IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A)

CIVIL REVISION NO. 4 OF 2012

CLAUDE ROMAN SHIKONYI ..... APPLICANT

VERSUS

1. ESTOMY A. BARAKA
2. WILL CHARLES N. TERI
3. COMMISSIONER FOR LANDS AMD JI,AM SETTLEMENTS
4. ATTORNEY GENERAL
5. DAVID KOMBE

..... RESPONDENTS

(Application for Revision of the Proceedings and Subsequent Orders of the High Court of Tanzania at Dar es Salaam)
Tanzania at Dar es Salaam)

(Aboud, J)

Dated the 29th October, 2009
In
Civil Case No. 410 of 2000

RULING OF THE COURT

10th June & 18th July, 2019

MUSSA, J.A.:

These revisional proceedings were opened *suo motu* by the Court pursuant to a complaint letter written by Mr. Wilson Ogunde, learned Advocate, addressed to the Hon. Chief Justice which was received by the Court Registry on the 21st June, 2011. The learned Advocate wrote

the complaint on behalf of his client namely, Claude Roman Shikonyi and it was out of sheer convenience that the latter was and is captioned as an applicant as against five others who were and are captioned as respondents. The background giving rise to the application is free of controversy and may briefly be recapitulated thus:-

In the High Court of Tanzania (Dar es Salaam Registry), the first and second respondents instituted Civil case No. 410 of 2000 against the third and fourth respondents. It is pertinent to observe that, in the trial proceedings, the first and second respondents stood as, respectively, the first and second plaintiffs, whereas the third and fourth respondents stood as, respectively, the first and second defendants. In the plaint, the first and second respondents (who were plaintiffs there) pleaded that they are lawful owners of two separate pieces of farm lands which are located at Tegeta area, Dar es Salaam Region. They pleaded further that the respective parcels of land were acquired by purchase from a certain Alois Samia on the 16th August, 1985 and both of them promised to refer a sale agreement to that effect at the hearing. It was also their claim that both were engaged in

the cultivation of crops on the parcels of land to which they constructed structures in which they were occupying with their dependants. (We shall henceforth refer the disputed parcels of land to as "the suit lands").

The first and second respondents further claimed that, to their surprise and without being consulted, the third and fourth respondents (who were defendants there), surveyed the suit lands and the area on which they were located was renamed: Tegeta Block "E". In addition, the third and fourth respondents contemporaneously carried a valuation and re-allocated the suit lands to other persons, as it were, without involving the first and second respondents.

In the upshot of it, the first and second respondents alleged that the course of action taken by the third and fourth respondents was illegal as well as void whereof they jointly and severally prayed for judgment and decree against the third and fourth respondents with the following reliefs:-

> *"(i) The declaration that the survey and allocation of plots from the plaintiffs farms was illegal, null and void ab initio;*

(ii) The defendants, its agent, workmanship and any other person related to him be permanently restrained from making harassment on the plaintiff's use of their farms. ***IN THE ALTERNATIVE;***

(iii) The plaintiffs be allocated plots from their farms and for themselves and their dependants forthwith;

(iv) The compensation if any, should be paid to the plaintiffs for the remaining plots at the current valuation report;

(v) Costs of the suit be provided for;

(vi) Any other relief(s) that the Honourable court may deem fit to grant."

The plaint was countered by the third and fourth respondent's written statement of defence in which the material averments of the same were refuted and the first and second respondents were put to strict proof thereof.

From the foregoing backdrop, the trial was commenced and on the 2nd day of December, 2008 when the suit was placed before Aboud, J., the first and second respondents (plaintiffs) entered appearance in

person, unrepresented, whereas the third and fourth respondents (defendants) were represented by Ms. S. Mrema, whose credentials were not disclosed. And, this is what transpired in court:-

> *"**Ms. Mrema**: We have filed the deed of settlement signed by the parties.*
>
> ***Plaintiffs**: That is correct and we pray that judgment should be entered in that respect.* ***Ms. Mrema**: Madam Judge, there is a problem with the deed of settlement because it has the home and signature of the 2nd plaintiff only Mr. Will Charles Teri.*
>
> ***1st plaintiff (Estomy Aloyce Baraka):** That is true my name is missing but we were advised by our lawyer that the deed of settlement will cover both of us.*
>
> ***Court:** since the Deed of settlement recognizes only one plaintiff it should be changed to cover the two plaintiffs.*
>
> ***Order:** Mention on 13/2/2009. Deed of settlement to be changed to cover both the 1st and 2nd plaintiffs."*

