

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CIVIL REVISION NO. 6 OF 2017

ABDULLATIF MOHAMED HAMISAPPLICANT

VERSUS

MEHBOOB YUSUF OSMAN 1ST RESPONDENT

FATNA MOHAMED.....2ND RESPONDENT

**(Revision from the proceedings and order of the High Court of Tanzania,
(Land Division) at Dar es Salaam)**

(Mgaya, J.)

**dated the 14th day of December, 2015
in**

Land Case No. 329 of 2015

RULING OF THE COURT

5th June & 1st August, 2018

MUSSA, J.A.:

In the High Court of Tanzania (Land Division), the 1st respondent, sued the 2nd respondent in Land Case No. 329 of 2015. The suit was over landed property situate on Plot No. 9 Block "A", Aggrey Street, Dar es Salaam which is registered in a Certificate of Title No. 56967. We shall henceforth refer to the described premises simply as "the suit land."

More particularly, in the plaint, the 1st respondent claimed that sometime in the year 2006, the 2nd respondent sold to him the suit land pursuant to a sale agreement which was appended thereof. From a fleeting glimpse of the agreement, it comes to light that, at the material times, the 2nd respondent was the administrator of the estate of the late Mohamed Khamis Abdallah who was the registered owner of the suit land. For ease of reference, we shall henceforth refer to him as "the deceased." The agreement also had a detail to the effect that the sale transaction between the 1st and 2nd respondents was fully blessed by the beneficiaries of the deceased's estate. Furthermore, attached to the plaint, was a certificate of occupancy in the name of the deceased unto which on the 4th August 2006, the name of 2nd respondent was posted in the Land Registry as registered owner on account of her capacity as the legal representative of the deceased's estate. Nonetheless, despite the foregoing details, the 2nd respondent was not, as such, sued in that capacity but, rather, she was sued in her personal capacity, that is, as an assumed owner of the suit land without more. The plaint which was presented for filing on the 19th October 2015, sought the following reliefs:-

"(i) Plaintiff be declared the rightful owner of the house on Plot No. 9 Block "A", Aggrey

Street, Kariakoo area, Ilala District, Dar es Salaam with Certificate of Title No. 56967.

- (ii) That an order to compel the Defendant to sign the Deed of transfer of Plot No. 9 Block "A", Aggrey Street, Kariakoo area, Ilala District, Dar es Salaam with Certificate of Title No. 56967.*
- (iii) An order for payment of (25%) percent interest of Tsh. 400,000,000/= for every month from 1st February, 2015 to the date of full payment.*

In the alternative;

An order that the apartment reserved for the Defendant to be declared to be lawful owned by the Plaintiff.

- (iv) Costs of this suit.*
- (v) Any other reliefs this honourable court deems fit to grant"*

It is noteworthy that a day after lodging the plaint, that is, on the 20th October 2015, the 1st respondent contemporaneously instituted an *ex parte* Miscellaneous Land Application No. 620 of 2015 through which she sought to be granted a temporary injunction to maintain the *status quo* with respect to the suit land pending hearing *inter - partes*. Both the suit

and the miscellaneous cause were, on that same date, assigned by the Judge in – charge of the Land Division to Kente, J.

In the meantime, in reply to the 1st respondent's pleadings, on the 20th November, 2015 the 2nd respondent lodged a brief written statement of defence in which she did not quite deny the substantive claims of the 1st respondent. As regards the Miscellaneous Land Application No. 620 of 2015, she also lodged, on that same date, a counter affidavit in reply to the application.

A little later, on the 25th November, 2015 both causes were placed before a certain Mr. Mahimbali, Deputy Registrar, for mention. As it were, the Deputy Registrar scheduled both causes for another mention on the 2nd March, 2016. The 1st respondent was seemingly discontented by the scheduling following which, through his learned counsel, Mr. Francis Makota, he on the 3rd December, 2015 wrote the Judge in – charge of the Land Division requesting for the re–assignment of Miscellaneous Land Application N0. 620 of 2015, the more so as the matter was preferred under a certificate of urgency and that the assigned Judge was unavailable. On the 15th December, 2015 the Judge - in – charge acceded to the request and, accordingly, Miscellaneous Land Application N0. 620 of 2015, was re–assigned to Mgaya, J. In this regard, it is noteworthy that

it was not explicitly directed that the re-assignment of the miscellaneous cause was just as well desired to extend to the main cause.

Thus, on the 10th December, 2015 both matters were, for the first time, placed before Mgaya, J., apparently, for necessary orders. As it turned out, on that date, the parties were not in attendance and, so Mgaya, J. singlehandedly re-scheduled the mention date for both causes from the 2nd March 2016, which had earlier been set by the Deputy Registrar, to the 14th December, 2015 with an order that the parties be notified.

Now, against the foregoing backdrop, on the scheduled 14th day of December, 2015 the two causes were, again, placed before Mgaya, J., whereupon Mr. Makota, the learned counsel for the 1st respondent, brought to the attention of the court the fact that the 2nd respondent had seemingly admitted the claim. Accordingly, the learned counsel for the 1st respondent prayed for judgment on admission in favour of his client in accordance with Order XII Rule 4 of the Civil Procedure Code. Incidentally, Mrs. Phillip, the learned Advocate, who had the conduct of the case for the 2nd respondent, went along in support of the prayer of her adversary, following which the trial court responded thus: -

"ORDER

As submitted by both counsel for the parties Mr. Makota the learned counsel for the plaintiff, and Mrs. Phillip the learned counsel for the defendant that the defendant had admitted the plaintiff's claim, I enter judgment on admission for the plaintiff as prayed under Order 12 rule 4 of the Civil Procedure Code Cap. 33 R.E. 2002 to the extent below and it is accordingly ordered as follows: -

- 1. The plaintiff Mehboob Osman is declared the rightful owner of the suit house on Plot N0. 9 Block "A", Aggrey Street' Kariakoo comprising Certificate of Title N0. 56967.*
- 2. The suit property a house located on Plot N0. 9 Block "A", Aggrey Street, Kariakoo comprising Certificate of Title N0. 56967 to be registered in the name of the plaintiff Mehboob Yusuf Osman by the operation of law under section 71 of the Land Registration Act, Cap. 334.*
- 3. Each party to bear his/her own costs.*

It is so ordered.

Signed

F. W. MGAYA

JUDGE

14/12/2015."

Coming to the Miscellaneous Land Application No. 620 of 2015, both Mr. Makota and Mrs. Phillip advised the court that, in the wake of the judgment on admission, the ancillary application had outlived its utility and they called upon the presiding officer to mark it closed and, indeed, it was, accordingly, closed on that same date.

A good deal later, more precisely, on the 5th August, 2016 the applicant herein, holding himself up as the lawful heir of the estate of the late Mohamed Khamis Abdallah, wrote the Secretary to the Judges' Ethics Committee and presented a litany of strong worded complaints which were personally directed against Mgaya, J. with respect to her handling of the two causes. We think it is best if we reproduce the letter of complaint in full:-

"That Hon. Judge F.W. Mgaya, J. has committed Extrinsic Fraud, has portrayed behaviour that is inconsistent with the code of judicial ethics and has handled the above mentioned case without due care and attention, shaming the judiciary as a whole.

- 1. That I am the law full heir of the late MOHAMED HAMIS ABDALLAH who has not received anything from my father's estate in probate cause No. 81 of 2006 Kariakoo Primary Court, declared by the High Court a lawful heir in Civil Appeal No. 31 of 2009.*

Annexed hear with are evidences to prove the above facts marked annexure AB1.

- 2. That, plot No. 9 Block "A" Aggrey Street Kariakoo area, Ilala District Dar es Salaam with certificate of Title No. 56967 was the property of my late father MOHAMED HAMIS ABDALLAH. Annexed herewith are a search documents to prove the same marked as annexure AB2.*
- 3. That, Judge F. W. MGAYA through Land Case No, 329 of 2015 fraudulently declared one MEHBOOB YUSUF OSMAN the rightful owner of suit house on Plot No. 9 Block A Aggrey Street Kariakoo comprising of certificate of Title No. 56967 and ordered the transfer of the said Plot to the MEHBOOB YUSUF OSMAN be and ordered the transfer of the said Plot to the MEHBOOB YUSUF OSMAN be affected by operation of law under section 71 of the Land Act. Annexed herewith is a copy of proceedings and decree of Land Case No. 329 of 2015 marked annexure AB3.*
- 4. That, Due to the Decree in Land Case No. 329 of 2015 I have lost my rights to inheritance that my mother CHIKU KAMBI IDDI fought for in courts of law in Tanzania for over 10 years now and still pursuing the same and the above named parties have instituted civil application No. 112/2016 and*

107/2016 and Civil Revision No. 11/2016 against me in the district court of Ilala claiming under this judgment and decree to prevent me from inheriting even a dime.

5. That, the conduct and actions of Hon. Judge F. W. MGAYA, J. in Land Case No. 329 of 2015 are in violation of trust and confidence of the Judiciary of Tanzania. Due to the following facts that depicts Extrinsic Fraud and lack of due care and attention in the part of Hon. F. W. MGAYA, J.

i) That, Land Case No. 329 of 2015 was assigned to Hon. J. Kente, J but Hon. F. W. MGAYA, J stole the case file on the 10/12/2015 she presided in the case without reassignment. The record is silent as to how she got the case file without reassignment and who gave the file to her. The record also reveals that on the 10/12/2015 she was alone in court, the court clerk was absent, the corum of that particular date does not show the presence of the court clerk and this means that she went to steal the file herself because this was the first day she presided over the case.

ii) That, Land Case No. 329 of 2015 was scheduled for mention on the 02/03/2016 but Hon. F. W. MGAYA, J. offended the

proceedings and vacated the order without assigning any reasons for vacating by presiding in the case on the 10/12/2015 and the record does not show why and how the order for mention was vacated. What was the urgency in this case?. Who moved the court?. This shows that she had personal interest in this case.

iii) That, on the 10/12/2015, Hon. F. W. MGAYA, J closed herself in her chamber without any of the parties decided to summon the parties suo motu for no apparent reasons. I wonder how she knew the name of the advocate of the defendant as it appears that the advocate for the defendant has never appear before her in this case before 10/12/2015 and that the record before 10/12/2015 does not show or reveal the name of the advocate for the defendant.

iv) That, on the 14/12/2015 the Hon. Judge entered Judgment on admission by considering the submission from the counsels without considering the pleadings which is contrary to the law. This is a complete disregarded of the law.

- v) *That, Hon. F. W. MGAYA did not inquire as the ownership of the disputed property on the pleadings because it's not reflected in her so called order. This is gross negligence and proves bad faith on the part of the learned judge as he has the required education and skills to know this.*
- vi) *That, Hon. F. W. MGAYA, J did not pronounce Judgment known to law. i.e. there was no Judgment at all, there was an order that one would not expect to have been pronounced by a judge of the High Court.*
- vii) *That, Hon. F. W. MGAYA – gave the order in the decree that (2) the suit property a house located in Plot No. 9 Block "A" Aggrey Street Kariakoo comprising of certificate of Title No. 56967 to be registered in the name of the plaintiff MEHBOOB YUSUF OSMAN by the operation of law under section 71 of the Land Registration Act Cap. 334. This order was never pleaded, from the record the plaintiff nor the defendant prayed for this kind of order. It seems that Hon. F. W. MGAYA, J came up with this order from her own head which is contrary to the law. The*

court cannot give you what you have not asked for.

