IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 218 OF 2020

TANZANIA RAILWAYS CORPORATION (TRC) ..... APPELLANT

VERSUS

GBP (T) LIMITED ..... RESPONDENT

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

(Mugeta, J.)

dated the 5th day of March, 2020

in

Land Case No. 9 of 2017

.....

JUDGMENT OF THE COURT

30th April & 7th May 2021

GALEBA, J.A.:

The appellant, Tanzania Railways Corporation (TRC) was sued by GBP (T) Limited, the respondent, in the High Court of Tanzania at Tabora in Land Case No. 9 of 2017. The appellant was sued because on 19.06.2017 it issued a thirty (30) days' notice requiring the respondent to demolish its structures erected on part of Plot No. 75 Block 'A' Kibirizi Area in Kigoma/Ujiji Municipality, registered as Certificate of Title No. 13215 (the dispute property). The reliefs

sought in the case were for a declaration that the threatened demolition is illegal and for a permanent injunction restraining the appellant from implementing the said demolition exercise.

The appellant's case on the other hand, was that the respondent's properties earmarked for demolition were those which had been erected on the land forming part of the thirty (30) meters railway land strip, set aside for railway activities and infrastructure development. It was also alleged that out of the 8,259.6 square meters which is the whole dispute property, only 1,989.6 square meters are within the railway strip. In fine, the complaint of the appellant is that this lesser area (the 1,989.6 square meter area) was illegally allocated to the respondent and its occupation and development by the respondent is equally unlawful.

After hearing the case, the trial court made a finding of fact that since the whole of the dispute property fell outside (fifteen) 15 meters from the railway line centre point, the respondent was entitled to protection of the law because the location of the dispute property was in Kigoma town which is an urban centre. It dismissed

the appellant's argument that the railway land reserve in Kigoma which is an urban centre, was thirty (30) meters each side of the railway line, as detailed in the Railway Engineering Manual of 1962 (the TRC Manual 1962). The court also found that according to the Manual and the evidence of the appellant, the railway land reserve was (fifteen) 15 meters in town centres and thirty (30) meters in the countryside outside urban centres. Accordingly, the trial court granted the respondent the reliefs sough with no order as to costs. Being aggrieved by the decision of the High Court, the appellant filed this appeal predicating it on two grounds of appeal, namely that;

> *"1. The trial Judge erred in law and in fact in holding that the Railway Engineering Manual which provided for, inter alia, the railway reserved land through item 8.04 did not apply or extend to the land in dispute owned by the respondent.*
>
> *2. That the trial Judge erred in law for failure to properly evaluate the evidence adduced by the appellant which proved that the land in dispute fall within the railway reserve land."*

To appreciate the nature of the dispute between the parties, a brief background to this appeal is necessary. According to the record of appeal, on 01.11.2000, the respondent was granted a right of occupancy over the dispute property for Special Industrial Use, use Group 'N' use class (c) as defined in the Town and Country Planning (use classes) Regulations 1960. The certificate of occupancy also called the title deed was executed by the Commissioners for Lands. After the allocation, the respondent developed it including erecting necessary buildings and infrastructure for petroleum products distribution depot.

However, on 19.06.2017 the appellant issued a thirty (30) days' notice requiring the respondent to demolish some of its buildings, erected on the dispute property because, according to the appellant the buildings were erected within thirty (30) meters which is a railway land reserve, in terms of clause 8.04 of the TRC Manual 1962. To assert its rights in the dispute property and in defending its real assets, the respondent filed Land Case No. 9 of 2017 from which this appeal emanates praying for reliefs referred to above. It also filed Miscellaneous Land Application No. 52 of 2017 and obtained an

injunction restraining any kind of threats from the appellant to demolish the buildings. The High Court was convinced that as the respondent's buildings were erected out of fifteen (15) meters measuring from the railway line sideways, and the dispute property being in Kigoma, an urban centre, the respondent had breached no law and entered judgment in its favour. That is the decision that the appellant is challenging based on the two grounds of appeal quoted above.

At the hearing of this appeal, the appellant was represented by Mr. Gabriel Pascal Malata, the learned Solicitor General assisted by Mr. Stanley Kalokola learned State Attorney and the respondent had the services of Mr. Bakari Chubwa Muheza, learned counsel.

Mr. Malata had filed written submissions which he adopted before he could elaborate on them. In respect of the first ground of appeal, Mr. Malata argued that the Court erred when it held that because in the year 2000 Kigoma was an urban centre then the railway land reserve was fifteen (15) meters from the centre of the railway line to the farthest points sideways. He submitted that in

1962 when the TRC Manual 1962 was published, the site where Kigoma town is located now was in the rural setting; it was not an urban centre where the width of the railway land reserve as envisaged under clause 8.04 of the TRC Manual 1962 is thirty (30) meters each side. He submitted that irrespective of when Kigoma was declared a township in the 1970's, such declaration of township would not affect the dimensions already proclaimed in 1962. Mr. Malata's argument was that the buildings or part of the buildings targeted by the demolition notice are erected within thirty (30) meters from the railway line, in clear breach of the said TRC Manual and finally that any encroachment in the area was trespass hence unlawful.

As for the second ground, Mr. Malata submitted at length that there was no evidence that the appellant sought and obtained building permits to build on the dispute property as required by section 28(a) of the Urban Planning Act of 2007 read together with Regulation 124(1)(c) of the Local Government (Urban Authorities) (Development Control) 2008. To bolster his argument, he relied among other decisions, on the case of the **Director Moshi**

Municipal Council v. Stanlenard Mnesi Roisiepeace Sospeter, Civil Appeal No. 246 of 2017 (unreported) in which it was stated that it is unlawful to build in a planning area without a planning consent. It was generally his contention that the respondent was a trespasser on the appellant's land, which according to him, was set aside and reserved for railway operations and infrastructure development. He moved the Court to set aside the judgment of the trial court with costs.

In reply to both grounds of appeal, Mr. Muheza, who had not filed any written submissions, argued **first**, that the respondent had valid title to the dispute property and before any construction the respondent sought and procured necessary building permits from relevant government authorities and **second,** that clause 8.04 of the TRC Manual 1962 relates to tenants of the appellant and does not apply to private owners of real estate with no connection with the appellant or its land like the respondent was.

Thirdly, counsel for the respondent argued that there is no evidence that in 1962 Kigoma was a rural settlement as submitted by

Mr. Malata. His argument was essentially that it was improper for Mr. Malata, to submit on points which would otherwise be considered evidence fit to be adduced at the trial. **Fourthly,** that the TRC Manual 1962 has no force of law because the same was not enacted under any law. In other words, Mr. Muheza's argument was that the TRC Manual 1962 was neither principal nor subsidiary legislation as known in this jurisdiction. He submitted that as the evidence of the appellant's witnesses at pages 147 and 150 of the record of appeal, was to the effect that the railway land reserve limits were set in the TRC Manual 1962 to the exclusion of any other law, then such land limits are not lawful or enforceable. He further submitted that the respondent did not sue authorities that allocated land to it, instead it elected to call a witness from the office of Kigoma Ujiji Municipal Council. He finally beseeched the Court to confirm the decision of the High Court and dismiss the appeal with costs.

In rejoinder Mr. Malata contended that, the Commissioner for Land was not called and PW2, Brown Henrick Nziku who was called from Kigoma Ujiji Municipal Council did not know if the appellant had any land in the vicinity of the dispute property, meaning that the

witness had no background to the underlying problem. He submitted that the building permit was very necessary for the respondent in the High Court because that would show that the appellant's buildings are legally erected on the dispute property. He explained further that a tenant referred to in the TRC Manual 1962 is any trespasser, like the respondent is in respect of part of the dispute property that extends to the railway land reserve. The Solicitor General reiterated that the judgment of the High Court ought to be quashed and set aside with costs.

At the outset we wish to make a point that, for reasons that will become obvious in a while, we will not determine this appeal based on the grounds raised, but to some extent, on submissions made by counsel, the pleadings and some evidence adduced at the trial. We have decided to shelve the grounds of appeal as indicated, because at a shallow level it looks like the dispute arose from construction of the buildings targeted by the demolition notice and that the parties involved are only the appellant and the respondent; but at a deeper level, at the bedrock, the underlying issue that the trial court ought to have sought to resolve was the legality or lawfulness of allocation

of the dispute property to the respondent. That is so because going by the pleadings, the issue was not whether construction of buildings was lawful or unlawful, rather it was whether vesting ownership to the respondent of the land where the buildings are erected was lawful. Therefore a great deal of the discussion to follow, will be whether the issue of legality of vesting ownership to the respondent by land allocating authorities would be completely resolved without having the said land allocating authorities as parties to the suit.

Our close scrutiny of the evidence of witnesses before the trial court and submission of parties in Court, revealed that in order to completely and exhaustively resolve the dispute between the parties a lot more information was needed not from the appellant or the respondent, but the official land authority that granted title to the respondent.

We hold that view because, **first,** there was neither allegation nor proof that vesting of title or ownership of the dispute property in the respondent was illegal or it was procured by fraud or that the estate fell within the categories of title to land referred to at section

33(1) (b) or (c) of the Land Registration Act [Cap 334 R.E. 2019] (the Land Registration Act) which provides that: -

> *33.-(1) The owner of any estate shall, except in case of fraud, hold the same free from all estates and interests whatsoever, other than-*
>
> *(a) N/A*
>
> *(b) the interest of any person in possession of the land whose interest is not registrable under the provisions of this Act;*
>
> *(c) any rights subsisting under any adverse possession or by reason of any law of prescription;*
>
> *(d) to (g) N/A."*

In the absence of such evidence, it would entail a conclusion that the respondent is an authentic holder of the entire dispute property free from all estates and interests whatsoever. A proper authority to justify that at the time the land was being granted to the respondent, did not have any subsisting third-party interests in terms of section 33(1) (b) or (c) of the Land Registration Act, above is the authority that granted it to the respondent.

Secondly, the appellant's allegations are that 1,989.6 square meters of land is the only area that is falling within the railway land reserve and not the entire 8,259.6 square meters which is the area of the whole plot. That complaint, calls for an inference from the appellant's perspective that the deed plan (a small sketch map of the plot with a few other plots in the neighbourhood always inserted in the title deed) was wrongly drawn by the land allocating authorities' cartographers or planners, by including the appellant's 1,989.6 square meters. In our view, this complaint would not properly be addressed by the respondent. It is an issue that would be resolved by a public authority that granted the land to the respondent.

Thirdly, if the allocation of the dispute property was unlawful as implied by the appellant, who would then compensate the respondent for the structures in case of demolition? If it is the land allocating authority, the respondent would have to institute another law suit, which would amount to multiplicity of suits, an absurdity.

The above issues constitute our basic reason why we stated above that we would not dispose of this appeal based on the grounds raised.

In forging some headway, it is now opportune at this point to remind parties that the appellant complained of the procedural irregularity of omitting to join an authority that granted the land to the respondent by way of a notice of preliminary objection contained at page 70 of the record of appeal that: -

> *"The plaint is bad in law for non-joinder of Tabora Municipal Council and or Commissioner for Lands who issued the certificate of Title."*
>
> (In the quotation hopefully, the appellant intended to refer to Kigoma Municipality)

Unfortunately, the High Court (Mallaba J.) at page 80 of the record of appeal overruled the objection because, according to him, if sustained, the point would not have completely disposed of the suit, therefore it fell short of the qualification of being a pure point of law. That was one way of reasoning but because of the three issues

above breeding out of failure to join the land allocation authorities, a better reasoning would have been based on Order I Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) on who may be joined as a defendant. That rules provides: -

> *"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."*

In ascertaining whether a party is a necessary party or not in the context of Order I Rule 10(2) of the CPC, in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), the Court stated that;

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

the questions in the suit cannot be completely decided".

See also **Claude Roman Shikonyi v. Estomy A. Baraka and Four Others**, Civil Revision No. 4 of 2012 and **Abdilatif Mohamed Hamis v. Mehboob Yusuf Osman**, Civil Revision No. 6 of 2017 (both unreported).

It could also be argued that as the respondent did not join Kigoma Ujiji Municipal Council or the Commissioner for Lands as a party, then there is nothing that the court could have done, because a plaintiff cannot be forced to sue a defendant that it does want to implead. That is correct and indeed, a plaintiff has that unfettered prerogative and freedom not to join a party it does not feel like joining, but if a party not joined is a necessary party, for resolving all issues raised by the pleadings, then the solution is provided by Order I Rule 10(2) of the CPC, which provides as that: -

*"(2) **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."***

In **Tang Gas Distributors Ltd v. Mohamed Salim Said and Two Others,** Civil Revision No. 6 of 2011 (unreported) while discussing a situation where both the plaintiff and defendant are unwilling to apply to join a necessary party, it was 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..."

We must stress as we wind up, that if a trial court notes that some issues raised in the pleadings call for addition of a party whose absence will lead to such issues of importance to remain unresolved,

then the court cannot fold its arms and assume a role of an onlooker, a bystander or a passer-by only because parties are resistant or unwilling to apply to join a necessary party or parties. The court has a duty to take an active role by taking matters on itself and add such a party or parties to the proceedings in order to facilitate effective and complete adjudication and resolution of all issues of controversy presented before it. That is what we hold to be the position of law.

It is our holding further that, had the trial court been keen enough as it should have, it would have required the respondent to amend its plaint and join the authority that granted land to it, or else, as stated above the court would have taken matters in its own hands and joined either the Commissioner for Lands or the Kigoma Ujiji Municipal Council to the proceedings.

In the upshot and for the foregoing reasons, in exercise of this Court's powers of revision conferred upon it by section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], we set aside the entire proceedings and judgment of the trial court and direct that Land Case No. 9 of 2017 be set down for trial after the Commissioner

for Lands or Kigoma Ujiji Municipal Council whichever granted the disputed land to the respondent shall have been joined as a party to the suit under Order, I Rule 10(2) of the CPC. As this matter has been decided largely on the issue raised by the Court *suo motu*, we make no order as to costs.

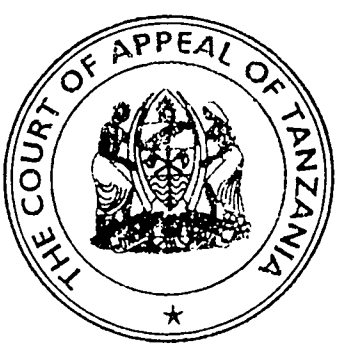
DATED at **TABORA**, this 6th day of May, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2021 in the presence of Ms. Mariam Matovolwa, learned State Attorney for the Appellant and Mr. Bakari Chubwa Muheza, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL