

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPLICATION NO. 129 OF 2022

**ASSENY ALEMYO MURO (SUE UNDER THE POWER
OF ATTORNEY OF GEOFFREY WILSON MURO) PLAINTIFF**

VERSUS

MY SPACE 1ST DEFENDANT
HILARY GODSON 2ND DEFENDANT
DAUDI SAINI MASIMBI 3RD DEFENDANT
LINA MSHANA 4TH DEFENDANT
BERNARD JAIROS MWAISEMBA 5TH DEFENDANT
CAROLINE RHOBBI KASUNTE 6TH DEFENDANT
BONNY MWAIKUSA 7TH DEFENDANT
SAPHINER JAMES KASANGA 8TH DEFENDANT
GOODLUCK BARAKA NYIONDO 9TH DEFENDANT
VIOLET D. MWANJALI 10TH DEFENDANT
HENRY DAVID KALENGA 11TH DEFENDANT
JOYCE GORDON MWAIPOPO 12TH DEFENDANT
RASHID ABDALLAH KILUVIA 13TH DEFENDANT
NASSIB BAKARI MBAGA 14TH DEFENDANT
ZAHRA OMARY MUYA 15TH DEFENDANT
RACHEL KALAITA 16TH DEFENDANT

RULING

24/4/2023 & 22/5/2023

A. MSAFIRI, J.



On 15/11/2022 when the 13th & 14th defendants filed their joint written statement of defence, they also raised a preliminary objection on four points of law to the effect that;

- a) The amended plaint is incurably defective for failure to state when the cause of action arose against the 13th and 14th defendants therefore offending the mandatory provisions of Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33 R.E 2019.(the CPC).*
- b) The Special Power of Attorney granted to the Plaintiff as disclosed in the amended plaint is against the law under the provisions of Order III Rule 2(a) and 6 of the CPC.*
- c) The verification clause in the amended Plaint is incurable defective as it offends the mandatory provisions under Order VI Rule 15(2) of the CPC.*
- d) The amended plaint is incurable defective (sic) for offending the provisions of Order VII Rule 1(c) and Order XXIX Rule 1 and 10 of the CPC as the 1st defendant's name contradicts with the one appearing in Annexure DWM – 4 as Getrude Sabas Mlay t/a MY SPACE with Annexure GWM – 6 which or who appears as Julius Meela t/a MY SPACE.*

The 13th & 14th defendants prayed for the suit to be struck out or dismissed with costs.

By order of the Court, the preliminary objection was heard by way of written submission. The submissions by the 13th & 14th defendants were drawn and filed by Mr. Nyangarika, learned advocate while the Reply submission by the plaintiff were drawn and filed by Mr. Fredrick Ododa, learned advocate.

Adls.

Mr. Nyangarika started his submission by informing the Court that they have decided to abandon the other three points of preliminary objection because they feel that the same will require examining evidence on record. He supported his argument by citing a famous case of **Mukisa Biscuits vs West End Distributors** (1969) EA 696 in which it was held that, a point of law is that which has been pleaded or which arises by clear implication out of the pleading and which if argued as a preliminary point may dispose of the suit.

Mr. Nyangarika stated that, he shall deal with the first point of preliminary objection only which states that the amended Plaint is incurably defective for failure to state when the cause of action arose against the 13th & 14th defendants, therefore offending the provisions of order VII Rule 1(e) of the CPC.

Mr. Nyangarika averred that, upon critically looking at the amended Plaint filed on 03/10/2022, there is nowhere in the same where the plaintiff has pleaded when specifically, the cause of action arose against the 13th & 14th defendants.

That the mandatory provisions of Order VII Rule 1(e) of the CPC states thus;

Rule 1;

"the Plaint shall contain the following particulars;

(e) The facts constituting the cause of action and when it arose."

Alle

He pointed that, since the word SHALL has been used in the said provisions, then it is imperative to state when the cause of action arose between the plaintiff and 13th & 14th defendants.

He argued that, the significance of stating the said position is that, from the date given in the amended plaint, the Court will know whether or not the suit is time barred by the Law of Limitation Act, Cap 89 R.E 2019 and the 13th and 14th defendants will be under no illusion as to the date or time the events took place.

To cement his points, he cited the case of **Rooby Traders Limited vs. CRDB Bank Plc & Another** (2017) TLR 503 at page 504 (CAT) where it was held that the Plaint should indicate the facts constituting cause of action and when it arose.

The counsel prayed that the preliminary objection be sustained and the Amended Plaint be struck out with costs.

Mr. Ododa for the plaintiff replied and prayed to adopt the plaintiff's pleadings to form part of the submission.

He gave a brief background of the dispute that the plaintiff entered with 1st defendant, a written sale agreement of her six plots of land (the suit land) as described in the Plaint. That according to sale agreement, it was agreed that the payments to be made on three instalments.

However, having paid part of payment and before finalizing the full payment, the 1st defendant started to develop the suit land and entered into a sale agreement with other 13 applicants who are known as interested parties and they include the 13th & 14th defendants. That the plaintiff filed a Land Case No. 129 of 2022 against the 1st defendant only. *Alb.*

However, the other 13 interested parties instituted Misc. Application No. 517 of 2022 seeking for leave of the Court to be joined in the current case as they are interested parties on the suit land. The application was granted and the 13 interested parties were joined as defendants in the current case.

Mr. Ododa stated further that, the defendants including 13th and 14th defendants, through their advocates expressed their wish to settle the dispute with the plaintiff, and the settlement was recorded and the matter was settled between the plaintiff and other defendants except for the 13th and 14th defendants who opted out.

Mr. Ododa states that, the 13th and 14th defendants became aware of the Land Case No. 129 of 2022 after the plaintiff has already establishes cause of action against the 1st defendant to whom the 13th & 14th defendants claim to have been entered into a Sale Agreement. That the plaintiff had no knowledge of existence of the sale agreement between the 1st defendants and the 13th and 14th defendants and thus the plaintiff has no cause of action against the 13th and 14th defendants. He concluded that, the plaintiff admits that it is true that he has a cause of action against the 1st defendant to whom he instituted a case against, but in the course of proceeding with the suit, the 13th and 14th defendants emerged as and interested parties who are strangers to the plaintiff.

The counsel prayed that, the names of the 13th and 14th defendants be omitted in a suit with costs and the matter proceed with other defendants.

Alle

There was no rejoinder. Having gone through the submission from parties along with their supporting authorities, the question for determination is whether the raised preliminary objection has merit.

I find this case with the raised preliminary objection to be interesting. As rightly put by Mr Ododa the counsel for the plaintiff, indeed the plaintiff has no cause of action against the 13th and 14th defendants. This is for a fact that originally the plaintiff instituted this land case against the 1st defendant, for a breach of sale agreement between them on the suit land. The plaintiff sold to the 1st defendant the suit property as described in the plaint. However, the 1st defendant paid only some amount of the purchase price and failed to pay the whole purchase price as agreed. Worse, the 1st defendant took possession of the suit land and started to develop it contrary to the terms of agreement.

The plaintiff instituted the suit at hand against the 1st defendant but the 2nd – 14th defendants were added as interested party when their application to be joined to the main suit was granted by this Court.

After joining the main case, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th, and 16th, defendants reached a mutual agreement and settled the matter by Deed of Settlement which was recorded in Court as a decree on 26/10/2022.

The 13th & 14th defendants did not agree on the settlement. Hence as of now, the parties to this case are the plaintiff, against the 1st defendant who is exparte and the 13th & 14th defendants.

Since the 13th and 14th defendants have raised an objection that the plaintiff has no cause of action against them and the plaintiff has conceded that indeed he has no cause of action against them, then I agree with the

All.

submission by the counsel for the plaintiff that the remedy is to struck out the names of the 13th and 14th defendants in the suit and continue with the remaining parties, as provided under Order 1 10(2) of the CPC.

In upshot, I hereby struck out the names of 13th & 14th defendants from this suit. The same shall continue with the remaining parties. No order as to the costs.

A. Msafiri

A. MSAFIRI

JUDGE

22/5/2023