- viii) That, Hon. F. W. MGAYA, J knew what she was doing. She aimed at helping and aiding the parties to evade capital gains – Tax and stamp duty tax and that she also aimed at helping the parties to escape the strict procedure of transferring probate property which would require my consent as an heir. This is so unprofessional and unethical on the part of the judge who has a law degree as it is evident she knew the legal effect of the order and that's why she pronounced it citing the relevant section in the order itself.*
- ix) That Hon. F. W. MGAYA, J knew what she was doing and was conscious of what was going on from the way she got this case file up to the order she pronounced shows that she was very aware of what was going on and that's why she fast tracked the proceedings by avoiding Misc. Land application No. 620/2015 and started with Land Case No. 329/2015 instead.*
- x) That, Hon. F. W. Mgaya J, has been seen by some of my relative exiting the probate house in Kariakoo and that there are rumors that she has been offered a business unit in*

the probate house and has ties with one Iqbal Baghdad the husband of Hasanat Mohamed Hamis a daughter of the respondent who takes his legal services with VLC Attorneys who represented the applicant in this case.

- xi) That there are people who are threatening my life because of reporting this matter to the relevant authorities and are blaming me for making allegations against Hon. F. W. Mgaya, J but I stand firm that the actions of the learned judge are a violation of the judicial code of conduct and a shame to the whole judiciary as the society I live in, do not trust the judiciary any more due to this case.*
- xii) That to date, I have not returned to school due to this case and despite reporting this matter to the judicial administration, no leader from the judiciary has taken any actions against Hon. F. W. Mgaya, J. No action has been taken against the administrator of the estate for breach of trust and administration conditions despite the fact that the administrator is accountable to the court.*

MY PRAYER: That I pray that the Honourable Judges ethics committee

investigate this matter and that after assuring itself that what is stated herein is true then it's my humble prayer that the appropriate action be taken against Hon. F. W. Mgaya, J and those who participated in this unethical acts.

I pray that the committee take administrative action to have the administrators appointment be revoked for breach of trust and doing things that are contrary to her terms of grant and help me get my lawful share within time, as I have waited for Ten years and nothing has happened.

I humbly submit for your consideration.

Signed at Dar es Salaam this 5th day of August, 2016

Signed

ABDULATIF MOHAMED HAMIS."

Somehow, the complaint was eventually placed before the Hon. Chief Justice who directed the Registrar of the Court of Appeal thus: -

"Let revisional, suo motu, be opened by the Court in Land Case No. 329/2015 (Mgaya, J.) in

particular to examine the correctness, legality or propriety:

- (a) the assignment of the case from Kente, J. to Mgaya, J.;*
- (b) the order of 2/03/2016;*
- (c) the coram of the proceedings;*
- (d) the proceedings, orders and judgment; and*
- (e) any other matter the Court may consider un-propriety."*

Thus, such is the background giving rise to the matter at hand and it is, so to speak, sheer convenience that the parties assumed the respective names of "Applicant" and "Respondents." At the hearing before us, the applicant entered appearance in person, unrepresented. The 1st respondent had the services of Dr. Masumbuko Lamwai and Mr. Francis Makota, learned Advocates, whereas the 2nd respondent was represented by Mr. John Laswai, also learned Advocate. From the very outset, we impressed upon the parties to restrict their submissions within the four corners of the direction of the Hon. Chief Justice which initiated the proceedings at hand.

As it were, the applicant commenced his address to us by fully adopting his lengthy letter of complaint. More particularly, on the first

issue framed by the Hon. Chief Justice for consideration, he submitted that the Hon. Mgaya, J. unilaterally assigned to herself the Land Case No. 329 of 2015, the more so as, upon record, the Judge - in – Charge only assigned to her the ancillary cause i.e., the Miscellaneous Land Application No. 620 of 2015. As regards the order for mention which the Deputy Registrar scheduled for the 2nd March 2016, the applicant bitterly complained that the Judge vacated the order for no apparent reason. In the same vein, as he addressed the issue of the *coram* of the December 10th proceedings, Mr. Hamis criticised Mgaya, J. for re-scheduling, singlehandedly, the mention date for both causes from the 2nd March 2016, which had earlier been set by the Deputy Registrar, to the 14th December, 2015. As it turned out, on that date, the parties were not in attendance and, so, according to him, it was not in the ordinary for Judge to sit alone and re-schedule the case. Coming to the judgment on admission, the applicant further criticised the presiding officer for handing down the following order: -

"The suit property a house located on Plot No. 9 Block "A", Aggrey Street Kariakoo comprising Certificate of Title NO. 56967 to be registered in the name of the plaintiff Mehboob Yusuf Osman

by the operation of law under section 71 of the Land Registration Act, Cap. 334."

The applicant contended that the foregoing extracted order was not contained in the 1st respondent's prayers for reliefs and, it was, thus, improper for the trial court to extend in favour of the 1st respondent an unsolicited order. Finally, as regards the blanket issue as to any other improper procedure or order apparent on the face of the record of the High Court, the applicant contended that, upon the 2nd respondent being registered, in the Land Register, as the owner of the suit land in her capacity as the deceased's legal representative, pursuant to section 67 of the Land Registration Act, Chapter 334 of the Laws, it was incumbent upon the 1st respondent to sue her in that capacity and not in her personal capacity as was obviously the case in the matter at hand.

Thus, on the score of the alleged variety of infringements committed by the trial court, the applicant impressed upon us to vacate, in revision, the entire proceedings below and quash the court's resultant verdict.

In reply, Dr. Lamwai for the 1st respondent sequentially addressed the issues formulated by the Hon. Chief Justice for our consideration. As regards the assignment of the case from Kente, J. to Mgaya, J., the learned counsel submitted that it is commonplace for an ancillary matter

to move together with the main cause. Thus, he said, although it was not explicitly so directed, it was implicit from an established practice that the re-assignment was just as well extended to the main cause, the more so as the ancillary proceeding stood on the legs of the main cause.

Coming to "*the order of 2/03/2016*", Dr. Lamwai submitted that no order was made on that date, rather, before the re – assignment, on the 25th November, 2015 the Deputy Registrar, scheduled both causes to come for a mention on that date but, as it turned out, the scheduling was superseded by the re-assignment which came about on the 15th December, 2015.

Addressing us on the issue as to "*the coram of the proceedings*", the learned counsel for the 1st respondent reminded us that upon the request for re-assignment being granted, it was quite in the ordinary for the matters to be mentioned before the re-assigned Judge for necessary orders. Dr. Lamwai further submitted that since mention came about on the 10th December 2015, as it were, ahead of the date scheduled by the Deputy Registrar, it was, again, quite in the ordinary for the Judge to handle the causes singlehandedly in the absence of the parties.

Dealing with "*the proceedings, orders and judgment*" the learned counsel for the 1st respondent contended that the judgment on admission

is unassailable much as the 2nd respondent unequivocally admitted the claim. And, finally, Dr. Lamwai was of the view that it was proper for the 1st respondent to sue the 2nd respondent in her personal capacity the more so as the suit land is presently registered in her name. On his part, Mr. John Laswai supported the submissions of Dr. Lamwai to which he had nothing useful to add.

Having heard the parties from either side, we propose to similarly sequentially address the issues formulated by the Hon. Chief Justice for our consideration. On the issue of the assignment of the Land Case No.329 of 2015, we should express at once that the allegation by the applicant that Mgaya, J. assigned the matter to herself is wholly unfounded. Granted that it was not explicitly so directed in the re-assignment note, but we agree with Dr. Lamwai that it is implicit from an established practice that the re-assignment of Miscellaneous Land Application No. 620 of 2015 just as well extended to the main cause, the more so as the ancillary proceeding stood on the legs of the main cause.

Coming to "*the order of 2/03/2016*", we also agree with Dr. Lamwai's submission to the effect that no particular order was made on that date, rather, before the re-assignment, on the 25th November, 2015 the Deputy Registrar, scheduled both causes to come for a mention on

that date but, as it turned out, the scheduling was superseded by the re – assignment which came about on the 15th December, 2015.

Addressing the issue as to “*the coram of the proceedings*”, we, again, accede to the formulation by the learned counsel for the 1st respondent to the effect that, upon the request for re–assignment being granted, it was quite in the ordinary for the matters to be mentioned before the re – assigned Judge for necessary orders. We note that the mention came about on the 10th December 2015, as it were, ahead of the date scheduled by the Deputy Registrar, and it was, thus and, again, quite in the ordinary for the Judge to handle the two matters singlehandedly in the absence of the parties.

Dealing with “*the proceedings, orders and judgment*” we have passionately weighed the applicant’s concern that the second leg of judgment on admission was not contained in the 1st respondent’s prayers for reliefs and, it was, thus, improper for the trial court to extend it in favour of the 1st respondent much as it was, so to speak, unsolicited. It should be recalled that the relevant portion of the judgment directed that “*...the Certificate of Title No. 56967 to be registered in the name of the plaintiff Mehboob Yusuf Osman by the operation of law under section 71*

of the Land Registration Act, Cap. 334. "It is, however, noteworthy that in paragraph 3 of the plaint, the 1st respondent specifically pleaded thus:-

*"That the plaintiff claims against the defendant is a declaration that he is a rightful owner of the house situated on Plot No. 9 Block "A", Aggrey Street Kariakoo with Certificate of Title NO. 56967 L.O. No. 226789 **and an order of honourable court for the transfer of the said certificate of Title into the name of the plaintiff.**"*

[Emphasis supplied].

Furthermore, in item (ii) of his prayers for relief, the plaintiff sought the following order: -

"That an order to compel the Defendant to sign the Deed of transfer of Plot No. 9 Block "A", Aggrey Street, Kariakoo area, Ilala District, Dar es Salaam with Certificate of Title No. 56967."

To say the least, we are fully satisfied that the prayer for the transfer of Certificate of Title No. 56967 and its ultimate registration into the name of the plaintiff was contained in the plaint or, at least, the same may be legally inferred therefrom.

Finally, as regards the blanket issue formulated by the Hon. Chief Justice as to any other improper procedure or order apparent on the face of the record of the High Court, we think that the applicant has a valid complaint with respect to the non-joinder of the deceased's legal representative in the plaint. If we may directly cull from the Land Register itself, the 2nd respondent's name was entered thus: -

"LAND REGISTRY DAR ES SALAAM 67

Document NO.111308

Date of registration. 4, 8. 06 time 1:00 pm

***FATNA MOHAMED of Box 25041 D'SALAAM as a
legal representative of MOHAMED KHAMIS
ABDALLAH (deceased)***

Signed

Asst. Registrar of Titles."

[Emphasis supplied]

We have purposely supplied emphasis on the extracted entry to underscore the fact that the 1st respondent's ownership of the suit land was not in her personal capacity, rather, it was on account of her being the legal representative of the deceased. Thus, in our view, to the extent that the suit land was vested upon the 2nd respondent by virtue of her

capacity as the deceased's legal representative, any suit with respect to that property ought to have been instituted against her in that capacity. That, we should suppose, would have augured well with the provisions of ORDER XXXI of the Civil Procedure Code, Chapter 33 of the Laws (the CPC) which requires that in all suits concerning property vested in, *inter alia*, an administrator, such administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit.

That said, we should prelude our consideration and determination of the contentious issue with the subject as to who may be joined as parties to a suit. In this regard, Order 1 of the CPC makes elaborate provision as well as laying down the procedure to be followed in cases of the non-joinder of the parties. Generally speaking, if a suit is instituted by or against a particular identifiable group, all the members of such a group have to be impleaded whether in personal or in representative capacity. The presence of opposing parties is, undoubtedly, one of the essential requirements of any civil suit but, as we shall shortly demonstrate, not all parties are necessary for the suit to be adjudicated upon.

The question of joinder of parties may arise either with respect to plaintiffs or the defendants. More particularly, the joinder of plaintiffs is regulated by Rule 1 of Order 1 of the CPC according to which all persons may join in one suit as plaintiffs in whom the right to relief alleged to exist in each plaintiff arises out of the same act or transaction; and the case is such of a character that, if such person brought separate suits, any common question of law or fact would arise. On the other hand, under Rule 3 of Order 1, all persons may be joined as a defendants against whom any right to relief which is alleged to exist against them arises out of the same act of transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise.

The CPC does not specifically define what constitutes a "misjoinder" or a "non-joinder" but, we should suppose, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1, Rules 1 and 3, respectively, and they are neither necessary nor proper parties, it is a case of misjoinder of parties. Conversely, where a person, who is necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non-joinder. Speaking of a necessary party, a non-joinder may involve an omission to join some person as a party to a

suit, whether as plaintiff or as defendant, who, as a matter of necessity, ought to have been joined.

Thus, over the years, courts have made a distinction between necessary and non-necessary parties. For instance, in the case of **Departed Asians Property Custodian Board v Jaffer Brothers Ltd** [1999] 1 EA 55, the Supreme Court of Uganda held that there was a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of one whose presence before the court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit (in this regard, the Court had considered and adopted the English case of **Amon v Raphael Tuck and Sons Ltd** [1956] 1 All ER 273). That prompts the question as to who exactly fits the qualification of a necessary party.

Although there is no definite test to be applied in this connection, in the Indian case of **Benares Bank Ltd. v. Bhagwandas**, A.I.R. (1947) All 18, the full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings: **First**, there has to be a right of relief against such a party in respect of the matters involved in the suit and; **second**,

the court must not be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by Supreme Court of India in the case of Deputy **Comr., Hardoi v. Rama Krishna**, A.I.R. (1953) S.C. 521.

We, in turn, fully adopt the two tests and, thus, on a parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from a 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.

Coming now to the effect of a misjoinder or non-joinder of either parties, the general rule is clearly stipulated under Rule 9 of Order 1 thus:-

"No suit shall 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."

Despite being couched in mandatory language, we should think, there is an exception to the foregoing general rule. In this regard, it is noteworthy that by an amendment Act No. 104 of 1976, the Indian Code of Civil Procedure, Act V of 1908 added a rider through a proviso to its Rule 9 of Order 1 which is, incidentally, word to word with our Rule 9. In the proviso, the Indian Rule excludes its applicability to cases of non-joinder of necessary parties.

Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff.

When all is said and applied to the situation at hand, as already mentioned, it is beyond question that the 2nd respondent was, at all

material times, the administratrix of the deceased's estate. The life of her legal representation with respect to the estate was still subsisting at the time of her transaction with the 1st respondent just as the suit land was vested in her in her capacity as the legal administratrix. But, as we have also hinted upon, the 2nd respondent was not sued in that capacity. Instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be granted as against her personally with respect to the suit land which, as it turns out, was vested in her other capacity as the legal representative.

Thus, although not raised as an issue during the trial, a material question regarding the constitution of the suit below presents itself in relation to the legal status of the 2nd respondent. To say the least, the plaint was incurably defective for the non-joinder of the legal representative of the deceased who was, so to speak, a necessary party. The joinder of a necessary party to a suit is procedural in nature and, accordingly, the same ought to have been done at the time of trial, through the application of Order 1 Rule 10 (2) which goes thus:-

"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."

Since, as we have just remarked, the legal representative of the deceased was a necessary party, her non-joinder was fatal and the trial court, either on its own accord, or upon a direction to the 1st respondent, was enjoined to strike out the name of the 1st respondent and substitute to it her name with the caption: **"As the legal representative of the deceased,"** during the initial stages of the trial.

Unfortunately, that was not done and, indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-exactitude which may, seemingly, breed injustice. The question which presently confronts us is as to what need be done. To us, there can be no option for the amendment of the plaint at this stage and the only viable option is invoke the revisional jurisdiction of the Court and do what ought to have been done by the trial court, that is: Strike out the name of the 2nd respondent who was improperly joined as the defendant

in her personal capacity. Having done so the entire proceedings below crumble just as the judgment on admission and the resultant decree follow suit and are, hereby, set aside. This matter is, accordingly, pushed back to where it was immediately before the institution of the suit. From there, the 1st respondent may wish to re-institute the suit.

It is so ordered.

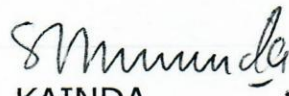
DATED at DAR ES SALAAM this 24th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL