IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 45 OF 2021.

[Arising from the judgment and decree of the District Land and Housing Tribunal for Tabora in Land Application No. 20 of 2021.]

JOSEPH DAUDI
EVAJUDITH M. NGASA
MARY BUNDALA KALUGULU
DAFROZA ISMAIL
MAGRETH JACOB
ASHURA RAMADHAN KASABUBU .....**APPELLANTS**
PAUL KANANDA
ISSA SADALA
NEEMA YASSIN MPANUKA
PRISSA S. KINYOTA
DOTTO MAYALA KISENA
ANASTAZIA RABSON MBARUKU

VERSUS

MSABAHA RAMADHANI..... 1ST RESPONDENT

SAIMON RAMADHAN BIHOLE ..... 2ND RESPONDENT

THE REGISTERED TRUSTEE OF THE
MARIAN FAITH HEALING CENTRE.....3RD RESPONDENT

.....

JUDGEMENT

.....

Date of Last Order: 21/03/2023

Date of Delivery: 16/05/2023

AMOUR S. KHAMIS, J.

The appellants herein instituted a dispute in the District Land and Housing Tribunal for Tabora through Land Application No. 20 of 2021 claiming to be declared as the lawful owners of farmlands located in Miemba Area, Usule Street, Mbugani Ward, within Tabora Municipality.

The respondents raised a preliminary objection on a point of law that the appellants' application was bad in law for failure to join all necessary parties to the case and failure to name the plot numbers of the disputed land since it was a surveyed land.

The trial Chairman then sustained the preliminary objection raised by the respondents and struck out the appellants' application hence this appeal at hand.

Aggrieved by the trial Tribunal's ruling, the appellants' appealed to this Court on one ground to wit;

1. That, in misdirection and non-comprehension of the facts of the appellants' case before the District Land and Housing Tribunal, the learned chairman erred in law and facts to uphold the preliminary objection raised by the respondents and dismiss the appellants case on the ground that the necessary parties were not joined to that case.

Hearing of the appeal was done by way of written submission as preferred by the parties who were fully represented by Mr. Kelvin Kayaga, Mr. Hassan Kilingo and Mr. Sylvester Shayo

advocates for the appellants, 1st, 2nd and 3rd respondents respectively.

Mr. Kayaga submitted in support of the appeal that the learned chairman did not take into account the appellants' submission against the preliminary objections at all, and had he considered the submissions and authorities cited therein, he would have understood the difference, and addressed such arguments in his ruling.

He cited the case of ***TANZANIA BREWARIES LIMITED v ANTONY NYINGI [2016] TLSLR 99,*** where the CAT at page 104 stated that;

> *"If a Court of law decides to accept or reject a party's argument,* ***it must demonstrate that it has considered the same, and set out the reasons for rejecting or accepting*** **it.** ***Otherwise, the decision becomes an arbitrary one."***

The learned advocate further cemented that, by all standards the said quoted, paragraph does not amount to taking into consideration the parties' arguments and addressing them by showing the reasons for accepting or rejecting them. This in itself is enough for this Court to quash the said Order of the trial Court for being arbitrary. However, since this is not the main complaint Mr. Kayaga prayed for the Court to direct its mind on the next paragraph as well.

He asserted that the central issue is the fact that the preliminary objection was based on a misconception of the law and the DHLT fell into the trap, and acted under such misconception, as such its decision was wrong due to the following reasons:

First, the DHLT did not consider the fact that the preliminary objection and the reasons thereto did arise from disputed facts. Hence this matter was not fit to be determined by way of preliminary objection.

Mr. Kayaga asserted that in the appellants' application before the DHLT filed on 05/05/2021, in paragraph 3 the Applicants stated that:

> ***"Location and address of the suit land: Unsurveyed farm land located at Miemba area in Usule street in Mbugani ward within Tabora municipality, the farm land estimated to be twenty-seven (27) acres with following demarcations ... "***

He argued that throughout their pleadings, the appellant referred to the suit land as unsurveyed. To the contrary, all respondents disputed the said averment in their WSD. Order XIII R. 1(1) of the Civil Procedure Code [Cap 33 R.E(2019)] provides that

> *"Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other"*

So, the fact of whether the suit land was surveyed or un-surveyed was a disputable fact that could only be determined upon evidence. Hence it was not fit matter to be determined by way of preliminary objection.

Secondly, Mr. Kayaga contended that the appellants' application did not indicate anywhere that the suit land was registered or that the same was allocated to the respondents by the said Tabora Municipal Council, or that the certificates were

issued by the Commissioner as such. But most importantly the appellant had no cause of action against the Tabora Municipal Council or the Commissioner.

