IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CIVIL APPEAL NO. 531 OF 2020

JULIANA FRANCIS MKWABI..... APPELLANT

VERSUS

LAWRENT CHIMWAGA..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dodoma)

(Kitusi, J.)

dated the 16th day of April, 2019
in
Land Appeal No. 45 of 2018

JUDGMENT OF THE COURT

29th October & 4th November, 2021.

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is on the ownership of a parcel of land measuring 2.5 acres described as Plot No. 390 Block 'BB' situated at Miyuji, Arusha Road, Dodoma Municipality in Dodoma Region comprised in a Letter of Offer with Ref. No. 4915/6/LAR dated 24th September, 1981 (the disputed land).

The material background facts of the matter as obtained from the record of appeal indicate that, originally, Juliana Francis, the appellant herein, sued Francis Mkwabi, the respondent before the Ward Tribunal of Miyuji claiming that he had trespassed into her land which had been

previously allocated to her and her husband, one Dominick Anthony Pallangyo by the Dodoma Municipal Council on 24th September, 1981. She alleged that in October, 1981 they utilized the disputed land for agriculture. She thus accused the respondent for having encroached into her land, destroyed her permanent crops, built his own house on it and subdivided the same into smaller plots which he sold out to other people.

To prove her title over the disputed land before the Ward Tribunal, the appellant tendered a letter of offer dated 24th September, 1981 which was admitted in evidence. In addition, the appellant summoned two witnesses namely, Nzumbi Jabiri Kagombe and Egrina Sauli Mwikombe who supported her evidence that she is the lawful owner of the disputed land. As such, the appellant prayed to be declared the lawful owner of the disputed land and for a permanent injunction against the respondent from trespassing into that land.

In his defence, the respondent alleged that he acquired the disputed land in 1983 under the operation commonly known as *'Nguvu Kazi'* by clearing a bush and cultivating various crops. The respondent went on to state that, the said programme was under the leadership of one Mathias Ngomboche the then Street Chairperson of that area. The respondent alleged further that, he had been in occupation of that land for about

thirty-five years without any interruption from the appellant. The respondent's version was supported by the evidence of William Msakwa Ndahani and Valerian Juma Mpingama who testified that they saw the respondent clearing the bush. In addition, one Julius Minyolwa Mdoli testified that he was a labourer employed by the respondent to assist him with the clearing of the bush. Thus, the respondent prayed for the dismissal of the appellant's suit with costs.

Having considered the evidence adduced before it, the Ward Tribunal decided the case in favour of the appellant and the respondent was ordered to demolish all buildings built by him on the disputed land. The Ward Tribunal further proceeded to order the respondent to vacate the disputed land. Dissatisfied, the respondent unsuccessfully appealed to the District Land and Housing Tribunal (the DLHT). Still dissatisfied, the respondent preferred an appeal before the High Court on the following grounds: -

(1) That, the Dodoma District Land and Housing Tribunal erred in law and in fact in finding that the Miyuji Ward Tribunal was properly constituted;

(2) That, the Dodoma District Land and Housing Tribunal grossly erred in law and in fact in finding that the respondent is a legal representative of the owner with the power of attorney when there was no evidence to warrant such finding of fact;

(3) *That, the Dodoma District Land and Housing Tribunal erred in law and in fact in ignoring the appellant's grounds of appeal that the Miyuji Ward Tribunal's judgment based on contradictory evidence thus failed to evaluate the evidence tendered before it; and*

(4) *That, the Dodoma District Land and Housing Tribunal erred in law and in fact in ignoring the evidence on the record to the effect that the appellant has been in uninterrupted possession of the suit property for over thirty-three years and was therefore entitled to judgment in his favour.*

When the appeal was placed before the High Court for hearing, the learned High Court Judge, *suo motu,* raised an additional issue on '*whether there was any adverse effect for non-joinder of Dodoma Municipal Council as a necessary party to the case'* and then invited the parties to address him on that issue. With the leave of the court, hearing of the appeal proceeded by way of written submissions, where parties submitted on both, the grounds of appeal contained in the memorandum of appeal and the additional issue raised *suo motu* by the Court.

In respect of the additional issue, the appellant argued that, she decided to proceed with the case without joining Dodoma Municipal Council, because under rule 3 of Order 1 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) there is no right to relief as against the said

authority. On the other side, the respondent argued that, since the Dodoma Municipal Council was alleged to have allocated the disputed land to the appellant, the appellant should have called the officers from that office as key witnesses.

The learned High Court Judge, having only considered the written submissions by the parties on the additional issue, made his observation found at page 147 of the record of appeal, that: -

> *"There are, in my settled view, quite a few questions that would be put to Dodoma Municipal Council. So,* ***the mere fact that the appellant had no intention of claiming for any reliefs from Dodoma Municipal Council, does not mean that, that authority was not a necessary party to the suit."*** *[Emphasis added].*

Then, the learned High Court Judge at page 148 of the same record concluded that: -

> *"It is therefore my conclusion that since the Dodoma Municipal Council, which had allegedly allocated the suit land to the appellant, was neither pleaded nor its officers summoned to testify, the appellant who had the onus to prove her title to that land, did not discharge that duty. This appeal, for that reason, is allowed, in view of which, I find no need to consider the rest of the grounds."*

Aggrieved, the appellant sought and obtained leave to appeal to this Court from the High Court which certified the following point of law: -

> *"Whether the effect of misjoinder or non-joinder of a party to a suit is to dismiss or allow the appeal or to quash the proceedings of the lower court and order retrial."*

However, in the memorandum of appeal, along with the above certified point, the appellant added two more grounds and in total, the said memorandum of appeal contained the following three grounds: -

1. *That, the High Court erred in law and fact for failure to consider all grounds of appeal submitted by the respondent and instead considered only the issue raised by the court itself and held that the appellant was supposed to implead Dodoma Municipal Council, the authority alleged to have allocated the disputed land to the appellant;*
2. *That, the learned High Court Judge's failure to consider that the appellant was properly allocated the suit land by Dodoma Municipal Council where she was given an offer of a right of occupancy under which she had been paying land rent from 1981 to date; and*
3. *That, the learned High Court Judge erred in law and facts by condemning the appellant to pay the costs of the case.*

At the hearing of the appeal, the appellant was represented by Mr. Paul B.S.M Nyangarika, learned counsel whereas the respondent had the services of Mr. Fred Peter Kalonga, also learned counsel. It is noteworthy that, both parties had earlier on lodged their respective written submissions in terms of Rule 106 (1) and (7) of the Court of Appeal Rules, 2009 which they sought to adopt to form part of their oral submissions.

At the outset, we invited counsel for the parties to address us on the propriety or otherwise of the memorandum of appeal which among others, contained additional grounds which were not certified by the High Court.

In his response, Mr. Nyangarika admitted that the second and the third grounds of appeal in the memorandum of appeal were not certified by the High Court. He therefore prayed to abandon them and argue only the first ground. The said prayer was not objected to by Mr. Kalonga. On our part, we outright granted the unopposed prayer made by Mr. Nyangarika and we will thus consider the submissions of the parties in respect of the first ground which was certified by the High Court.

Submitting in support of that ground, Mr. Nyangarika faulted the learned Hight Court Judge for not considering all grounds of appeal presented before him and instead decided the matter only on the issue

raised *suo motu* by the court. He further faulted the learned High Court Judge for allowing the appeal after he erroneously concluded that a necessary party, Dodoma Municipal Council was not pleaded. He argued that, there is no law to the effect that a non-joinder or misjoinder of a party to the suit lead to dismissal or allowance of the appeal. It was his argument that, the proper procedure which was supposed to be adopted by the learned High Court Judge, after concluding that, Dodoma Municipal Council was a necessary party, was to order for a retrial where the said party could have been joined in the suit. It was his further argument that since Dodoma Municipal Council was not a necessary party, the learned High Court Judge was required to consider all grounds of appeal presented before him to resolve the dispute between the parties. He contended that, the learned Judge did not do what he was required to do. Based on his submission, he beseeched us to allow the appeal, set aside the decision of the High Court and remit the case file to the High Court for it to determine all grounds of appeal.

In response, Mr. Kalonga, though he initially indicated that he was supporting the impugned decision of the High Court, but upon further reflection, he conceded to the prayer made by his learned friend. He insisted that the issue of misjoinder or non-joinder of the parties to the

case is not fatal to the extent of defeating the suit, He thus also urged us to allow the appeal without costs and remit the case file to the High Court for it to consider all grounds of appeal. Following the concession by Mr. Kalonga, Mr. Nyangarika had nothing useful to add, in rejoinder.

On our part, having examined the record of appeal and considered the submissions advanced by the learned counsel for the parties, it is clear to us that, both counsel are in agreement that, it was not proper for the learned High Court Judge to allow the appeal on the issue of misjoinder or non-joinder of a necessary party to the suit. We respectfully, share similar views. Therefore, the main issues for our consideration are **one**, whether the Dodoma Municipal Council was a necessary party in the circumstances of this matter, and two, whether omission to join her as a necessary party entitled the learned High Court Judge to allow the appeal.

Starting with the first issue, the term necessary part is defined in the **Black's Law Dictionary,** 8th Edition 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."*

It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. 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) 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) NA*
>
> *(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.*** [Emphasis added].

Again, in **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another,** Civil Revision No.6 of 2017 (unreported), when faced with an akin situation, we stated that: -

> "*The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.*"

Being guided by the above authorities and having reflected on the matter at hand, it is our settled view that, Dodoma Municipal Council was not a necessary party who ought to have been joined in the proceedings. This is so because, in the circumstances of the case the subject of this appeal, Dodoma Municipal Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed. Even if, for the sake of argument, she could have been a necessary party, still the High Court would not have made a verdict of allowing the appeal without directing on the way forward and then ignore to consider the other grounds of appeal presented before it.

Flowing from the foregoing discussion, it is our considered view that, upon making a determination that, a necessary party was not joined in the suit, the learned High Court Judge was required to refer back the matter to the trial court with a direction that a necessary party be joined and the suit proceed from there. We are fortified in this view by our decision in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), where, after detecting that the necessary party was not joined into the suit, we remitted the matter to the trial court with directions that hearing should proceed after joining a

necessary party. Having been guided by the above decision, we answer both issues in the negative.

In the upshot, we find merit in this appeal and allow it. Consequently, we hereby quash the judgment of the High Court and set aside the subsequent orders thereto. As the parties had already argued the appeal before the High Court by way of written submissions, we remit the case file to the High Court for it to render a decision which will consider and determine all grounds presented before it. Since, both parties have not pressed for costs, we make no order in that regard.

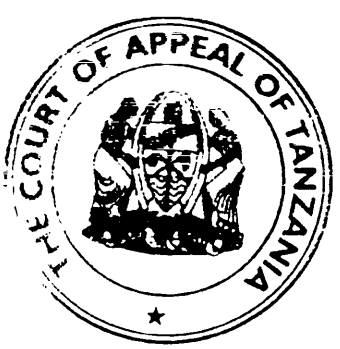
DATED at **DODOMA** this 3rd day of November, 2021.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the presence of Mr. Paul Nyangarika, learned counsel for Appellant and Mr. Lawrent Chimwaga, Respondent present in person is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL