

IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO. 45 OF 2022

LEONIDA TRYPHONE MORRIS ..... PLAINTIFF

VERSUS

NCBA BANK TANZANIA LIMITED ..... 1<sup>ST</sup> DEFENDANT

JUNIOR TWIN DIGITAL LIMITED ..... 2<sup>ND</sup> DEFENDANT

LOCUS DEBT MANAGEMENT LIMITED ..... 3<sup>RD</sup> DEFENDANT

RULING

*Date of last Order: 09.08.2022*

*Date of Ruling: 12.08.2022*

**A.Z.MGEYEKWA, J**

On 7<sup>th</sup> March, 2022, the Plaintiff herein, instituted this suit against the eight Defendants and on 31<sup>st</sup> March, 2022, the Plaintiff filed an amended Plaintiff seeking the following six reliefs:-

- a) *The declaration that the Public Auction was unlawful in the eyes of law and it was un-procedural hence null and void.*

b) *Declaration that the loan facility was unlawful since the plaintiff is not liable to overdraft loan facility given to 2<sup>nd</sup> defendant.*

c) *Court should permanently issue injunctive order to stop the Defendants from their intention to dispose of properties located at Gezaulole Kigamboni Municipality.*

d) *Costs*

e) *Any other relief (s) this Hon. Court deems fit and just to grant.*

The 1<sup>st</sup> & 3<sup>rd</sup> Defendants filed a Written Submission of Defence and they raised two points of Preliminary Objection as follows:-

1. *That the Plaint is defective for want of proper verification clause.*
2. *That the Plaint is incurably defective for non-joinder of necessary party to wit the bonafide purchaser of the suit property in the auction.*

When the matter was called for hearing of the preliminary objection on 12<sup>th</sup> July, 2022, the Plaintiff enjoyed the legal service of Mr. Amon, learned counsel whereas, on the 1<sup>st</sup> and 3<sup>rd</sup> Defendant had the legal service of Mr. Chuwa, learned counsel.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the suit.

The learned counsel for the 1<sup>st</sup> & 3<sup>rd</sup> Defendants started his onslaught by submitting that the Plaint is defective for want of proper verification

clause. Mr. Chuwa contended that the Plaintiff's Complaint lacks a proper verification clause whereby contents numbered 1 to 4 immediately after paragraph 10 of the Amended Complaint is not included in the verification clause. It was his view that such omission makes the verification fatally defective. He insisted that the omission is incurable the same goes to the root of the case, thus, the remedy is to strike out the entire Complaint. Fortifying his submission he cited the cases of **Salim Vuai Fom v Registrar of Cooperative Societies and 3 others** [1995] TLR 75 CAT and **Nolasco Kalongola v Promasindor (T) Pty Ltd** [2018] LCCD 45 and **Bulham Abdul Karim t/a EAU Enterprises v NBC Jamhuri Branch Bukoba**, Civil Application No. 7 of 1995 (unreported).

Mr. Chiwa did not end there, he added that the impugned paragraphs can be expunged from the affidavit, and the court will determine whether the remaining paragraphs of the affidavit can support the application or not. In his view, the remaining paragraphs do not confer this court jurisdiction, hence the complaint is incurable defective.

Arguing for the second objection on non-joinder of a necessary party, Mr. Chuwa referred this court to Order 1 Rule 3 of the Civil Procedure Code Cap. 33. He contended that the land in dispute was auctioned off before the opening of this suit thus it is proper for the Plaintiff to join the *bonafide* purchaser in the suit. Mr. Chuwa went on to submit that this court

must look at whether the case is properly before entertaining the matter on merit and in order to avoid unnecessary delay. To bolster his submission he cited the case of **Abdulatif Mohamed Hamis v Mahboub Yusuf Osman and Fatma Mohamed**, Civil Revision No. 6 of 2017 (unreported).

The learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants insisted that the Plaintiff's mistake goes to the root of the case and is detrimental to the determination of this suit. Supporting his submission he cited the case of **Mandorosi Village Counsel and two others v Tanzania Breweries Ltd and Four Others**, Civil Appeal No. 66 of 2017 CAT at Arusha (unreported).

On the strength of the above submission, the learned counsel for the 1<sup>st</sup>, and 3<sup>rd</sup> Defendants beckoned upon this court to strike out the suit with costs.

In his reply, the learned counsel for the Plaintiff on the first limb of objection argued that the Plaintiff in his 13 paragraphs of the Plaint and in his verification clause all contents had been verified clear by the Plaintiff herself being knowledgeable by herself. He added that the verification clause listed and verified 1 to 13 paragraphs. He admitted that in the course of writing some errors occurred during numbering that there is a

repetition of 1, 2, 3, and 4 paragraphs seen. He went on to argue that in this circumstances can be rectified since it does not go to the root of the case. He added that this court can apply overriding objective principles to cure the errors and expunge unnecessary paragraphs. To fortify his submission he cited the cases of **Gasper Peter v Mtwara Urban Water Supply**, Court of Appeal Mtwara, 2019 (unreported) and **Alliance One Tobacco & Another v Mwajuma Hamis & Another**, HC DSM 2019 (unreported).

Submitting on the second limb of objection. Mr. Ndunguru contended that the Plaintiff on 20<sup>th</sup> April, 2020 made a prayer orally before this court to compel the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to state the name and physical address of the buyer in which they refused. He lamented that the Defendants have raised the instant objection while they knew from the beginning of the case that the Plaintiff prayed to amend the Plaint. He contended that to-date the Defendants have not availed them with the name of the purchaser. He argued that the objection is unprocedural and intend to infringe the Plaintiff's rights.

On the strength of the above submission, he urged this court to strike out the suit with costs.

In his rejoinder, Mr. Chuwa reiterated his submission in chief. He stressed that the verification clause is defective. He added that the overriding objective and the cited cases of **Gasper Peter** (supra) and **Alliance One Tobacco** (supra) are distinguishable and inapplicable in current situation. He added that in the cited case of **Gasper Peter** (supra) is distinguishable in two aspects first; the nature of objection raised in **Gasper Peter's** case is different from the current point of objection since in the matter at hand, the issue is related to defective Plaintiff and not missing document. He added that in the case of **Alliance One Tobacco** (supra) this court dealt with wrong citation of the law but in the present case the Plaintiff is defective.

On the second limb of objection, he added that there was no any effort taken by the Plaintiff to seek help to find the name of the buyer. Ending, Mr. Chuwa urged this court to strike out the suit with costs for noncompliance with the law.

I have carefully summarized the submissions made by learned counsels for the Plaintiffs and Defendant. I have opted to start with the second objection. The main issue which I am called upon to resolve in this ruling is *whether or not there was a non-joinder of the necessary party.*

Before embarking on the merit of the case, the court has found it imperative to understand and define who is a necessary party in a suit. The term has been defined in the text book titled: Civil Procedure Limitation Act of 1963 by I L C.K Takwani. 7 Edition Published by Eastern Book Company Lucknow at page 162 as follows:-

*"a necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed"*.

The said position was also echoed in the case of **Food and Packaging Ltd v Tanzania Sugar Producers Association and another**, Civil Appeal No. 91/2003 CA at Tanga (unreported) wherein the court observed and I quote;

*"A necessary party is one whose presence is prescribed by law and in whose absence no effective decision can be given, without such a party, the action appeal or proceedings in not property constituted."*

In determining whether there purchaser was a necessary party to this suit, I had to peruse the Plaintiff and find out *whether the cause of action involved the purchaser*. The Plaintiff on paragraphs 11 and 12 of the Plaintiff has acknowledge that the 2<sup>nd</sup> Defendant being instructed by the 1<sup>st</sup> Defendant sold a property with CT No. 21312 Plot No. 33, Block 'B'

located at Sinza Area within Ubungo Municipality to unknown person. Therefore, there is no dispute that the suit landed property in dispute was sold and there is no dispute that the purchaser is in possession of the suit landed property. Thus, in my view, the purchaser falls within the category of necessary party and in the matter at hand the purported buyer is not a part to the suit.

The Plaintiff in his written submission claimed that the 1<sup>st</sup> Defendant has not availed the name of the purchase, however in the records, it is clear that the Plaintiff's counsel obtained leave to amend the Plaint to join the purchaser and the court granted his prayer. Conversely, Mr. Nduguru decided to withdraw his prayer that means the necessary party whose presence is prescribed by the law is not joined hence, this court in is not in position to proceed with a case which is not properly constituted. Therefore, I fully subscribe to the second objection raised by Mr. Chuwa that the Plaint is incurably defective for non- joinder of necessary party.

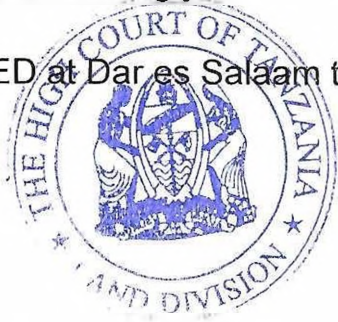
The above finding sufficiently disposes of the suit. Consideration of the first objection raised will not affect the above finding. I accordingly refrain from delving on it.



In the upshot, for the reasons epitomized above, I proceed to sustain the objection raised by the defendants' counsel and strike out the Land Case No.45 of 2022 with costs.

Order accordingly.

DATED at Dar es Salaam this 12<sup>th</sup> August, 2022.



A.Z.MGEYEKWA

**JUDGE**

12.08.2022

Ruling delivered on this 12<sup>th</sup> August, 2022 via video conferencing whereas Mr. Chuwa, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants also holding brief for Mr. Nduguru, counsel for the Plaintiff was remotely present.

A.Z.MGEYEKWA

**JUDGE**

12.08.2022