Mr. Kayaga contended that there is a general stance of the law when determining the competency of the application or suit on preliminary Objection, the Court is required to look at the Plaint/ Application alone and not the WSD since that is not what institutes the case, and the Applicant/ Plaintiff is not required to predict the Defendant's defence. And such failure to predict does not render the case incompetent.

The learned counsel argued that it was wrong for the learned chairman to hold that the matter was incompetent based on what was alleged in the WSD apart from the fact that the same needed proof.

He cited the case of ***ABBASA AWES OMAR v DEZO CIVIL CONTRACTORS CO. LTD & ANOTHER, Land Case No. 190/2022, HC Land Division at Dar es Salaam,*** (unreported) where the Court stated that;

"I am of the settled view that in order to determine ***whether the Court has jurisdiction,*** *paragraph 10 should not be read in isolation, instead* ***the whole plaint should be looked at."***

Thirdly, the learned advocate submitted that, assuming that the said were necessary to be made parties (even though not in the circumstances of this case) since the Tribunal was a court of first instance, the effect if any would not be to hold that the suit was incompetent. This is so taking into account the spirit of the law under Order 1 Rule 9 of the Civil Procedure Code [Cap 33 R.E (2019)] which provides that

"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."

The appellant's counsel asserted that since it was not at an appeal stage, the Tribunal erred in declaring the matter incompetent while it had the option to join them and order accordingly, including transferring the matter to a Court with jurisdiction if such a joinder had the effect of lifting jurisdiction.

In reply, Mr. Hassan Kilingo, advocate for the 1st and 2nd respondents, submitted that the trial tribunal was right to sustain the preliminary objection and struck out the application due to the fact that the necessary party to the suit was not joined.

He averred that the appellants' submission relied on the application concerning the issue of unsurveyed farmland and totally forgot that the disputed land is within Tabora Municipality which is identified by a title number under the Land Registration Act, and since the suit land was allocated to the respondents by the Commissioner for Lands and certificates of title issued, then the Commissioner for Lands and Government ought to have been joined as the necessary parties to the case.

He cited the case of ***JULIANA FRANCIS MKWABI VERSUS LAWRENT CHIMWAGA, CIVIL APPEAL NO. 531 /2020,*** CAT at Dodoma (Unreported) which quoted some cases which clearly provide the distinction between necessary and non-necessary parties being joined or non-joined to the case respectively as in the case of ***TANG GAS DISTRIBUTORS LIMITED V. MOHAMED SALIM SAID & 2 OTHERS, CIVIL APPLICATION FOR REVISION***

NO.68/2011 (unreported) at pg. 9-10 when considering circumstance upon which a necessary party ought to be added in a suit stated that,

" .... an intervener, otherwise commonly referred to NECESSARY PARTY, would be added in a suit under this rule ..... even though there is no distinct cause of action against him/ where:-

(a) NA

(b) His proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit."

Mr. Kilingo asserted that in the circumstances of this appeal in relation to the given authorities above, the Commissioner for Lands and the Government are necessary parties to be joined in the suit before its determination. He said the respondent was already given the Certificate of Title as stipulated in their Written Statement of Defense.

Mr. Kilingo contended that failure to join the Tabora Municipal and Attorney General is fatal to the proceeding because on the facts of the case, most of which do not appear to be disputed, it is impossible to make any orders in this matter without affecting the rights of Tabora Municipal and Attorney General who has not had any chance of being heard in this matter at all.

He argued that every person must be heard on matters that concern and/or affect their rights. He added that this is a fundamental principle of justice in any democratic must be guarded and cited the case of ***JUMA B. KADALA V. LAURENT MNKANDE [1983] TLR 103*** at page 106 which he said supported

the case of ***NGERENGERE ESTATE COMPANY LIMITED VERSUS EDNA WILLIAM SITTA. CAT- CIVIL APPEAL NO.209 OF 2016*** (unreported) wherein it was held:

"In view of the settled law on the right to be heard, we are of a seriously considered view that, it will be absurd for this Court to make any order against the Registrar of Titles as *prayed by the appellant without availing her opportunity to be heard. In this* regard, *we* agree *with Mr. Lutemo that, the Registrar of Title sought to have been joined* as *a party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal."*

Mr. Kilingo further contended that the trial tribunal was correct to strike out the application for the purpose of joining the necessary parties to wit the Commissioner for Lands and the Government (Tabora Municipal).

He submitted that failure to join the Commissioner for Lands is very fatal, since the respondents acquired the land and have titles to own the same, due to the fact that the whole process has been done/ conducted by the owner, the Tabora Municipal, and the Commissioner for Lands in the availability process of the issuance of the title deed.

The learned counsel contended that these are the necessary parties to be joined as parties in this case.

Mr. Shayo, advocate for the 3rd respondent was also in line with the submission of Mr. Kilingo. He cemented that he agrees with the appellants that the non-joinder is curable by joining the Tabora Municipal Council and the Commissioner for Lands but it

can only be cured after the appellants have complied with the statutory requirements of giving the appropriate statutory notices.

Upon going through submissions of the rival parties and considering the records of the trial Tribunal, I find that the issue in contention is whether it was proper for the trial Chairman to strike out the appellants' application on the basis that they did not join the Tabora Municipal Council as a necessary party.

A necessary party has been elaborated in the case of ***HAMISI SALUM KIZENGA vs MOSES MALAKI SEWANDO AND 18 OTHERS; LAND APPEAL NO. 51 OF 2019***, (unreported) as;

> *"A non-necessary party is a person who has merely to be joined in the suit. He also commonly referred to as a proper party. However,* ***a necessary party is a person who has to be joined in the suit yes, but whose presence before the court is necessary for it to effectively and completely adjudicate upon the questions involved in the suit****. In other words, a court can effectively and completely adjudicate upon the dispute between the parties even in the absence o f a non-necessary party. Nonetheless, the court cannot do so without a necessary party."*

From the impugned ruling of the trial Tribunal, the Chairman stated that, and I quote;

> *"Kimsingi katika kesi iliyo mbele yetu hakuna ubishi kuwa Manispaa ya Tabora ndio mamlaka ya ugawaji viwanja na Kamishna wa Ardhi ndio mamlaka ya utoaji wa Hati. Aidha hakuna ubishi kuwa wajibu maombi wamepatiwa viwanja na Manispaa ya Tabora na*

hatimae kupatiwa Hati na Kamishna wa Ardhi. Mfano mijbu maombi na. 1 Hati yake ni ***Na. 12007 Kiwanja Na. 612 Kitalu "C" Usule Tabora Manispaa****.....kitendo cha kutokuwaunganisha wadaawa hawa muhimu..... Ni tatizo linalofanya kesi hii ikose muguu ya kusimama hapa Mahakamani."*

Order I rule 10(2) of the Civil Procedure Code provides that:

"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." (Emphasis added)

The above provision was discussed in the case of ***FARIDA MBARAKA AND ANOTHER VS DOMINA KAGARUKI, Civil Appeal No. 136 of 2006*** in which it was held that:

"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as plaintiff or defendant and is not joined so; or (ii) ***when without his presence, the questions in the suit cannot be completely decided****."*

I wish to state firmly that I fully subscribe to the above position of the law in respect of a necessary party. I do concur with the following findings of the trial Chairman, thus;

> *"Kimsingi katika kesi iliyo mbele yetu hakuna ubishi kuwa Manispaa ya Tabora ndio mamlaka ya ugawaji viwanja na Kamishna wa Ardhi ndio mamlaka ya utoaji wa Hati. Aidha hakuna ubishi kuwa wajibu maombi wamepatiwa viwanja na Manispaa ya Tabora na hatimae kupatiwa Hati na Kamishna wa Ardhi. Mfano mijbu maombi na. 1 Hati yake ni* ***Na. 12007 Kiwanja Na. 612 Kitalu "C" Usule Tabora Manispaa****.....kitendo cha kutokuwaunganisha wadaawa hawa muhimu..... Ni tatizo linalofanya kesi hii ikose muguu ya kusimama hapa Mahakamani."*

In the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuf Osman and Another, Civil Revision No. 6 of 2017** (unreported) the Court of Appeal held 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 determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

From the above authority I go along with the trial Tribunal's finding that the Tabora Municipal Council and Commissioner for Lands as necessary parties, ought to have been joined in the suit

since they are the ones who allocated the disputed land to the respondents.

Since the effect of failure to join a necessary party renders the suit incompetent, it was proper for the Chairman to strike it out following the preliminary objection raised.

In the upshot, the appeal is dismissed for lack of merits.

It is so ordered.

AMOUR S. KHAMIS

JUDGE

16/05/2023

ORDER: Judgment delivered in open Court in absence of both sides. The right of appeal is fully explained.

AMOUR S. KHAMIS

JUDGE

16/05/2023