

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 324 OF 2022

KASSIM OMARY CHIONGOLA

(As the Administrator of the estate of the late ANAFI OMARY

ALLY)..... PLAINTIFF

VERSUS

ZAMDA GUGU SHABANI1ST DEFENDANT

THE ATTORNEY GENERAL2ND DEFENDANT

RULING

Date of Last Order: 22/02/2023

Date of Ruling: 21/03/2023

A.MSAFIRI, J.

At the centre of this land dispute there is the plaintiff and two defendants. The plaintiff claims against the defendants jointly and severally for a declaration that the 1st defendant is the trespasser after the 1st defendant erected the business pavilion which now she is using it for conducting business within plaintiff's land. Also the plaintiff claim for payment of 7,200,000/- being the rent which the plaintiff ought to have gained as the rent all that time the 1st defendant could have used the premise, and permanently restraining the 2nd defendant from licencing the first defendant for trespassing in the plaintiff's premise, payment of 21% of the 7,200,000/- from the date of Judgment until paid in full, costs of the suit and any other relief that this Honourable Court may deem fit to grant.

Alle

The 2nd defendant has filed a Notice of preliminary objections on two points of law as follows;

- 1. The plaintiff has no cause of action against 2nd defendant.*
- 2. The application is bad in law for misjoinder of proper party to this suit without leave of the court.*

While filing her written statement of defence, the 1st defendant also raised two preliminary objections namely;

- 1. That the suit is hopeless bad in law non-joinder of necessary party being TANESCO.*
- 2. That the suit is hopeless bad in law for lacking Jurisdiction Clause.*

It is the rule that when the preliminary objection on point of law is raised, it has to be disposed of before proceeding with the matter on merit. So the raised preliminary objections was disposed of by way of written submissions and the parties complied with the Court's schedule order.

The 1st defendant was represented by Rose Charles Nyatega learned Advocate, the 2nd defendant was represented by Jesca Joseph Shengena learned Principal State Attorney, while the plaintiff was represented by Trasis Attorneys.

Ms Nyatega, counsel for the 1st defendant submitted on the first limb of objection that Order 1 Rule 10(2) of the Civil Procedure Code, Cap 33 [R.E. 2019], (the CPC), provides for necessity to join the necessary part which is Tanzania Electric Supply Company Limited (TANESCO).

To bolster her argument she cited the case of **Abdullatif Mohamed Hamisi vs Mehboob Yusuph Osman Another**, Civil Revision No. 6 of 2017 (unreported) which ruled that;-

Acute.

"A necessary party is the one in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case".

She stated further that so long as the at the instant case TANESCO has built the alleged main power source into the suit land, then it has to be joined as necessary party rather than excluding the same.

She argued that the rationale behind joining the necessary party is to make that person be bound by the result of the action and the dispute be settled. She cited the case of **Farida Mbaraka and Another vs Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) which adopted the decision set in the English case of **Amon vs Raphael Tuck and Sons** (1956) 1 ALL ER 273 which ruled that; -

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action which cannot be effectually and completely settled unless he is a party..."

She averred that since the matter is on ownership of the suit land, it is necessary to join TANESCO so that it could be bound by the result of its action. She added that, it will be improper and against the principle of natural justice for Court to make orders condemning a party unheard.

On the second limb of objection, the counsel for the 1st defendant submitted that, the Plaint does not contain the Jurisdiction clause which is the law requirement under Order VII Rule 1 (f) and (i) of the CPC which makes it mandatory for the Plaint to show the jurisdiction of the Court trying the matter.

Alle

She also cited the case of **China Pesticide (T) Ltd vs Safari Radio Ltd**, High Court Commercial Case No. 170 of 2014 (unreported).

She said that basing on the cited case, the plaint in the case at hand should have revealed the jurisdiction of the Court. However, looking at paragraph 9 of the Plaint, it does not comply with Order VIII Rule 1(i) of the CPC and that this omission renders the suit incompetent before this Court. To substantiate this, she cited the case of **Esther Alphonse Mahende and Another vs Maendeleo Bank PLC and Another**, Land Case No. 95 of 2017 which ruled that; -

"It is a mandatory requirement that the plaint must disclose the facts showing that the court has jurisdiction".

She prayed for the Court to dismiss the suit.

Ms Shengena for the 2nd defendant, submitted on the first limb of preliminary objection that this suit is incompetent for failure to show cause of action against the 2nd defendant, since the 2nd defendant have no connection with the 1st defendant upon failure to join TANESCO as a proper party.

To cement her points, she cited the cases of **Abdullatif Mohamed Hamisi vs Mehboob Yusuph Osman Another**, Civil Revision No. 6 of 2017 (unreported) and **Tanga Gas Distributors Ltd vs Mohamed Salim Said and 2 Others**, Civil Revision No. 68 of 2011, Court of Appeal of Tanzania (unreported) which made it mandatory to join the necessary party.

