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

**(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)**

**CIVIL APPEAL NO. 255 OF 2018**

1. **GEORGE NDEGE GWANDU**
2. **JOSEPH OLDEANI SLAA**
3. **KAROLI EMMANUEL NADE**
4. **MELKIADI NG'ORA SIGHIS**
5. **XUFU SHAURI NAMAN**
6. **DANIEL AWET TEWA**
7. **DAWI ISSAAY AMI**
8. **EMMANUEL AWE SIGHIS**
9. **EMMANUEL MICHAEL HOTAY**
10. **HONORATI MAYKO JACOB**
11. **JOHN HAYSHI GIMOKA**
12. **JOHN SALUSTIAN BAYO**
13. **MARCO SHAURI SAREA**
14. **MELKIORI MICHAEL JACOB**
15. **PAMPHILI VINCENT MASSAY**
16. **PAULO LAZARO LUKAS**
17. **PETRO TLUWAY SIASI**
18. **STEPHANO SHAURI SAREAA**
19. **URBANO ULRICK BEE**
20. **ZAKARIA DISDERI QANDE**

**..... APPELLANTS**

**VERSUS**

1. **KASTULI SAFARI TEKKO**
2. **KARATU TOWNSHIP AUTHORITY**

**..... RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania at Arusha)**

**(Moshi, J.)**

**Dated the 23rd day of October, 2015**
**in**
**Civil Appeal No. 17 of 2015**

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# JUDGMENT OF THE COURT

10th & 17th February, 2021

**KITUSI, J.A.:**

At the District Land and Housing Tribunal (DLHT) for Karatu, at Karatu District, there is pending an Application No. 11 of 2014, instituted

by Kastuli Safari Teko against Karatu Township Authority. While that matter was and is still pending, twenty people turned up and moved the DLHT by a Chamber Summons to be joined as co-defendants. That application was dismissed by the DLHT for want of merits and the appeal to the High Court by the twenty people was also unsuccessful.

This therefore is an appeal by the said twenty people, hereafter referred to as the appellants, against the judgment of the High Court in Land Appeal No. 17 of 2015 upholding the decision of the DLHT. Kastuli Safari Teko and Karatu Township Authority who were the main parties at the trial are the first and second respondents respectively.

The background of the instant matter is that there is a dispute as to whether Karatu Township Authority was competently established and whether the council for the village known as Ayalabe was abolished as a consequence. At the DLHT the first respondent alleged that before its abolishment the village council of Ayalabe had allocated to him the parcel of land which is the subject of these proceedings. He sought for an order declaring him the rightful owner of that land. That is when the appellants moved in by way of a Chamber Summons drawn under section 51 of the Land Disputes Courts Act [Cap 216 R.E 2002], Order 1 Rule 10 (2) and (4) Sections 68 (a) and 95 of the Civil Procedure Code Act [Cap 33 R.E. 2002] henceforth the CPC.

The appellants took a joint affidavit in support of their application. In essence they challenge the first respondent's title to the land on the basis that the authority which purported to give it to him was incompetent or it was nonexistent. They stated that the land in dispute belongs to Ayalabe Village and as members of that village they have a right and interest in that land.

The trial DLHT's dismissal of the application was on the ground that the appellants had not satisfied it that they being mere members of the defunct Ayalabe village would be affected if the said DLHT granted the orders that the first respondent was praying for. Before that, the learned Chairman of the DLHT made findings in relation to the legal status of the second respondent vis a vis that of Ayalabe village and went on to conclude that with effect from 2009, Ayalabe village being within Ganako Ward, is part of Karatu Township Authority, the second respondent. Further the learned Chairman concluded that the first respondent had no cause of action against the appellants.

As intimated earlier, the appellants were unsuccessful at the High Court which took the view that village land is vested in the village council as per section 8 (1) of the village Land Act [Cap 114 R.E. 2002] and Ayalabe Village Council being a corporate body under section 26 (2) (b) of the Local Government (District Authorities) Act [Cap 287 R.E. 2002]

was the one with a legal mandate to sue or be sued. The learned Judge concluded that it is the village council of Ayalabe, not members of that village, who ought to have applied to be joined.

