

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

AT MWANZA

LAND APPEAL NO. 16 OF 2021

*(Arising from the Decision of the District Land and Housing Tribunal for Mwanza at
Mwanza in Land Application No. 363 of 2018)*

ROBERT MASHINE ----- APPELLANT

VERSUS

GODFREY MSOKA----- RESPONDENT

JUDGMENT

Last Order: 10.3.2022

Judgment Date: 31.3.2022

M. MNYUKWA, J.

The Appellant herein was a losing party in Land Application No. 363 of 2018 before the District Land and Housing Tribunal for Mwanza at Mwanza in a decision dated 23/10/2020 before Hon. Chairperson Phillip D. He has now appealed to this court advancing 4 grounds of appeal as follows;

- 1. That, the trial Tribunal erred in law and fact for failure to analyze documentary evidence adduced.*
- 2. That, the trial Tribunal erred in law and fact for entering judgement in favour of a respondent without joining necessary party.*
- 3. That, the trial tribunal erred in law and fact for entertained the matter which it had no jurisdiction.*



4. That, the trial tribunal erred in law and fact for disregarding the appellant evidence and entering judgement in favour of the respondent.

The appellant prayed for the following relief;

- i. This honourable court be pleased to quash and set aside the decision of the trial court and order trial denovo with a necessary party.*
- ii. In alternative to prayer number one the appellant be declared a lawful owner of the disputed plot.*
- iii. Cost of the appeal be provided for.*
- iv. Any other relief this court may deem fit to grant.*

The brief facts that has given rise to this appeal are that, the respondent herein instituted Application No. 363 Of 2018 against the appellant seeking before the trial tribunal order declaring him to be the lawful owner of Plot No. 458 Block "B" Nyamhongolo Mwanza, order to restrain the appellant from erecting the foundation and interfering with his peaceful enjoyment of his property, costs of the application and any other relief.

During the hearing, the applicants (the respondent herein) who testified as PW1, disclosed to have acquired the disputed land from his

mother who was the administrator of estate of his late father Lawrence Msoka. That, he effected transfer as he now holds a title deed with Registration No. 39953 on Plot No. 458 Block "B" Nyamhongolo Mwanza, which was admitted as Exhibit P1. He blamed the appellant herein, to have trespassed to his plot and that he had already erected a foundation as he alleges to have been acquired the disputed land as a compensation from his previous plot by the land authority.

PW2 (Edina Phillip Antony) testified that, she works at the office of Assistant Registrar of Title and the disputed land is currently registered under the ownership of Godfrey Siara Msoka. And that, the first owner was Lawrence Msoka who was the applicant's late father.

On defence, the respondent (the appellant herein) testified as DW1. He alleged to have been allocated the disputed plot by Municipal Council as a compensation for his three houses allocated at Ilemela that were demolished to allow road constructions. That, he was given documents (offer letter, admitted as Exhibit D1) on that plot which by the time was just a bare land. He planted trees and built a foundation and from there is when the dispute arose. His children helped in making follow-up and he was given a letter (Exhibit D2) to permit him to go on with the building activities. He paid for the building permit as he tendered the payment receipt as Exhibit D3.



DW2 (Lucio Anthony Sambala), testified as a land officer at Ilemela and he knew the dispute over Plot No. 458 Block "B" Nyamhongolo as it is allocated to two people. He went on that, the first owner was the respondent who was allocated on 2004, and later on was allocated to Laurence Msoka in 2012, before it was transferred to the applicant. He alleged that the applicant was required to surrender the title of disputed land so that he can be allocated another plot of land. He admitted that the applicant had already been issued with a certificate of occupancy which made it difficult to issue another certificate to the respondent. He added that the respondent was the legal owner as he was firstly allocated for 33 years and there was no revocation done in respect to that land.

In finalizing the trial, Hon. Chairman allowed the application without costs and went on to declare the applicant as the legal owner of the disputed land and the respondent was ordered to remove the raised structure from it.

Dissatisfied with the above decision, the appellant brought this appeal and advanced four grounds as shown above. During the hearing of this appeal, the appellant was represented by Mr. Geoffrey Kalaka, learned counsel while the respondent was represented by Mr. Mahamoud Mwangia, learned advocate. With the leave of the court, the appeal was argued orally.



Arguing in support of the appeal, the appellant counsel opted to drop the 3rd ground of appeal and argued the 1st, 2nd and 4th grounds of appeal. He also chose to argue the 1st and 4th ground jointly and argue the 2nd ground separately.

In arguing the 1st and 4th grounds of appeal, the appellant's counsel submitted that, at the trial Tribunal, DW1 who is now the appellant, testified to have been allocated plot No. 458 Block B Nyamhongolo by Mwanza City Council in 2004 which is currently Ilemela Municipal Council. That, he was given the letter of offer which was admitted as Exhibit D1. That, he developed the area by surveying it and as he made follow-up for getting title, it is when he realized that there is another title issued by the responsible authority to PW1 father on 2012 on the same disputed plot.

In making a close follow-up on the double allocation, the Ilemela Municipal Council wrote a letter to appellant (Exhibit D2) on 20/1/2016 which was also copied to the respondent. The letter required the respondent to surrender the title deed of the disputed plot as it was issued without following the procedure and he was to surrender it so as to be allocated alternative piece of land. That, the respondent did not adhere to those instructions which are seen in Exhibit D2.



The appellant's counsel went on that, such evidence was also corroborated by DW2 who was the land officer from Ilemela Municipal Council as reflected on page 6 of the judgement. He avers more that, for that basis it is their view that, the first person to be allocated that piece of land was the one to be given first priority in case of double allocation. The appellant's counsel cited the case of **Ombeni Kimaro V Joseph Mishili**, Civil Appeal No. 33 of 2017, CAT at Dar es salaam to stress on the issue of double allocation and went on to refer our case at hand that, the appellant was allocated a disputed land before the respondent.

The appellant's counsel went on to make reference to page 10 of trial tribunal's judgement as the tribunal stated that if the title is issued, it supersedes the letter of offer. However, he distinguished that finding by stating that, it is not the correct position taking into consideration the circumstances of this case as shown by exhibit D2 that is supported by evidence of DW2, which shows that there was confusion on issuing the title to the respondent which requires him to surrender the same to the responsible authority and the appellant to be given the disputed land.

In arguing the 2nd ground of appeal, the appellant's counsel submitted that, looking at the proceedings and parties pleadings in the trial tribunal, the appellant was firstly allocated land by Ilemela Municipal Council which later on, the same land was allocated to the respondent



and so, Ilemela Municipal Council was a necessary party to the case as their involvement can bring impact as the losing party can be compensated by being given alternative land or any other compensation.

He went further submitting that, non-joining of Mwanza City Council resulted the case not to reach its finality as there are some reliefs which the party cannot get after being wrongly allocated the disputed land which was also allocated to another person. The appellant's counsel cited a persuasive decision of **Severini Ndekoi Masha V Hurbet Kisanga**, Land Appeal No. 19 of 2019, HC at Moshi where the court held that the Director of Moshi Municipality is the necessary part. That the circumstance of the above case is similar to the case at hand.

He finalized his submission in chief that Ilemela Municipal Council was supposed to be a necessary party to decide who was wrongly allocated the disputed land. He prayed for the appeal to be allowed.

In response to appellant's submissions, the respondent's counsel in 1st and 4th grounds of appeal submitted that, it is their view that the evidence was properly evaluated and the documentary evidence that is Exhibit D1 and D2 which is the letter of offer and the letter from Municipal were considered while on the other side the respondent tendered Exhibit P1 which is the title deed. That, on page 10 of trial tribunal's judgement



the chairperson made a critical analysis of the evidence of both parties. That, once a title is granted it supersede the letter of offer. He supported the decision of the trial tribunal by citing the case of **Amina Maulid Ambali and 2 others V Ramadhani Juma**, Civil Appeal No. 35 of 2015(CAT), where it was stated that, when two persons have competing interest the person with certificate of title is regarded as a lawful owner unless it is proved that it was unlawful obtained.

He further cemented that, in all proceedings before the trial tribunal and in this present appeal, the appellant did not contend that the respondent obtained title through unlawful manner. He went on that, the trial tribunal did not pay much attention on Exhibit D2 because the District Commissioner does not have power to deal with land dispute. And therefore, the trial tribunal was not bound by the decision of District Commissioner. He finalized his submission on these grounds by praying them to be dismissed as they lack merit.

He argued on the 2nd ground by stating that, the respondent was declared a lawful owner and the cause of action was trespass and there was no any prayer of rectification, therefore the tribunal was proper to deal with the parties of the case without joining the other party because the tribunal has no power to order rectification. That, it was the duty of the appellant to pray before the trial tribunal to add a necessary party if



he thinks it was proper. And that, the issue was not determined by the trial tribunal.

The respondent's counsel further argued that, the cited case by the appellant's counsel is distinguished because, in our case at hand there was a person who had a title who is the respondent. He added that the title was given to the person who was given a right of occupancy.

He attacked the appellant's prayer for this court to order denovo of the matter by submitting that, denovo is ordered when there is illegality on the part of the court and not the parties. The respondent's counsel went on to the second prayer and argued that, this court has no power to do rectification since the appellant was supposed to go to the proper forum. That rectification is done through Land Registration Act, under s. 99(1) of Cap 334 R.E 2019. That rectification cannot be done by way of appeal. For those reasons, the counsel prayed for the appeal to be dismissed with costs.

In his rejoinder, the appellant's counsel argued that, they did not advance rectification prayer. That, the cause of action resulted among the prayers which was the respondent to be declared as a lawful owner, and that's why he did not report the matter as a criminal trespass.



That, in trial tribunal they prayed for the joining of necessary party so as to determine the dispute to its finality but the tribunal didn't see the importance of doing so. That Exhibit D2 was issued by the Director of Ilemela Municipal Council who is responsible in land matters, therefore the same was issued by the appropriate authority.

He went on that; the certificate of title surpassed the letter of offer only if there are procedural formality of getting the same. However, in our case at hand there was procedural irregularity that's why he was ordered to return it. That since there was no revocation of offer letter, the procedure was not followed. He therefore prayed for his appeal to be allowed. That's mark the end of both parties' submissions.

I appreciate both counsels for their valued submissions. From these submissions, I will now determine this appeal in which I will have one issue to tackle which is, whether this appeal has merit. In answering this issue, I choose to start with the 2nd ground of appeal for the reason that will be revealed at the end.

It is the appellant's counsel submission that, Ilemela Municipal Counsel was to be joined as a necessary party in this saga, as he was the allocating authority that has allocated the same plot for both the appellant and the respondent. That, their involvement can bring impact as a losing



party can be either compensated or allocated another plot. This assertion brings my mind to the provisions of Order I Rule 3 of the Civil Procedure Code Cap 33 R.E 2019, which carters for who can be joined as defendants.

The provision states;

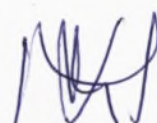
Order I Rule 3.

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in alternative where, if separate suits were brought against such persons, any common question of law or facts would arise.

That is to say for two or more persons or entities, to be joined as defendants there must be a right to relief against them which if separates suits were to be filed then a question of law or fact would arise.

Apart from that provision which provides as to who can be joined as a necessary party, there are case laws which has provided for who can be a necessary part. The Court of Appeal in the case of **Abdi M. Kipoto Versus Chief Arthur Mtoi** Civil Appeal No. 75 of 2017(unreported) the court said that;

"A party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party".



This is to say, a necessary party has to have rights which will be affected by the decision of court and therefore his presence in the suit is important.

See also the case of **Abdullatif Mohamed Hamisi Versus Mehboob Yusuph Osman and Another**, Civil revision No. 6 of 2017(unreputed).

However, this is not the only environment for a person to be joined as a defendant, as it is provided under Order I Rule 5 which states that;

Order I Rule 5

- *"It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him."*

I would also like to borrow the same legal principle in the persuasive Indian case of **Ramesh Hiranand Kundanmal Versus Municipal Corporation of Greater Bombay and ORS**, 1992 SCR (2) 1 where the Supreme Court of India in its holding stated that;

"... The person to be joined must be one whose presence is necessary as a party. what makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved that would only make him a necessary witness- and not merely that he has an interest in the correct solution of some questions involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled therefore, must be a



question in the action which cannot be effectually and completely settled unless he is a party...."

Going further, we can now come to a conclusion that for a party to be a necessary party it is not necessarily for his rights to be at stake but he has to be bound by the result from the question to be settled thereof, the question which the court cannot effectively answer without his presence in that suit. That, without him/her the court cannot be in a position to pass an effective decree. This was also discussed in the British case of **Benares Bank Ltd Versus Bhagwandas, AIR (1947) ALL 18**, as quoted in the case of **Abdullatif Mohamed Hamis (supra)**.

Coming to our case at hand, we now need to pose a question if Ilemela Municipal Council being an allocating authority, needed to be joined as a necessary part as alleged by the appellant. From the extracted facts of the trial tribunals proceedings, it is without doubt that, both the appellant and the respondent plots were allocated by Ilemela Municipal Council by virtue of being allocating authority in accordance with the Land Act, Cap 114 R.E 2019 at different times. Setting these facts on our case at hand, firstly, it is my considered view that Ilemela Municipal Council needs to be joined as a necessary party for the court to determine the legal rights or relief whatsoever over the disputed land as its purpose was to allocate the disputed land, despite the fact that, now the Municipal



holds no interest over the disputed land as the title had already passed over to the allocatee in which at our case there are two allocatee's.

Secondly, it is true that non-joining of the Ilemela Municipal Council does not bar this court to pass a decree considering the primary prayers of the suit as pleaded in the trial tribunal. The court can pass a decree to one among these litigants which were both allocated by Municipal Council, the question is what will be the remedy of the losing party? does he have to institute another suit against the allocating authority or the Assistant Commissioner responsible for registering that land?

If so, then the answer is, the case will not be effectively ended and meanwhile the issue of multiplicity of suit will arise while it is the duty of the court to make sure that there is ending to litigation.

From this findings, it is when I see the question which its answer depended on the joining of Ilemela Municipal Council as a necessary party to the suit. It is also my considered view that the trial tribunal had a duty to add the Ilemela Municipal council as a necessary party even if that matter was not raised by the parties for it to finally conclude the matter to its finality by virtue of Order I rule 10(2) of the CPC Cap 33 R.E 2019.

The same decision was held in the case of **Tanzania Railways Corporation (TRC) Versus GBP(T) limited**, Civil Appeal No. 218 of

2020 (Unreported), where the Court of Appeal stated that the plaintiff cannot be forced to sue a defendant that it does not want to implead as the plaintiff has that freedom to choose who to sue. However, the solution is provided under Order I rule 10(3) of the CPC, Cap 33 R.E 2019.

The court went further to analyze that, if there is a need to add another party whose absence will lead to such issue of importance to remain unsolved, the court cannot take a role of bystander, as it has the duty to take matters on its own and add such parties to the proceeding in order to facilitate effective and complete adjudication and resolution of all issues in controversy presented before it.

From the trial tribunal record's there was a point when the applicant prayed for the amendment of his application to join Ilemela Municipal Council and the Tribunal granted that prayer (page of 4 of trial tribunal proceedings). However, later on through his advocate decided not to do so. It's my take that, from that moment if the trial tribunal was keen enough, would have seen the importance of joining Ilemela Municipal Council as a necessary party to the case.

It is my belief that, our case at hand falls upon the circumstances that was decided upon by the Court of Appeal in the above cited case of **Tanzania Railway corporation(supra)**. Therefore, I allow the second



ground of appeal and I will not tire myself to discuss the rest of the argued grounds as this finding is enough to dispose of this appeal.

I therefore, proceed to exercise my revisional powers under section 43(2) of the Land Dispute Courts Act, Cap 216 R.E 2019, by quashing and setting aside the entire proceeding and judgement of the trial tribunal and directs that Land Application be tried afresh by another chairperson with a new set of assessors after the addition of Ilemela Municipal Council as the allocating authority of the land in dispute. No order as to costs.


M. MNYUKWA

JUDGE

31/03/2022

Court: Judgment delivered on 31st March, 2022 in the presence of the appellant's representative and in the presence of the respondent's counsel.




M. MNYUKWA

JUDGE

31/03/2022