

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND CASE APPLICATION NO. 220 OF 2023

(Arising from the Land Case No. 39 of 2023)

NASSOR BINZOO APPLICANT/ DEFENDANT

VERSUS

ASILE ALLY SAIDI RESPONDENT/ PLAINTIFF

RULING

Date of last Order: 10.05.2023

Date of Ruling: 18.05.2023

A.Z. MGEYEKWA, J.

With respect to the application broached herein, this Court is called upon to grant leave to the applicant/ defendant to defend Land Case No. 39 of 2023 filed under Summary Procedure. The Application is made under Order XXXV, Rule 3 (1) (b) of the Civil Procedure Code, Cap.33 [R.E 2019] and buoyed by the affidavit affirmed by one Nassor Binzoo filed on 18th April 2023.

The applicant enlisted the noble legal services of Mr. Mwitwa Waissaka whereas the respondent was duly represented by the learned counsel Mr. Abubakar Salim.

On 10th May 2023, during the hearing of this Application, counsel for the applicant commenced by getting the feet of his opponent wet. He submitted that the defendant/applicant is desiring of defending the main suit due to reasons envisaged in the affidavit. He further maintained that, going by the content of the counter affidavit of the respondents, it is clear that the issue in dispute is regarding the status of the property as to ownership as well as matrimonial matters between the respondent and her husband who is not a party to this matter.

He stressed that, if leave is not granted, the applicant will be condemned unheard, and once granted he will have a forum of informing this Court of the contentious issues regarding the suit property. He added that that is why there is a caveat as per annexure D-5 to the application. To conclude, he stated that, the counter affidavit does not dispute the granting of leave and prayed for leave to file the written statement of defence.

Objecting to the application, the learned advocate for the respondent argued that, there are no sufficient reasons to grant the prayer sought by the applicant. He added that, since the applicant has admitted that he was

given the power of attorney by a person who is not the owner of the property, then he has nothing to defend in this suit.

He contended that the caveat is meant for at least 100 days to protect the interest of the caveator if any and the caveator is required to file a suit to establish his interest in the property as the alleged caveat was prepared on 24th January 2022 but there is no proof that it was filed in the land registry.

In a brief retort, thereto, he amplified that, the essence of applying for leave is to find if there is any reason for the defendant to give an account, and in the matter at hand, the caveat reveals that the said property is under the dispute by an interested party who claims ownership of the landed property, hence leave is of vital in the constraint of this matter. He reiterated his submission in chief. Ending he urged this Court to grant the applicant leave to defend himself in the main suit.

Having considered the rivaling arguments for and against the Application advanced by both learned counsels, the issue is whether the current Application is meritorious or otherwise.

The law governing leave to defend the main suit under the summary procedure is embedded under Order XXXV, rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] which provides to the effect that: -

“3.- (1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-

(a) NIL

(b) disclose such facts as the court may deem sufficient to support the application; or

(c) NIL

(i) NIL

(ii) NIL

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing and recording issues or otherwise as the court thinks fit”.

In the case of **Simplisius Felix Kijuu Issaka v The National Bank of Commerce**, Civil Appeal No. 74 of 2010, CAT at DSM, (unreported) on page 4 of the Ruling, the Court echoed that: -

“In terms of O.XXV, (sic) r. 2(1) and 3 of the Civil Procedure Code, Cap. 33 RE 2002 (the CPC) if a defendant intends to defend such suit, then he is required to obtain leave.”

Equally, in the case of **Daybreak Tanzania Limited vs. The Board of Trustees of the National Social Security Fund**, Misc. Civil Application

No. 507 of 2022, (HCT-DSM), (Unreported) on page 3 of the Ruling, my brother S.E. Kisanya, J observed and ruled that: -

“In view of the facts deposed in the supporting affidavit and exhibits appended thereto, this Court is of the view that the issue between the parties is whether the outstanding principal members’ contributions and accumulated penalties which the applicant owes the respondent is TZS 221,270,000/=. That is a triable tribal issue in the summary suit. It can be determined if the applicant is granted leave to defend the summary suit”. Emphasis supplied

I have scrutinized the applicant’s affidavit in support of the Application specifically paragraphs 2, 3, 6, and 8 and paragraph 3 to the counter affidavit, this Court, for the interest of justice is left with nothing than to grant the applicant leave to file his written statement of defence in respect to Land Case No. 39 of 2023.

On that note, I further associate with the submissions made by Mr. Waissaka that, if leave is not granted the applicant will be condemned unheard in Land Case No. 39 of 2023 which is contrary to the principles of natural justice among others *audi alteram partem*.

In the case of **Mbeya – Rukwa Auto Parts & Transport Limited vs. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000, (Unreported) the Court of Appeal of Tanzania principled and emphasized that:

“In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law”. Emphasis added.

See the case of **Abbas Sherally & Another v Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002, (CAT), (Unreported) and that of **Danny Shasha vs. Samson Masoro & 11 Others**, Civil Appeal No. 298 of 2020, CAT at MUSOMA, (unreported) at page 6 and 7 of the Judgment of the Court to that effect.

In the upshot, the defendant in a summary suit does not have an automatic right of defending the suit. Such right is exercised upon him being granted leave to defend the suit and not vice versa.

Having said so, the application is meritorious. The applicant is granted leave to enter appearance and file his written statement of defence within twenty-one (21) days from the date of this Ruling. Reply if any by 14th June, 2023. 1st Pre-Trial conference on 28th June, 2023. Costs shall follow the event in the summary suit.

It is so ordered.

Dated at Dar es Salaam this 18th May 2023.



A.Z.MGEYEKWA

JUDGE

18.05.2023

Ruling delivered on 18th May 2023 in the presence of Mr. Abibakar Salim.

Learned Advocate for the respondent also holding brief for Mr. Mwita

Mwaissaka, learned Advocate for the Applicant.



A.Z.MGEYEKWA

JUDGE

18.05.2023