

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

LAND CASE NO. 02 OF 2021

DR. ANTHONY AMBIKILE NSOJO.....PLAINITFF

VERSUS

ADAM MWAKYEMBE.....1ST DEFENDANT

ALISTAR GROUP TANZANIA.....2ND DEFENDANT

RULING

Date of Last Order: 13/08/2021

Date of Ruling : 02/09/2021

MONGELLA, J.

The plaintiff filed the case at hand seeking to be declared the rightful owner of the suit land. He claims that the defendants have invaded his land measuring 8 ¼ acres located at Chimbuya village in Ukwile ward, Mbozi district in Songwe region. He claims that the 1st defendant invaded, trespassed and claims ownership of 3 ¼ acres within the suit land since 2015 to date. With respect to the 2nd defendant, he claims that the 2nd defendant in 2019 invaded, trespassed and claims ownership of 5 acres within the suit land.



While filing his written statement of defence (WSD), the 2nd defendant filed a notice of preliminary objection containing three points as follows:

1. *The plaintiff is defective for non-joinder of necessary parties, as defendants.*
2. *The plaintiff has no locus standi on the land in dispute.*
3. *The plaintiff has sued a wrong party.*

The plaintiff is represented by Mr. Victor Mkumbe and the 2nd defendant is represented by Mr. Shaba Mtung'e, both learned advocates. The preliminary objection has been argued by written submissions filed by both parties in accordance with the scheduled orders.

Arguing on the first point of preliminary objection, Mr. Mtung'e submitted that the land in dispute is a registered land harbouring two registered plots. The first is Plot No. 1 Block "A" Chimbuya with Title No. 21579, LO No. 13991, registered in the name of **Adam Nelson Mwakyembe**. The second plot was owned by one **Charles Milton Mlungu** under customary right of occupancy No. 107MBZ/31122. He said that the said Charles Milton Mlungu transferred his customary right of occupancy to one **Ally Mohamed Sood** through sale. Ally Mohamed Sood leased the land to **ALISTAR JAMES Company Limited**.

Considering that the land in dispute is registered, Mr. Mtung'e had a stance that the land allocating authorities, to wit, the Commissioner for

Lands (as the allocating authority of the granted right of occupancy) and the Mbozi District Council (as the allocating authority of the customary right of occupancy) were supposed to be parties to the suit. Apart from these land allocating authorities, he added that the owners of the land in dispute were also supposed to be parties to the suit.

He mentioned the owners to be Adam Nelson Mwakyembe (as the owner of the first plot under granted right of occupancy), Charles Milton Mlungu (as the owner of the land under customary right of occupancy), Ally Mohamed Sood (as purchaser of the land under customary right of occupancy), and Chimbuya village council (for double selling the land in dispute). He was of the view that these are necessary parties to the suit as without them there is no case and the court decision shall have no effect. In support of his argument he referred the court to the case of ***Oil Com Tanzania Ltd. v. Christopher Letson Mgalla***, Land Case No. 29 of 2015 (HC at Mbeya, unreported). In conclusion he contended that the defendants are strangers to the case at hand as they are not necessary parties.

With regard to the second point of preliminary objection, Mr. Mtung'e challenged the plaintiff's claim that he purchased the land in dispute from Chimbuya village council. Referring to section 8 (5) of the Village Land Act, which prohibits the village council to allocate land or grant customary right of occupancy without prior approval of the village assembly; he contended that the plaint does not show if such approval was secured as it misses in its annexures "*the Chimbuya village council minutes on selling the land in dispute; the Chimbuya village assembly minutes on selling the land in dispute; and the receipt of Chimbuya village*

council between the plaintiff and the village council (sic)." By lacking such documents, Mr. Mtung'e had a stance that the plaintiff lacks locus standi. He further referred the court to the case of **Godfrey Chilongola v. Nicodemus Martine & 19 Others**, Land Case Appeal No. 29 of 2018 (HC at Tanga, unreported).

Still on the issue of locus standi, Mr. Mtung'e while referring to a letter from Mbozi District Council addressed to his law firm "Right Choice Attorneys & Company" and a certificate enclosed to the same letter, contended that Chimbuya village was registered on 22nd July 2005, hence not in existence in the year 2003. Considering the situation, he argued that there could be no any contract on sale of land entered between the plaintiff and Chimbuya Village Council as the same was not in existence. He was of the view that the village lacked capacity as it was not yet registered as per the Local Government (District Authorities) Act, Cap 287.

On the third point of preliminary objection Mr. Mtung'e argued that the plaintiff has sued wrong parties. He contended that this fact is apparent on the 1st and 2nd defendants' WSDs whereby one could clearly see that the defendants are not the owners of the plot in dispute. He reiterated his submission on the first point to the effect that the land in dispute is a registered land harbouring two registered plots. The first is Plot No. 1 Block "A" Chimbuya with Title No. 21579, LO No. 13991, registered in the name of **Adam Nelson Mwakyembe**. The second plot is owned by one **Charles Milton Mlungu** under customary right of occupancy No. 107MBZ/31122. He said that the said Charles Milton Mlungu transferred his customary right of occupancy to one **Ally Mohamed Sood**, who leased the land to **ALISTAR**

JAMES Company Limited. He further argued that the plaint names the 1st defendant as "Adam Mwakyembe" but the names "Adam Mwakyembe" appearing in the plaint and "Adam Nelson Mwakyembe" appearing in the title deed are two different names. To buttress his point he referred the court to the case of **OLAM (T) Ltd. v. Zakaria D. Marinya**, Revision No. 518 of 2019 (HC at DSM, Labour Div. unreported); and that of **Alex Mwita Msama v. Rose Mhando & 2 Others**, Civil Case No. 129 of 2018 (HC at DSM, unreported).

Mr. Mkumbe surprisingly raised a preliminary objection as well when replying. This concerned the locus standi of the 2nd defendant to appear in the case at hand. With regard to this point, he contended that the WSD is not signed by the 2nd defendant as required under Order VI Rule 14 of the Civil Procedure Code, Cap 33 R.E. 2019. He challenged the 2nd defendant's WSD for being signed only by his advocate with no reasons assigned. In consideration of this defect he argued that it is as good as there is no WSD properly before the court thus rendering the 2nd defendant losing his right of audience before the court. In the same line, he added that the 2nd defendant has no locus standi to present anything in court, including any arguments on any preliminary objection. He was of the view that the case should proceed in the absence of the 2nd defendant.

In reply to the 2nd defendant's points of preliminary objection, which I find to have been done generally and insufficiently, Mr. Mkumbe sought refuge under Order I Rule 9 of the Civil Procedure Code, which prohibits suits to be defeated by reason of misjoinder or non-joinder of parties. The

provision further requires the courts to deal with matters in controversy so far as regards the rights and interests of the parties actually before it.

Mr. Mkumbe was of the stance that the plaintiff has sued the right defendants in conformity with Order I Rule 9 as they are the ones that trespassed on the plaintiff's land. In what I find totally misconceived, he was of the view that if the 2nd defendant thinks that there is another person responsible in answering the claims set out in the plaint, then he should invoke the provisions of Order VIII Rule 10 of the Civil Procedure Code, by setting up a counter claim that joins that other party.

In rejoinder, Mr. Mtung'e first attacked the preliminary objection raised by Mr. Mkumbe in his reply submission saying that it is a new tradition. However, he went further to reply whereby he referred to Order VI Rule 14 of the Civil Procedure Code which authorises persons duly authorised to sign pleadings. He argued that the advocate can sign pleadings for the company as an officer of the company. He also referred to section 44 of the Companies Act, Cap 212 and argued that being an advocate of the applicant (sic) who is a legal company, he could sign in the pleading of the company.

In relation to the matter in controversy in the preliminary objection at hand, he challenged Mr. Mkumbe's contention that the defect in non-joinder of necessary parties can be cured under Order I Rule 9 of the Civil Procedure Code. He contended that the provisions of Order I Rule 9 apply to a non-necessary party. He said, the provision does not apply where a necessary party is concerned, whom without a decision of the court

cannot be executed. He once again referred the court to the case of **Oil Com Tanzania** (supra). He as well argued that even Order VII Rule 10 (2) of the Civil Procedure Code cannot cure the anomaly in non-joinder of a necessary party. He contended that the provision is applicable only when the defendant has raised a question to the plaintiff and other people out of the plaintiff but in connection to the plaintiff.

With regard to the rest of the points of preliminary objection, Mr. Mtung'e was of the view that since the plaintiff's advocate has not addressed them in his submission, it entails that he has conceded to the same. He prayed for the case to be struck out with costs.

After considering both counsels' submissions and gone through the pleadings, I prefer to start with the preliminary objection raised by Mr. Mkumbe in his submission regarding the competence of the 2nd defendant's WSD for lack of signature. I in fact do not intend to allow the same to detain me simply because it has been improperly raised. It is trite law that a preliminary objection cannot be raised to pre-empt another preliminary objection. The one raised first has to be addressed first and if it does not succeed then the other party shall have the opportunity to raise his/her preliminary objection. There is a plethora of authorities to this effect. In the case of **Standard Chartered Bank & Another v. VIP Engineering & Marketing Limited & 4 Others** (Necessary Parties), Civil Application No. 222 of 2016, (CAT at DSM, unreported), the Court of Appeal while revisiting its previous decision in the case of **Method Kimomogoro v. Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (unreported) had this to say:

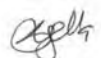


*"This Court has said in a number of times that it will not tolerate the practice of an Advocate trying to pre-empt a preliminary objection either **by raising another objection** or trying to rectify the error complained of."* [Emphasis added]

Mr. Mkumbe has raised his preliminary objection through a back door while submitting on the preliminary objection raised by the 2nd defendant. It certainly cannot be entertained. See also: ***The Board of Trustees of Good Neighbors Tanzania v. Dorreen Augustine Dominic T/A Dawson's Water Point Drilling***, Commercial Case No. 69 of 2019.

Given my deliberation on the point raised by Mr. Mkumbe, I proceed to determine the 2nd defendant's points of preliminary objection. However, before I deliberate on the first point of preliminary objection, I wish to deliberate first on the second and third points collectively. On the second point the 2nd defendant claims that the plaintiff has no locus standi on the land in dispute; and on the third point he claims that the plaintiff has sued a wrong party. What I discerned from the submission by Mr. Mtung'e is that the plaintiff has failed to show that he was allocated the land in dispute by Chimbuya Village Council because he did not attach to the plaint copies of the receipts, and minutes of the village council and the village assembly in allocating him the land in dispute.

On the same bases he argued that the plaintiff has sued wrong parties. Referring to the documents annexed to the 2nd defendant's WSD and the list of documents, he contended that the land in dispute contains two plots whereby the first is Plot No. 1 Block "A" Chimbuya with Title No. 21579, LO No. 13991, registered in the name of **Adam Nelson**




Mwakyembe. The second plot is owned by one **Charles Milton Mlungu** under customary right of occupancy No. 107MBZ/31122. He said that the said Charles Milton Mlungu transferred his customary right of occupancy to one **Ally Mohamed Sood**, who leased the land to **ALISTAR JAMES Company Limited**. His argument in my view, connotes that the defendants do not appear in any of those documents and thus not connected to the suit land.

With respect to the 1st defendant, Mr. Mtung'e argued that the plaintiff names him as "Adam Mwakyembe" but the names "Adam Mwakyembe" appearing in the plaint and "Adam Nelson Mwakyembe" appearing in the title deed are two different names. Thus he is not connected to the suit land.

The arguments by Mr. Mtung'e bring me into determining as to whether these two points of preliminary objection qualify as such. The law is trite to the effect that a preliminary objection has to be purely based on law unstained with facts and requiring no evidence in proof. In the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd** (1969) EA 696, specifically at page 700, the Court observed that:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."



Considering the arguments by Mr. Mtung'e, it is obvious that the determination of these points of preliminary objection shall require scrutiny of the documents referred to by him. The law is settled to the effect that the objector is not required to revisit exhibits in ascertaining the arguments he advances in the preliminary objection. This was ruled in the case of ***The Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Ltd***, Civil Appeal No. 105 of 2011 (Unreported) in which the CAT held that:

"A preliminary objection should be free from facts calling for proof or requiring evidences to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of proper procedure for entertaining application for preliminary objections. It will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits. [Emphasis added]"

On account of the settled legal position as settled in the above cited authorities, I am of the considered view that it takes proof in evidence to ascertain whether the plaintiff lacks locus standi on the disputed land. He claims to have legally acquired the same from Chimbuya village and that the defendants have trespassed. It is thus upon him to provide proof to that effect, which shall be considered by the court in determining the rights of the parties.



With regard to the names of the 1st defendant, I must first say that I am baffled for the same being raised by the 2nd defendant. This is because each of the defendants has his own legal representation. The 1st defendant and his advocate, Mr. Mwakilima, did not find it relevant to raise such objection.

Nevertheless, if the same was raised, I would still be of the opinion that it needs proof to the effect that the two are indeed different persons. The names have not been misspelt. It is only that the middle name was omitted. The omission of the middle name does not render the 1st defendant a different person. If the 1st defendant shared the same concern with the 2nd defendant he should have challenged accordingly and the plaintiff would have been put to task to prove that the names belong to the 1st defendant. In addition, in arguing this point, Mr. Mtung'e referred to the names appearing in the title deed thereby making reference to annextures contrary to the settled legal position. See also: ***Juma Bussiyah v. The Zonal Manager (South) Tanzania Posts Corporation***, Civil Application No. 4 of 2005 (CAT-Mbeya- unreported).

In consideration of my observation as presented above, I find no merit in these two points of preliminary objection. The points are based on facts which need proof in evidence. They are therefore overruled.

I now revert to the first point of preliminary objection. In this point the 2nd defendant claims that necessary parties to the suit, as defendants, were not joined by the plaintiff. In his argument, Mr. Mtunge was of the view that the necessary parties that ought to have been joined as defendants

are: 1. Commissioner for Lands as allocating authority; 2. Mbozi District Council as allocating authority under customary right of occupancy; 3. Adam Nelson Mwakyembe as owner of the first plot; 4. Chimbuya Village Council as vendor; 5. Milton Charles Mlungu as owner; and 6. Ally Mohamed Sood as purchaser.

The term "necessary party" has been defined by the CAT in the case of **Abdullatif Mohamed v. Mahboob Yusuf Othman & Another**, Civil Revision No. 6 of 2017 (unreported) as **"...one in whose absence no effective decree or order can be passed."** The Court went further to say that depending on the facts and circumstances of each particular case, the determination as to who is a necessary party to a suit would differ from one case to another. Explaining on the indicators of a necessary party, it stated further that *"among the relevant factors for such determination include the particulars of the non-joined party, the nature of the relief claimed, as well as, whether or not, in the absence of the party, an executable decree may be passed."*

The CAT expounded on the provisions of Order I Rule 1 and 3 which allows for several persons to be joined as plaintiffs or defendants in one suit whereby the reliefs sought for or against arises 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 follows therefore that for a party to be termed as necessary and to be joined in a suit two important tests 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.

Like I pointed out, Mr. Mtung'e was of the stance that the allocating authorities and the true owners of the land in dispute ought to have been joined as necessary parties as no effective decree can be issued and executed without them as parties to the suit. Mr. Mkumbe on his part never challenged the necessity of these parties to be joined, but only sheltered under Order I Rule 9 of the Civil Procedure Code which directs that no suit shall be defeated by reason of misjoinder or non-joinder of a party.

With respect to the land allocating authorities, the CAT in the case of ***Shaibu Salim Hoza v. Helena Mchacha (as Legal Representative of Amerina Mchacha, Deceased)***, Civil Appeal No. 7 of 2012 (CAT at DSM, unreported) showed the importance of joining the land allocating authority. The Court dealt with a land allocated by the Dar es Salaam City Council. It ruled that it was improper for the suit to proceed in the subordinate courts without the Dar es Salaam City Council who allocated the land in dispute to the deceased. See also: ***Efratha J. Mlay (as administratrix of the Estate of the Late William Jacob Ngowi) v. Josephine***

Rasieli Mremi/Josephine William Ngowi & Another, Land Case No. 31 of 2019.

In the case of **Mussa Chande Jape v. Moza Mohamed Salim**, Civil Appeal No. 141 of 2018 (CAT at Zanzibar) indicated that persons claimed to be owners of the suit land have to be joined as necessary parties. In that matter, the appellant claimed to be the rightful owner of the suit premises and at the same time one named Yahya Ahmed Salim was also alleged to be the rightful owner, though not party to the suit. The Court ruled that since it was communicated earlier before the trial court through WSD and preliminary objection raised that the Yahya Ahmed Salim was a necessary party, then the appellant or even the court ought to have joined him as a necessary party to the suit.

My understanding of the decision in **Musa Chande Jape** (supra) is that a suit cannot be defeated on the ground of non-joinder of a necessary party. Instead, where the court becomes aware, through pleadings or notice of preliminary objection or notification by a party, of a party not joined and is convinced that no effective decree can be issued and executed without such a party, it has powers to order that party to be joined as defendant on its own motion or upon application by the parties. The Court invoked the provisions of Order I Rule 10 (2) of the Civil Procedure Decree of Zanzibar which is parimateria to Order I Rule 10 (2) of the Civil Procedure Code, Cap 33 R.E. 2019. The provision states:

"The court may, at any stage of proceedings either upon or without 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 against who the defendant claim to be entitled to contribution or indemnity, or **whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added.**
[Emphasis added]

See also: **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (CAT, unreported); and **Farida Mbaraka & Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (CAT, unreported).

To this point considering the claim by the 2nd defendant that the plots forming the land in dispute was allocated by the Commissioner for Lands and Mbozi District Council, respectively; and considering the claim that part of the land in dispute was previously owned by Milton Charles Mlungu and later purchased by Ally Mohamed Sood, I agree with Mr. Mtung'e that these parties are necessary parties to the suit for the decree of the court to be effective. The alleged owners are also necessary as they have an interest in the outcome of the case and thus have to be accorded the right to be heard.

I do not find Chimbuya Village Council a necessary party/defendant as she is not claimed to have allocated the land in dispute to anyone else other than the plaintiff himself. She is better placed to appear as witness and not a party. With regard to Adam Nelson Mwakyembe, I am of the considered finding that his middle name was omitted by the plaintiff in



drafting the plaint. The mistake is curable under the overriding objective principle through amendment of the pleading.

On the other hand however, in joining the Commissioner for Lands and the Mbozi District Council, the law requires the Attorney General to be joined whereby a 90 days' notice has to be issued prior to filing the case. This position of the law has been brought up through an amendment made under the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020, which was gazetted on 21st February 2020. In this amendment, among other laws, **section 6 of the Government Proceedings Act, Cap 5 R.E. 2019**, has been amended to the effect that any case against a local government should be filed after a notice of 90 days has been issued. It also requires the Attorney General to be joined and issued with the 90 days' notice. The same law also amended **section 190 of the Local Government (District Authorities) Act, Cap 287** by requiring a prior notice of 90 days to be issued to the local government authority and a copy thereof be served to the Attorney General and the Solicitor General before instituting a suit against the local government.

In consideration of my findings that the Commissioner for Lands and the Mbozi District Council have to be joined as necessary parties, as well as, in consideration of the new legal position in suing a local government as explained above, the plaintiff's suit cannot competently remain in the court registry even if the court orders that the necessary parties be joined in terms of Order I Rule 10 (2) of the Civil Procedure Code. The suit can only be competently filed in this court after the Mbozi District Council, the



Attorney General and the Solicitor General have been issued with the 90 days' notice of intention to sue.

In the circumstances, I sustain the 2nd respondent's first point of preliminary objection and struck out the suit. The plaintiff is advised to take necessary steps to join all the necessary parties if he still wishes to pursue his claims.

Each party shall bear his own costs of the suit.

Dated at Mbeya on this 02nd day of September 2021.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 02nd day of September 2021 in the presence of the plaintiff, Mr. Philip Mwakilima, learned advocate for the 1st defendant, and Mr. Shaba Mtung'e, learned advocate for the 2nd defendant.




L. M. MONGELLA
JUDGE