THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 24 OF 2022
(From the District Land and Housing Tribunal for Kyela at Kyela in Land Application No. 06 of 2020.)

DAUDI MWAKALONGE.....1ST APPELLANT
ISIAKA MWAKILEMA.....2ND APPELLANT
JOTAM MWAKISILE.....3RD APPELLANT
HAMISI MWAKIPESILE.....4TH APPELLANT
MATHAYO MWAKILIMA.....5TH APPELLANT
ANGUMBWIKE MWAKILEMA.....6TH APPELLANT
MASIKITIKO MWAKIPESILE.....7TH APPELLANT
SAUDENI MWAKAFILWA.....8TH APPELLANT
SELEMANI MWASAMASUBA.....9TH APPELLANT

VERSUS

OSIJA KAPISO.....RESPONDENT

JUGDEMENT

Date of Hearing : 20/10/2022
Date of Judgment: 22/12/2022

MONGELLA, J.

The respondent instituted a suit in the District Land and Housing Tribunal for Kyela at Kyela claiming, among other things, to be declared the rightful owner of the suit land measuring 7.7 acres, located at Malangali B

Hamlet, Malangali village, Ipande ward, within the district of Kyela in Mbeya region. She as well claimed for the sale of land between the respondents to be declared a nullity and for the respondents and or agents and assignees to be permanently refrained from interfering with the appellant's right to own the land. She claimed ownership by virtue of clearing a virgin land way back in 1950, together with her late husband. The appellant further claimed that after the demise of her husband she continued to use the land until 2010 when she fell sick and went to Lindi region for treatment. When she came back to Kyela in 2019 she was surprised to find her land been sold by the 1st respondent to the rest of the respondents.

The respondents disputed the claim. The 1st respondent in particular, and who is the alleged seller of the suit land, as per the Written Statement of Defense (WSD) filed jointly by the respondents, claimed that the land in dispute belonged to his late father, one Angumbwike Mwakalonge. That, after the demise of his father, one, Lazaro Mwakalonge, who was the respondent's husband shifted to the land with his wives. That, after the demise of Lazaro Mwakalonge, he was given inheritance of the suit land. Thus he claimed to have sold the suit land which belonged to his late father and after agreeing to do so with the clan members to get rid of monkeys. He admitted though, that the respondent was never involved in the sale.

The Tribunal unanimously ruled in favour of the respondent. It declared the sale made by the 1st respondent a nullity for lack of title to pass. It declared the respondent the rightful owner of the suit land. Aggrieved by

the decision, the appellants filed the application at hand. Initially, they had three grounds of appeal, to wit:

1. *That the trial court erred both in law and in facts when it failed to interpreted* (sic) *the nyakyusa customary on inheritance of widows after death of her* (sic) *husband.*

2. *That the trial Chairman erred both in law and fact when they* (sic) *failed to analyse the evidence adduced during hearing hence reached on a wrong premise.*

3. *That the trial chairman erred in both law and facts to rule in favour of the Respondent who sue* (sic) *without having locus standi on the disputed property.*

When the matter came for orders on 21.09.2022, the appellants' counsel, Ms. Tumaini Amenye prayed to file additional grounds of appeal. The prayer was granted by the Court leading her to file three additional grounds on 27.09.2022. The grounds are:

1. *That the trial court* (sic) *Orders which delivered (sic) on 21/12/2020 was* (sic) *issued in* (sic) *contrary to the purpose of issuing temporary injunction hence caused a greater hardship to Appellants in this suit.*

2. *That the trial chairman erred both in law and fact when they failed to read the content of Application to the respondents/Appellant.*

3. *That the proceedings in the trial Tribunal was teinted* (sic) *with illegality for failure to join the necessary parties in the proceedings hence failure to reach into a fair hearing.*

The appeal was argued orally by the counsels for both parties. However, this time the appellants were represented by Mr. Ezekiel Mwampaka, learned advocate. The respondents were represented by Mr. Good Mgimba, learned advocate. In his submission in chief, Mr. Mwampaka abandoned all the initial grounds of appeal and the 1st ground in the additional grounds. Therefore it was only the 2nd and the 3rd additional grounds of appeal that were addressed by the learned counsels.

The 2nd additional ground concerns reading of the content of the application to the respondents. Mr. Mwampaka faulted the Tribunal for not complying with the said obligation under the law. Specifically, he cited **Regulation 12 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003**, which he said, requires the Tribunal to read and explain the contents of the application to the respondent. Considering what transpired in the Tribunal, he argued that the hearing of the case before the Tribunal started on 23.12.2020, however there is nowhere in the proceedings showing that the contents of the application were explained to the respondents. He said that the Chairman went directly into framing the issues which brings doubts as to whether the appellants, who were respondents in the Tribunal, understood the contents of the application.

He explained further, that the provisions of **Regulation 12** are couched in mandatory terms and the Tribunal never explained the reasons for non-explaining the contents of the application to the appellants. In the circumstances, he contended that it can be believed that the appellants never understood the contents of the application. However, he reserved the bases of his arguments to the 3rd additional ground. He however, prayed for the Court to nullify the proceedings, judgment, and orders by the Tribunal for failure to comply with the mandatory provisions of the laws.

On the 3rd additional ground, Mr. Mwampaka challenged the Tribunal decision for failure to join necessary parties in the proceedings. He considered the omission an illegality. Elaborating the point, he submitted that it is the stance of this Court that all parties with interest on the matter pending in court have to be joined for justice to be availed to all. He continued that in the matter at hand whereby there are 9 appellants, with the exception of the 1st appellant, the rest of the appellants have asset ownership by purchase from other different persons. He gave an example of DW3 (the 3rd appellant) saying that he testified to have bought the land from on Adam, however the said Adam was never joined in the matter. Further, he referred to DW4, the 4th appellant, who testified that the land was not his, but of one Kissa Nsambe. That, he only witnessed the sale.

Further, he said that DW5, the 5th appellant, said that the land was not his but belonged to his father, one Amunike Kisyanjo and the one in possession of the land in Lucy Lyasi, his father's wife, who continued using

the land after the demise of his husband. He added that the 5th appellant, prayed for the Tribunal to declare the land as that of Amunike Kasyanjo and being in possession of Lucy Lyasi as he was not the administrator of the estate involving the suit land or even in use of the land.

In the circumstances as explained above, Mr. Mwampaka reverted to his argument that had the Chairman explained the contents of the application, necessary parties would have been joined and the dispute determined fairly. On the importance of joining necessary parties, he referred the case of ***Juma B. Kadala vs. Laurent Mnkande*** [1983] TLR 103; and that of ***Shaibu Salim Hoza vs. Helena Mlacha***, Civil Appeal No. 7 of 2012.

He concluded that the issue of joining necessary parties was not only the obligation of the appellant but of the Tribunal as well in reaching justice as it is empowered to do so by the law. He prayed for the judgment, orders and proceedings to be nullified with costs.

The appeal was challenged by the respondent through her counsel. Addressing the 2nd additional ground, he started by referring to **Regulation 7 of G.N. No. 174 of 2003** which gives the respondent 21 days to file defence upon receipt of the application. He argued that the defence is filed upon being served with the application and only when the respondent understands the application. To substantiate that the appellants understood the application, he contended that the appellants filed their defence with a notice of preliminary objection to the effect that the respondent had no *locus standi*.

Further, he argued that at the commencement of hearing issues were framed, which are basically framed upon discussion by both parties. He had the stance that the issues cannot be framed if the application and the WSD have not been discussed. On this observation he urged the Court to take note that the application was read and understood leading into framing of issues.

As to the 3rd additional ground, he first appreciated that the argument on joining necessary parties is important and the law is clear to the effect that a necessary party must be joined for justice to be achieved. However, on the other hand, considering the nature of the case at hand, he disputed the appellants' arguments on the grounds that:

One, if the appellants knew that the land was acquired in different ways they were supposed to show that early in their WSD. He contended that the law is trite that parties are bound by their own pleadings and they ought to have stated in their WSD that they acquired the land from different people. Failure to do that the claims could not be raised during defence evidence as that goes against the pleading. He considered the argument a technique of running away from the truth. He further referred the testimony of the 1st appellant who was the first to adduce evidence. He submitted that the 1st appellant testified to have sold the land to the rest of the eight appellants and the rest of the appellants never cross-examined him or denied buying from the 1st appellant when asking him questions. In the premises, he found there was need of joining those claimed to have sold the land to he 4th and 5th appellants.

Two, he argued that in their WSD, the appellants never mentioned about buying land from other people. He had the stance that it was from this point the respondent would have seen the importance of joining the claimed necessary parties and the Tribunal would have acted as well. He added that there was also no any exhibit attached to their WSD to prove the claim that they bought land from other people and not from the 1st appellant. He prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Mwampaka challenged Mr. Mgimba for relying on Regulation 7 of G.N. No, 174 of 2003 saying that the provision provides for procedure after receiving the application, but their argument was on whether the application was read and explained to the respondents (appellants herein) before framing of issues. He continued to argue that there is nowhere in the proceedings showing that the issues were framed in discussion with the parties, which is the gist of Regulation 12 (1) and (2) of G.N. 174 of 2003. He maintained his stance that the regulation was violated. He contended further that there is nowhere the Tribunal informed the appellants that they were to frame issues and that the appellants are to be given the benefit of doubt since the proceedings are silent.

As to the 3rd issue, he replied first on the argument that no exhibits were tendered by the appellants. He contended that DW3, as seen at page 37 of the proceedings, tendered an exhibit but the same was rejected. He contended that in the WSD all the appellants never stated from whom they bought the suit land. While admitting that parties are bound by own pleadings, he contended that pleadings can be amended at any point.

He referred to **Order I Rule 10 (2) of the Civil Procedure Code, Cap 33 R.E. 2019** which provides that position. He argued that the provision is applicable in the Tribunal as there is a lacuna in G.N. No. 174 of 2003 and Cap 216.

Further, he contended that even if the appellants never pleaded, the proceedings are controlled by the Tribunal and it should have guided the parties to join a necessary party or give such order as it is not bound by technicalities. He urged the Court to consider the issue as peculiar and order for necessary parties to be joined.

After considering the grounds of appeal, the arguments by the learned counsels and gone through the Tribunal record, I have the following observation:

Considering the claim on the 2nd additional ground on non-adherence to the provisions of **Regulation 12 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003**, I wish to first quote the provision for ease of reference as hereunder:

> *"12 (1) The Chairman shall at the commencement of hearing, read and explain the contents of the application to the respondent.*
>
> *(2) The respondent shall, after understanding the details of the application under sub-regulation (1) be required either to admit the claim or part of the claim or deny.*
>
> *(3) The Tribunal shall*

(a) where the respondent has admitted the claim, record his words and proceed to make orders as it thinks fit;

(b) where the respondent does not admit the claim or part of the claim, lead the parties with their advocates, if any, to frame issues."

In accordance with the above provision, particularly Regulation 12 (1), the Tribunal Chairman is required to read and explain the contents of the application to the respondent. The record does not indicate if the Tribunal read and explained the contents of the application. However, I wish to consider the proceedings as a whole and the provisions of Regulation 12 as a whole.

The proceedings of 23.12.2020 indicate that all the parties were present before the Tribunal, including the respondent's counsel. On this date the Tribunal framed issues that guided the entire hearing. **Regulation 12 (3) (b)** provides that "***where the respondent does not admit the claim or part of the claim, lead the parties with their advocates, if any, to frame issues***." In my considered view, the issues could not be framed by the Tribunal if the appellants (respondents in the Tribunal) had not denied the claim. The framing of issues as directed under **Regulation 12 (3) (b)** entails that the appellants denied the claim. The appellants, in my view, could not have denied the claims without the same first being read and explained to them. On this reasoning, I am not traveling on a virgin land. The same issue was addressed by my learned sister, Ebrahim, J. in the case of ***Jiskaka Mwangolwa vs. Olipa Joram Mwangupili & 2 Others***, Land Appeal No. 03

of 2021 in which the learned Judge, observed at page 9 of the decision, that:

> *"... it is true that the record does not show if the same was read and explained to the respondent. The record also does not show if the appellant admitted or denied the contents in the application. However, the record shows that issues were framed before witnesses adduced their evidence. Regulation 12 (3) (b) of the Regulations provides that where the respondent does not admit the claim or part of the claim, the Tribunal shall lead the parties with their advocates (if any) to frame issues ...*
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> *Now the issue is whether or not the trial Tribunal committed any irregularity for not recording if the contents of the application were read and explained to the respondent/appellant. In my view, there was no any irregularity committed. This is due to the following reasons: to start with, the law (i.e. the regulations) does not provide that the record must indicate that the contents were read and explained. It only requires the trial Tribunal to record the word of the respondent if he admits the claim ...*
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> *... I am constrained to agree with the 1st respondent's arguments that the contents were read and explained to the appellant; that is why the issues were framed and he was able to defend the suit accordingly. More-so, it is clear that the appellant (respondent) did not admit the claim hence, the framed issues."*

I am at one with the reasoning of the learned Judge in the above cited decision. In the matter at hand the respondents entered their defence addressing the core issues in the matter. I also do not subscribe to Mr. Mwampaka's contention that the necessary parties as claimed were not seen relevant due to non-reading and non-explaining of the contents of the application. The 4th and 5th appellants asserted to have bought the land from other persons as a matter of defence. However, their assertion

was contradicted by DW1, the 1st appellant, who testified to have sold the land to the rest of the appellants as also correctly observed by the Tribunal.

Further, the 3rd, 4th and the 5th appellants failed to prove their assertion that they bought the land from other persons or that the lands belonged to other persons as they failed to furnish the sellers or owners to testify in their favour. The respondent, on the other hand, discharged her duty to the effect that the land belonged to her and her late husband. In that respect the burden shifted to the appellants to prove their assertions.

The fact that the 1st appellant who claimed ownership of all the disputed land by inheritance and that he sold the land to the rest of the appellants renders the claim by the 3rd, 4th and 5th appellants unsubstantiated. This is because, as argued by Mr. Mgimba, they failed to cross examine the 1st appellant on the claim that he sold the land to them. The law is trite that failure to cross examine on an important issue entails acceptance of the facts alleged. See: ***Bomu Mohamedi vs. Hamisi Amiri***, Civil Appeal No. 99 of 2018 (CAT at Tanga, found at Tanzlii).

On the 3rd additional ground, the appellants claim that necessary parties were not joined leading to unjust decision. As a general rule, a suit cannot fail by reason of misjoinder or non-joinder of parties. This is provided under **Order I Rule of the Civil Procedure Code, Cap 33 R.E. 2019** which states:

> *"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal*

with the matter in controversy so far as regards the rights and interests of the parties actually before it."

The law gives the plaintiff the liberty of choosing who to sue though the Court may order for a party not joined to be joined or a party joined to be removed without the application of either party as it deems fit for effectual and complete adjudication of the issues involved. This was decided in the case of ***Mohamed Masoud Abdallah & 42 Others vs, Tanzania Road Haulage (1980) Ltd.*** (supra), cited by Mr. Kalonga. In this case, at page 19, the Court stated:

*"We wish to start our deliberation by asserting a clear position, on the general rule, that the plaintiff is the **dominus litis**, that is, the plaintiff is entitled to choose the person or persons as appellants against whom he wished to sue. Nonetheless, under Order I Rule 10 (2) of the CPC, the court has discretion to add a person who is not a party to the suit as originally constituted as a defendant against the will of the plaint, either of its own motion or at the instance of the defendant or a non-party to the suit. Such discretion will only be exercised where it is necessary to do so in order to effectually and completely adjudicate and settle all the questions in the suit."*

A party will therefore be joined to a suit if he/she is necessary. The term "necessary party" has been defined by the Court of Appeal (CAT) in the case of ***Abdullatif Mohamed v. Mahboob Yusuf Othman & Anotherr,*** Civil Revision No. 6 of 2017 (CAT at DSM, unreported) as "***... one in whose absence no effective decree or order can be passed***." The Court further explained that, the determination as to who is a necessary party to a suit would differ from one case to another depending on the facts and

circumstances of each particular case. Explaining on the indicators of a necessary party, it stated that "*among the relevant factors in such determination include the particulars of the non-joined party, the nature of the relief(s) claimed, as well as, whether or not, in the absence of the party, an executable decree may be passed.*"

In that case the CAT expounded on the provisions of **Order I Rule 1 and 3 of the Civil Procedure Code** which allows for several persons to be joined as plaintiffs or defendants in one suit whereby the reliefs sought for or against arise out of the same transaction; and the case is of the character that if such persons instituted separate suits any common questions of fact or law would arise. Considering the decision in ***Abdullatif Mohamed*** (supra), it is clear that for a party to be termed as necessary and to be joined in a suit two important conditions must be met:

(i) There has to be a right of relief against such a party in respect of the matters involved in the suit; and

(ii) The court must not be in a position to pass an effective decree in the absence of such a party. The presence of this person must be indispensable to the constitution and for passing of an effective decree or order. I would also add that a party can be joined as a necessary party to a case where the decision of the court affects his/her interests on the subject matter of the case.

In the matter at hand the purported necessary parties were one Adam, Kissa Nsambe and one, Lucy Lyasi. In my view, a party does not become necessary by merely being mentioned in the suit. The court before issuing such orders has to satisfy itself that the mentioned party is indeed necessary for the execution of the decree. Given my observation on the 1st additional ground that the 3rd, 4th, and 5th, appellants failed to prove that the said Adam was the owner, or that the said Kissa Nsambe and Lucy Lyasi were the owners, I find that the Tribunal committed no error in not ordering for these persons to be joined as necessary parties to the suit. To this juncture, I find the appeal lacking merit and I dismiss it with costs.

Dated at Mbeya on this 22nd day of December 2022.

L. M. MONGELLA

JUDGE