

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CIVIL CASE NO 213/1998
EDWARD NYELUSYE.....PLAINTIFF/APPLICANT

versus

THE N.B.C.(1997) LIMITED..1st DEFENDANT/RESPONDENT
ABUBAKAR ALI HIMIDI2nd DEFENDANT/RESPONDENT

R U L I N G

A. SHANGWA, J.

Before me is a Chamber application which was filed by the plaintiff Edward Nyelusye on 23rd March, 2001 for the amendment of the plaint which was presented for filing on 30th July, 1998.

The amendment is sought to add the new defendant and to include new facts and pray for new reliefs. The new defendant whom the plaintiff wants to add as third defendant is Majembe Auction Mart. The new facts which are sought to be included by him are based on allegations of secrecy and fraud in the sale of the plaintiff's residential house at plot No.573 block D Sinza area which he mortgaged to the 1st defendant National Bank of Commerce (1997) Limited

...2/-

for a bank overdraft; and in the transfer of the Right of Occupancy with title No 26465 in respect of that house and plot to the 2nd defendant Abubakar Ali Himid who bought it at a public auction conducted by Majembe Auction Mart whom he wants to add as the third defendant.

The new reliefs which are prayed for area as follows: First, is a declaration that the sale of the suit premises is illegal, null and void ab initio on ground of fraud. Second, is a declaration that the transfer of his Right of Occupancy (Title No 26465 is illegal, null and void ab initio on ground of fraud.

In general, this application was brought under O.VI r.17 of the Civil Procedure Code 1966. It is supported by affidavit which was sworn by the plaintiff himself on 22.3.2001. R.17 of O.VI under which this application was brought provides as follows and I quote:

"R.17. The court may at any stage of the Proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall

be made as may be necessary for the purpose of determining the real questions in controversy between the Parties".

The above quoted provision confers power upon the court at any stage of the proceedings to allow the plaintiff or the defendant to amend his pleadings in case it is necessary to do so for the purpose of determining the real questions in controversy between the Parties.

Learned counsel for the plaintiff/applicant Mr. K.M. Fungantama, Advocate submitted that the amendment sought will not occasion injustice to the defendants/respondents and will avoid the multiplicity of suits and conflict of decisions over the suit property. On the other side, Learned counsel for the 1st defendant/respondent M/S IMMMA and learned counsel for the 2nd defendant/respondent M/S M. A. Ismail and Co. Advocates have vehemently resisted this application on ground that the amendment which is applied for seeks to introduce a new cause of action. Other grounds on which it has been so resisted are that it is an afterthought which is intended to defeat the ends of justice;

and to bypass the preliminary objections which were raised by them in their respective written statement of defences that the suit is improperly before the court, and that the plaint is bad in law.

In considering this application, I have found that it is absolutely necessary to look at the past history of this case which has been pending in court for the past six years and three months or so in order to avoid any confusion or abuse of the court's process. Prior to this application, there were two interparte applications which were filed by the plaintiff over the suit property and dismissed by this court.

The first application was for the orders that the respondents/defendants by themselves, their agents or otherwise howsoever be forthwith restrained to register the transfer of the Right of Occupancy title No 26465 pending the hearing of the main suit. This application was dismissed on 2.3.2000 by his Lordship Manento J, as he then was. In his ruling, he remarked that "the plaintiff/ applicant had not taken any action for over a year after the sale of the suit property and that to say

that he will suffer more mischief if the injunction is not granted is nothing but an after thought". This remark was based on the fact that the sale of the suit property was conducted on 16.4.1997 and the plaint was filed on 29.7.1998.

Furthermore, he remarked that "people should borrow and pay or else they suffer the consequences". This remark was based on the fact that the plaintiff obtained a bank overdraft from the 1st defendant to whom he mortgaged his house but later he failed to repay in due course the overdraft plus interest thereon upon which his house was sold by auction to the 2nd defendant/respondent in order to recover the amount of debt which was overdue.

The second application was for an order of stay of operation of this court's ruling by Manento, J. who is now J.K. given on 2.3.2000 with an implied order that the plaintiff/applicant should vacate the suit premises. In his ruling, Chipeta, J (Rtd) who heard the said application observed that the plaintiff's decision to file the suit against the defendants was an afterthought as it was filed more than a year from the date of Registration of transfer of the

Right of occupancy. He said that "since registration of transfer of the Right of occupancy had already been done to grant the application would be like closing the stable after the horse has already bolted".

From the past history of this case which is on record, it can clearly be seen that this court presided over by Chipeta, J. (Rtd) refrained from granting the application for an order of stay of operation and or execution of this court's ruling dated 2.3.2000 by Manento, J. now J.K. which is to the effect that the plaintiff/applicant should vacate the suit premises.

Incidentally, the main relief which was being sought in the main suit was similar to the main relief which was being sought in the chamber application. Both in the main suit and chamber application the plaintiff/applicant was seeking for an injunction to restrain the defendants/ respondents, their agents or otherwise howsoever from registering the transfer of the Right of Occupancy Title No 26465. The refusal by this court to grant the main relief which was being sought in the chamber application had negative

effects on the main suit in which a similar relief was being sought.

In general, the refusal by this court to grant the relief sought which it did after determining the real question in controversy between the 1st and 2nd defendants/respondents makes it impracticable for me to order for the amendment of the plaint in which a third new defendant, new particulars alleging fraud and new reliefs are intended to be incorporated. Allowing such amendment is likely to result into injustice to the 1st and 2nd defendants/respondents for whom this court ruled in their favour on 2.3.2000.

It should be born in mind that the court can only allow a party to the suit to amend his pleadings at any stage of the proceedings before determining the real question in controversy ~~between~~ the parties and not thereafter. For this reason this application fails and I hereby dismiss it with costs.


A. SHANGWA

JUDGE

16/12/2004

.....8/-

Delivered in court in the presence of the
plaintiff and 2nd defendant this 16th day of
December, 2004.


A. SHANGWA

JUDGE

16/12/2004

O R D E R

On 10/4/2001, the 2nd defendant/respondent
filed an application for an order to evict the
plaintiff and his family from the suit premises.
From the date when that application was filed to the
present date, it is more than three years ago and
no eviction order has been granted against them.
For the interest of expediting justice, I hereby
grant it without further ado.


A. SHANGWA

JUDGE

16/12/2004