

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 141 OF 2018

MUSSA CHANDE JAPE.....APPELLANT

VERSUS

MOZA MOHAMMED SALIMRESPONDENT

**(Appeal from Judgment and Decree of the High Court of Zanzibar
at Vuga)**

(Mahmoud, J.)

**dated the 11th day of December, 2017
in
Civil Case No. 47 of 2012**

JUDGMENT OF THE COURT

06th & 12th December, 2019

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Zanzibar sitting at Vuga (Mahmoud, J) dated 11th December, 2017 in Civil Case No. 47 of 2012. In that case, the appellant claimed that he is the lawful owner of a house plot No. 198 situated at Mombasa area, within Zanzibar Municipality (the suit premises) having purchased it on 15th October, 1992 from one Hamid Ramadhani Mgongo. It was his contention that in July 2003, the respondent herein trespassed into the said suit premises and resided therein with her family without the appellant's consent. As

such, the appellant prayed, among other reliefs, an order evicting the respondent from the suit premises.

In her defence, the respondent disputed the appellant's claim by stating that, at the time of filing the suit the appellant was not a lawful owner of the suit premises as the same had been already purchased by one Yahya Ahmed Salim in 1995. She contended further that she was wrongly sued by the appellant as she is not the owner of the said suit premises. In addition, the respondent raised a notice of preliminary objection consisting of three points mainly challenging the competence of the plaintiff for suing a wrong party to the suit. However, the said objection was overruled by the trial court and the matter proceeded with the hearing on merit.

Upon completion of filing parties' pleadings the following issues were framed, recorded and agreed upon by the parties.

(1) Whether the plaintiff sold the suit premises through annexure 'A' attached to the written statement of defence;

(2) Whether the plaintiff/defendant is the lawful owner of the house No. 198 situated at Mombassa within the municipality of Zanzibar;

(3) Whether annexure 'A' in the written statement of defence was fraudulently obtained;

(4) Whether the defendant trespassed into the suit premises;

(5) Whether the plaintiff has been removed by the defendant from the suit premise; and

(6) What are the available remedies to the parties.

Having heard the evidence of the witnesses for both sides, the trial court found that the appellant had failed to prove his case to the required standard. It thus dismissed the suit with costs.

Aggrieved, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant had raised ten (10) grounds of appeal which can be conveniently condensed into the following main grounds, namely **one** that, the evidence adduced by the defence witnesses was tainted with inconsistencies and contradictions, **two**, Exhibit Y1 was unprocedurally admitted, **three**, the learned trial judge erred by framing a new issue on the non-joinder of a necessary party to the suit, in the course of composing the judgment without according the parties right to be heard on that issue and **fourth**, failure by the trial judge to evaluate and consider the evidence adduced by the appellant.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Masoud Hamidu Rukazibwa assisted by Mr. Jambia S. Jambia, both learned counsel, while the respondent had the services of Mr. Suleiman Salim Abdulla assisted

by Mr. Said M.H. Mayugwa, also learned counsel. It is noteworthy that the counsel for the appellant had earlier on filed written submissions in support of the appeal as required by Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended by GN No. 344 of 2019 (the Rules). For the respondent, it transpired that, the reply written submissions were filed out of time contrary to Rule 106 (7) of the Rules. As such, the counsel for the respondent was allowed to address the Court under Rule 106 (10) (b) of the Rules.

Mr. Rukazibwa commenced his submission by fully adopting the contents of his written submissions lodged on 7th September, 2018 to form part of his oral submissions. However, for reasons which will be apparent herein, we do not intend to consider the submissions made by the counsel on all grounds of appeal. We only need to consider the submissions made on the third ground above.

Amplifying on that ground, Mr. Rukazibwa referred us to Order XVI rule 1 (5) of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD) and argued that, pursuant to that provision, issues for the determination of a case are required to be framed and recorded by the trial court on the first day of hearing. He further argued that, in the case at hand, on the first hearing the trial judge framed six issues. However, at the time of composing the judgment, she again unprocedurally introduced a new issue on the non-joinder of the necessary party to the suit, without according the parties the right to be heard on that issue and went ahead to dismiss

the appellant's suit. Mr. Rukazibwa argued further that, pursuant to Order XVI rule 5 (1) and (2) of the CPD, the trial judge is allowed to amend or strike out the framed issue or frame additional issues before passing a decree, but that power must be exercised judiciously by according parties the right to be heard on those additional issues. To buttress his position, he cited the cases of **Alpitour World Hotels & Resorts S.P.A and 2 Others v. Kiwengwa Limited**, ZNZ Civil Application No. 3 of 2012 and **Margwe Erro and 2 Others v. Moshi Bahalulu**, Civil Appeal No. 111 of 2014 (both unreported). He then emphasized that, denying the parties the rights to be heard is a violation of parties' constitutional rights and breach of principles of natural justice.

When probed by the Court as to whether or not the issue of non-joinder of the parties to the case is fatal to the extent of defeating the suit, Mr. Rukazibwa cited Order I rule 9 of the CPD and argued that the same is not fatal, as pursuant to the said provision, a suit cannot be defeated by a misjoinder or non-joinder of parties.

In response, Mr. Abdulla conceded that the new issue on the non-joinder of the necessary party was raised *suo motu* by the trial judge at the time of writing the judgment and made decision upon it without according the parties the right to be heard. When prompted by the Court on the remedy of the said omission, Mr. Abdulla submitted that, it is for the matter to be remitted back to the trial court to accord the said right to the parties and make an informed decision on that issue. Again, when

probed by the Court, as to whether or not the issue of non-joinder or misjoinder of the parties to the suit is fatal, Mr. Abdulla also said that, it is not fatal.

From the above submissions of the counsel for the parties, it is clear that they are in agreement that, it was not proper for the trial judge to frame a new issue, on non-joinder of the necessary party to the suit, *suo motu*, in the course of composing the judgment and make a determination on it without according the parties the right to be heard. We respectfully, share similar views, because it is evident from page 41 of the record of appeal that, a non-joinder of the necessary party to the suit was not among the six issues framed by the trial court at the first hearing of the matter. It is also not in dispute that the said issue was introduced and framed by the learned trial judge in the course of composing the judgment contrary to the law. We are alive to the fact that, pursuant to Order XVI rule 5 (1) and (2) of the CPD cited to us by Mr. Rukazibwa, the trial judge may amend, add or strike out an issue already framed, but parties should be given an opportunity to address the court on the new added issue(s), which was not the case in this matter.

Basically, cases must be decided on the issues on record and if it is desired by the court to raise other issues either founded on the pleadings or arising from the evidence by witnesses of the parties or arguments during the hearing of the suit, those issues should be placed on record and parties should be given an opportunity to be heard by the court. Commenting on the foregoing legal position, **Mulla**, in his

book **The Code of Civil Procedure** Vol. II 15th Edition at page 11432 cited in the case of **Scan-Tan Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported) observes:-

"If the court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue..."

In the instant case, as intimated above, parties were not accorded the right to be heard and address the court on the new framed issue. This Court has always emphasized that the right to be heard is a fundamental principle of law which courts of law must jealously guard against. See Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. Therefore, a denial of the right to be heard in any proceedings would vitiate the entire proceeding. We do appreciate the authorities cited by Mr. Rutakazibwa in the cases of **Alpitour World Hotels & Resorts S.P.A and 2 Others** (supra) and **Margwe Erro and 2 Others** (supra). We wish however to add, on the list, the case of **Mbeya – Rukwa Autoparts Ltd v. Jestina Mwakyoma** [2003] T.L.R 251.

We are also mindful of the fact that, by relying on Order I rule 9 of the CPD, both counsel were also in agreement that non-joinder of parties could have not defeated

the suit before the trial court. Fortunately, the law is settled, and we think Order I, rule 10 (2) of the CPD is the controlling provision which states that:-

*"The court may, at any stage of the proceedings **either upon or without 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 **against whom the defendant claim to be entitled to contribution or indemnity, 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]*

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 or (ii) when, without his presence, the questions in the suit cannot be completely decided. (iii) where such a person, who is necessary or proper party to a suit has not been joined as a party, the court is empowered to join him. Over the years, courts have made a distinction between necessary and non-necessary parties. See for instance the case of **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd** [1999] 1 EA 55 where the Supreme Court of Uganda held that there is 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. Therefore, 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. In the **Black's Law Dictionary**, 8th Edition, the term 'necessary party' is defined to mean: *"a party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings."*

This Court in the case of **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported) at page 30, when considering circumstances upon which a necessary party ought to be added in a suit, stated that:-

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

(a) in a representative suit; he wants to challenge the asserted authority of a plaintiff to represent him/ or;

*(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/ or;***

(c) in actions for specific performance of contracts/ third parties have an interest in the question of the manner in which the contract should be performed: and/or; and

(d) on the application of the defendant, it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is called as a co-defendant. "[Emphasis added].