The court did not quite palpably adduce the Deed of Settlement but the same is contained at page 57 of the record of revision and was, apparently, not changed to comply with the order of the trial court. On the 29th October, 2009 when the suit was placed before the same Judge, a certain Mrs Nambuo was recorded to be in appearance for the first and second respondents (plaintiffs thereat), whereas Ms. Temi was indicated to appear for the third and fourth respondents (defendants thereat). Mrs. Nambuo then informed the trial court that a settlement had been reached between the second respondent (second plaintiff) and the third and fourth respondents (defendants) and, accordingly, the second respondent withdrew himself from the case. Incidentally, for whatever cause, Mrs. Nambuo also sought to withdraw herself from the conduct of the case for the first respondent (first plaintiff). To this telling by Mrs. Nambuo, Ms. Temi had no objection, whereupon the court ordered as follows:-

> *" The matter is marked settled between the 2nd plaintiff and the defendant and will now proceed with the 1st plaintiff only. Learned counsel for the plaintiffs is also marked has (sic) withdrawn from representing the 1st plaintiff. Hearing on 15/4/2010."*

It is, again, significantly noteworthy that in her submissions, Mrs. Nambuo did not make reference to the Deed of Settlement just as the court did not refer to it in its order.

Thereafter, the suit travelled through a litany of court mentions till, a good deal later, on the 19th April 2011 when it, again, came for hearing before Aboud, J. This time the first respondent (first plaintiff) entered appearance in person, unrepresented, whereas the third and fourth respondents (defendants) had the services of Mr. Senguji, whose credentials were not disclosed. Mr. Senguji made a lengthy submission which culminated to a Prayer that *"the deed of settlement entered with the 2nd plaintiff should also affect the 1st plaintiff."* On his part, the first respondent had no objection whereupon the court made the following order:-

> *"Defendants have conceded with the plaintiff prayers and that the 1st defendants should settle the matter with the 1st plaintiff as they did with the 2nd plaintiff. In such settlement the issue of compensation for the damages have to be considered accordingly. In such settlement the 1st defendant should make sure that it is completed within three months from this order."*

Once again, the trial court did not specifically refer to the Deed of Settlement but, by agreeing with the parties that the same should bind them, the court tacitly and implicitly lent itself on its conditionalities. It is significantly noticeable that the Deed of settlement had far reaching consequences particularly to persons who were in occupancy of the suit lands. We will reproduce the relevant provisions of the Deed thus:-

> *"**NOW THIS DEED WITNESSETH AS FOLLOWS**.*
>
> 1. *That immediately upon signing of this agreement, the 1st defendant shall cause the area in dispute to be **resurveyed** so as to remove a road which passes through the farm near second plaintiff's residential house and ensure that 4 people who are occupying part of the Plot 397 are given Titles Deeds according to these changes.*
> 2. *That all current existing Title Deeds over the whole disputed piece of land are **revoked** to accommodate those changes be made on the area.*
> 3. *The 2nd plaintiff accepts and agrees in principle that all those occupants the allocated plots in his farm and who have developed their area in*

accordance with the City master plan are legally and formerly recognized by the defendant.

4. *That Plot No. 397 shall be issued to second plaintiff on condition that he shall bear all survey costs to resurvey the area to divert the planned road which passes through his house to accommodate the city master plan.*

5. *That all persons allocated land by 2nd plaintiff and who have developed their area in accordance with the city master plan who are occupying Plots No.* ***57, 58, 59, 60, 61, 62, 401, 402, 403, 404, 405, 406*** *AND* ***407*** *are issued with new certificate of Titles to formely recognize and legalize them.*

6. *That immediately upon signing of this agreement to second plaintiff shall withdraw all cases pending in court in respect of the defendant and there shall be no further claim against defendants on this regard.*

7. *That upon due execution by both parties hereto, this deed shall be recorded with High Court of Tanzania Dar Es Salaam Registry at DAR ES SALAAM and shall constitute a judgment of the court and shall be executed upon default of any of the terms hereto contained."*

As it shall later become apparent, the applicant herein was an occupant at Plot No. 58. Sequel to the April 19th the order of the court, almost a year later, on the 29th day of March 2012 the Registrar of Titles issued a written notice to the applicant which was couched as follows:-

> ***"RE: THE LAND REGISTRATION ACT (CAP 334) NOTICE TO COMPLY WITH COURT ORDER TO CHANGE OF OWNERSHIP UNDER S. 71***
>
> *TAKE NOTICE that an Application for registration of a Transmission by Operation of Law has been presented for change of ownership of the Right of Occupancy in respect of Plot No. 58, Block E. Tegeta in Dar es Salaam City, Title No. 45477 registered in the name of CLAUDE ROMAN SHIKONYI of P.O. Box 70697, DAR ES SALAAM.*
>
> *The application will have the effect of change the name to WILL CHARLES NDELEMO TERI of P.O. Box 3894, DAR ES SALAAM. This is in compliance with an Order delivered at the High Court of Dar es Salaam in Civil Case No. 410 of 2000 between ESTOMY A. BARAKA AND*

WILCHARLES N. TERI (PLAINTIFFS) vs. COMMISSIONER FOR LANDS AND HUMAN SETTLEMENTS DEVELOPMENTS AND ATTORNEY GENERAL (DEFENDANTS).

Take further Notice that, I intend to register the said change of ownership within thirty (30) days from the date of postage or dispatch of this Notice, unless within that period the Court Orders otherwise.

Dated at Dar es Salaam this 29th day of March 2012

BUMI MWAISAKA

SEN. ASST. REGISTRAR OF TITLES."

From the documents availed to us, the foregoing detail concludes what transpired in the High Court with respect to Civil case No. 410 of 2000.

In another development, apparently, by then unaware of Civil case No. 410 of 2000, on the 11th day of may, 2011 the applicant herein instituted Land case No. 80 of 2011 in the High Court (Land Division) at Dar es Salaam against the fifth respondent. In the plaint, the applicant alleged that on the 6th day of April, 1996 he was granted

a right of occupancy with respect to plot No. 58 Block "E" Tegeta area under certificate of title No. 45477. For the purposes of Land Case No. 80 of 2011, we shall henceforth refer to this piece of land as "the suit premises". A good deal later, on the 22nd May, 2002 the applicant obtained a building permit to construct a double storey building and a servant quarter on the suit premises. Thereafter, the applicant sent to the suit premises two lorry trips of aggregates, three trips of sand and 1500 cement blocks so as to prepare for the desired construction. To his surprise, sometime in January, 2011 the fifth respondent encroached on the suit premises, and commenced construction of a house. The applicant insistently claimed that he is the lawful owner of the suit premises wherefore he prayed for judgment and decree against the fifth respondent with the following reliefs:-

> *"(a) Declaration that the plaintiff is the rightful owner of all piece and paral of land described as plot No. 58, Block "E", Tegeta. Dar es Salaam City.*
>
> *(b) An Order of eviction of the defendant from Plot No. 58, Block "E" Tegeta area, Kinondoni, Dar es Salaam City.*

(c) *Demolition of any structure erected by the Defendant on plot 58, Block "E", Tegeta area, Kinondoni, Dar es Salaam city.*

(d) *An order of permanent injunction against the Defendant by himself, his agents, servants, workmen, assignees, invitees or any other person from committing any act of physical treapass onto the plaintiff's Plot No. 58 Block "E" Tegeta area, Kinondoni, Dar es Salaam City.*

(e) *General damages to be assessed by the Court.*

(f) *Costs be provided for.*

(g) *Any other order (s) and/or relief (s) as the Honourable court may deem just to grant."*

The plaint was resisted by the fifth respondent through a written statement of defence in which the material averments of the same were refuted and the applicant was put to strict proof thereof. In addition, the fifth respondent (defendant there) embodied a notice of preliminary points of objection to the following effect:-

"1. That the matter is Res judicata Land Application No. 506 of 2005 which was conclusively determined at Kinondoni Land and Housing Tribunal on 21st April, 2008.

2. *That the suit is bad in law for misjoinder of parties as the defendant is not the owner of the suit plot at issue.*

3. *That the alleged Title Deed No. 45577 does not exist as the same has already been revoked by the High Court order dated 29th October, 2009"*

To buttress his contention about the revocation of the applicant's title, the fifth respondent attached the much referred Deed of Settlement in his written statement of defence. In a further development, on the 28th day of May, 2012 the second respondent, who was the second plaintiff in Civil case No. 410 of 2000, made an application to be joined in the Land Case No. 80 of 2011.

According to Mr. Ogunde, the learned Advocate who was representing the applicant at the Land Division of the High Court, it was through the fifth respondent's written statement of defence whence his client became seized of the the Deed of Settlement which was the subject of Civil Appeal No. 410 of the High Court, Dar es Salaam registry. By that time, the period within which the applicant could have otherwise sought to impugn the decision of the High Court by way of revision had long elapsed. Faced with the predicament, the applicant

then, through Mr. Ogude sought the Court's intervention and, as we have already intimated, the proceedings at hand were intiated.

When the matter was placed before us for hearing on the 10th June 2019 the applicant entered appearance through Mr. Wilson Ogunde, learned Advocate, whom we have already mentioned. On the adversary side, Mr. Amini Mshana, learned Advocate, stood for the first, second and fifth respondents, whereas the third and fourth respondents had the services of Ms. Irene Lesulie, learned Senior State Attorney.

Addressing us in support of the application, Mr. Ogunde fully adopted the applicant's written submissions as well as the list of authorities and had nothing of importance to add. In a nutshel, the gist of the applicant's complaint was that the decision of the High Court which was based on the Deed of settlement amounted to condemning, without a hearing, the applicant who had interest on a portion of the suit lands. In the premises, he argued, as a failure to afford a hearing to a necessary interested party vitiates a judicial proceeding, he invited us to nullify the proceedings of the High Court in relation to Civil case No. 410 of 2000. In the upshot, he prayed thus:-

"The matter should be tried denovo whereby the Applicant and other interested parties will be pleaded."

To buttress his contentions and prayers, the applicant relied upon the decisions of the Court in **Mbeya – Rukwa Autoparts & Transport Limited v. Jestina George Mwakyoma** [2003] T.L.R. 153; Civil Application for Revision No. 68 of 2011 – **Tang Gas Distributors v. Mohamed Salim Said and Two others;** and Civil Application No. 183 of 2004 – **Highland Estates Limited V. Kampuni ya Uchukuzi Dodoma Limited and Another** (both unreported).

On their part, both Mr. Mshana and Ms. Lesulie had not lodged written submissions on behalf of their respective clients. In the first instance, they both sought refuge on a claim that their clients have not been served with the applicant's written submissions but, when the contrary came to light, they both requested a re-service as well as being granted time within which to glean from the applicant's written submissions. The prayers were granted and the hearing of the application was adjourned to the 12th June, 2019 so as to let the respondents reply to the applicant's written submissions.

At the resumed hearing, in his oral submissions, Mr. Mshana submitted that as a rule of practice, the first and second respondent were not obliged to sue the applicant. To fortify his contention, the learned counsel for the first, second and third respondent referred us to order 1 Rule 1 of the Civil Procedure Rules. In any event, he further argued, the mis-joinder of the applicant was not deliberate much as he was invited to join the suit but took no step towards it. Mr. Mshana did not elaborate on this latter detail which is not contained in the proceedings of the High Court Civil case No. 410 of 2000. In sum, Mr. Mshana urged us to find the contentions of the applicant to be without a semblance of merits and he, accordingly, advised us to refrain from disturbing the decision of the High Court.

On her part, Ms. Lesulie firmly contended that the non-joinder of the applicant in the High Court Civil Case No. 410 of 2000 was a fundamental procedural error. To fortify her contention, the learned Senior State Attorney referred us to Article 13(6) of the Constitution of the United Republic of Tanzania, 1977 as well as the case of **Mbeya – Rukwa** (supra). In sum, Ms. Lesulie advised us to nullify the proceedings of the High Court and remit the matter back to the High

Court with an order for it to settle the dispute upon a proper joinder of all interested parties.

We have dispassionately considered the foregoing learned rival contentions from which it is discernible that, although not raised as an issue during the trial, a material question regarding the constitution of the suit with respect to who should have been joined as necessary parties, in Civil case No. 410 of 2000 presents itself. In this regard, the case of **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd.** [1999] EA 55 is persuasively instructive. In that case, the Supreme Court of Uganda, per Mulenga JSC, made the following observation:-

> *"I have not laid my hands on any reported decision in East Africa directly on the point of criteria for determining that the presence of a person is necessary under Order 1, rule 10 (2) of the Civil Procedure Rules ... However, taking leaf from authorities in other jurisdictions having similar and even identical rules of procedure, I would summarise the position as follows: For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions*

involved in the suit, one of two things has to be shown. ***Either it has to be shown that orders which the plaintiff seeks in the suit would legally affect the interests of that persons, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application of Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person"*** [Emphasis supplied].

The foregoing statement of principle was adopted by the Court in the unreported Civil Application for Revision No. 6 of 2011 – **Tang Gas Distributors Ltd vs Mohamed Salim Said and Two Others**. In that case, the Court went further and observed:-

> *"... it is now an accepted principle of law (see MULLA's 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)."*

[See also: **Abdulatif Mohamed Hamis v. Mehboob Yusuf Osman and Another** – Civil Revision No.6 of 2017 (unreported)]

When all is said and applied to the situation at hand, it is beyond question that the applicant had an interest on Plot No. 58, Block "E" Tegeta area and was, so to speak, a necessary party to the High Court Civil case No. 410 of 2000.

To say the least, it was a material irregularity for the trial court to issue the referred orders dated the 29th October, 2009 and the 19th April, 2011 in the absence of the applicant whose interest on Plot No. 58 was adversely affected. The joinder of a necessary party to a suit is procedural in nature and, accordingly, the same ought to have been done at the time of trial, through the application of Order 1 Rule 10 (2) which goes thus:-

> *"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 in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It is common ground that, seemingly and, as confirmed by Mr. Mshana, the first and second, respondents did not wish to sue the applicant. That was their prerogative and, as a general rule, the first and second respondents were entitled to choose the person or persons as defendants against whom they wished to sue. The treatise Mulla, Code of Civil Procedure, 15th Edition, vol. II tells it all at pages 1011 – 2:-

"Plaintiff is the dominus litis. He cannot be compelled to sue a person against whom he does not claim any relief ... It is not for him to decide the forum where the suit is to be instituted and the parties to be impleaded. A party cannot be thrust on an unwilling plaintiff, unless otherwise provided by law."

Nonetheless, despite the foregoing general principle, which we do not wish to disturb, we pay full homage to an observation of the Court in the case of **Tang Gas Distributors** (supra) which went thus:-

> *"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..."*

Unfortunately, in the case at hand, the learned trial Judge did not find cause to exercise the discretion and join the applicant as a necessary party and, indeed, to also join all the persons whose titles to land were purportedly revoked by operation of the so-called Deed of settlement. Viewed from that angle, their non-joinder was a fatal inexactitude which was bound to breed injustice.

There is yet another corresponding ground for us to hold that the trial court fatally erred in issuing the referred orders in the absence of the applicant. It is now settled law that no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of

any person without first giving him a hearing according to the principles of natural justice. The stance was re-asserted by the Court in the case of **Mbeya-Rukwa** (supra) which went further and held that a decision reached without regard to the principles of natural justice and/or in contravention of Article 13(6)(a) of the constitution, is void and of no effect. In this regard, both the referred impugned orders of the High Court were made in contravention of the rules of natural justice as well as Article 13(6) (a) of the Constitution. The question which presently confronts us is as to what needs be done. If we may borrow a leaf from **Tang Gas Distributors** (supra), the Court ordered thus:-

> *"We accordingly nullify, quash and set aside the proceedings in the High Court of 16th May, 2011 as well as the judgment, decree and orders emanating therefrom ... Finally, we order that the applicant and all interested parties (eg. Abdallah Said and Mehboob Bukhari) be added in the suit as necessary parties and the pleadings be amended accordingly."*

Likewise, in the matter presently under our consideration, in the exercise of our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws, we nullify the

proceedings of the High Court in Civil case No. 410 of 2000 as well as the orders emanating therefrom. Finally, stepping into the shoes of the High Court, we order that the pleadings be amended so as to add in the suit, the applicant as well as all the persons whose titles to land were purportedly revoked by operation of the Deed of Settlement, as necessary co-defendants. For avoidance of doubt, we make this order on our own accord. The matter is, accordingly, remitted back to the High Court for it to proceed with a fresh hearing before another Judge. We give no order as to costs. Order accordingly.

DATED at **DAR ES SALAAM** this 11th day of July, 2019

K. M. MUSSA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL