

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

LAND APPEAL NO. 96 OF 2021

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land
Application No. 254 of 2018.)

RAKI KAJETI LWESYA.....APPELLANT

VERSUS

ADAMU MUSA MBINDI.....1ST RESPONDENT
AIZACK JOSEPH MLOLWA.....2ND RESPONDENT
SALEHE ALI.....3RD RESPONDENT

JUGDEMENT

Date of Last Order: 06/10/2022
Date of Judgment: 22/12/2022

MONGELLA, J.

The appeal at hand has been preferred under two grounds, to wit:

1. *That the learned chairman erred in law and fact by declaring that the first respondent is the lawful owner of the land in dispute basing on weak and contradictory evidence while disregarding the water tight evidence of the appellant.*



2. *That the learned chairman erred in law and fact by failure to consider that the land in dispute was sold by failure to execute the mortgage hence arriving to a wrong decision it had reached. (sic)*

The background to the case is briefly to the effect that: The 1st respondent filed a suit in the District Land and Housing Tribunal for Mbeya (the Tribunal, hereinafter) claiming for a farmland located at Nsenga village, Swaya Ward in Mbeya Rural district. He claimed to be the lawful owner of the suit land and that the appellant had invaded by cutting down trees in claim of ownership. He claimed to have purchased the suit land in 2015 at T.shs. 4,500,000/- from one Salehe Ally, the 3rd respondent. He tendered a sale agreement to that effect which was admitted as "exhibit P1."

On the other hand, the appellant as well claimed to be the lawful owner by purchase. He claimed to have purchased the land in dispute in 2015 from FINCA as the same was mortgaged to FINCA. In the end the Tribunal ruled in favour of the 1st respondent following being convinced that the 1st respondent proved his case compared to the appellant. Aggrieved, the appellant preferred the appeal at hand on the grounds already listed hereinabove.

The appeal was argued by written submissions filed in Court in adherence to the scheduled orders by the appellant and 1st respondent. The appellant and the 1st respondent were represented by learned advocates, Mr. Fred Peter Kalonga and Mr. Josephat Kazaura, respectively. The 2nd and 3rd respondents defaulted to adhere to the scheduled orders whereby they filed no written submission. The



determination of the appeal shall therefore proceed *ex parte* against them. This is due to the legal position that failure to file written submission is as good as failure to enter appearance on the date scheduled for hearing. See: **Harold Maleko v. Harry Mwasanjala**, DC Civil Appeal No. 16 of 2001 (unreported); and **P3525 LT Idahya Maganga Gregory v. The Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported).

Arguing on behalf of the appellant, Mr. Kalonga first raised a legal issue to the effect that the suit could not be fairly determined by the Tribunal for lack of joining necessary parties. I find it pertinent to deliberate on this ground first before dealing with the grounds of appeal set out in the Memorandum of appeal.

On this issue, Mr. Kalonga submitted that after recording the evidence of PW1, one Adam Musa Mbindi, the Tribunal ordered the seller to be joined as a necessary party. In that respect the 2nd respondent was joined and pleadings amended accordingly. However, he contended that upon scrutinizing the proceedings he noted that when the appellant, DW1 Raki Kajeti Lwesya, was testifying, he stated that he bought the land in dispute from Franet Investment Company who were instructed to sell the land by FINCA Bank after one Salehe Ally, the 3rd respondent had failed to pay the loan. The sale agreement was tendered and admitted as "exhibit D1." He added that officers from FINCA Bank, one George Paulo (DW3) and from Franet Investment Company Limited, one Promise Dominica Chaula (DW4) testified proving the transaction.



In the above premises, he argued that the Tribunal could not have reached a fair decision without allowing the 1st respondent, who was the applicant at the Tribunal to join FINCA Bank and Franet Investment Company Limited as parties to the suit. He argued so saying that these were agents who purportedly sold the disputed land. In support of his contention he referred the case of **Mohamed Masoud Abdallah & 42 Others vs. Tanzania Road Haulage (1980) Ltd.**, Consolidated Civil Appeal No. 150 & 158 of 2019 (CAT at DSM, unreported). In that case he said, the respondent sued the appellants over a house which she claimed that was sold to her by Tanzania Housing Agency. That the Court noticed that the agency who purportedly sold the disputed house to the respondent was not made a party to the suit. The Court thus held that the agency could not have been left out of the dispute because the Court would not have been able to adjudicate upon the rival claims of the parties more effectively and completely.

In conclusion he contended that in the circumstances whereby the case was instituted and determined by the Tribunal without joining FINCA Bank and Franet Company Limited, the Tribunal was not in the position to adjudicate upon the rival claims of the parties effectively and completely. He thus urged the Court to nullify the proceedings of the Tribunal and order for retrial of the matter before the Tribunal after joining the necessary parties.

Mr. Kazaura opposed the issue on joinder of necessary parties raised by the appellant's counsel. He contended that the parties claimed, that is, FINCA Bank and Franet Company Limited, were not ordered by the



Tribunal to be joined as they were not mentioned on record. That the applicant never mentioned those parties as the ones who sold the house in dispute and in fact that the appellant did not understand who exactly sold the land to him and how he came into the suit land.

Apart from his submission as above, he challenged the point on the ground that it is a new point as it was not contained in the grounds of appeal filed by the appellant. He had the stance that this is not acceptable, as under the law, a case is built up by pleadings that are before the court and that parties are bound by their own pleadings and are required to stick to their pleadings. To buttress his point, he referred the case of **Halfani Charles vs. Halima Makapu and Juma S. Makapu**, Misc. Land Appeal No 85 of 2021 (HC at DSM, unreported); **Zubeir Seifu Kimbuke vs. Grace Charles Magoa**, Misc. Land Appeal No. 87 of 2021 (HC at DSM, unreported); and that of **Philip Anania Masasi vs. Returning Officer Njombe North Constituency and Others**, Misc. Civil Cause No. 7 of 1995 (HC at Songea, unreported). He continued to submit that the appellant raised a new ground without leave of the Court thereby prejudicing the 1st respondent by taking him by surprise.

In rejoinder, Mr. Kalonga reiterated what he submitted in the submission in chief. I therefore find no relevance of re-summarising the submission.

I have considered the arguments by the learned counsels. To start with, the question of necessary or proper party to a case is a legal issue and touches the competence of the suit before the Court. As such it can be raised at any stage of the suit so long as the parties are accorded the



chance to address the Court on the same. In that respect I do not subscribe to Mr. Kazaura's contention that the issue should not be entertained by the Court for not being included in the grounds of appeal. Since the appeal was argued by written submissions, the 1st respondent had ample time to argue on it in reply. The claim that he has been taken by surprise thus prejudiced, has no room. See: **Hassani Ally Sandali v. Asha Ally**, Civil Appeal No. No. 246 of 2019 (CAT at Mtwara, unreported). To this point I proceed to deliberate on the issue raised by the appellant.

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 plaintiff, 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 & Another**, 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 case at hand, Mr. Kalonga contended that FINCA Bank and Franet Investment Company Limited who sold the suit property to the appellant were necessary parties to be joined for effective and complete determination of the issues in the case. However, he did not state the issue that would be effectively and completely determined. It should be noted that the 1st respondent instituted the suit against the appellant claiming to be the lawful owner of the suit premises by purchase from the 2nd and 3rd respondents. In my view therefore, the 2nd and 3rd respondents were necessary parties as far as the 1st respondent's claims were concerned.

It was the appellant's case that he was the lawful owner of the suit property by purchase from FINCA Microfinance Bank and Franet Investment Company Limited whereby the property belonged to the 3rd



respondent who mortgaged it with FINCA Microfinance Bank and defaulted repayment leading to the sale of the property.

The Tribunal remarked that the appellant failed to state who sold the property to him and used that as one of the factors in reaching its decision. Mr. Kazaura supported the Tribunal's reasoning. However, going through the record I find the finding of the Tribunal untrue. When examined in chief, the appellant stated that he does not remember the name of the selling company. However, during cross examination he remembered the name and stated that it was Franet Investment. (See page 25 of the typed proceedings).

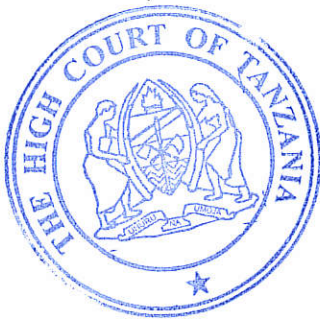
Considering the fact that DW3 and DW4 testified that the suit property was charged as mortgage by the 3rd respondent on a loan advanced by FINCA Microfinance Bank and upon default Franet Investment Company Limited was employed as a bank broker to sell the property; and considering that the suit property was bought by the appellant in that sale; I am of the considered view that the decision of the court cannot be entered without affecting the interests of FINCA Microfinance Bank and Franet Investment Company Limited. This is because upon declaring the 1st respondent the rightful owner of the suit property, the sale of the suit property by Franet Investment Company Limited on behalf of FINCA Microfinance Bank is automatically rendered void/ineffective. In that respect, I find that FINCA Microfinance Bank and Franet Investment Limited should not be condemned unheard. They are therefore necessary parties as well.



In the circumstances, I agree with Mr. Kalonga that all the relevant questions in the suit could not be effectively and completely settled without FINCA Microfinance Bank and Franet Investment Company Limited to be joined as necessary parties. Having observed as such I quash the proceedings, judgment and decree of the Tribunal in this matter and order the matter to be re-tried afresh after joining FINCA Microfinance Bank and Franet Investment Company Limited as defendants in the suit. Costs to be in the course.

Appeal Allowed.

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




L. M. MONGELLA
JUDGE

Date: 22/12/2022

Coram: A. P. Scout, Ag. DR.

Appellant: Present

For the Appellant: Absent

1st Respondent: Present

For the 1st Respondent:
For the 2nd Respondent:
For the 3rd Respondent:

} Absent

B/C: Mapunda

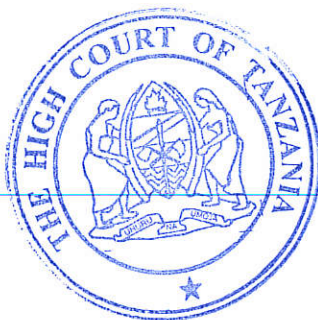
Appellant:

I am ready to proceed with Judgment.

1st Respondent:

I am ready too.

Court: Judgment delivered in the presence of Appellant, 1st Respondent with absent of 2nd and 3rd Respondents Court Clerk in Chamber Court on 22/12/2022.




A. P. Scout
Ag. DEPUTY REGISTRAR
22/12/2022