IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 75 OF 2017

ABDI M. KIPOTO ..... APPELLANT

VERSUS

CHIEF ARTHUR MTOI ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Msuya, J.)

dated the 19th day of February, 2015
in
Land Appeal No. 21 of 2013

.....

JUDGMENT OF THE COURT

26th & 28th February, 2020

MWAMBEGELE, J.A.:

This is a third appeal. It stems from the decision of the Mzizima Ward Tribunal in the City of Tanga in which the appellant sued the respondent for recovery of a parcel of land measuring 16 acres which was allegedly trespassed by the respondent. The Ward Tribunal decided in favour of the appellant holding that the respondent had abandoned that land for years and the Village Council of Mleni Village allocated it to the appellant after following the procedure prescribed under the law. The

Ward Tribunal thus declared the appellant as the rightful owner of that piece of land. We shall hereinafter refer to it as the disputed land.

Aggrieved the respondent successfully appealed to the District Land and Housing Tribunal (henceforth the DLHT). The DLHT held that the respondent bought the disputed land from a certain Ankin in 1970 and the procedure for declaring the same as abandoned land was not adhered to thus its allocation to the appellant was unlawful.

The reversal of the decision of the Ward Tribunal by the DLHT did not amuse the appellant. He unsuccessfully appealed to the High Court. The High Court, like the DLHT, had the view that the evidence adduced at the trial, amply spoke loudly and clearly in favour of the respondent that he bought the disputed land from one Nankiri in 1970. That evidence is found in the testimonies of Halidi Abdallah, Fundi Ramadani, William Ntulwe and Mzuri Ankiri; child of the appellant as well as the respondent himself. The High Court added that the procedure for declaring land as abandoned under section 45 (4) and (5) of the Village Land Act, Cap. 114 of the Revised Edition, 2002 (elsewhere referred to as Cap. 114), was flouted, as such, the disputed land could not have been legally allocated to the appellant.

The appellant was aggrieved by the decision of the High Court. He thus lodged this appeal with a view to assailing the decision of the High Court after he obtained the requisite leave to appeal and a certificate on a point of law. The High Court (Msuya, J.) certified the following points of law:

> *"1. Whether the whole trial of the suit was legal without joining Mleni Village Council;*
> *2. Whether the trial was legal where pleadings and evidence did not state the value of the subject matter, and*
> *3. Whether the legal requirements under the Village Land Act for revocation procedure was properly invoked."*

The memorandum of appeal has a bearing on the points of law certified by the High Court. It is composed of one ground with three limbs of complaint; namely:

> *"1. That the Hon trial judge failed to evaluate the evidence on record and see that the whole trial was a nullity on grounds that:-*

a) Whether the whole trial of the suit was legal without joining Mleni Village Council;

b) Whether the trial was legal where pleadings and evidence did not state the value of the subject matter, and

c) Whether the legal requirements under the Village Land Act for revocation procedure was properly invoked."

When the appeal was called on for hearing on 26.02.2020, the appellant had the representation of Mr. Daniel Haule Ngudungi, learned advocate and the respondent appeared through Mr. Hassan Abdallah Kilule, also learned advocate, holding brief for Mr. Saleh Njaa, learned advocate for the respondent. Both parties had earlier on filed written submissions for or against the application which they sought to adopt at the hearing as part of their respective oral submissions.

We gave the floor to Mr. Ngudungi who kicked the ball rolling in clarification of the written submissions that the Mleni Village Council ought to have been joined as a necessary party because it was the one which allocated the disputed land to the appellant. The learned council referred us to the case of **Juma B. Kadala v. Laurent Mnkande** [1983] TLR 103

on the issue of indispensability or unavoidability of joining the vendor as a necessary party in circumstances where the land is sold to a third party, and that nonjoinder of the vendor vitiates the proceedings.

Regarding the second ground of appeal, it was the learned advocate's submission that the Ward Tribunal erred in law in not considering the value of the property. It was his argument that in determining whether a court or tribunal has power to entertain a particular matter, the issue of pecuniary jurisdiction cannot be dispensed with. Failure to determine the value of the subject matter rendered the proceedings of the Ward Tribunal a nullity, he argued. The learned counsel directed us to the provisions of section 15 of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 which puts a ceiling of Tshs. 3,000,000/= as the pecuniary jurisdiction for Ward Tribunals.

On the third ground of appeal, the learned advocate submitted that since it was not in dispute that in 2009, the Mleni Village Council declared the disputed land to be an abandoned land, then it was the respondent's duty to seek application for relief pursuant to section 46 of Cap. 114. The learned advocate was of the view that the village council exhausted the statutory procedure in declaring the land an abandoned land and that what

remained was for the respondent to seek reliefs against that declaration. In his view, however, the procedure for declaring that land as abandoned, was followed to the letter. He concluded that the High Court was wrong to decide otherwise.

On the strength of the above submissions, the learned counsel implored upon us to allow the appeal with costs.

In response, Mr. Kilule submitted that the appeal was filed with no iota of merit. With regard to the first ground of appeal, the learned advocate was of the view that, non-joinder of Mleni Village Council did not in any way prejudice any party and that the trial was not rendered a nullity. He submitted that Ward Tribunals have their own rules and procedure as envisaged by section 15 (1) and (2) of the Ward Tribunal Act, Cap. 206 of the Revised Edition, 2002 (hereinafter referred to as Cap. 206). The learned counsel added that nonjoinder or misjoinder of parties are issues under the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth the CPC) and therefore they could not be raised by the Ward Tribunal *suo motu*. If anything, the learned counsel submitted, it was the appellant who ought to have joined the Village Council if he thought it was a necessary party to the suit. He challenged **Juma Kadala** (supra) as

distinguishable from the matter at hand in that it has peculiar circumstances and cannot in any way be compared to the present matter. He added that, nonetheless, the Village Council itself never saw the need to be joined as a party and that is why it participated in the suit as a mere witness for the appellant.

Regarding the second ground of appeal, Mr Kilule submitted that it was the appellant's duty to bring the value of the disputed land to the tribunal and nobody else's since he was the one who had control on where to institute his case. He relied on section 112 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 to state that the burden of proof lies on he who wishes to make the court believe in the existence of a certain thing or situation. He added that 16 acres of land does not necessarily mean that its value is beyond the pecuniary value of the Ward Tribunals.

On the last ground of appeal, the learned advocate submitted that there was no need of the respondent pursuing the remedies under section 46 of Cap. 114 as the procedure for declaring the dispute land as abandoned land under sections 45 (4) and (5) of Cap. 114, were never adhered to in the first place by Mleni Village Council thus making the allocation of the land to the appellant a nullity. He added that there was

brought no evidence that there were any announcements, no receipts were tendered, no prescribed form was filled, no notice was given to the respondent and the Commissioner for Lands was not consulted.

On the strength of the above, the learned advocate for the respondent prayed for the dismissal of the appeal with costs.

In brief rejoinder Mr. Ngudungi submitted that nonjoinder of the Village Council to the proceedings was not the duty of the appellant alone. He also rejoined that the value of the subject matter was not a question of law but one of fact. He, however, was quick to state that it was incumbent upon the Ward Tribunal to satisfy itself beforehand that it had jurisdiction to hear and entertain the matter before it. Jurisdiction is a question of law, he argued.

Having summarized the submissions and arguments of the learned counsel for the parties, we should now be in a position to confront the three grounds of appeal on which the parties have locked horns.

The first ground of appeal is about the proceedings of the Ward Tribunal going on without the Mleni Village Council being joined as a necessary party. While Mr. Ngudungi is of the view that the same vitiated

the proceedings of the Ward Tribunal, Mr. Kiule is diametrically opposed to that view, he says it did not. We have dispassionately considered these rival arguments. Having so done, we are inclined to agree with Mr. Kilule that the nonjoinder of the Village Council in the suit before the Ward Tribunal did not vitiate the proceedings. We shall give reasons.

First, nonjoinder of parties is the creature of CPC which is not applicable in the Ward Tribunal. The Ward Tribunal, in terms of Cap. 206, is not only not bound by rules of evidence and procedure but also regulate its own procedure. We reproduce here section 15 (1) and (2) for ease of reference:

> *"(1) The Tribunal shall not be bound by any rules of evidence or procedure applicable to any court.*
> *(2) A Tribunal shall, subject to the provisions of this Act, regulate its own procedure."*

Secondly, even if we were to agree with the appellant that the village council ought to have been joined, we have serious doubts if it was a necessary party. A party becomes necessary to the suit if its determination cannot be made without affecting the interests of that

necessary party. **Black's Law Dictionary,** Eighth Edition, by Bryan A. Garner, defines the term "interested party" as:

> *"a party who has a recognizable stake (and therefore standing) in a matter."*

The same legal work defines the term "necessary party" as:

> *"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. "*

At this juncture, while still on the subject, we find it irresistible to refer to our decision in **Melchiad Peter Kimaro v. Riziki Samuel (as Administratrix of the Estate of the late Mama Hattasi) & 2 Others**, Civil Revision No. 5 of 2017 (unreported) wherein we grappled with the circumstances under which a necessary party may be joined. In an endeavour to answer the question, we recited the position we previously took in **Tang Gas Distributors limited v. Mohamed Salim Said and 2 Others,** Civil Revision No. 68 of 2011 (also unreported) in which we held:

> *"... an intervener, otherwise commonly referred to as a **NECESSARY PARTY,** would be added in a suit under this rule [Order I, rule 10 (2) of the Civil*

Procedure Code, Cap. 33 RE 2002] 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 contracts should be performed; and/or

(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]"

And the provisions of Order I rule 9 of the CPC supports the above stance. It provides:

"9. Misjoinder and non-joinder of parties

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."

What we can discern from the above is that nonjoinder of a party does not defeat the proceedings of a suit as long as the dispute between the parties to the suit can be resolved without that party and without affecting that party's interests.

Flowing from the above, and taking inspiration from the provisions of the CPC, we do not think the joinder of the Mleni Village Council was necessary to the determination of the controversy on which the parties to this appeal locked horns. No interests of the village council were be at stake even if the suit was decided in favour of either party. But what is more important is that nonjoinder of any party does not defeat the suit.

Thirdly, the Chairman of Mleni Village, one Kelvin L. Athanas, who is also a member of the village council (see p. 32 of the record of appeal), was featured in the Ward Tribunal to testify in favour of the appellant.

Fourthly, the Ward Tribunal visited the disputed land in the presence of the Village Council (see p. 29 of the record of appeal). Also present were the Village Chairman and member of the Village Council, the Village Executive officer and the Hamlet Chairman.

The foregoing shows that the interests of the Mleni Village Council were taken good care of in the proceedings of the Ward Tribunal. No prejudice was therefore occasioned for its nonjoinder as a party to that suit.

In view of the above discussion. We find the first ground of appeal wanting in merits. We dismiss it.

The second ground of appeal is on the pecuniary jurisdiction of the Ward Tribunal. We think the determination of this ground of appeal will not detain us. It is the appellant who instituted the suit in the Ward Tribunal. The respondent participated in the suit and the Ward Tribunal determined the matter before it to its finality. No eyebrow was raised then and the matter was decided in favour of the appellant. It is our view that the parties to the suit in the Ward Tribunal submitted themselves to the pecuniary jurisdiction of the Ward Tribunal and to us that was quite

sufficient. What perturbs us is Mr. Ngudungi's mere allegations from the bar that there was no value of the subject matter which was stated. He did not even state what the value the disputed land was. We do not think we should be detained by sheer allegations of fear that the value of the subject matter might have been above the pecuniary limit of the Ward Tribunal. This ground too is devoid of merit. It is dismissed.

Regarding the third ground, Mr. Ngudungi is of view that the procedure for declaring the disputed land an abandoned land was followed to the letter. We have serious doubts. That procedure is provided for under section 45 of Cap. 114. That section reads:

> *"45. Abandonment of land held for a customary right of occupancy*
>
> *(1) Land held for a customary right of occupancy shall be taken to be abandoned where one or more of the following factors are present:*
> *(a) The occupier has not occupied or used the land for any purpose for which land may lawfully be occupied and used, including allowing land to lie fallow, in the village for not less than five years;*
> *(b) the occupier, other than a villager whose principal means of livelihood is agricultural or*

pastoral, owes any rent, taxes or dues on or in respect of the land and has continued to owe that rent, taxes or dues or any portion of it for not less than two years from the date on which that rent, taxes or dues or any portion of it first fell to be paid;

(c) the occupier has left the country without making any arrangement for any person to be responsible for the land and for ensuring that the conditions subject to which the customary right of occupancy was granted are complied with and has not given any appropriate notification to the village council.

(2) In determining whether land has been abandoned in terms of paragraph (a) and (b) of subsection (1), regard shall be had to–

(a) the means of the occupier of the land, and where the occupier is an individual, the age and physical condition of the occupier;

(b) the weather conditions in the area during the preceding three years;

(c) any customary practices, particularly practices amongst pastoralists which may have contributed to the non-use of the land during the preceding three years;

(d) any advice on the matter sought by the village council or given to it by the Commissioner.

(3) Land shall not be taken to be abandoned under subsection (1) where a spouse or dependants of the occupier are occupying and using that land, notwithstanding that the occupier–

(a) is not and has not for not less than three years occupied or used that land; or

(b) owes, in accordance with paragraph (b) of that subsection any rent, taxes, fees or dues on that land; or

(c) has not specifically appointed a spouse or a dependant to manage the land in his absence.

(4) Where a village council considers that any village land held for a customary right of occupancy has been abandoned, it shall publish a notice in the prescribed form at the offices of the village council and affix a copy of the notice in a prominent place on that land–

(a) stating that the question of whether that land has been abandoned will be considered by the village council at a time which shall be not less than thirty days from the date of the publication of the notice;

(b) inviting any person in the village with an interest in that land to show cause as to why that land should not be declared to be abandoned.

(5) A copy of a notice referred to in subsection (3) shall be sent to the Commissioner who shall be entitled to make representations to the village council on the matter.

(6) Where either no person interested in the land has shown cause or a person interested in the land has shown cause to the satisfaction of the village council as to why the land should not be declared to be abandoned, the village council may make an order, to be known as a 'provisional order of abandonment' in the prescribed form declaring the land to be abandoned.

(7) A copy of a provisional order of abandonment shall be–

(a) posted up in the offices of the village council;

(b) affixed in a prominent place on the land to which it refers;

(c) sent to the Commissioner.

(8) A provisional order of abandonment shall, without more, unless a person claiming an interest in the land applies to the court for relief against that

order, become a final order of abandonment ninety days from the date of the declaration of the provisional order.

(9) On the coming into effect of a final order of abandonment–

(a) the customary right of occupancy in the land which has thereby been declared to be abandoned, shall immediately and without further action being required stand revoked; and

(b) the land which has been declared to be abandoned shall, immediately and without any further action being required, revert back to land held by the village council as available for allocation to persons ordinarily resident in the village.

(10) The village council shall, on a claim being made within sixty days of the coming into effect of a final order of abandonment by an occupier of land declared by that final order to be abandoned, on being satisfied by that claim, pay compensation for any unexhausted improvements on that land at the time of the coming into effect of the final order, but shall, where the occupier is an individual after taking account of the means, age and physical condition of that occupier, deduct from any payment or compensation–

(a) all the costs incurred by the village council in the process of declaring the land to be abandoned, including any costs incurred in any action in court where a person claiming an interest in the land is applying for relief from a provisional order;

(b) all the costs incurred in restoring the land or any buildings on the land to the condition that it would be reasonable to expect they should have been in if they had not been abandoned,

any rent, taxes, fees or other dues owing and not paid by the occupier.

(11) A village council shall record a provisional and a final order of abandonment in the register of village land."

We have reproduced the above section *in extenso* with a view to bringing to light every aspect of it. Our cursory look at the foregoing has it that as far as is relevant to the matter under scrutiny, may be summarized as follows: Land is abandoned if it is not used for five years since allocation, or rent, tax or dues have not been paid. If a village council considers land to have been abandoned, it publishes notice stating that adjudication regarding that land will be done by the Village Council and inviting persons interested to show cause why the land should not be

declared as abandoned. If no person shows cause, the Village Council will make a provisional order of abandonment which will become final order on expiry of ninety (90) days if no person challenges it in Court. The effect is to render the Right of Occupancy over the land revoked after which it reverts to the village and becomes available for allocation to another person ordinarily resident in the village.

In the case at hand, there was no evidence brought before the Ward Tribunal to show that the procedure under the provisions of section 45 of Cap. 114 was followed. Given the ailment, we are of the considered view that the allocation of the disputed land to the appellant was illegal. Therefore, no good title passed to him by the purported allocation. This is exacerbated by the fact that there was ample evidence at the Ward Tribunal, including the testimony of the respondent himself, that he bought the disputed land from one Nankiri. That was testified to by , as already alluded to above, Halidi Abdallah, Fundi Ramadani, William Ntulwe Mzuri Ankiri and as well as the respondent himself.

We agree with Mr. Kilule that the procedure to declare the disputed land to have been abandoned was not followed. We think this ground was not proved as well

In the upshot of the above, we are certain that this appeal was filed without any scintilla of merit. It is consequently dismissed with costs.

Order accordingly.

DATED at **TANGA** this 28th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of February, 2020 in the presence of Mr. Abdi M. Kipoto, Appellant present in person and Mr. Hassan Abdallah Kilule, learned counsel for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL