IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 183 OF 2019

GODFREY NZOWA ..... APPELLANT

VERSUS

SELEMANI KOVA .... 1ST RESPONDENT
TANZANIA BUILDING AGENCY ..... 2ND RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 20th day of September, 2013
in
Land Case No. 12 of 2008

.....

RULING OF THE COURT

21st September & 15th November, 2021

KOROSSO, J.A.:

In the High Court of Tanzania at Arusha the appellant, Godfrey Nzowa filed a suit against the 1st and 2nd respondents on claims related to house No. 203, Sekei area, known as Plot No. 40, Block 3 Sekei Arusha Municipality (suit premises). The appellant's claims were **one**, for a declaratory order that the plaintiff/appellant is the legitimate owner and rightful employee in the civil service entitled to purchase the suit premises; **two**, a declaratory order that whatever sale agreement or arrangement that the 1st defendant/respondent may or might have executed purporting to acquire title over the suit premises are illegal and

void ab-initio; **three**, a certificate of occupancy (CT No. 30906) (Moshi land Registry) issued to the 1st respondent in respect of the suit premises be nullified; **four**, in the alternative to prayer (three) an order be made and issued for rectification of the register of titles to substitute the name of the appellant for that of the first respondent in certificate of occupancy upon appellant paying consideration to the 2nd respondent for the purchase of the suit premises; **five**, a further order by way of permanent injunction to perpetually restrain the respondents, their agents, servants and or assignees from interfering with the appellants peaceful and continuous occupation of the suit house; and **six**, costs and reliefs.

The 1st respondent through the written statement of defence countered the claims with own claims stating: **one**, a judgment on the counter claims for appellant to immediately vacate the suit premises; **two**, a judgment against appellant to pay arrears of rent of US$200 per month from 2002 until the appellant vacates the premises; **three**, an order against the appellant to pay costs for restoration of the premises in habitable condition at a sum of Tshs. 10,000,000/-; and **four**, costs for the suit and any other reliefs.

Briefly, the background leading to the present appeal is as follows:

In December, 2001 the appellant was transferred from Kigoma to Arusha as the Regional Crimes Officer (RCO) and simultaneously, the 1st respondent who was the RCO of Arusha at the time was transferred to Kigoma Region. Noteworthy, is the fact that while stationed at Arusha the 1st respondent resided at the suit premises. The appellant reported in Arusha on 1/1/2002. The handover of the suit premises between the appellant and the 1st respondent took place on 8/1/2002. While the transfers of the appellant and 1st respondent were effected it was also the time when the Government introduced a new policy to dispose of its houses across the country. The condition precedent in the disposition of the said houses from the government to civil servants was that civil servants who were to benefit from the initiative had to be in occupation of the premises they intended to purchase. In the process, the suit premise was sold to the 1st respondent, and it is this sale that prompted the suit subject to the current appeal.

After hearing the evidence from both parties, the trial judge held in favour of the 1st respondent. Aggrieved, the appellant appealed to this Court through the memorandum of appeal predicated on twelve grounds of appeal which for reasons which shall soon become apparent will not be reproduced.

When the appeal was called for hearing, the appellant was represented by Ms. Neema Mtayangilwa and Mr. Modest Akida, both learned Advocates. On the part of the 1st respondent, he enjoyed the services of Mr. Paschal Kamala, learned Advocate. The 2nd respondent was represented by Ms. Irene Lasulie and Ms. Joyce Mtinyange both Principal State Attorneys, together with Mr. Felix Chakila and Mr. Gallus Lupogo, both learned State Attorneys.

At the commencement of hearing, Ms. Lasulie rose up, sought and was granted leave to raise a point of law that she contended had come to their attention while preparing for the appeal. She argued that the instant appeal was incompetent since it arose from an incompetent suit and null judgment. The learned Principal State Attorney contended further that the 2nd respondent, an executive agency established under the Executive Agency Act, Cap. 245 of 2002 (the Act) in terms of section 3(6)(b) of the said Act although a legal entity cannot be sued in the absence of a contract between the parties in dispute.

The learned Principal State Attorney argued further that at the time the suit was instituted, no contract existed between the 2nd respondent and the appellant. She reasoned that as an executive agency, the 2nd respondent was a mere implementor of the Government

policy pronounced on 1/5/2002 to sell its houses and not the owner of the houses intended to be sold. She argued that the fact that the filed suit by the appellant against the respondents challenged the said Government policy further reinforced the contention that the 2nd respondent was not the one who should have been sued, understanding that an executive agency is not a policy maker. Ms. Lasulie further argued that the instituted suit, Land Case No. 12 of 2003 between the current parties is improper because apart from the 1st respondent other necessary parties who should have been sued were the Permanent Secretary, Ministry of Works, who stood in possession of the suit premises and the Attorney General so as to comply with the Government Proceedings Act, Cap 5 RE 2002, now 2019 (the GPA) where a ministry, government department or institution is sued. She thus maintained that the suit filed in the High Court suing the 2nd respondent was incompetent.

With regard to the query on why the 1st and 2nd respondents delayed to raise the issue upon becoming aware of the suit, the learned Principal State Attorney contended that the record of appeal shows, the 2nd respondent had raised a preliminary objection related to incompetency of the suit in the first written statement of defence filed

on 9/5/2008 (page 41 of the record of appeal) and the objection seems not to have been addressed as the record is silent on what transpired thereafter. Accordingly, the learned Principal State Attorney implored the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, now 2019 (AJA) and strike out the appeal.

In response, Ms. Mtayangilwa contended that having perused through section 3(6)(b) of the Act and the Civil Procedure Code [Cap 33 RE 2002, now 2019] (CPC) in view of the point of law raised, the Court should take into account the following matters when determining the same, thus: **one**, that the objection addressed misjoinder and non-joinder of parties are matters governed by Order 1 Rule 13 of the CPC which requires that all such objections be presented at the earliest and if this is not done as the case on hand, the objection shall be deemed to have been waived and that this is what the Court should hold since it was not raised when the pleadings were filed; **second**, that pursuant to Order 1 Rule 9 of the CPC, a suit shall not be defeated merely by misjoinder or non-joinder of parties in so far as the interest of the parties are concerned, therefore the Court should subscribe to that principle and also consider the fact that the case subject to the current

appeal involves parties more than the 2nd respondent. She argued that the cited provision requires for the rights and interests of the parties to be considered and that in case the 2nd respondent was not supposed to be sued, then the suit cannot be defeated for that reason alone. The learned counsel argued that if the 2nd respondent was not properly joined in the suit, then justice demands that instead of striking out the appeal, a retrial should be ordered so that necessary parties may be joined in the suit and in the process avoid subjecting the appellant to start afresh. She argued that in the instant appeal as can be discerned from the record, many exhibits have been tendered and admitted supporting the claims sought thus striking out or dismissing the appeal without any direction on the suit will be leaving the matter in the air and prejudice the rights of the appellant. She referred us to the case of **Japan International Cooperation Agency (JICA) vs Khaki Complex Limited** (2006) TLR 343, which addressed matters to consider when determining whether to order a retrial where various exhibits have been admitted.

On the part of the 1st respondent, Mr. Kamala concurred with the submissions by the learned Principal State Attorney and argued that in including the 2nd respondent as a party section 3(6)(b) of the Act was

not complied with and thus vitiating the whole process related to filing the suit. The learned counsel contended that if the Court was to be persuaded by the submissions of the appellant's counsel and proceed without the necessary parties the exercise will be futile since there will be no one to execute any decree in favor of the appellant. The nature and subject matter of the suit being such as to require inclusion of the Permanent Secretary Ministry of Works as a necessary party in the suit since under section 3(6)(b) of the Act the 2nd respondent may only be sued as regards existing contractual obligations which was not the case with the appellant in the instant case. With respect to the way forward and the prayer for retrial, Mr. Kamala argued that having regard to the intricacies to pursue a suit against a government ministry or department under the Government Proceedings Act, a retrial will not be the best way forward. He asserted that the only available remedy was to either withdraw the appeal and start afresh or for the Court to strike out the same. He also resisted the submissions by the learned counsel for the appellant about conditions or consequences where there is a misjoinder or non-joinder of parties in a suit, he referred us and urged us to be inspired by our decision in **Stanslaus Kalokola vs Tanzania Building Agency and Another**, Civil Appeal No. 45 of 2018 (unreported) and what we set out as the way forward in such a situation.

In rejoinder, Ms. Lesuile reiterated her earlier submission on the import of section 3(6)(b) of the Executive Agency Act arguing that indeed in the absence of any contract between the appellant and the 2nd respondent meant the appellant had no cause of action against the 2nd respondent and thus the suit was incompetent. She contended further that if the appellant wishes to proceed with the claims, she cannot escape joining the necessary parties that is, the Permanent Secretary, Ministry of Works and the Attorney General. Regarding the submissions on the legal requirements and conditions set related to non-joinder and misjoinder of parties under the CPC, she was in agreement with the assertion by the learned counsel for the 1st respondent that the case of **Stanslaus Kalokola** (supra) provides the way forward since the circumstances therein have close similarity to those in the instant case. She urged the Court to dismiss the appeal and nullify the decision of the High Court.

Having heard and carefully considered the submissions before us from counsel for all the parties about the preliminary concern raised by the learned Principal State Attorney that related to the competency of the appeal, on the basis of what was submitted by all the counsel for the parties, there was no dispute that the objection was a point of law.

We have no qualms in agreeing with the undisputed stance being satisfied that the objection raises a point of law based on ascertained facts and not on evidence and if the objection was to be sustained it will dispose of the matter and thus falls within the ambit of the factors to consider in determination of a pure point of law outlined in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] E.A 696 and **CPTTWU (T) OTTU Union & Another vs Hon. Iddi Simba Minister of Industries and Trade and Others**, Civil Application No. 40 of 2000 (unreported).

Suffice to say, determination of the objection raised shall be guided by the following: **one,** competency of the 2nd respondent as a party to the suit filed in the High Court, Land Case No. 12 of 2008; **two**, implications of non-joinder and misjoinder of parties; and **three,** the consequences thereto.

We will start with issue number one on whether the 2nd respondent was a competent party to be sued. A perusal of the record reveals that the 2nd respondent, Tanzania Building Agency (TBA) was established as an executive agency through the Tanzania Building Agency (Establishment) Order, 2003 GN No. 24 published on 14/2/2003 that states:

"2. The Tanzania Buildings Agency to be known by the acronym TBA is hereby established as an Executive Agency to take over the day-to-day management of Buildings as specified in the Schedule to this Order that are currently under the responsibility of the Department of Buildings in the Ministry of Works."

The above provision indicates that TBA was established under the umbrella of the Department of Buildings in the Ministry of Works and according to item 3.1 of the Schedule to the Order cited above, TBA is semi-autonomous. Its import being that TBA, is a semi-autonomous institution under the umbrella of the Ministry of Works and thus undoubtedly, when suing TBA involvement of the Permanent Secretary, Ministry of Works at the least is essential. Additionally, TBA as an executive agency, under section 3 (6)(a) and (b) of the Act, is capable of entering into contracts in its own name and can sue or be sued in its own name only in contract. For ease of understanding we reproduce section 3(6) of the Act that reads:

"S. 3(6)- Notwithstanding any other law, an Executive Agency shall-

(a) be capable of entering into contracts in its own name;

(b) ***be capable of suing and being sued in its own name only in contract;*** *and in that respect all laws appliable to legal proceeding other than Government Proceedings Act, 1967, shall apply to legal proceedings to which the Agency is a party;*

(c) *in all matters relating to contract, not be competent to sue or be sued in its own name; however, any legal proceedings which but for this paragraph, would have been instituted by or against the Government in accordance with the Government Proceedings Act.*

(d) *N/A*

(e) *N/A" [Emphasis Added]*

The import of the above provision as rightly argued by the learned Principal State Attorney and supported by the counsel for the 1st respondent, and in essence not objected to by the respondent's counsel is that; **first**, as an executive agency, TBA can only sue or be sued where there is a contract with the one sued or suing it; **second**, where the suit is not based on contract and in any other matter, then the 2nd respondent as an executive agency may sue or be sued in accordance with the GPA as expounded in Section 3(6)(c) of the Act and the

respective Ministry or Department and Attorney General have to be joined as parties to the suit.

In the suit subject to the current appeal, first, there is no dispute that there was no contractual relationship between the appellant and the 2nd respondent, this was readily conceded by the appellant's counsel. We have gone through the pleadings before the Court and considered the submissions before us and failed to find anything to indicate the existence of any contractual relationship between the appellant and the 2nd respondent. From the record; **firstly**, there is no doubt that TBA were responsible for supervision of government house construction, distribution of houses to government employees, in effect it was the government houses distributing authority, however the government quarters were under the central government, Ministry of Works; and **secondly**, it is clear, a fact also conceded by the counsel for the appellant that there being no contract between the appellant and the 2nd respondent, the procedure for suing an executive agency found in the GPA was not followed.

With our finding above, there is no doubt that it was not proper to sue the 2nd respondent in this case and that the one who should have been sued is the Permanent Secretary, Ministry of Works. What is clear

is that the Permanent Secretary, Ministry of Works was an essential party to the suit, and it paves way for us to address the second issue on joinder and non-joinder of parties.

The 1st and 2nd respondents' counsel argued that non-joinder of the Permanent Secretary, Ministry of Works, a necessary and essential party as alluded to hereinabove and especially for execution of any decree or order declared, render the instant appeal to be incompetent for reason that it arises from an incompetent trial. The response from the appellant's side was that non joinder of a party cannot vitiate the proceedings and that since no such objection was fronted at the earliest possible time at the start of trial, it meant that the respondents waived the same. Additionally, the appellant counsel argued that by virtue of Order 1 Rule 9 of the CPC, misjoinder or non-joinder of parties by itself does not render a suit incompetent and especially since there were other defendants and the rights and interests of all parties have to be considered.

It is a common ground as submitted by counsel for both parties, that misjoinder and non-joinder of parties to the suit is addressed under Order 1 Rule 1 and 3 of the CPC that lays down the procedure to be followed in cases where there is non-joinder or misjoinder of parties.

Under those provisions where a suit is instituted by or against certain identifiable parties, all members of such a group must be impleaded whether in personal or in representative capacity, although it is not all the time that not all parties are necessary for the suit to be adjudicated upon. The question of joinder of parties may arise with respect to plaintiffs or the defendants. Joinder of plaintiffs is regulated by Order 1 Rule 1 of the CPC. In the case of defendants, as held by this Court in the case of **Abdulatif Mohamed Hamis vs Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported) that:

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

The Court proceeded further and discussed what a misjoinder or non-joinder of parties in the suit is and stated:

> *"The CPC does not specifically define what constitutes a "misjoinder" or a "non -joinder but, we should suppose, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1, Rules 1 and 3,*

respectively, and they are neither necessary nor proper parties, it is a case of misjoinder of parties. Conversely, where a person, who is necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non-joinder. Speaking of a necessary party, a non-joinder may involve omissions to join some person or party to a suit, whether as plaintiff or defendant, who, as a matter of necessity ought to have been joined."

Suffice to say, while considering the arguments by the counsel for the appellant, the provision of Order 1 Rule 1 of the CPC that all parties who are necessary must be joined to the suit, cannot be ignored. On the other hand, we agree that it is also true that under Order 1 Rule 9 of the CPC, no suit shall be defeated only for reason of non-joinder. In the present case, it is pertinent to consider that non-joinder of parties has been raised at the appellate stage because it was not considered at the trial court. At this stage the Court cannot interfere and order for the name of any party to be joined where it finds to be just and necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit in terms of Order 1 Rule 10(2) of CPC.

While alive to the provision of Order 1 Rule 9 of the CPC, it is important to also take into account the fact each case has to be determined in accordance with its peculiar circumstances. We align to the observation of this Court in the case of **Stanslaus Kalokola** (supra) that:

> *"...there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential."*

The Court thereafter quoted a commentary from *Mulla Code of Civil Procedure, 13th Edition Volume I pg. 620* stating thus:

> *"As regards non-joinder of parties, a distinction has been drawn between non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because O. 1 r.9 is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed."*

This Court had also another opportunity to deliberate on a similar situation on the effect of not joining a necessary party to a case. In the case of **Tang Gas Distributors Limited vs Mohamed Salim Said and 2 Others,** Civil Application for Revision No. 68 of 2011

(unreported), the Court highlighted situations where a necessary party ought to be added in a suit at page 9 of the judgment, that is, where:

> "(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..."*

Additionally, the Court observed further in the case of **Tang Gas Distributors Limited** (supra) 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)."*

(See also, **Musa Chande Jape vs Moza Mohamed Salim**, Civil Appeal No. 141 of 2018 (unreported)).

Indeed, the fact that the Permanent Secretary Ministry of Works was a necessary party has not been disputed by all the parties. In **Abdullatif Mohamed Hamis** (supra), the Court was inspired by the decision from India in the case of **Benares Bank Ltd vs Bhagwandas**, A.I.R. (1947) All 18, in which the full bench of the High Court of Allahabad provided two tests for determining whether a party is necessary party to the proceedings which we readily adopted; **one**,

there has to be a right of relief against such a party in respect of the matters involved in the suit and; **second**, the court must not be in a position to pass an effective decree in the absence of such a party.

We adopt the above tests and apply the same to the instant appeal, understanding that the Government through the Ministry of Works being the owners of the suit premises, had the right of relief against such a party as also conceded by the counsel for the appellant, together with the fact that under the circumstances it will be impossible to pass an effectual decree in the absence of Ministry of Works.

We are of the view that the current situation falls under the above circumstances.

Taking into account the above and the fact that neither the appellant nor the trial court found it important to join the Permanent Secretary, Ministry of Works, a necessary party so as to effectually and completely adjudicate and settle the controversy involving the sale of suit premises, it cannot be argued that such non-joinder can be ignored only for reason that no objection was raised at the earliest or that it is not sufficient to render dismissal of the suit. To say the least the non-joinder of the necessary party was as held in **Abdullatif Mohamed Hamis** (supra); *"a serious procedural in-exactitude which may,*

seemingly, breed injustice." For the foregoing, we find that under the circumstances non-joinder of the Permanent Secretary, Ministry of Works rendered the suit subject to the instant appeal unmaintainable and any granted decree ineffective and thus fatal.

In consequence to the above finding, what remains for determination is the way forward. Submitting in the alternative, the counsel for the appellant urged us to order a retrial if we were to find that non-joinder of the Permanent Secretary, Ministry of Works fatal. She argued that we should take into account the volume of exhibits tendered and admitted in evidence and it will be judicious taking into consideration all the obtaining circumstances in the case and the fact that there are other respondents to consider. On the part of the counsel of the 1st and 2nd respondents implored us to strike out the appeal for lack of competency since it arose from an incompetent suit.

At this stage, taking all the facts into consideration and there being no option to amend the plaint, in the interest of justice, we set aside the entire proceedings from the date of commencement of the trial up to the date of judgment and the resultant judgment and decree of the trial court in Land Case No 12 of 2008, High Court of Tanzania at Arusha together with subsequent orders.

We have considered the peculiar circumstances pertaining to this matter and thus in the interest of justice we order that the record be remitted back to the High Court for retrial after the necessary parties have been joined in the suit. Considering the circumstances of this case, we make no order as to costs.

DATED at **DAR ES SALAAM** this 10th day of November, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 15th day of November, 2021 in the presence of Mr. Sabas Shayo, holding brief for Ms. Neema Mtayangulwa, learned counsel for the appellant and also holding brief for Mr. Paschal Kamala, learned counsel for the 1st respondent and Mr. Felix Chakila, learned State Attorney for the 2nd respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL