

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 313 OF 2002

MIRE ARTAN ISMAIL.....PLAINTIFF  
VERSUS  
1. SOFIA YASIN NJATI.....1<sup>ST</sup> DEFENDANT  
2. ZAINABU MZEE.....2<sup>ND</sup> DEFENDANT

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R U L I N G

KALEGEYA, J:

Having secured leave to depart from the scheduling order, Mr. Galikano for the 1<sup>st</sup> Defendant prays for leave to amend the written statement of Defence by adding a prayers' paragraph. Unfortunately, he has just been retained hence had no hand in the drawing up of the written statement of Defence. If leave to amend is granted, he intends to include a prayers' paragraph which would seek

- (i) *Nullification of the sale.*
- (ii) *Dismissal of the suit.*
- (iii) *Costs.*

Mr. Marando and Mr. Mnyeale for the Plaintiff, while conceding to inclusion of prayer (ii) and (iii) they stiffly resist prayer (i) arguing that that cannot be included as there is no counter – claim.

Mr. Galikano rejoins by urging that the sale is contested in paragraphs 4 – 7 of the written statement of defence hence found no reason at all of filing a counter – claim.

While I appreciate that generally, where in a suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the Plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence, the defendant may in his written statement of defence state particulars of the claim made or relief or remedy sought by him (O. VII, Rule 9 (1) (CPC), there are certain situations where the Defendant may seek a relief or remedy without fronting a formal counter – claim. In my view, this arises in situations like the one at hand, wherein, if the Plaintiff’s prayers are dismissed would tantamount to what the Defendant is seeking. And indeed, the 1<sup>st</sup> Defendant, in her written statement of defence very vigorously, challenges the sale.

In the case at hand, the Plaintiff seeks (as per prayers’ paragraph):

- “(i) A declaration that the sale of the property by the 2<sup>nd</sup> Defendant to the Plaintiff was lawful and proper and the Plaintiff has thereby acquired good title over the same.*
- (ii) An order of specific performance by the surrender of vacant possession by the defendants and all those claiming under him.*
- (iii) A declaration that the first defendant has no further claim over the property and that her right and that of her children is now limited to receiving the money as her share of the estate.*
- (iv) Costs and any further or other relief.*

And, issues framed are,

- “1. *Whether the Plaintiff obtained good title on purchase of the property on Plot No. 4, Block 61, Hse No. 29, Livingstone street, Kariakoo.*
2. *To what rights are parties entitled.”*

Now, looking at the above prayers and the issues framed was it necessary that if a nullification prayer was to be included by Defendants there should specifically be a counter – claim? In my considered view, the answer is unreservedly negative. If for example, at the conclusion of the trial, the first prayer by the Plaintiff is answered negatively, that is that the sale was not lawful and therefore Plaintiff did not acquire good title, will that answer not have covered the prayer that is sought to be included in the Defendant’s prayers? I am convinced that it will have covered it. That being the case, is there any cause why the Plaintiff should cry wolf to the application? I see none.

For reasons discussed, the prayer to amend the written statement of defence along the proposed lines is hereby granted.

Now, ruling on the above controversy put aside, I should make further observations which I think are legally grounded and which require the attention of the parties and their Counsel for purposes of satisfying ourselves that we are treading within legal parameters.

In the course of composition of the ruling, I came across annexure “G” to the Plaint which is a copy of a chamber summons presented for

filing at Kisutu Resident Magistrate's Court on 28/11/2002, the same having been filed by the present 1<sup>st</sup> Defendant (Sofia Yasin Njati). This, seeks to have the applicant heard for the following orders:-

- “(a) That this honourable court it be pleased to revoke the letters of administration of the estate of the late Yusufu Mzee granted to one Zainabu Mzee.*
- (b) That this honourable court it be pleased to nullify the purported sale of the suit premises situate at Plot No. 4 Block 61 Hse No. 29 Livingstone/Udowe Streets, Kariakoo, Dar es Salaam*
- (c) Costs of this application be provided for.*
- (d) Any other relief this honourable court may deem fit and/or equitable to grant”.*

Upon this discovery (the matter came before me for continuation under O. 8 B CPC hence I did not deal with the preliminaries and the defendants did not raise the matter before) and when I compared what is sought in that application with what the Plaintiff seeks in this suit, I asked myself whether the matter is properly and legally before this court. This is because a decision on prayer (b) of the application before Kisutu RM's Court would directly impact on the prayers in this case and vice versa. It will be noted that the present suit was filed 32 days (30/12/2002) after the chamber application had been filed at Kisutu RM's Court. In my view, this matter should not have been filed in this court because of O. VI, Rule (3) CPC (as amended by GN 140 of 1999) and which provides:

*“No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or tribunal ...or which falls within the jurisdiction of a lower court.”*

One may academically argue that what is before Kisutu RM’s Court is a Probate and Administration cause but what is at the heart of both matters is the sale of the disputed premises, which the applicant seeks to nullify at Kisutu RM’s Court and the Plaintiff seeks to confirm before this court.

That apart, in my view, the present trial, on this matter, also violates section 8 of the Civil Procedure Code which is categorical,

*“No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under same title where such suit is pending in the same or any other Court in Tanganyika having jurisdiction to grant the relief claimed.”*

Yes, the present Plaintiff is not a Party to the case at Kisutu but the 2<sup>nd</sup> Defendant is the Respondent in that case, and on the suit premises, their interests are the same – to have a confirmation that the sale was proper. In my view, the situation is covered under section 8 CPC as well. The purpose behind both S. 8 CPC and O. IV, Rule 3 CPC is to avoid conflicting decisions which would put courts into ridicule.

For the above reason, together with the filing of an amended written statement of the Defence to accommodate the prayers' paragraph, the Counsel should also file written submissions on whether or not the present suit is properly before this court.

**L.B. KALEGEYA**  
**JUDGE**

Delivered in the presence of Prof. Safari.

**L.B. KALEGEYA**  
**JUDGE**

- Order:** (i) Amended WSD by 27/10/2003  
(ii) Written submissions on jurisdiction, simultaneously by all Counsel by 27/10/2003.  
(iii) Opinion of the court and hearing on 31/10/2003.

**L.B. KALEGEYA**  
**JUDGE**

**20/10/2003**

1,271 WORDS

I Certify that this is a true and correct  
of the original of the above mentioned  
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e: star  
Commercial Court.  
Dar es Salaam  
Date: 20/10/03