There are nine grounds of appeal. Ahead of the date of hearing, written submissions had been filed by the appellants' counsel. At the hearing Mr. Peter Qamara, learned advocate for the appellants, adopted the written submissions and addressed the Court orally in clarification. The first respondent appeared in person and briefly addressed the Court while the second respondent was represented by Mr. Peter Jackson Musetti, learned State Attorney, who was assisted by Mr. Mkoma Msalama and Prosper Adam, also learned State Attorneys. No written submissions had been filed by the respondents.

Before we refer to the submissions by the parties it has occurred to us necessary to make a small observation by way of a preamble. Both at the DLHT and before the High Court the parties were so carried away with the issue of the legal status of the second respondent vis a vis that of Ayalabe Village Council, that the principles as to joinder of parties, which is core to this case, missed the limelight. We think the issue before the DLHT and before the High Court was narrow, so we shall deliberately avoid all those grounds of appeal and submissions that go beyond the issue of joinder of parties. In similar vein we think both the DLHT and the

High Court erred in pronouncing themselves on issues that would probably be canvassed during the substantive hearing.

In order therefore to appreciate what is relevant for the purpose of determining the issue of joinder of parties, we shall shed light on the relevant legislation. It is Order 1 Rule 10 (2) of the CPC which was also cited in the appellants' Chamber Summons. It provides:-

> *"1 – 10 (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 of 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."*

With the above understanding of what the law requires, we are satisfied that only two out of the nine grounds of appeal address the issue of joinder of the appellants, and we shall confine our deliberations to those grounds. These are grounds 7 and 8 of appeal. Ground 7 states: -

"7 – *That the Honourable High Court Judge grossly erred in law in finding and holding that, the appellants have no right to be joined as necessary party in Land Application No. 11 of 2014, while the 1st Respondent's pleadings indicated clear complaints against the appellants."*

Ground 8 of appeal states: -

"8 – *That the Honourable High Court Judge grossly erred in law by finding and holding that the 1st Respondent did not have a cause of action against the appellants in Land Application No. 11 of 2014, without considering the fact clearly pleaded in the 1st Respondent's application."*

We think grounds 7 and 8 raise one and the same thing, so we shall take them simultaneously just as the appellants' counsel did in the written submission from page 15 of the said submissions. In this respect the learned High Court Judge is faulted for concluding that the 1st respondent had no cause of action against the appellants, and further faulted for concluding that the appellants have no interest in the case.

It has been submitted citing the decision of the High Court in **Martha Joshua v. Samwel Kastuli**, Land Appeal No. 25 of 2010 (unreported), that a cause of action is established from the contents of the plaint. Counsel submitted further that under paragraph 8 (a) (vii) (viii)

and (xii) of the application, the first respondent raised complains against the appellants and this, it is argued, constituted a cause of action.

There was an attempt by the appellants' counsel to submit, both in writing and orally, that this is a public interest litigation therefore the appellants have a locus standi because they intend to protect public property. The case of **Rev. Christopher Mtikila v. Attorney General** [1993] T.L.R. No. 31 was cited for the proposition that the contemporary view of locus standi covers those who are not personally and directly affected by the wrong being complained of.

In response, the first respondent briefly submitted that the appellants are strangers to the case so they should not be joined. He argued that if they wish, the appellants may institute a fresh suit of their own.

On the other hand, Mr. Musetti, learned State Attorney, submitted that the case of **Rev. Christopher Mtikila** (supra) is irrelevant to the case at hand because the former was a public interest litigation while the latter is a normal civil case.

We may as well dispose of the issue of public interest litigation right away. The provision of Order 1 Rule 10 does not, in our view, envisage a party joining an existing suit to institute his own claim within it, but rather it gives room to that party to take part in the existing cause of action. If

the appellants have in mind a public interest litigation, they may institute such action separately as correctly submitted by the first respondent, before a competent court. Therefore, we agree with Mr. Musetti that the case of **Rev. Christopher Mtikila** (supra) is not relevant to the instant case.

Now back to grounds 7 and 8 of appeal. Mr. Musetti submitted that a party is joined to a case if he is necessary for its disposal, and he cited the case of **Musa Chande Jape v. Moza Mohamed Salim**, Civil Appeal No. 141 of 2018 (unreported) in which the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported) was referred to.

The learned State Attorney went on to submit that paragraph 8 (a) (xi) of the application does not mention the persons who allegedly interfered with the first respondent's enjoyment of the piece of land and he further argued that the dispute before the DLHT could be resolved without joining the appellants.

In a short rejoinder Mr. Qamara, learned advocate, submitted that the second respondent was not being accused of interfering with the first respondent's enjoyment of the land, so those who were being accused of such interference as mentioned under paragraph 8 (a) (xi) ought to be joined.

We wish to start by appreciating the general rule that a person has a right to choose who to sue. However, this rule is not without exception for, Order 1 Rule 3 of the CPC provides for defendants who may not be left out in the institution of a suit. The said rule was paraphrased by the Court in **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman** (supra), cited by the learned State Attorney. The relevant part reads: -

> *"On the other hand, under Rule 3 of Order 1, all persons may be joined as defendants against whom any right to relief which is alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of fact or law would arise".*

The same was stated by the Court in **Farida Mbaraka & Farid Ahmed Mbaraka v. Domina Kagaruki,** Civil Appeal No. 136 of 2006 (unreported), and we shall reproduce the relevant part which stated: -

> *"Needless to say, the respondent is the **dominus litis** and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim any relief. However, it is abundantly clear to us that the Tanzania Building Agency who purportedly sold the disputed property to the respondent cannot be left out of the picture. The Agency says that it is the*

*owner of the property. This has to be established clearly since it is challenged by the appellants."*

The law on this area is long settled. The principle in the case of **Departed Asian Property Custodian Board v. Jaffer Brothers Ltd** [1999] E.A 55 (SCU) has been applied in many of our decisions. For instance, **Tang Gas Distribution Limited v. Mohamed Salim Said & 2 others,** Civil Application for Revision No. 68 of 2011 (unreported); **Musa Chande Jape v. Moza Mohamed Salim** (supra); **Stanslaus Kalokola v. Tanzania Building Agency & Mwanza City Council,** Civil Appeal No. 45 of 2018 (Unreported) and; **Ami Mpungwe v. Abas Sykes**, Civil Appeal No. 67 of 2000 (unreported), to mention a few. In the latter case the factors for joining a party as a defendant were summarized thus: -

*"(i) where any right to relief alleged to exist against them arises out of the same act or transaction; and*

*(ii) where, if separate suits were brought against such persons, any common questions of law or fact would arise."*

We shall now apply those principles to the facts of this case. To begin with, we agree with Mr. Qamara on two points. First, whether or not a person has a cause of action against another, must be determined

from the contents of the plaint or application. Two, the first respondent's pleadings did not raise any complaint against the second respondent. Mr. Qamara submitted that the appellants are impleaded under paragraph 8 (a) (Xi) of the application. On the other hand, Mr. Musetti submitted in rebuttal, that no names are mentioned under that paragraph therefore the appellants have no justification for assuming that they are the ones referred to under it. We think our decision lies here.

To us it is clear that the cause of action in this case is interference with the first respondent's peaceful enjoyment of the disputed land. That is what the first respondent alleged from paragraph 8 (a) (Vii) – (Xi), that some residents of Ayalabe Kaskazini suburb took it upon themselves to protect what they considered to be public land from misappropriation and prevented him from cultivating the land in dispute. It follows that if those people are not joined in this case, then the first respondent will have to institute another suit against them in which questions of law or fact, similar to those raised in this case, are bound to arise. By and large, this will amount to violation of Order 1 Rule 3 of the CPC. To put it differently, if left as it is, the suit would be unmaintainable because the first respondent has sued a party against whom he has no complaint.

Certainly, the learned State Attorney is correct in submitting that no names were mentioned, but that is only true if Annexture AE-5 referred

to under paragraph 8 (a) (X) is excluded. But then we know too well that annextures are part of pleadings, and the first respondent prayed, under paragraph 8(a) (X), that annexture AE-5 be part of the application. The relevant paragraphs of the application referring to Annexture AE-5 are (iX) and (X) and for ease of understanding we reproduce them: -

> *"(iX) That, following such an unjustified act of preventing the applicant and his servants from cultivating the land in dispute, the applicant decided to report the matter to Ward Executive Officer of Ganako.*
>
> *(X) That the Ward Executive Officer of Ganako, together with a letter he wrote to OCS directed the applicant to report the matter to the Police Station. A letter by Ward Executive Officer to OCS is hereby annexed and marked AE-5 and the leave of this Honourable Tribunal is craved to consider the letter forming part of this Application thereof".*

That letter (Annexture AE-5) mentions names, so we shall take them as the alleged perpetrators of the interference, and if any of them be among the appellants, a case will have been made for them to be joined as defendants. But before we make that conclusion, there is also the relief part of the application. Under prayer (ii) the first respondent is praying for an order restraining the respondent, her residents or any person claiming right under her from trespassing the land in dispute. We are of the view

that this relief can only be claimed against those who are being accused of interfering with the first respondent's peaceful use of the land, not against the second respondent. Therefore, if those mentioned in the pleadings (Annexture AE-5) as perpetrators of the interference are not joined, then relief (ii) referred to above will not materialize and again, that will be violation of Order 1 Rule 3 of the CPC.

Back to Annexture AE-5, and we begin by reproducing it: -

*"HALMASHAURI YA WILAYA YA KARATU MAMLAKA YA MJI MDOGO WA KARATU*

*OFISI YA A/MTENDAJI,*
*KATA YA GANAKO*
*S.L.P 190,*
***KARATU***

*23/12/2013*

*MKUU WA KITUO,*
*KITUO CHA POLISI,*
***KARATU***

*YAH:* ***KASTULI SAFARI TEKO***

*Mtajwa amefika hapa ofisini kwangu akilalamika kuwa watu wanaoitwa 1. John Hayshi Ginoha, (2) Ndege George Gwandu (3) Emanuel Michael Hotay (4) Davidi Awet Sighis na (5) Petro Tluway Siasi walienda kuwavuruga na kuwafukuza vibarua vyake Shambani kwa kutumia silaha aina ya Fimbo na Mapanga.*

*Vibarua waliofukuzwa shamabani wanaitwa:-*

*(1) Laura Bombo Masgnect; (2) Joseph Leonsi Kwaangw (3) Elias Silvini Leonsi (4) Leso Jumanne Iddi. Hata hivyo walizuia kazi hiyo isiendelee tena.*

*Kwa barua hiyo na kwa sababu watu hawa wamejichukulia sheria mkononi, nimemwelekeza Mlalamikaji kwako kwa hatua zaidi kisheria.*

*Wako katika Utumishi*

*Imesainiwa*
*Hyacenti A. N'gaida*
*A/Mtendaji Ain'gaida*

Five people are mentioned in Annexture AE -5, these are; John Hayshi Ginoha (11th appellant), Ndege John Gwandu, (1st appellant), Emanuel Michael Hotay (9th appellant), David Awet Sighis (6th appellant); and (5) Petro Tluway Siasi (17th appellant). On the basis of Annexture AE -5 which is part of the first respondent's pleadings at the DLHT, the first, sixth, ninth, eleventh and seventeenth appellants were impleaded, therefore it was an error on the DLHT and the High Court to dismiss their application to be joined.

On the basis of what we have discussed above, we partly allow the appeal to the extent that the DLHT and the High Court erred in not finding merit in the application of the first, sixth, ninth, eleventh and seventeenth appellants to be joined as defendants. We quash the judgment of the High Court to the extent that it dismissed the appeal by the named five

appellants and we order that they be joined in the proceedings before the DLHT for Karatu in Karatu District. The appeal against the rest of the appellants is dismissed because they were not impleaded.

In view of the position we have taken, we make no order as to costs.

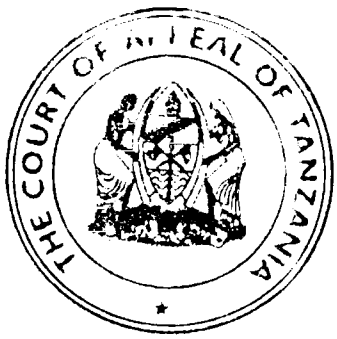
**DATED** at **ARUSHA** this 16th day of February, 2021.

A. G. MWARIJA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Judgment delivered this 17th day of February, 2021 in the presence of Mr. Peter Qamara, learned counsel for the Appellants and in the absence of the 1st and 2nd Respondents, is hereby certified as a true copy of the original.




H. P. NDESAMBURO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**