IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND APPEAL NO. 4 OF 2022

(Originating from the District Land and Housing Tribunal for Mbulu at Mbulu in Application No. 34 of 2020)

LOHAY KWASELEMA KWARA.....APPELLANT

VERSUS

KWARA YORO KWARA.....RESPONDENT

RULING

10/11/2022 & 26/01/2023

GWAE, J

This appeal originates from the land dispute filed by the respondent, Kwara Yero Kwara in the Karatu District Land and Housing Tribunal (herein after the DLHT) against the appellant, Lohay Kwaslema Kwara. Initially, the respondent claimed to have been given a piece of land measuring 20 acres by his father Yero Kwara on the 15th June 1996. He was able to produce a letter dated 15th June 1996 demonstrating that one Kwaslema Kwara was the one who handed over the suit land to the respondent.

After full trial of the parties' dispute, the DLHT's chairperson finally found that the evidence adduced by the appellant was contradictory. He

eventually issued a verdict in favour of the respondent. However, the finding of the trial chairperson was a total departure from the opinion of the assessors who sat with him. The 1st assessor opinioned that, none of the parties are the owners of the suit land since the disputed land is the belonging of the family of Anton Naamo Lawi and and Slaa Lawi whilst the 2nd assessor gave his opinion to the effect that, the evidence adduced by the applicant now respondent was very contradictory.

Aggrieved by the DLHT's decision declaring the respondent the owner of the suit land, the appellant has knocked this court's doors armed with a total of eight grounds of appeal to wit;

1. That, the learned trial chairman erred in law and facts for failure to make proper evaluation of evidence on record hence, reached a wrong decision
2. That, the learned trial chairman erred in law and facts for failure to decide in the appellant's favour beside the cogent evidence that weighed that of the applicant (respondent)
3. That, the learned trial chairman erred in law and facts for failure to compose judgment according to law

4. That, the learned trial chairman erred in law and facts for failing to invite the tribunal's assessors to give their opinion before judgment
5. That, the learned trial chairman erred in law by not giving reasons for departing from opinion of the tribunal's assessors
6. That, the learned trial chairman erred in law and facts for failing to consider that, the case against the appellant was not proved on the balance of probability
7. That, the learned trial chairman erred in law and facts for relying on the S1 which shows neither demarcation nor measurement in the acres of the disputed land
8. That, the learned trial chairman erred in law and facts for failure to consider that the applicant (respondent) had failed to call upon material witnesses

On 22nd day of September 2022 this appeal was called on for hearing however the parties sought and obtained leave to dispose it by way of written submission taking into account that both parties are laypersons, leave was granted accordingly.

In his submission, the appellant opined to have abandoned the following grounds of appeal No.3, 4, 5 and 8 herein above. Through the

written submissions duly filed by the parties and a chain of judicial decisions thereof, the parties' submission are centered at evaluation of evidence by the DLHT. However, having closely looked at the parties' evidence, I have noted a serious and vital legal issue as to the mis-joinder or non-joinder of the parties. I am saying so simply because, when the respondent was cross-examined he stated that the suit property is his own property together with his brother called Serea Yero. Similarly, the appellant and his witnesses namely; Antony Naanu and Ae Slaa when appeared before the trial tribunal testified that, the suit land is the property of the Slaa Lawi and Naanu Lawi and that the appellant is a mere invitee to the suit land parties. For easy of reference parts of the pieces of evidence adduced by the parties during trial of the matter by the DLHT are herein reproduced;

SM1 (Respondent's evidence)

> *"Eneo hilo tulikabidhiwa pamoja na ndugu yangu Serea Yero"*

SUI (Appellant's testimony)

> *"Ninachojua Mimi eneo la mgogoro liliachwa kwa baba yangu Kwaslema Kwara na Slaa Lawi na Naanu Lawi mwaka 1969 na baba yangu akatumia eneo hilo mpaka*

mwaka 2002.... 20002..akaniambia nitumie eneo hilo nisiuze ni la watu wa ndani ya familia....

xxEneo la mgogoro ni la Slaa Lawi na Naamu Lawi ila wameniachia ili niliangalie na kulitunza"

SU2 (Antony Naanu)

"Ninachojua ardhi yenye mgogoro ni mali yetu mimi pamoja na Ae Slaa ambapo tulihamia Karatu kwa kuwa ndugu zetu walikuwa wanakufa mfululizo na ardhi hiyo tulimwachia Kwaslema Kwara baba wa mdaiwa"

Having observed as explained earlier, I am therefore duty bound to entertain the parties to address the court as to non-joinder of necessary part (ies) so that to do away with taking an adverse action against a person who was not afforded an opportunity to be heard and not a party to the proceedings. Similarly, to declare a person as a lawful owner of the property which in essence belong to other person (s).

Addressing the court, the appellant told the court that the suit land is the belonging of the family of Lawi since his father was a mere invitee whereas the respondent on his part stated that, the suit land is the belonging of his late father Yero Kwara. Hence, the children of his late father are the beneficiaries of the suit land, including himself.

It is trite law that, a necessary party must be made a party to the proceedings so that, the decree emanates from such proceedings may be enforceable and failure to join such a necessary party may lead to condemning a person unheard through a decision in which he was not availed an opportunity to be heard. The requirement to implead a necessary party was stressed in **Patrobert D. Ishengoma vs. Kahama Mining Corporation Ltd (Barrick) (T) and two Others,** Civil Application No. 172 of 2016 where the Court of Appeal held

> *"It is vivid that the applicant who was challenging unfair termination of employment was a subject of the Minister's determination of the appeal. However, surprisingly, when it came to challenging the decision of the Minister by way of judicial review, the applicant was not pleaded as one of the respondents. This was regardless of his request and upon having indicated that, he was likely to be affected by the outcome of the decision in question. With respect, this was a violation of the rules of natural justice. It is settled law that no person shall be condemned without being heard is now legendary. More so, it is law that any decision affecting the rights and interests of any person arrived at without hearing the affected party is a nullity even if the same decision would have been arrived at had the affected party being heard".*

Also this court (Commercial Division) in **Suryakant D. Ramji v. Savings and Finance Limited and Others** (2000) TLR 121 where it was held that;

> *"The plaintiff may decide to join both proper and necessary parties in litigation, a necessary party is one against whom the relief is sought or without whom an effective decree cannot be passed by the court all those whom the law requires to be impleaded and , and on the other hand proper parties are those whose presence enable the court to decide effectively and finally the dispute presented before it and these include those who in one way or another are interested or connected with the reliefs being sought against others".*

In our instant dispute, it goes without saying that, the said Antony Naanu (SU2) and Ae Slaa (SU3) or any other person (s) who are members from the family of Slaa Lawi and Naanu Lawi. Hence, they are interested persons in the suit land. Thus, if the disputed land is /was declared the lawful property of the either parties, there are persons who will likely be deprived of their property without being afforded an opportunity of being heard which is against the principle of natural justice (See Article 13 (6) (a) of our Constitution, 1977 as amended form time to time.

According to the nature of the case and evidence adduced by the parties before the trial tribunal, the application before the trial tribunal

ought to have either been struck out or the tribunal ought to have caused the respondent application to be amended to include necessary parties including the respondent's brother one Serea Yero and any other Yero's heirs. It is my considered view that, had the trial tribunal declared the appellant as a rightful owner of the suit land, such declaratory order would have been prejudicial to the family members of the late Slaa Lawi and his late brother Naanu Lawi. It follows therefore non-joinder of the necessary parties may not enable the court or tribunal to effectively and finally determine the dispute between the parties involved.

In the case of **Godfrey Nzowa vs. Selemani Kova and another**, Civil Appeal No. 183 of 2019, reportable at https://tanzlii.org/tz/ judgment /court-appeal-tanzania/2021/674, the Court of Appeal faced the similar situation that is misjoinder or non-joinder of the Ministry of Works and Attorney General in the suit instituted by the appellant. In the Nzowa's case, the appellant and 1st respondent were claiming to be legally entitled to purchase and to have lawfully purchased the suit premise located in Arusha at Sekei area respectively. The Court of Appeal of Tanzania had these to say;

> *"It is a common ground as submitted by counsel for both parties, that misjoinder and non-joinder of parties to the suit is addressed under Order 1 Rule 1 and 3 of the CPC*

that lays down the procedure to be followed in cases where there is non-joinder or misjoinder of parties.
Under those provisions where a suit is instituted by or against certain identifiable parties, all members of such a group must be impleaded whether in personal or in representative capacity, although it is not all the time that not all parties are necessary for the suit to be adjudicated upon. The question of joinder of parties may arise with respect to plaintiffs or the defendants. Joinder of plaintiffs is regulated by Order 1Rule 1 of the CPC."

Guided by the above legal principle and the circumstances of this particular case, I am of the firm view that, the said siblings of Lawi and their descendants were to be joined in the proceedings under their personal capacities or as representatives. Omission to implead or failure by the trial tribunal to cause the respondent's application to be amended renders whatever was done before the tribunal below a nullity as both parties lacked locus standi. Equally, the respondent's brother one Serea Yero and any other heirs of the late Yero be joined in the suit or a heir of the late Yero be appointed as an administrator of the estate of the late Yero.

In view of the above deliberations and by virtue of section 43 of the Land Disputes' Courts Act, Cap 216 Revised Edition, 2019, I hereby quash DLHT's proceedings, decision and any ancillary orders thereto. Parties or

any other person are advised to bring afresh a case before a competent court joining necessary parties. According to the nature of the dispute and the fact that the issue of non-joinder was raised by the court suo moto, I refrain from making any order as to costs of this appeal.

It is so ordered.

DATED at **ARUSHA** this 26th January 2023

M. R. GWAE
JUDGE