

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 283 OF 2022

**JASON R. KALEMERA.....1ST PLAINTIFF
LAURENT R. KALEMERA.....2ND PLAINTIFF
JOSEPH R. KALEMERA.....3RD PLAINTIFF
FLORIAN R. KALEMERA.....4TH PLAINTIFF
PATRICK K. KALEMERA.....5TH PLAINTIFF
DESIDERIUS RUGEIGIZA.....6TH PLAINTIFF
RENALDA CLEMENS.....7TH PLAINTIFF
RESPICIUS MUSHAIRIZI.....8TH PLAINTIFF**

VERSUS

**RAZALOUS MWAKIPOSA Alias ZIMWI.....1ST DEFENDANT
MUSTAFA AMIRALI SOMJI.....2ND DEFENDANT
IQBAL HUSSEIN SOMJI.....3RD DEFENDANT
NAZIR HUSSEIN SOMJI.....4TH DEFENDANT**

RULING

*Date of last Order:14/12/2022
Date of Ruling:09/02/2023*

K. D. MHINA, J.

The Plaintiffs, Jason R. Kalempera, Laurent R. Kalempera, Joseph R. Kalempera, Florian R. Kalempera, Patrick K. Kalempera, Desiderius Rugeigiza, Renalda Clemens, and Respicius Mushairizi sues the respondents, Razalous Mwakiposa Alias Zimwi, Mustafa Amirali Somji, Iqbal Hussein Somji, and Nazir Hussein Somji for trespassing into their

surveyed land measuring 9 acres, formerly known as Farm No. 355 located at Dovy Street in Boko within Bunju Ward, Kinondoni Municipality. Further, the plaintiffs claimed damages for demolishing the houses in the suit land and unlawful entry and continued occupation of the suit property.

In response, the 1st defendant countered the plaint by filing a written statement of defence in which he denied the allegations.

Further, the 1st defendant confronted the plaint with a notice preliminary objection to the effect that;

"The suit is bad in law for want of joining the Kinondoni Municipal Council."

Before going into the parties' submission and merits or demerits of the application, brief facts from the pleading are significant for a better understanding of the matter.

Briefly, according to the plaint, the 1st plaintiff alleges that he acquired the suit land on 13 April 1979 after compensating the previous occupants. After acquiring the land, by the letter of approval dated 10 August 1984 from the then Dar es Salaam City Council, he surveyed the

land to conduct agricultural activities. The same was registered as Farm No 355 as per Plan No. E'302 with Registration No. 20700. After the survey, he was given a letter of offer with reference No. DCC/LD/43586/2/DDM dated 15 April 1993.

In 2015, he decided to change the land use and distribute the farm to various choices, including the 2nd-8th plaintiffs, to whom he had already allocated parcels of land to them; therefore, he was advised by the Kinondoni Municipal Council to surrender the ownership and apply for new allocation after the approval of the new survey plan, an act which he did as he surveyed and submitted the new use plan.

It is further alleged that prior to the completion of the survey process, the Government introduced the nationwide survey project whereby the Kinondoni Municipal Council was appointed to survey all land in Boko within Bunju Ward. Despite affecting the requisite payments for the survey project, the survey had not been completed, and they continue to occupy that land waiting for the finalization of the project.

On 7 September 2022, a group led by the 1st defendant, holding lethal weapons and demolition equipment, entered the suit land and demolished all houses and building thereon. When he objected, he was informed that the process was lawfully conducted by the 2nd, 3rd, and 4th defendants to recover the beacons on their land.

His efforts to inquire about the matter at Kinondoni Municipal Council went unrewarded.

On his part, as I indicated earlier, the 1st defendant denied the allegations. In paragraph 2 (a) of his WSD, he disputed being responsible for demolishing the applicants' structures.

In the joint WSD by the 2nd, 3rd, and 4th defendants, they alleged that (in paragraph 3) the suit land was previously owned by their late father and brother. But later, the ownership was revoked by the Government. The annexure indicated that they were negotiating the amount of compensation. They are the administrators of the estate of their late father and brother. In the relief claimed, they prayed to be declared the rightful owner of the suit land.

The preliminary objection was argued by way of written submissions. The plaintiffs were represented by Mr. Mohamed Tibanyendera, learned advocate, while the 1st defendant by Mr. Datus Kamugisha John, also a learned advocate.

Mr. John submitted that the 1st defendant, as the Chairman of the local Government of Boko Dovyia, was directed by the Kinondoni Municipal Council to supervise the clearing of the land and demarcation of the suit land in recovering the beacons of that land.

Therefore, he argued that since the Kinondoni Municipal Council was involved in that transaction, then the Municipal Council is a necessary party that needs to be joined in the suit as a defendant as per Order 1 Rule 10 (2) of the CPC which reads that;

"The Court may order at any stage of the proceedings, either upon or without application of either party to be added, the person whose presence before the Court may be necessary to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the suit be added."

He concluded by submitting that failure to join the Kinondoni Municipal Council is bad in law in determining this suit. Therefore, he prayed for the suit to be dismissed with costs.

In response, Mr. Tibanyendera began by submitting that in the 1st defendant's written statement of defence; there was nothing that suggested that the 1st defendant was acting under the Kinondoni Municipal Council as there was no document to prove that he was appointed to act on behalf of Kinondoni Municipal Council.

Further, he submitted that the preliminary objection raised does not deserve to be entertained as it offends the principle of overriding objectives set out in section 3 (1) of the CPC.

Mr. Tibanyendera also submitted on what should be a preliminary objection by citing **Mukisa Biscuits Manufacturing vs. West End Distributors Ltd** (1969) EACA 696, where it was held that;

"The preliminary objection is in nature of what used to be a demurrer; it raises a pure point of law which is argued on assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be

ascertained or what is sought is the exercise of the judicial discretion."

He also cited **Sykes Travel Agent Ltd vs. National Identification Authority (NIDA) and The Attorney General**, Civil Case No. 27 of 2019, HC-DSM (unreported) with the same principle that objection must be of pure points of law without requiring other facts/evidence to prove its existence.

When responding to the prayer that the suit should be dismissed, Mr. Tibenyendera submitted that the 1st defendant did not address why Kinondoni Municipal Council be joined as a necessary party.

He submitted that the suit is maintainable without the Kinondoni Municipal Council. Further, the orders and decrees can be executed without joining the Kinondoni Municipal Council. He said the test for joinder or non-joinder is stipulated under Order 1 Rule 1 and 3 of the CPC; therefore, the counsel for the 1st defendant misconceived the provision of Order 1 Rule 9 of the CPC.

He concluded by submitting that nothing dictated if the suit could not be determined in the absence of the Kinondoni Municipal Council.

The 1st defendant's counsel did not file the rejoinder.

Having considered the written submission made by the learned counsel for the parties and their pleadings, the issues that have to be resolved are

1. whether the Kinondoni District Council is a necessary party in the circumstances of this matter and;
2. if issue no one will be in the affirmative, then what is the remedy?

But first of all, quite briefly, I have to deal with an issue raised by Mr. Tibanyendera that the objection raised is not a pure point of law, as per **Mukisa Biscuits** (Supra).

In this matter, what was raised as a preliminary objection is that there is a non-joinder of the necessary party. Therefore, the question is whether the non-joinder of a necessary party is a pure point of law.

Being guided by a number of the authorities of the Court of Appeal, I hold that the issue of non-joinder is a pure point of law because;

One, in case of the absence of the necessary party, may affect the court not to be able to pass the effective decree, which would be of no practical utility. See **Ilala Municipal Council vs. Sylvester Mwambiye**, Civil Appeal No. 155 of 2015 (Tanzlii).

Two, the presence of the necessary party is indispensable to the constitution of the suit. See **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman and another**, Civil Revision No. 6 of 2017 (Tanzlii)

Therefore, as it touches the constitution of the suit and may affect the decree passed, it is a pure point of law.

Flowing from above, the preliminary objection raised is a pure point of law, and it qualifies the conditions set in **Mukisa Biscuits Manufacturing (Supra)**, and it was properly raised.

Coming to the matter at hand, in the determination of the preliminary objection, the entry point is the definition of the term “necessary party” as defined by the Court of Appeal in **Ilala Municipal Council (Supra)**;

"...one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed".

In **Abdullatif Mohamed Hamis (Supra)**, the Court of Appeal set a criterion for determining who is a necessary party by holding 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 a determination include the **particulars of the non-joined parties, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable***

***decree may be passed.**"*[Emphasis provided]

In the matter at hand, as per the submission, the ground for the 1st defendant to raise the preliminary objection based on the reason that the Kinondoni Municipal Council directed him to supervise the clearing of the land and demarcation of the suit land in recovering the beacons of that land.

The question is whether, in the circumstances of this matter, the Kinondoni Municipal Council is a necessary party in this matter. On this, I will be guided by the cited cases above, which developed criteria to

consider and test for determining whether a particular party is necessary to the proceedings.

One, there has to be a right of relief against such a party in respect of the matters involved in the suit. See **Ilala Municipal Council (Supra)**.

Two, the Court must not be in a position to pass an effective decree in the absence of such a party. See **Ilala Municipal Council (Supra)**.

Three, the nature of the relief claimed. See **Abdullatif (Supra)**,

Four particulars of the non-joined parties. See **Abdullatif (Supra)**,

Five, the facts and circumstances of each particular case. See **Abdullatif (Supra)**,

Six, the presence of that party is indispensable to the constitution of a suit. See **Ilala Municipal Council (Supra)**.

Looking at the reliefs, as indicated earlier, the main claims by the plaintiffs are the declaration that they are the lawful owners of the suit land and damages for the demolition of the houses in the suit land and unlawful entry and continued occupation of the suit property.

On the other side, the 1st defendant in his WSD did not claim the ownership; further, he denied the allegations. As I indicated earlier, as per paragraph 2 (a) of the WSD, he denied being responsible for demolishing the applicants' structures.

In his written submission, he stated that the Kinondoni Municipal Council directed him to supervise the clearing of the land and demarcation of the suit land in recovering the beacons of that land.

Therefore what was contained in the WSD differs from his written submission.

Flowing from above by looking at the relief claimed and the nature of what was counted by the 1st defendant in his WSD, the circumstances of this matter lead me to hold that the Kinondoni Municipal Council is not an indispensable party to the constitution of this suit.

The non-joinder of the Kinondoni Municipal Council will not affect the effective decree or order being passed; therefore, the decree would be executable.

Further, looking at the circumstances of the matter and what I alluded to above, the Kinondoni Municipal Council is not a necessary

party as it falls short of the criteria and test of who is necessary to the suit. The 1st defendant, if wishes, may call the officers who directed him to supervise the clearing of the land and demarcation of the suit land in recovering the beacons of that land as his witnesses.

As to the remedy, since I hold that from the circumstances of this matter, the Kinondoni Municipal Council is not a necessary party to the suit, the preliminary objection raised lacks merits.

Flowing from above and for the reasons shown, the preliminary raised is overruled, and further, it is dismissed with costs.

I order accordingly.

DATED at **DAR ES SALAAM** this 09/02/2023.





K. D. MHINA
JUDGE