

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND CASE NO. 58 OF 2022

MATHAYO OROMBOI 1ST PLAINTIFF

OROMBOI KINYASI 2ND PLAINTIFF

SALOME MATHAYO 3RD PLAINTIFF

NAITAPUAKI OROMBOI KINYASI 4TH PLAINTIFF

VERSUS

HASSAN AHMED IBRAHIM 1ST DEFENDANT

NOLERAH FARM LIMITED 2ND DEFENDANT

ASSISTANT REGISTRAR OF TITLES MANYARA 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

5th & 26th May, 2023

TIGANGA, J.

On 4th May 2023, Mr. Michael Lengitambi, learned Advocate for the plaintiffs made a prayer under Order VII, Rule 14 (1) of the **Civil Procedure Code**, [Cap 33 R.E. 2019] for the court to proceed with hearing and determination of the suit *ex-parte* against the 3rd and 4th defendants. This was a result of their non-appearance as well as their failure to file their Written Statements of Defence (WSD) timely. Mr. Shadrack Mofuru, learned Advocate for the 1st and 2nd defendants conceded with the prayer. The Court scheduled to make its directives on

the following day, that is, 5th May, 2023. However, on that day, Ms. Zamaradi Johanes, the learned State Attorney made an appearance for the 3rd and 4th defendants and made a brief submission that, they have failed to file their statements of defence due to the fact that, the plaintiffs have sued the Assistant Registrar of Titles of Manyara, but the issue which is complained against is fraud. She told the court that, the Registrar of Titles only registers titles hence, it is the Commissioner for Lands who is to be sued.

She further stated that the case should not proceed against them and if it has to, she prayed for an extension of time so that she could file the Written Statement of Defence within seven days. She also made another reason for non-appearance on a previous day that it was due to the fact that, on that day, she was making an appearance before Hon. Kamuzora, J. and did not hear when this case was called. She prayed that, the order to proceed *ex-parte* should not be granted so that they can be heard inter-partes.

Replying to her brief submission, Mr. Lengitambi argued that, the reasons given by Ms. Zamaradi as to why they failed to file their WSD in time are supposed to be in the WSD. Further to that, he argued that, learned State Attorney has not conducted his research, because sections

4 and 79 of the **Land Registration Act**, Cap 334, R.E. 2019 provides that, when there is an allegation in respect of titles obtained fraudulently, the person objecting may go and take his complaint to the Registrar of Title who rectifies it or to the High Court. He further argued that, the title which is challenged was issued by the Land Officer of Moshi therefore, the State Attorney should have filed their WSD to that effect. He prayed that this Court grants his prayers made by the plaintiff and rejects the prayers made by Ms. Zamaradi Johanes.

Mr. Mofuru also made a brief submission that, the Court should stick with giving necessary order. That, the 3rd and 4th defendants ought to have filed their WSD and raise a preliminary objection if they think the Commissioner of Lands was a necessary party to be joined. He prayed that, the Court denies Ms. Zamaradi's prayer as it will be doing an injustice to the procedures and proceed with giving its directives.

Rejoining briefly, Ms. Zamaradi submitted that, it is true that section 4 of the Land Registration Act states that the Registrar of Titles can also be sued. However, the fraud talked about by the learned counsel for the plaintiffs concerns with the office of the Commissioner for Lands and that is what made them delay in filing their defence as they got no any defence

from the Registrar of Titles in this case. she insisted that her prayers be granted for the interest of the justice.

After hearing, brief submissions from each side, the main issue for determination is whether this matter should proceed *ex-parte* against the 3rd and the 4th defendants. The law is clear under Order VII Rule 1 (1) of the CPC that, WSD must be filed within 21 days from the date of service of summons. It reads;

1.-(1) Where a summons to file a defence has been served by Order V and the defendant wishes to defend the suit, he shall within twenty-one days from the date of service of the summons, file to the court a written statement of defence and enter an appearance on the date specified in the summons.

Rule 14 (1) of the same Order provides for consequences of failure to adhere to the above provision. It reads;

*"14.-(1) Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended by sub-rule 3 of rule 1, within the period of such extension, **the court shall, upon proof of service** and on an oral application by the plaintiff to proceed *ex parte*, fix the date for hearing the plaintiff's evidence on the claim."*

These provisions go hand in hand with the policy that, litigation must come to an end as was observed in the case of **Stephen Masato Wasira vs Joseph Sindi Warioba and the Attorney General** [1999] TLR 334 where it was observed that litigation has to come to an end, it cannot be open-ended, otherwise, the other party would be prejudiced. See also **Karshe vs Uganda Transport Co.** [1997] EA 774 Pg 777.

In the instant matter, the 3rd and 4th defendants have failed to file their WSDs in time, and as per the provisions quoted above, such failure calls for an *ex- parte* order. However, the law provided for a loophole when the defendant assigns good reason before the Court that made the order of an ex-parte hearing. This is provided under Order VII Rule (2) of the CPC and it reads;

Where before ex-parte judgment has been entered under sub-rule (1) the court may, if the defendant assigns good cause, set aside the order to proceed ex-parte, upon such terms as the court may direct as to costs or otherwise.

Ms. Zamaradi provided two reasons for her failure to file WSD timely for the 3rd and 4th defendants. One is the fact that, the 3rd defendant is the wrong party to be sued and another reason is that, when the matter was last adjourned, she did not appear before this court as she was appearing before Hon. Kamuzora, J. With due respect, I do not think

either of the reason given is enough to cease the *ex-parte* order against them. I say so because, **first**, even if Ms. Zamaradi holds the position that, the 3rd defendant is not a proper party to be sued, she ought to have responded to the same through the WSD and let the court make its verdict. **Second**, even though there was no proof that Ms. Zamaradi made an appearance before Hon. Kamuzora, J. on 4th May, 2023, I do not think their office has only Ms. Zamaradi to prosecute the case for them. I therefore find a claim that, she appeared before another judge a mere afterthought.

Nevertheless, in the spirit of the Overriding Objective, the Court of Appeal in the case of **Yakobo Magoiga Gichere vs Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT (unreported) had this to say:

With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT NO. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard substantive justice;

Simply the principle requires courts and litigants to exonerate themselves from minor and unnecessary legal technicalities to reach just decisions and to decide cases on merits. In the circumstances, I find the 3rd and 4th defendants' mishaps can be pardoned and I hold so because


extending the 3rd and 4th defendants' time to file their WSD will not prejudice the plaintiffs or lead to miscarriage of justice but rather help the court decide the matters of controversy to their finality. I further hold so because the fact that, they are denied the audience will not preclude them from applying to set aside the ex-parte judgment if it will be in the favour of the plaintiff against the 3rd and 4th defendants.

That said, I hereby grant the 3rd and 4th defendants seven (7) days to file their Written Statement of Defence, failure of which the suit will proceed *ex-parte* against them.

It is so ordered.

Dated and Delivered at **Arusha** this 26th day of May 2023




J.C. TIGANGA
JUDGE