IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And KITUSI J.A.)

CIVIL APPEAL NO. 45 OF 2018

STANSLAUS KALOKOLA.....APPELLANT

VERSUS

1. **TANZANIA BUILDING AGENCY**
2. **MWANZA CITY COUNCIL .....RESPONDENTS**

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Maige, J.)

Dated 7th day of March, 2017

in

Consolidated Land Appeals No. 2 & 5 of 2016

JUDGMENT OF THE COURT

23rd October & 6th November, 2019.

KITUSI, J.A.:

The appellant instituted an action against the appellants; for breach of contract against the first appellant, and for the tort of trespass against the second appellant. In essence, the appellant claimed before the District Land and Housing Tribunal (DLHT) for Mwanza District, that he purchased from the first respondent a house on Plot No. 94 Block D, CT 033006/43,

Isamilo area within Mwanza City, hereafter to be referred to as the house. The appellant further claimed that when he had discharged his obligation under the contract by paying for the house, he took possession of it and leased it out to a tenant. However, subsequently, the second respondent trespassed upon the house and forced the tenant out, claiming to be the lawful owner thereof. He prayed for an order declaring him the lawful owner of the house and for injunctive orders restraining the second respondent from continued interference in the appellant's peaceful enjoyment and occupation of the house.

The DLHT entered judgment for the appellant declaring him the lawful owner of the house and permanently restraining the second respondent from disturbing the said appellant or taking possession of the house. It ordered restoration of the evicted tenant.

The respondents were aggrieved by the decision of the DLHT so they separately appealed to the High Court against it, in Consolidated Land Appeals No. 02 and 05 of 2016, High Court, Mwanza District Registry. Among the issues which fell for determination by the High Court was whether the matter before the DLHT was maintainable without joining the Government, a necessary party to the proceedings.

The High Court, (Maige, J.) nullified the proceedings and set aside the judgment of the DLHT for having being preferred against an incompetent person without joining the necessary party.

This decision did not quench the appellant's thirst for justice, hence this appeal that rests on two grounds, to wit;

1. *That the learned appellate judge erred in allowing the above-mentioned appeals in view of the overwhelming evidence on record in favour of the appellant.*
2. *That the learned trial (sic) judge erred in entertaining land appeal No. 2 of 2016 aforementioned as the said appeal was incompetent for want of the requisite decree.*

Briefly, the disturbing background facts leading to this case are as follows: -

Between 1999 to 2005, the appellant was an employed in the capacity of the City Treasurer, by Mwanza City Council, an office under the second respondent. By virtue of his position, the appellant was allocated the house and was occupying it during the times material to this case.

Incidentally, during the same period, the Government had formulated a policy of selling out its houses to qualified people. The key qualifications were that the buyer must be a public officer in actual occupation of a particular house. Under this arrangement, the appellant, as earlier shown, a public officer and in actual occupation of the house, applied and was permitted to purchase it.

It is not necessary, we think, to go into the details of the contract at this stage, but it is undisputed that when the appellant had completed payments for the house, the Chief Executive Officer of the first respondent wrote to him acknowledging receipt of all payments and appreciating that he had paid up for the house. All appeared to be well then, but as it turned out, that was not the case.

On 20/2/2006 employees of the second respondent called at the house and forced out the person who was hitherto occupying it under a tenancy agreement with the appellant. This person immediately informed the appellant about that development and the appellant, who was then stationed at Babati District, travelled to Mwanza to try to sort out the matter. However, he only ended up preferring the action before the

DLHT, as earlier referred to, whose decision was quashed by the High Court in the Consolidated Appeals.

Back to the High Court, what was it that led to the impugned decision? Here we shall confine ourselves to the issue of non-joinder of parties, which ultimately carried the day. It was the City Solicitor who raised it in her submission arguing that the parties to the Agreement which forms the basis of the appellant's case (Exhibit P1), were the Permanent Secretary, Minister of Works, being the "seller", and the appellant, being the "purchaser". The learned Solicitor submitted in that regard, that only when the second respondent, an Executive Agency, is a party to a contract may it sue or be sued in its own name, as provided by section 3 (6) (b), of the Executive Agencies Act [Cap 245 R.E 2002], hereafter the Act. The learned solicitor then submitted, in a way suggesting, that since the first respondent was not a party to the contract in question, the appellant should have sued the Government before the High Court in accordance with the Government Proceedings Act, 1967, an option available under section 3 (6) (c) of the Act. Because of its import, it is better that we reproduce the last part of the learned Solicitor's written submission made at the High Court: -

"The proper party to sue should have been the Government and as such the suit was incompetent from the beginning for not following the procedures stipulated by the Government Proceedings Act, 1967. It was bad in law to file a suit against the second respondent who was actually not a party to sale agreement, and by filing that suit against the second respondent, the District Land Housing Tribunal for Mwanza entertained that suit as it falls within the meaning of section 3 (6) (b) and (c) of the cited Act above."

The first respondent was the second respondent in Land Appeal No. 2 of 2016 that had been preferred by the now second respondent.

Responding to the foregoing submissions, counsel for the appellant (who was the first respondent in the said Land Appeal No. 2 of 2016) briefly stated;

"In the first place the Tanzania Buildings Agency was impleaded in the present case at the instance of the District Land and Housing Tribunal. Secondly, we do not find the impleading of this agency fatal because by and large there was evidence led as to the breach of the terms of contract (Exh. P1) by the

said agency by pleading mistake and misrepresentation. Thus, given the circumstances of this case section 3(6) (c) of the Executive Agencies Act [Cap. 245 R.E 2002] squarely applied to the said case. There was no need to sue the Government as the appellants (sic) want us to believe..."

We have already shown that after considering those arguments, the High Court concluded that the suit before the DLHT was unmaintainable because the Government, a necessary party, had not been impleaded and that in any event the DLHT lacked the requisite jurisdiction to adjudicate matters under the Government Proceedings Act, 1967. This is the thrust of the impugned decision.

At the hearing of this appeal Mr. Anthony Nasimire, learned advocate, who had represented the appellant at the trial and before the High Court on first appeal, continued to act for him. Mr. Lameck Merumba, learned State Attorney appeared for the first respondent, whereas Ms Maryam Ukwaju and Mr. Joseph Vungwa, learned Solicitors, stood for the second respondent. Ms Ukwaju like Mr. Nasimire, had prosecuted the matter at the DLHT and before the High Court. Parties had filed written

submissions ahead of the date of hearing in terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), and they sought to adopt them.

Mr. Nasimire first abandoned the second ground of appeal and said he would go with the first ground. Initially, this stance appeared strange to us because at a glance the first ground of appeal does not seem to address the issue of non-joinder of parties, on the basis of which Maige J. disposed of the matter at the High Court. However, during his address, Mr. Nasimire came out clearer.

The learned counsel submitted that the matter before the DLHT was in two categories namely; the tort of trespass which was against the second respondent, and the alleged breach of contract which was against the first respondent. He argued that the appellant successfully made a case against the second respondent and the DLHT had a duty to determine it. He urged us to step into the shoes of the High Court and direct the DLHT to determine the issue of trespass.

As for the first respondent's involvement, Mr. Nasimire had two arrows to his bow. First, he submitted that as far as he knows, the City

Council is a part of the central Government, therefore by impleading the said City Council, the appellant impleaded the Government. Secondly, he submitted that Rule 9 of Order 1 of the Civil Procedure Code, [Cap. 33 R.E 2002] (the CPC) provides that no suit shall be defeated merely for non-joinder of parties. He thus challenged the decision of the High Court for having been arrived at in oblivion of Rule 9 of Order 1 of the CPC.

Mr. Nasimire concluded by inviting us to issue necessary directions to the High Court so as to have the issue of trespass determined, because the sale agreement had not been nullified. Alternatively, he prayed that we direct the High Court to determine the legality of the agreement between the Government and the appellant.

On his part, Mr. Merumba, learned State Attorney, submitted on behalf of the first respondent, that the High Court was correct in deciding that the DLHT had no jurisdiction. To the learned State Attorney, the reasons that justify that decision are; **first** that it is the Government that was a party to the contract. **Secondly**, the Executive Agencies have no mandate to own immovable property under Section 3(6) (d) of the Act. **Thirdly,** he submitted that the problem with the house under our consideration is precipitated by the fact that it has a title deed, unlike other

houses. We think we need not wait any longer to observe that the only point of immediate relevancy here is the first, because it addresses the point on which the decision of the High Court was based. We shall therefore limit our scope to that.

Ms. Ukwaju, learned solicitor, was the one who responded first on behalf of the second respondent. In essence she stood by the ground which she had earlier asserted at the High Court, that the contract for sale (Exhibit P 1) being the bedrock of the case, it was fatal for the suit not to implead the Government, a party to that contract. She referred us to Rule 3 of Order 1 of the CPC which requires that all parties who are necessary must be joined to the suit. Somehow, she conceded that under Rule 9 of Order 1 of the CPC, no suit shall be defeated only for non-joinder of parties, a point that was raised by Mr. Nasimire. She however submitted that Rule 9 cannot be of any assistance to a party when the matter is at appellate stage. Ms. Ukwaju was at one with the appellant's counsel that the issue of trespass was not determined by the DLHT. Mr. Vungwa, learned Solicitor, submitted that even if it seems necessary to remit the matter to the High Court with specific directions, we should not make such

orders because that will go against the policy of speedy disposal of matters.

In a short rejoinder Mr. Nasimire submitted that although the DLHT had no jurisdiction to determine the issue of the contract, it should have determined the issue of trespass. He therefore faulted the High Court for quashing the entire proceedings of the DLHT.

As we are about to determine the matter before us, we note that in their submissions, both written and oral, counsel have cast their nets wider than demands the issue under scrutiny. However, we think our decision must only cover a narrow landscape lest we decide outside what was decided by the High Court. Thus, the issue for our determination is, whether the High Court was correct in deciding as it did, that the suit was unmaintainable by the DLHT for non-joinder of the Government and for want of jurisdiction.

Fortunately, the law on the issue is settled, and we think Order 1 of the CPC is the controlling provision. Rule 3 of that order sets the general principle as regards joinder of defendants, that is, the plaintiff must join persons against whom the right to relief arising from the same transaction

exists. Rule 9 of Order 1 of the CPC, which Mr. Nasimire relies on, provides what appears to be like an exception. It provides;

> *"9. 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 rights and interests of the parties actually before it."*

Mr. Nasimire has argued that in deciding the matter before it the High Court did not take the above provision into account. On the other hand, Ms. Ukwaju submitted that Rule 9 of Order 1 cannot come to a party's rescue at an appeal stage.

Our decision on this point is that there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential. Commenting on this aspect, Mulla, Code of Civil Procedure, 13th Edition Volume I pg. 620 writes;

> *"As regards non-joinder of parties, a distinction has been drawn between non-jolnder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because O. 1*

r. 9 is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed."

Kenya shares this position [See **Attorney General v. Kenya Bereau of Standards & Geo-Chem Middle East,** Civil Appeal (Application No. 132 of 2017 Court of Appeal Kenya], and similarly Uganda as we shall later see.

We think this Commentary is relevant to our situation. Here at home this issue was discussed at length in **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others,** Civil Application for Revision No. 68 of 2011 (unreported). In that case the Court took the view that the decision of the Supreme Court of Uganda on the issue of joinder of parties, was relevant and applied to our jurisdiction. It was in the case of **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd** [1999] EA 55 (SCU). The position in Kenya is reflected in the case of, **Attorney General v. Kenya Bereau of Standards & Geo-Chem Middle East,** Civil Appeal (Application No. 132 of 2017) Court of Appeal Kenya.

From our reading of the cited case law and provisions of the Civil Procedure Codes, Rule 9 of Order 1 becomes relevant if and when Rule 10(2) of Order 1 of the CPC is brought to use. Without reproducing this provision, it empowers the court, on application of either party or on its own motion, to order the joining of a person who ought to have been joined. To answer Ms Ukwaju's submission that such provisions may not rescue the appellant at this stage, we reproduce a portion of the decision in **Tang Gas Distributors Limited v. Mohamed Salim Said and 2 Others** (supra);

> *"Although it is not specifically necessary in the determination of this application, we would like to observe in passing, that this power can be exercised by the Court* ***"at any stage*** *of the proceedings" even without any party so applying. This may be done either before, or during trial or even if after judgment if damages are yet to be assessed, etc..... it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that this rule becomes inapplicable. As such, a party can be added even at the appellate stage:* ***IRAMMA v. CHAUDAMAN*** *AIR 1976 Kant 62"*

In view of the above, we think Mr. Nasimire should have been heard suggesting that the High Court ought to have ordered the joining of the Government to the suit. But that, as we know, is not Mr. Nasimire's point. The learned counsel's argument is that the High Court should have severed the causes of action into two. That is, it should have ordered the DLHT to proceed with the tort of trespass and leave the parties to sort out how to proceed with the issue of contract.

Given the background of the matter as we have earlier given, we are certain that such a course would not have achieved finality of the matters in controversy. In our view rule 3 of Order 1 of the CPC is very clear on this;

> *"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 the alternative where,* ***if separate suits were brought against such persons, any common question of law or fact would arise.***" (emphasis ours).

In considering Mr. Nasimire's suggestion, we take it to be our duty to guard against having separate suits from which common questions of law or fact are likely to arise. In a scenario closely similar to this, the Court remitted the suit to the High Court with directions that hearing should proceed after joining the necessary party. It was in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki,** Civil Appeal, No. 136 of 2006 (unreported). The respondent in that case claimed ownership of a house on Plot No. 105/6 House No 2, Burundi Road, Kinondoni Area in Dar es Salaam, which she had allegedly purchased from the Government through the Tanzania Housing Agency. On the other hand, the second appellant's claim on the house was derived from the Liquidator of AISCO. However, the respondent who was originally the plaintiff had not impleaded the Tanzania Housing Agency. The Court observed that the respondent as plaintiff could not be compelled to sue a party she did not wish to sue, but still the determination of the suit would not be effective without the Tanzania Housing Agency being joined. Hence the order directing the High Court to proceed upon joining the necessary party.

Similarly, in this case, there is no way that the suit of trespass, which the appellant intends to prosecute against the second respondent, may

proceed without questions about the contract of sale being raised. Therefore, for an effectual disposal of the real controversy involving the house in this case, the causes of action and issues arising therefrom must be tried together. With that, it is our conclusion that the learned High Court Judge was correct in finding the non-joinder in this case fatal. This in our view, is the category of no-joinder which, according to Mulla's Commentary, may render the decree ineffective.

The last question is whether the High Court was correct in holding that the DLHT had no jurisdiction. We shall dispose of this issue by first referring to Section 7 of the Government Proceedings Act, [Cap 5 RE 2002]. It provides;

> *"Notwithstanding any other written law, no proceedings against the Government may be instituted in any court other than the High Court."*

Having concluded that the suit was unmaintainable without joining the Government, the High Court was correct in holding that the DLHT had no jurisdiction, because in terms of the provisions of the Government Proceedings Act, only the High Court is vested with such jurisdiction. There

would be no point therefore, for the High Court remitting the matter to the DLHT knowing that the said Tribunal lacked the requisite jurisdiction.

In our conclusion, this appeal is without merits and it is dismissed with costs. Any interested person may institute this matter before a court of competent jurisdiction.

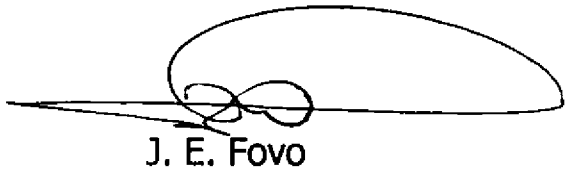
DATED at **MWANZA** this 5th day of November, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of Ms. Subira Mwandambo, State Attorney for the 1st respondent and Mr. Kitia Turoke, City Solicitor for the 2nd Respondent and Stanslaus Kalokola the Appellant appeared in personal is hereby certified as a true copy of the original.



J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL