

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: WAMBALI, J.A, SEHEL, J.A And KIHWELO, J.A.)

CIVIL APPEAL NO. 127 OF 2018

JANUARY NSHIMBA.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF DAUGHTERS OF MARY

IMMACULATA AND COLLABORATORS.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Land Division
at Dar es Salaam)**

(Mkuye, J.)

dated the 24th day of February, 2016

in

Land Case No. 111 of 2006

JUDGMENT OF THE COURT

21st March & 28th April, 2022

SEHEL, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Land Division whereby the respondent was the plaintiff and the appellant was the defendant. In that suit, the respondent claimed that she acquired the disputed property through a sale transaction between her and the late Augustine S. Ng'ittu concluded in December, 2003 and that between November, 2004 and March, 2006, the appellant trespassed into the

disputed property and uprooted beacons YX229, YX882 and YX884 and placed therein poles and wire fence. She therefore claimed for the following reliefs: -

- "1. A declaration that the plaintiff is the lawful owner of all that parcel of land known as Plot No. 97, 111 and 112 Block C, Luguruni Area, Mbezi, Kinondoni District at Dar es Salaam with its boundaries shown in the registered survey plan No. 37328 (hereinafter to be referred to as "the disputed property").*
- 2. An order restraining the defendant permanently from encroaching onto the plaintiff's land in any way and remove whatever kind of constructions, erections or whatever effected by him to the plaintiff's land.*
- 3. An order compelling the defendant to incur all costs and expenses for the beacons and marks he has tampered with as pointed out in Paragraph 7 hereinabove and place them where they were as of November, 2004.*
- 4. Payment of general damages as may be assessed by the court.*
- 5. Costs of the suit be provided for.*
- 6. Any other remedy the honourable court will deem fit to grant be so granted."*

The appellant did not dispute the sale agreement entered between the respondent and one Augustine S. Ng'ittu. Nevertheless, he disputed the claim that he trespassed into the disputed property as he averred that he lawfully owned it since August, 2002 and the same was previously known as Farm No. 281, Luguruni Kibamba, Kinondoni District at Dar es Salaam Region. The appellant averred further that the dispute between the two parties arose from the survey conducted in September, 2003 that was done without consulting him.

Suffices to state here that the record of appeal shows that Immaculata Stephen Ng'ittu (an administratrix of the estate of the late Augustine S. Ng'ittu) and Kinondoni Municipal Council were impleaded as third parties by the appellant. As to how they came to be joined as third parties, we shall let the record speak for itself.

On 12th September, 2006 when the suit was called for mention before the trial Judge, the counsel for the defendant expressed the defendant's intention to file a third-party notice. The proceedings of that date reads: -

"12/9/2006

Coram: P.A. Rugazia, J

For the Plaintiff: Mr. Buberwa, Advocate

For the 1st defendant: Mr. Msefya, Advocate

Cc: Eliuter

Mr. Msefya, Advocate: I intend to file a third-party notice

Court: To be filed by 20/9/2006

Order: Mention on 2/11/2006."

After several adjournments, on 10th May, 2007 the appellant notified the trial court that the defendant had already filed a third-party notice. The record of appeal further shows that on 11th December, 2008 the 1st third party obtained leave to file her written statement of defence and the same was filed on 23rd December, 2008. In her written statement of defence, the 1st third party averred that the defendant has no legitimate claim against her as, upon sale, the respondent lawfully acquired the disputed property from the late Augustine S. Ng'ittu. She thus prayed for the defendant's claim against her be dismissed with costs.

Following an unsuccessful mediation, the suit went to a full trial that was conducted with the aid of two assessors, namely; Mrs. Martha Bukuku

and Ms. Hellen Joseph. During trial, the following three issues were framed for the trial court's determination: -

- "1. Whether the plaintiff is the lawful owner of Plot No. 97, 111 and 112 Luguruni Area, Mbezi, Kinondoni District at Dar es Salaam Region.*
- 2. If the answer to the first issue is in the affirmative, whether the defendant trespassed into the land in dispute*
- 3. To what reliefs are the parties entitled."*

As the determination of the appeal before us will focus on the third-party notice procedure, we shall not reproduce the evidence led by the appellant and the respondent. On the part of the 1st third party, she herself testified as DW3 on 24th November, 2015. In her evidence, she disputed the defendant's claim. She told the trial court that her late husband, Augustine Ng'ittu purchased the disputed property from the villagers way back in 1969 and that in 1991 the land was surveyed. They were issued with a Certificate of Title over Farm No. 1944. In 2002, they applied for change of use from Farm to plots. She testified further that after the Kinondoni Municipal Council had consented to the change, the Farm was subdivided into five Plot Nos. 97, 111, 112, 113 and 114. Plot Nos. 97, 111 and 112 were sold to the respondent and all beacons were there at the

time the Plots were sold. The 2nd third party did not take part in the proceedings.

At the end of the trial, the learned trial Judge was satisfied that the respondent proved her case that she was the lawfully owner of the disputed property having purchased it from Augustine Ng'ittu at a consideration of TZS. 52,000,000.00 as evidenced by the sale agreement (Exh. P1) and the Certificate of Title (Exh. P2). She thus answered the first issue in favour of the respondent. Having found that the respondent was the lawful owner, the learned trial Judge answered the second issue in the affirmative that the appellant trespassed into the respondent's land and removed beacons in Plot No. 111. At the end, the learned trial Judge concurred with the opinion of the wise assessor Martha Bukuku. Accordingly, she entered judgment in favour of the respondent and declared her as the lawful owner of the disputed property. Further, the appellant was permanently restrained from trespassing into the respondent's land in any way and was ordered to remove whatever kind of constructions, erections or whatever erected by him to the respondent's land; the appellant to return the uprooted beacons; the appellant to pay the respondent a sum of TZS. 10,000,000.00 as general damages for the

trespassing that infringed the respondent's right to enjoy and live peacefully in her premises and the appellant to pay costs of the suit. There was no findings or otherwise of the third parties' liabilities against the defendant's claim.

When the appeal was placed before us for hearing on 21st March, 2022, the Court invited Mr. Jamhuri Johnson, learned advocate for the appellant to address it as to whether the third-party procedure prescribed under Order I Rule 14 of the Civil Procedure Code, Cap. 33 R.E 2019 ("the CPC") was complied with by the trial court. Before recapitulating the submission of Mr. Johnson, we find it apt to point out that the respondent did not enter appearance despite being duly served through his advocate, one Erasmus Denis Buberwa. Since the respondent filed written submissions, pursuant to Rule 112 (2) and (4) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), he was deemed to have appeared.

Coming back to the issue posed by the Court, Mr. Johnson admitted that the trial court did not comply with the stipulated procedure provided under Order I rule 14 of the CPC. He gave four reasons that; **first**, there was no application by way of affidavit for the issuance of a third-party notice as required by Order I rule 14 (2) and (3) of the CPC. **Secondly**,

after the 1st third party had filed her written statement of defence, the trial court did not give directions as required by Order I Rule 18 of the CPC. **Thirdly**, that the trial court in its judgment misdirected itself by treating the third parties as defendants. To fortify his argument that the third parties were treated as defendants, he referred us to page 168 of the record of appeal. **Fourthly**, there was no finding on the liability of the third parties. Given the pointed-out anomalies, Mr. Johnson urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (“the AJA”) to nullify the trial court proceedings, set aside the judgment and decree and make an order of a re-trial.

It is unfortunate that the written submissions filed by the respondent did not address the issue of the third-party procedure. It focussed on the grounds of appeal. Accordingly, we shall not summarize the respondent’s submission.

From the submission of Mr. Johnson, the crucial issue for our determination is whether the joining of the third parties was in accordance with the law. The law allows a defendant to apply to the trial court for leave to present a third-party notice. This is clearly provided under Order 1 rule 14 (1) of the CPC that reads: -

"14 (1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party"): -

(a) any contribution or indemnity; or

(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff,

the defendant may apply to the court for leave to present to the court a third-party notice."

Such an application, unless directed otherwise by the court, must be made *ex parte* and supported by an affidavit whose contents are provided under sub-rule 2 of Order I rule 14 of the CPC that: -

***"14 (2) An application under sub-rule (1) shall, unless the court otherwise directs, be made ex parte and be supported by an affidavit stating:* -**

(a) the nature of the claim made by the plaintiff in the suit;

(b) the stage which proceedings in the suit have reached;

(c) the nature of the claim made by the applicant against the third party and its relation to the plaintiff's claim against the applicant; and

(d) the name and address of the third party.”

In the light of the above provision of the law, unless directed otherwise by the court, a defendant who intends to present a third-party notice has to make an application and he must satisfy the trial court that he has a prima facie case and that there is a bona fide claim of indemnification or contribution against the third party or a relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff. On this, we subscribe to what was held by the High Court of Tanganyika in the case of **Mandani v. Suchale** [1971] HCD. 10. In that case, El – Kindy Ag. J. reiterated the need for the defendant to disclose sufficient facts in the affidavit to prove that it is necessary to join a third party when he said:

“Unless this is done, this court will not be in a position to state whether the respondent should be joined in as a third party or not. The affidavit should have disclosed sufficient facts to show that the joining of the respondent would not be premature if allowed. In the absence of these facts, this application cannot be granted.”

It is upon an application being made under sub-rule (1) of Order I rule 14 of the CPC and if the trial court is satisfied that the facts stipulated

under Order I rule 14 (a) and (b) of the CPC have been proved to be in existence, the trial court may grant leave to the defendant to present a third party notice, upon such terms and conditions as it may deem just (see Order I rule 14 (3) of the CPC).

In the appeal before us, we have earlier on stated that after the appellant was served with the plaint, on 12th November, 2006 Mr. Msefya, learned counsel for the appellant notified the trial court of the appellant's (the then defendant) desire to file a third-party notice. It was from that wish, the trial court ordered for the filing on 20th September, 2006 without specifying as to what had to be filed. The order was not clear as to whether the appellant was granted leave to present a third-party notice or he was required to file an application seeking leave for presentation of a third-party notice. Nonetheless, as indicated earlier, the appellant presented a third-party notice against Immaculata Stephen Ng'ittu (an administratrix of the estate of the late Augustine S. Ng'ittu) and Kinondoni Municipal Council. This means that, the third-party notice was presented without there being any application supported by an affidavit.

It should be noted that, the main purpose of presenting an application supported by an affidavit, is to enable the trial court to

ascertain as to whether the third parties i.e Immaculata Stephen Ng'ittu (an administratrix of the estate of the late Augustine S. Ng'ittu) and Kinondoni Municipal Council, could be held liable for any contribution or indemnity or any relief or remedy relating to the subject matter of the suit, if the defendant (the appellant herein) is found liable against the plaintiff's suit. As there was no any other directions issued by the trial court, the appellant ought to have filed the application for the presentation of a third-party notice. This is clearly a contravention of the provisions of Order 1 rule 14 (2) and (3) of the CPC.

In the present appeal, we are settled that the absence of the application and the failure by the trial court to ascertain as to whether the defendant had a bona fide claim of indemnification or contribution against the third parties, led the trial court to misdirect itself when it erroneously referred the third parties as defendants in its judgment. This is gathered at page 168 of the record of appeal where it said:

"The plaintiff, therefore, prays for judgment and decree against the defendants jointly and severally ..."

Further, at page 177 it said:

"I also order the defendants to return the uprooted beacons. Since the 1st defendant is found to be a trespasser, I make an order that the 1st defendant pays the plaintiff a sum of TZS. 10,000,000.00 as general damages..."

It should be kept in mind that the essence of the third-party procedure is to determine a dispute over any contribution or indemnification of the defendant by the third party sought to be impleaded or over any relief or remedy relating to the subject of the suit and substantially the same as a relief or remedy claimed by the plaintiff.

We earlier on stated that, in the suit there was only one defendant (the appellant herein) and Immaculata Stephen Ng'ittu (an administratrix of the estate of the late Augustine S. Ng'ittu) and Kinondoni Municipal Council were joined to the suit as third parties. Further, it be noted that the 1st third party took part in the trial court proceedings as a third party and not a party to the main suit. In that regard, the third parties were not parties to the original suit filed by the plaintiff but rather, they were brought into the suit for any contribution or indemnity or any relief or remedy relating the subject matter of the suit, if the defendant is found liable and if the trial court is satisfied that the defendant has a bona fide

claim against them. In that respect, though they were not properly joined in accordance with the requirement of the law, the trial court erred in treating the third parties as parties to the suit filed by the plaintiff.

In the case of **Metropolitan Tanzania Insurance Co. Ltd v. Frank Hamadi Pilla**, Civil Appeal No. 191 of 2018 (unreported) the Court held: -

"...the third-party procedure is based on the principle of contribution and/or indemnity upon the defendant being found liable to the plaintiff. We also agree with him that what is material is not the plaintiff, but the right of the defendant to indemnity from the third party. We further agree that under such circumstance, the third party is not supposed to be treated as a defendant in the suit, but essentially as a third party and no-party to the suit..."

Moreover, in our decision in the case of **Hasnain M. Murji v. Abdulrahim A. Salum t/a Abdurahim Enterprises**, Civil Appeal No. 6 of 2012 (unreported) we adopted the quotation from the learned author, Mulla, Code of Civil Procedure, Vol. II, 15th Ed., Page 1303 concerning a policy behind the third-party procedure that: -

"The policy behind this rule is that the defendant who has got a claim against a third party need not be driven to a fresh suit against the third party to put the indemnity in his favour into operation or to establish his entitlement to contribution from the third party. The claim and rights interse of the defendant and the third party have to be decided in the third-party proceedings."

We reaffirm the above policy.

After the service of the third-party notice to the third party and after the third party had filed a defence, the law requires the trial court to make directions as to how it will determine the liability of the third party in respect of the claim made against him by the defendant. This is provided under Order I rule 18 of the CPC which provides: -

"18 (1) where a third party has presented a written statement of defence the court shall on the application of the defendant presenting the third party notice or on the application of the third party or, where the third party has disputed the plaintiff's claim against the defendant, on the application of the plaintiff, or on its own motion, fix a date for giving of directions and may on such date, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made

against him by the defendant, order the question of such liability to be tried in such manner, at or after the trial of the suit, as the court may direct or, if the court is not so satisfied, pass such decree or make such order as the nature of the case may require.”

In the present appeal, the 1st third party filed her written statement of defence and disputed the defendant’s claim but the trial court did not fix a date for giving directions. Besides, judgment was entered in favour of the respondent who was the plaintiff but there was no any finding made over the liability of the third parties. There was no decree passed or any other order made as to the liability of the third parties. Failure to do so contravened Order 1 rule 18 of the CPC.

Given the pointed-out anomalies, it is without doubt that the third-party procedure was not complied with thus vitiated the whole trial court proceedings.

Yet, there was another procedural irregularity addressed to us by Mr. Johnson concerning the involvement of the assessors. However, in view of the conclusion we have reached above with regard to the propriety of the trial court’s proceedings, we do not need to address this particular point as it is inconsequential.

As to the way forward, since we have found that there was non-compliance of the third-party procedure that vitiated the entire trial court proceedings, in terms of section 4 (2) of the AJA we invoke our revisional powers and nullify the proceedings of the trial court, quash the judgment and set aside the decree. We further make an order of an expedited retrial of the suit by another Judge. We make no as to costs since the issue was raised by the Court.

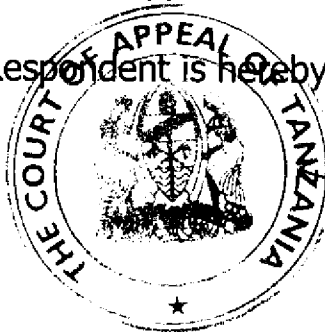
DATED at DAR ES SALAAM this 22nd day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 28th day of April, 2022 in the presence of Ms. Rosalia Ntiruhungwa holding brief for Mr Jamhuri Johnson, learned counsel for the Appellant and Mr. Erasmus Buberwa, learned counsel for the Respondent is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL