

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MTWARA
AT MTWARA**

LAND APPEAL NO. 30 OF 2023

(Originating from Land Application No. 33/2021, the decision of the District Land and
Housing Tribunal for Mtwara at Mtwara)

HASSAN SAIDI MTILI

(Administrator of the Estate of the Late

SAIDI SELEMANI MTILI) APPELLANT

VERSUS

SAIDI MOHAMEDI LUMANI 1ST RESPONDENT

MARIAMU HAIFAI 2ND RESPONDENT

JUDGEMENT

20th February & 28th March, 2024

MPAZE, J.:

The appellant in this case is the administrator of the estate of the late Saidi Selemani Mtili, who passed away in 2016. He filed a suit against the respondents, both jointly and severally, in the District Land and Housing Tribunal of Mtwara (referred to herein as 'the DLHT') in Land Application No. 33/2021 for trespass on the land owned by the late Saidi Selemani Mtili,

measuring 48 acres (the disputed land), located at Kilimahewa Village, Mnongodi Ward in Nanyamba Town Council. It was alleged that the late Saidi Selemani Mtili inherited this land from his parents in 1978.

The appellant claimed that after the demise of his father, the late Saidi Selemani Mtili, he was appointed as the administrator of his estate on 04/06/2021. Subsequently, he commenced his duties as the estate's administrator. While identifying the late Saidi Selemani Mtili's properties, he discovered that the 1st and 2nd respondents had trespassed onto the disputed land without any colours of right.

It was alleged that sometime in 2010, the 2nd respondent sold the disputed land to the 1st respondent. The appellant further claimed that he attempted to resolve the matter amicably with the respondents, but his efforts proved futile. Therefore, he decided to initiate this proceeding against the respondents, seeking the following reliefs;

1. A declaratory order that by virtual of the estate administration and on behalf of the heirs the applicant is the rightful owner of the suit land and orders the 1st respondent to vacate the suit land and deliver the same to the applicant.
2. A declaratory order that the respondents are trespassers.

3. A declaratory order that the sale by the 2nd respondent to the 1st respondent is null and void.
4. General damages as the tribunal may determine.
5. Costs of the suit.
6. Any other relief(s) and order(s) that the tribunal may deem just and fit to grant.

Both respondents vehemently disputed the appellant's claim. In their written statements of defence and during their oral testimony before the DLHT, they asserted that the 1st respondent is the rightful owner of the disputed land, having purchased it lawfully from the 2nd respondent, who also bought it from the late Saidi Selemani Mtili, the deceased.

After considering the evidence as adduced by both parties, the trial chairman concluded that the disputed land did not belong to the late Saidi Selemani Mtili. He stated that the 1st respondent lawfully owns 15 acres within the disputed land, which he purchased from the 2nd respondent. The trial chairman went on declaring that the remaining portion of the disputed land, amounting to 25 acres, remains in the possession of the 2nd respondent.

The appellant was aggrieved by the said decision and thus lodged this appeal with five grounds of appeal with a prayer that this court to allow his appeal. The grounds of appeal are as follows;

1. That, the trial tribunal erred in law and fact for failure to consider and analyze the weight of the appellant witnesses' evidence.
2. That, the trial tribunal erred in law and fact for not joining Saidi Awadhi to the suit land as the necessary party in the suit.
3. That, the trial tribunal erred in law and fact for failure to see that the Late Saidi Selemani sold the respondent 2 acres and not 48 acres.
4. That, the trial tribunal erred in law and fact by departing from the opinion of the assessors without any good or sufficient reasons.
5. That, the trial tribunal erred in law and fact to hold in favour of the respondents while they failed to produce any strong evidence to prove ownership of the suit land.

Thus, the appellant prayed before this court on the following orders;

- i. The appellant is declared as the lawful owner of the disputed land.
- ii. Any other relief the court deems fit and just to grant.
- iii. The appeal is to be allowed with costs.

The appeal was argued orally, both parties appeared in person unrepresented.

When the appellant was allowed to argue his appeal, he asked the court to adopt the grounds of appeal as outlined in the memorandum of appeal and supplemented them with brief additional arguments for each ground.

Concerning the first ground of appeal, the appellant argued that the chairman erred in both law and fact by failing to consider the evidence provided by his witnesses. He added that the trial chairman wrongly awarded the 2nd respondent 25 acres, even though the 2nd respondent did not claim such acreage.

Moving on to the second ground for appeal, the appellant contended that the trial chairman erroneously proceeded with the case without summoning a crucial witness, namely, Saidi Awadhi, who was deemed a necessary party to the matter. The appellant stressed the indispensability of Said Awadhi's presence in the matter and argued that the failure to call him as a witness or include him as a necessary party constituted a significant oversight.

Regarding the third ground for appeal, the appellant argued that the trial chairman failed to properly evaluate the evidence. He claimed that the chairman incorrectly concluded that the deceased did not sell 2 acres, instead relying on the 2nd respondent's testimony indicating a sale of 40 acres plus, which the appellant asserted was not proper.

As for the fourth ground of appeal, the appellant argued that the trial chairman's failure to consider the opinion of the assessors without providing any justifiable reason was unjust.

Finally, concerning the fifth ground of appeal, the appellant argued that the tribunal rendered a decision without adequately considering the claim presented before it, thus reaching a decision contrary to what was being contested.

In conclusion, the appellant prayed for the court to allow his appeal.

In response to the appellant's submission, the 1st respondent disputed the merit of the appellant's appeal. He began by addressing the second ground of appeal, alleging that if Saidi Awadhi was intended to be a witness, it was the appellant's responsibility to call him, and not to blame the respondents or the tribunal for his absence.

Regarding the third ground of appeal, the 1st respondent argued that the number of acres purchased by the 2nd respondent from Saidi Selemani Mtili was proved by Exhibit D1. He said the Exhibit indicated that the 2nd respondent purchased 40 acres plus from the deceased, contrary to the appellant's contention.

On the fourth ground of appeal, where the appellant faults the DLHT for failure to consider assessors' opinions, the 1st respondent argued that the chairman made a sound decision, and no wrongdoing was committed by him.

Regarding the fifth ground of appeal, the 1st respondent contended that the proof of ownership was supported by the documented sale transaction involving Saidi Selemani Mtili, Saidi Awadhi, and Mariamu Haifai, hence to him the tribunal reached a fair conclusion based on the evidence adduced by the parties.

Concluding his submission, he requested this court to dismiss the appeal.

Briefly, the 2nd respondent, in addressing the grounds of appeal, generally emphasized that the decision made by the trial chairman was

correct, and no errors were committed by the tribunal. She requested the court to dismiss the appeal.

The appellant had nothing to add to the rejoinder.

The court carefully examined the rival submission of both parties about the grounds of appeal and is now tasked with determining the appeal, with the central issue being whether the appeal is meritorious.

In determining this appeal, the court will adhere to the legal principle that the first appellate court is obligated to re-evaluate the entire evidence objectively and come up with its own findings of facts. This principle is supported by the case of **Attorney General & 3 others v. Nibert Yamsebo** [2013] TLR 501.

Relying on the aforementioned principle, the court will now proceed to examine the grounds of appeal, adhering to the standards expected as the first appellate court.

In resolving the grounds of appeal, the court finds it important to start deliberating the appeal with the second ground of appeal, which criticizes the trial chairman's failure to include Saidi Awadhi as a necessary party. The

crucial question in dealing with this ground is whether Saidi Awadhi was a necessary party to the case at hand.

To determine whether Saidi Awadhi qualifies as a necessary party or not, it is essential to first understand who is a necessary party. The Black's Law Dictionary, 8th Edition, had defined a necessary party to mean;

'a party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings.'

In the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, (Civil Revision No.6 of 2017), published on website www.tanzlii.org [2018] TZCA 25, when faced with a similar situation regarding a necessary party, the Court stated that;

*'The determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, **the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.**'* [Emphasis added]

While in the case of **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported) when considering circumstances upon which a necessary party ought to be added in a suit stated that;

'...an intervener, otherwise commonly referred to as a NECESSARY PARTY, would be added in a suit under this rule ...even though there is no distinct cause of action against him/where: -

(a) NA

(b) ***his proprietary rights are directly affected by the proceedings*** and to avoid a multiplicity of suits, his joinder is necessary to have him bound by the decision of the court in the suit.' [Emphasis added]

Based on the principles established in the cited cases, it is apparent that a necessary party is one whose presence is indispensable to the constitution of a suit, and without whom no effective decree or order can be passed.

According to the evidence presented during the trial, the appellant claimed trespass of approximately 48 acres against the respondents regarding the land that belonged to his late father, Saidi Selemani Mtili.

Simultaneously, the 1st respondent stated that he purchased 35 acres from the 2nd respondent, who, together with her husband Said Awadhi, acquired the land by buying it from Saidi Selemani Mtili.

The 2nd respondent confirmed to have sold 15 acres to the 1st respondent, not 35 acres as claimed by the 1st respondent. The 2nd respondent further explained that the 15 acres sold to the 1st respondent were part of her share of matrimonial properties following her divorce from her husband, Saidi Awadhi. Three Exhibits were tendered by the respondents and admitted as Exhibits D1, D2 and D3 respectively.

Exhibit D1 is the sale agreement signed before the Namtumbuka Village Council on 21/01/2006. The sale agreement states that the late Saidi Selemani Mtili agreed to sell 40 acres plus to Saidi Awadhi and Mariamu Haifai, the 2nd respondent, for a consideration of Tshs 70,000/=. For clarity, the content of the sale agreement read as follows;

'YAH: HATI YA MAUZO YA SHAMBA LA MIKOROSHO LILILO
NA MSITU NDANI

*Mimi Saidi Selemani Mtili mkazi wa kitongoji cha Majengo-
Namtumbuka nimeuza shamba langu la mikoroshö zaidi ya 30
lililo na msitu ndani lenye ukubwa wa zaidi ya ekari 40 lililo*

eneo la bondeni nijoma kwa thamani ya shs 70,000/= elfu sabini tu.

Mnunuzi wa shamba hilo ni ndugu SAIDI AWADHI na mkewe MARIAMU HAIFAI MNISHINDWA wa kazi wa Kitongoji cha Bondeni-Namtumbuka. Leo wametoa Shs 40,000/= Efu Arobaini) Baki Shs 30,000/= Efu thelathini ambazo zitalipwa tarehe 10/12/2006 Msimu wa Mazao ya Korosho.

Mauzo haya yamefanyika ofisi kwa Makubaliano yao

Sahihi Muuzaji.....

Sahihi ya Mnunuzi.....No. 1...

No. 2

Sahihi ya shahidi wa muuzaji.....

Sahihi ya kiongozi.....'

Exhibit D2 is a sale agreement signed before the Namtambuka Village Council on 11/7/2010, where the seller was Mariamu Haifai, the 2nd respondent, and the buyer was Saidi Mohamedi Lukami, the 1st respondent. Upon examination of Exhibit D2, it has been noted that the number of acres sold has been crossed out and replaced with "35".

However, this issue was resolved by the DLHT, where it was determined that the 2nd respondent sold only 15 acres to the 1st respondent and not 35 acres as stated by the 1st respondent and indicated in Exhibit D2.

Exhibit D3 is a copy of the judgment of Nanyamba Primary Court in Civil Case No. 16/2009 between Mariamu Haifai Mnishindwa and Saidi Awadhi Bushiri, which shows that the 2nd respondent was awarded 15 acres as part of her share of matrimonial properties.

Through these Exhibits and considering the evidence as presented, it is clear, as mentioned earlier, that Exhibit D1 is a sale agreement for land measuring 40 acres plus, between Saidi Selemani Mtili as the seller, and Said Awadhi Bushiri and Mariamu Hafai the buyers, who are husband and wife.

Nevertheless, as per Exhibit D3, the 2nd respondent was awarded only 15 acres as her matrimonial share in properties acquired with her husband. Exhibit D3 did not state anything regarding the remaining 25 acres, which are shown in Exhibit D1 as the ones purchased by the 2nd respondent and her husband.

However, in his judgment, the trial chairman considered Exhibit D1 and agreed with the respondents that the land was not owned by Saidi Selemani

Mtili as it had already been sold to the 2nd respondent. He declared that the 15 acres belonged to the 1st respondent as he had lawfully purchased them from the 2nd respondent, and went on that the remaining acres belonged to the 2nd respondent.

Based on the evidence presented and the tribunal's findings, it is plain that if Exhibit D1 is deemed entirely accurate, then Saidi Awadhi, who is purported to have acquired the land with his wife (the 2nd respondent), was pivotal in this case. This is because any decision made would have impacted him as well.

The court is of this considered view due to the fact that Exhibit D3 indicates that when the marriage between Saidi Awadhi and the 2nd respondent was dissolved, the 2nd respondent was awarded only 15 acres as part of her share in matrimonial properties, implying that there are 25 acres plus that were not addressed. In this context, it is apparent that Saidi Awadhi was indispensable to be joined as a necessary party to this case.

The question then arises; who should have joined Saidi Awadhi as a necessary party?

Order 1 Rule 10(2) of the Civil Procedure Code [CAP 33 R.E 2019] elaborates the procedure to be followed in cases of the non-joinder of parties. It provides as follows;

'The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.'

The Court of Appeal in the case of **Mexons Investment Ltd v. CRDB Bank Plc**, (Civil Appeal No. 22 of 2018), published on website www.tanzlii.org [2022] TZCA 297, elaborated on the applicability of this rule, stating;

'In terms of the above rule, a person may be added as a party to a suit (i) when he ought to have been joined as a plaintiff or defendant or (ii) when, without his presence, the questions in the suit cannot be effectually and completely decided upon, (iii) where such a person, who is the necessary or proper party

to a suit has not been joined by an application of any party to the suit as a party, the court is empowered to join him or her.'

In the case of **Tang Gas Distributors Limited** (supra), it was stated that when it's discovered that a necessary party has not been included in the suit and neither party is inclined to apply for his inclusion then the court is duty bound to ensure that he is added. The Court said;

*'Settled law is to the effect that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, **the Court has a separate and independent duty from the parties to have him added...**'* [Emphasis added]

Likewise, in the case of **Mexons Investment Ltd v. CRDB Bank Plc**, (supra), the Court articulated;

'Similarly, in the case at hand, as the appellant did not wish to join Mogas to the suit even after the prompting by the respondent through a notice of preliminary objection, it was crucial for the trial court to join the necessary party to effectually and completely adjudicate and settle all the questions related to the suit. Ultimately, all parties would be bound by the decision, hence, avoidance of the multiplicity of suits'

In such circumstances therefore, where none of the parties made an application for Saidi Awadhi to be joined as a necessary party, then the tribunal was in a favourable position to direct the inclusion of Saidi Awadhi as a necessary party for a fair determination of the suit before it and avoidance of multiplicity of cases.

The Court in the case of **Tang Gas Distributors Limited**, (supra) emphasized that the failure to include a necessary party in the suit is fatal, it stated;

'... it is now an accepted principle of law (see Mulla Treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore is fatal (MULLA at p 1020).'

Following the discussion above, I agree with the appellant's argument that Saidi Awadhi was a necessary party to be joined in this suit. This is supported by Exhibit D1, which clearly shows that Saidi Awadhi and the 2nd respondent jointly purchased 40-plus acres. Also, Exhibit D3 indicates that when the marriage between the second respondent and Saidi Awadhi was dissolved, the second respondent was awarded only 15 acres, leaving 25 acres unaccounted for.

Therefore, the declaration by the DLHT that the remaining 25 acres belong solely to the 2nd respondent without affording Saidi Awadhi the right to be heard constitutes a material irregularity failing justice.

For these reasons, the court finds that the second ground of appeal is sufficient to dispose of this appeal, hence the remaining grounds of appeal die naturally.

In the event, the court is hereby invoking its revisional powers vested in this court under section 43 (1) (b) of the Land Dispute Court Act Cap 216 R.E 2019 and hereby nullify the entire proceedings, quash the judgement and set aside the resultant decree issued by the trial court on 11th August, 2023.

Consequently, Land Application No. 33 of 2021 is remitted to the District Land and Housing Tribunal for Mtwara at Mtwara for it to re-hear the case after the necessary party has been added to the suit in accordance to the law. Due to the nature of the case, no order as to costs is made.

Ordered accordingly.



Dated at Mtwara this 28th March 2024.

M.B. MPAZE

JUDGE

Court: Judgment delivered in Mtwara on this 28th day of March 2024 in the presence of Hassani Saidi Mtili the appellant and Saidi Mohamedi Lumani, and Mariam Haifai the 1st respondent and 2nd respondent respectively.



M.B. MPAZE

JUDGE

28/3/2024