On the second limb of her preliminary objection, the counsel for the 2nd defendant submitted that the suit is contrary to Order 1 Rule 3 of the CPC, *Alb.*

which requires the necessary party to be joined. She argued that the joinder of TANESCO was necessary in order to avoid multiplicity of suits and also guarantee the safeguard of interests of the parties to the land.

To bolster her arguments, she cited the case of **Tanzania Railways Corporation (TRC) vs. GBP (T) Limited**, Civil Appeal No. 218 of 2020 (Unreported). She prayed that the matter be dismissed.

In reply to the first limb of the preliminary objection raised by the 1st defendant, and the 2nd limb of preliminary objection by the 2nd defendant which are similar, the counsel for the plaintiff submitted that, Order 1 Rule 9 of the CPC, provides that no suit shall be defeated by reason of misjoinder or non-joinder of a party and the Court may in every suit deal with the matter in controversy so far as regard the right and interest of the parties actually before it hence, this suit cannot be defeated for failure to join TANESCO. The counsel added that, TANESCO has been served 90 days' Notice, hence that the defect is curable as TANESCO can be added at any time.

He cited the case of **Khadija Ally Almas vs The Tabora Municipal Council and 2 Others**, Land Appeal No. 39 of 2018 High Court Tabora (Unreported) at page 9.

Regarding to the first limb of the preliminary objection raised by the 1st defendant, he stated that, this Court is vested with jurisdiction both pecuniary and geographically. He contended that, paragraph 4 of the plaint state that the plaintiff claim 7,200,000/- being rent which the plaintiff ought to have gained from the 1st defendant. He argued that, that fact constitute value of the subject matter.

Alle

The counsel admitted in the submission that TANESCO is a Government institution which in accordance to the law, the Attorney General must be added as a necessary party where the said institution was joined in the case. However, he pointed that the defects can be cured under the principle of overriding objective brought under the Written Laws (Miscellaneous) Act Amendment No. 3 of 2018.

He prayed that the 1st defendant preliminary objections are without merit, and the same be overruled with costs.

Replying to the 1st preliminary objection raised by the 2nd defendant, the submissions by the counsel for the plaintiff were the same from what was submitted in reply to the 1st defendant regarding to joinder of TANESCO as necessary party, and prayer that the preliminary objections are without merit, suitable for dismissal.

After a careful consideration of the submission of the parties, I will start with determination of the second limb of preliminary objection raised by the 1st defendant that; *that the suit is hopeless bad in law for lacking Jurisdiction Clause.*

I have gone through the entire Plaintiff, and according to the plaintiff, the value of the subject matter is stated under paragraph 4 of the Plaintiff. I would like to reproduce what paragraph 4 states.

*'That the plaintiff's claim against the defendants joints (sic) and severally is for declaration that the 1st defendant is a trespasser after the 1st defendant erected the business pavilion which now she is using it for conducting business within plaintiff land, **payment of 7,200,000/- being the rent which the plaintiff ought to have gain(sic) as the rent for the all that time the 1st defendant uses the***

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premise, and permanently restraining the 2nd defendant from licencing the first defendant from trespassing in the plaintiff's premise.'
(Emphasis added)

Learning from the wording under paragraph 4 of the Plaint reproduced above, it appears that the plaintiff is claiming ownership over the suit land that is alleged to belong to the late Anafi Omary Ally within which the plaintiff is the appointed administrator of the estates of Anafi Omary Ally. However, the plaintiff is claiming TZS.7,200,000/- as compensation to the unpaid rent to him since the 1st defendant trespassed into his land, and those TZ.7,200,000/- do not appear as value of the subject matter. The same amount of money is also being claimed in the relief part of the Plaint.

Order VII Rule 1 (f) of the CPC provides:

Rule 1: The plaint shall contain the following particulars-

(f) the facts showing that the court has jurisdiction;(emphasis added)

The Plaint in this suit does not contain the clause indicating facts showing that the Court has jurisdiction to determine this case. The failure to contain mandatory Jurisdiction clause is fatal, such that the Court is not in a position to determine as to whether it has jurisdiction to entertain the matter or not.

In the case of **China Pesticide (T) Ltd vs Safari Radio Ltd** (supra), which was referred to this Court by the counsel for the 1st defendant, Hon. Mwambegele, J. (as he then was) stated that; - *Alls.*

"My understanding of the law has it that the court will not wander about in the plaint or amended plaint to look for facts showing that it has pecuniary or geographical jurisdiction. Neither will the court wonder about the plaint or amended plaint to look for facts showing that the disputed between the parties is commercial in nature. These facts must be specifically pleaded in a paragraph respecting jurisdiction".

In that regard, I sustain the second limb of the preliminary objection by the 1st defendant that this suit is bad in law for contravening the provisions of Order VII Rule 1 (f) of the CPC. Since the issue of jurisdiction goes to the root of the suit, and it has the effect of disposing of the matter, then I will not labour on the remaining limbs of objections.

I proceed to struck out this suit with costs.

Order accordingly.


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A. MSAFIRI

JUDGE

21/03/2023