITED.....2<sup>ND</sup> RESPONDENT**

*Date of last order: 12/7/2022*

*Date of ruling: 28/7/2022*

**RULING**

**A. MSAFIRI, J.**

On the 21<sup>st</sup> day of March 2022, the applicant lodged an application in this Court by way of chamber summons under Order XXXV Rule 2(2) of the Civil Procedure Code [CAP 33 R.E 2019], for the following orders;

- i. *That the Honourable Court may be pleased to grant leave to the applicant to appear and defend Land Case No. 62 of 2019.*
- ii. *Costs be provided for.*
- iii. *Any other order and/or relief that this Honourable Court may deem just and proper to grant.*

The application is supported by an affidavit sworn by the applicant herein. Mr. Victor Joseph Muhana, Mr. Abubakari Salim and Mr. Selemani Almasi learned advocates represented the applicant, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. It is on record that the 2<sup>nd</sup> respondent did not object this application. The application was disposed of by written submissions hence this ruling.

The dispute giving rise to the present application is over landed property known as Plot No. 9, Title No. 186100/82 Kurasini area Dar es Salaam (disputed property). It is claimed that the disputed property was registered in the name of the late Ferdinand Mutagwabwa Mutabiilwa, but it was disposed through public auction and the 1<sup>st</sup> respondent was a successful bidder. The auction was a result of the order of Kisutu Resident Magistrate Court in Civil Case No. 137 of 1996.

It is claimed that the 2<sup>nd</sup> respondent had trespassed on the disputed property and has been using the premises for parking her lorries. The 1<sup>st</sup> respondent therefore instituted Land Case No. 62 of 2019 against the 2<sup>nd</sup> respondent seeking eviction of the latter. The applicant became aware of the said suit and because he was not a party thereto he sought and was granted leave to be joined as a necessary party. *Aelle*

Now as the said suit was preferred under summary procedure the applicant had no automatic right to appear and defend the same hence he preferred the present application.

In the affidavit and written submissions in support of the application, the applicant has contended that he has interest over the disputed property because the said property was formerly registered in the name of the late Ferdinand Mutagwabwa Mutabiilwa as stated above and therefore as he is the administrator of the estate of the late Ferdinand Mutagwabwa Mutabiilwa he made an application as a legal representative hence he is the registered owner of the disputed property.

The applicant contended further that he was not aware of the existence of Civil Case No. 137 of 1996 at Kisumu Resident Magistrate Court and further that the disputed property has never been associated with any party in that case.

The applicant submitted that in application for leave to appear and defend in a summary suit, the applicant has to satisfy the court through affidavit that there are triable issues and that the applicant has a fair or bona fide or reasonable defence. To fortify his point the applicant has referred to me the case of **Mohamed Enterprises (T) Ltd v Biashara**

*Atts*

**Consumer Services Ltd** [2002] TLR 159 in which it was observed that for application of leave to appear and defend the summary suit, the court has to determine whether there are triable issues or not. In which triable issues are those which are contested and therefore in the interest of justice ought to be canvassed further through evidence.

On reply, the 1<sup>st</sup> respondent has contested the application both in the counter affidavit as well as the reply submissions. The 1<sup>st</sup> respondent contended that there is no any serious triable issue raised by the applicant. The 1<sup>st</sup> respondent contended further that if the applicant intends to challenge the sale of the disputed property he ought to have done so at the Resident Magistrate Court of Kisumu and not by coming to this court.

The 1<sup>st</sup> respondent submitted further that he legally acquired the disputed property through a public auction and there was no application to set the same aside.

The applicant did not file rejoinder submission.

Having gone through the submissions of the parties rival and in support of the application, the sole issue calling for determination by the Court is whether the application has merits.

*Ally*

Where a suit has been instituted under summary procedure, the party against whom the suit is instituted does not have an automatic right to appear and defend in the said suit, unless he applies for leave. This is in accordance to the provisions of Order XXXV Rule 2 (2) of the CPC.

The court is required to assess the said application and satisfy itself whether the conditions stipulated under Order XXXV Rule 3 (1) have been met. The decision of **Mohamed Enterprises (T) Ltd v Biashara Consumer Services Ltd** [supra] cited by the applicant requires the application to disclose triable issues, which are contested.

In the present application, looking at the affidavit in support of the application, I am of the settled mind that the applicant has advanced several issues which are also being disputed by the 1<sup>st</sup> respondent.

The applicant has contended that the 1<sup>st</sup> respondent acquired the disputed property fraudulently and at no point in time he was made a party to the Civil Case No. 137 of 1996 before Kisumu Resident Magistrates' Court. The applicant contended further that the property was being owned by his late father and he is now registered as a legal owner. The 1<sup>st</sup> respondent on the other hand stated that he legally acquired the disputed property through a public auction. *Alls.*

These facts in my view constitute serious triable issue(s) as they form basis of the dispute in Land Case No. 62 of 2019. The Court at this stage has only a duty to assess the affidavit whether there is disclosure of any issues fit to go for trial and not determine them at this stage. Hence I am satisfied that the applicant has advanced reasons sufficient to grant him leave to appear and defend in the said suit.

It is for the foregoing reasons that, the applicant is granted leave to appear and defend in Land Case No. 62 of 2019. He is given **21 days** to file his written statement of defence from the date of this ruling. Costs to follow event.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written over a horizontal dotted line.

**A. MSAFIRI,  
JUDGE  
28/7/2022**