The Supreme Court of India in **Razia Begum v. Anwar Begum** AIR 1958 SC 886 while considering the power of the court to add a necessary party to a suit relating to property held thus:-

*(ii) where the subject matter of litigation is a declaration as regards the status or legal character, the rule of present or direct interest may be relaxed in a suitable case **where the court is of the opinion that by adding that party it would be in a better position to effectually and completely to adjudicate upon the controversy.**" [Emphasis added].*

See also the case of **Abdulatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No.6 of 2017 (unreported).

In the instant case, the appellant is claiming to be declared the lawful owner of the suit premises and at the same time Yahya Ahmed Salim, who was not a party to the suit is also alleged to be the current owner of the suit premises. It is also not in dispute that, the trial court together with the appellant became aware of the existence of the alleged necessary and interested party to the case at the initial stage of the trial. This is due to the fact that, in her written statement of defence, apart from raising a point of preliminary objection to that effect, the respondent had also indicated at the earliest possible, in almost all paragraphs of her written statement of defence (see paragraphs 2, 4, 5, 6 and 7 of the written statement of defence) that the necessary and proper party to the suit is one Yahya Ahmed Salim, a person who is alleged to be the current lawful owner of the suit premises. Likewise, in her testimony before the trial court found at pages 49 -50 of the record of appeal, the respondent who testified as DW1 said:-

*"I am Moza Ahmed Salum, **I live at Mombasa at the house M/A/F 265 the house of my brother Yahya Ahmed Salum. That house I live he bought from Mussa Chande...the sale deed is there which shows that Mussa sold that house. There is a witness in that sale. The sale deed was of 1995...This document is***

not concerning me direct it is belonging to my brother Yahya Ahmed Salum. [Emphasis added].

That being the case, the appellant or even the trial court ought to have joined the said necessary party to the suit as a defendant. In **Tang Gas Distributors Limited** (supra) the Court, while considering the issue of a necessary party to be joined in a suit stated that:-

*"Settled law is to the effect that **once it is discovered that a necessary party has not been joined in the suit** and neither party is ready to apply to have him added as a party, **the Court has a separate and independent duty from the parties to have him added...**"* [Emphasis added].

As to the effect of not joining a necessary party to the case, the Court in the same case, at page 37 of that decision stated that:-

"... it is now an accepted principle of law (see Mulla Treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore is fatal (MULLA at p 1020)."

It is therefore our respectful view that, since the trial court was notified at the pre-trial stage of the said necessary party's interest in the suit premises, it ought to

have joined him, but that was not done, hence rendering the proceeding thereto fatal. In **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court, after detecting that the necessary party was not joined into the suit, it remitted the suit to the High Court with directions that hearing should proceed after joining the necessary party. 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 the case at hand, it was crucial for the trial court to join the necessary party to effectually and completely adjudicate and settle all the questions related to the ownership of the suit premises. Ultimately, all parties would be bound by the decision, hence, avoidance of multiplicity of suits.

For the foregoing reasons, we set aside the entire proceedings from the date of commencement of hearing to the date of judgment and set aside the resultant

judgement and decree of the trial court in Civil Case No. 47 of 2012 together with subsequent orders thereto. We remit the record to the High Court to re-hear the case after the necessary party has been added in the suit in terms of Order 1, rule 10 (2) of the CPD. Considering the circumstances of this case, we make no order as to costs.

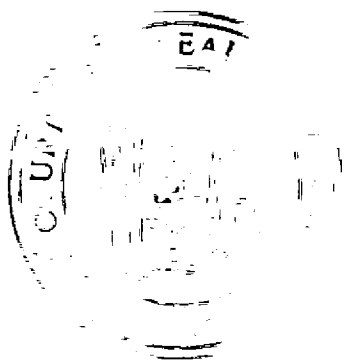
DATED at ZANZIBAR this 12th day of December, 2019.

A.G.MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment of the Court delivered this 12th December, 2019 in the presence of Mr. Jambia S. Jambia, counsel for the appellant and Mr. Said M. H. Mayugwa, counsel for the respondent, is hereby certified as a true copy of the original.




A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL