

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. 70 OF 2019

COSTANTINE B. ASSENGA APPELLANT

VERSUS

ELIZABETH PETER1ST RESPONDENT

FRANCIS MILLINGA2ND RESPONDENT

GODFREY LUFUNGULA AS GUARDIAN

OF AGATHA LUFUNGULA (MINOR)3RD RESPONDENT

GODFREY LUFUNGULA AS GUARDIAN

OF JAQLEEN LUFUNGULA (MINOR)4TH RESPONDENT

THE ATTORNEY GENERAL5TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es Salaam Registry at Dar es Salaam)

(Mwandambo, J.)

Dated the 18th day of December, 2017

in

Land Case No. 9 of 2013

JUDGMENT OF THE COURT

14th March & 29th April, 2022

WAMBALI, J.A.:

This appeal emanates from the decision of the High Court of Tanzania at Dar es Salaam in Land Case No. 9 of 2013 in which the first, second, third and fourth respondents (then defendants) were declared

lawful owners of Plot No. 2166, Block H, Mbezi Beach area in Dar es Salaam. In short, the appellant (then plaintiff) lost the suit which he had instituted against the respondents.

To appreciate the background of the dispute between the parties it suffices to revisit briefly the facts of the case. According to the plaint contained in the record of appeal, the appellant was granted an offer of a right of occupancy in respect of the land on Plot No. 506, Block H, Mbezi - Dar es Salaam (the disputed land) bearing reference No. DCC/LD/28987/5/DSM for a term of thirty-three (33) years commencing on 1st January, 1997. The appellant expressed his acceptance of the offer when he effected various payments on 24th January, 1997. Subsequently, he took possession and developed the land he occupied by constructing a residential house on the same year and continued to occupy it peacefully before the dispute that necessitated the institution of the suit at the High Court arose.

The appellant averred further that he continued to pay the land rent through the bills he received bearing the same plot number he was offered and accepted until 29th June, 2006, when to his surprise he was served

with a bill to pay land rent for the year 2005/2006 in which the land in dispute was described as Plot No. 2166, Block H, Mbezi.

Upon inquiry, he was notified that the Commissioner for Lands resurveyed the area in the process of having a better management of the land and thereby Plot No. 506 Block H, Mbezi was changed to Plot No. 2166, Block H, Mbezi. The appellant thus agreed to pay the respective land rent on a plot bearing the title of the changed number on that year, that is, 2005/2006 and continued to pay the same for the years 2006/2007 and 2007/2008. The appellant stated further in his plaint that to his surprise from the years 2008/2009, 2009/2010 and 2010/2011 he did not receive bills to pay for the land rent. When he inquired from the land authorities concerning the situation, he was informed that he had no debts to settle in respect of the land rent over Plot No. 2166, Block H, Mbezi.

Nonetheless, the appellant contended that later on 14th January, 2011 when he further applied for a land rent bill for the respective years, he learnt that the Commissioner for Lands had fraudulently granted the changed plot number to the first, second, third and fourth respondents. The appellant did not give up but continued with the follow up. In the process it came to his knowledge through the information he received from

the Land Offices that in view of the review process conducted between the years 2006 and 2007, Plot No. 2166 which is allegedly owned by the first, second, third and fourth respondents came into existence after it was changed from Plot No. 508 Block H, Mbezi. On the same occasion, it also came to his knowledge that Plot No. 506 was changed to Plot No. 2164 and it was indicated that it was allocated to a person known as Judica Teri.

In the circumstances and amid the confusion on the ownership of the disputed land coupled with the failure of the Commissioner for Lands to settle the dispute, the appellant gave a 90 days' statutory notice to sue for the recovery of the disputed land. Moreover, after he noted that the solution was not forthcoming, he formerly instituted Land Case No. 19 of 2013 before the High Court as alluded to above.

At the High Court the suit was strongly contested by the respondents. Basically, the first, second, third and fourth respondents averred in their joint written statement of defence that they are lawful owners of Plot No. 2166 Block H, Mbezi which resulted from the resurvey of Plot No. 508 Block H, Mbezi. They strongly contended that the claim of the appellant is by virtue of his unilateral trespassing and developing on Plot No. 2166 Block H, Mbezi High Density, formerly Plot No. 508 Block H,

Mbezi, leaving his Plot No. 506 Block H, Mbezi which was changed to Plot No. 2164.

Similarly, the fifth respondent denied the allegation of the appellant's ownership of Plot No. 2166 on the contention that the same was allocated to the first, second, third and fourth respondents as per the certificate of occupancy dated 21st May, 2010. It was further stated that the change of Plot No. 506, Block H, Mbezi Dar es Salaam was meant for proper land management and there was no fraud committed by the Commissioner for Lands in the transaction as alleged by the appellant.

In order to determine the case, the High Court framed two issues: -

"1. Who is the legal owner of the property in dispute?"

2. What reliefs are the parties entitled?"

As it were, after the High Court heard evidence from the parties, it found that the appellant had failed to prove his claims on balance of probabilities. Ultimately, it dismissed the suit with costs and declared the first, second, third and fourth respondents as lawful owners of the disputed land, that is, Plot No. 2166 Block H, Mbezi as intimated above.

It is against the judgment and decree of the High Court that the appellant has approached the Court armed with a memorandum of appeal comprising sixteen (16) grounds of appeal. Noteworthy, before the appeal was called on for hearing, through written submission lodged by the appellant's counsel, the 3rd, 6th, 8th, 9th, 14th and 15th grounds of appeal were abandoned; remaining with a total of ten grounds, namely, the 1st, 2nd, 4th, 5th, 7th, 10th, 11th, 12th, 13th and 16th respectively. The appellant's counsel confirmed the position before he presented brief oral arguments in support of the written submission. For the purpose of convenience and record, we reproduce and assign them numbers consecutively: -

"1. That the Honourable High Court of Tanzania (Dar es Salaam District Registry) (hereinafter called the High Court) erred in law and fact for holding that the Appellant's Plot No. 506, Block H, Mbezi Beach has nothing to do with the Plot No. 2166, Block H, Mbezi Beach while the uncontroverted evidence given showed that the Appellant was allocated with Plot No. 506 and used to receive and pay rent addressing that plot

No. 506 in that number (see Exhibit P1 and P2) but in 2005, 2006, 2007 his bill came and payments were made in respect of his plot described as Plot No. 2166, Block H, Mbezi (Exhibit P3, P5 and P6) and there was no explanation given by the 5th Respondent or any of the Respondents explaining the disconnection;

2. That having the uncontroverted evidence given shown, and having even the Honourable High Court held, that the Appellant had been allocated with Plot No. 506, Block H, Mbezi Beach in 1997 but having the Appellant indicated his doubt that his right might have been taken away by change of numbers of the plots that was unilaterally effected by the 5th Respondent, now describing the plot interchangeably as plot No. 2164 and 2166 (see exhibits P3, P5, P8 and D3), but having the Appellant shown that Plot No. 2164, Block 'H', Mbezi has the name of the Judica Teri (Exhibit P9

while Plot No. 2166 appears in the name of 1st – 4th Respondents (Exhibit P7), the Honourable High Court erred in law and in fact not to hold that the Appellant was the owner of the plot in dispute, either described as Plot No. 506, 508, 2164 or 2166.

3. That the Honourable High Court erred in law and fact to hold that the 1st, 2nd, 3^d and 4th Respondents were owners of the land which Exhibit P1 showed to have been granted to the Appellant with effect from 1/1/1997 while the evidence possessed by the said 1st, 2nd, 3^d and 4th Respondents was the evidence which started with the offer dated 19th January, 2010.

4. That the Honourable High Court erred in law and fact to hold that apart from the offer of the Appellant over the suit land (Exhibit p1) there was any other offer over the suit land which had

proof of being accepted to constitute ownership of a plot in question;

- 5. That the Appellant's assertion that he has been in occupation of the suit land and developed it and that he remained there undisturbed since 1997 to 2011 having not been controverted, the High Court erred not to declare the Appellant owner of the suit property by adverse possession, even if his documents of ownership proved unsatisfactory;*
- 6. That the Honourable High Court erred in law and in fact for holding that there was no forgery while upholding the purported certificate of occupancy No. 52657 of the suit land in the name of one EVERLYN PHILLIP MILLINGA looking issued in 2002 (Exhibit D5) mentioning the plot at issue as plot No. 2166, Block H, Mbezi while a letter from the same office of the Commissioner of 28/6/2011 (Exhibit P8) and even exhibits P1, P2, P3, P4, P5 and P6 indicate that the exercise which changed the numbers of the plots at issue from 506 and 508 to either 2164 and 2166 or 2164 and 2166 respectively was conducted between the years 2006 and 2007;*

7. *That the Honourable High Court erred in law and in fact by not taking inconsistencies of several areas from the evidence of the 5th Respondent, avoidances with no explanation on matters which are within the province of the daily operations of the 5th Respondent, absence of any supporting documents of the Respondents from their defences of the Respondents and late delivery of documents from the 5th Respondent with no sufficient explanation as evidence of forgery, even at a beyond reasonable standard;*
8. *That the Honourable High Court erred in law and in fact not to hold that on the totality of evidence and everything on record, the Appellant proved his case of ownership at least on the required standard;*
9. *That the Honourable High Court erred in law and in fact by going further to enter judgment for the Respondents' who had not counterclaimed or brought any case instead of dismissing the suit of the Appellant, if it found the same to have no merit;*
10. *That the Honourable High Court erred in law and infact to leave the Appellant with no*

remedy, even if it might be true that the suit land belonged to the 1st – 4th Respondents”.

Ultimately, the appellant proposes to the Court to reverse the decision of the High Court and declare him as a lawful owner of the disputed land, costs of the appeal and any other relief which might appear just and proper to be granted in his favour.

The appeal is strenuously resisted by the respondent who also lodged written submissions to express their respective stands in opposing the grounds of appeal.

At the hearing of the appeal, parties’ written submissions for and against were adopted for consideration by the Court. Indeed, counsel for the appellant and fifth respondent made brief oral submissions to complement their written submissions. On the other hand, the first, second, third and fourth respondents had nothing to add to their joint written submission they lodged earlier on in Court. All in all, while the appellant prayed for the appeal to be allowed with costs, the respondents urged the Court to dismiss it with costs.

Before us, Mr. Audax Kahendaguza Vedasto, learned advocate entered appearance for the appellant. On the adversary side, the first, second, third and fourth respondents appeared in person, unrepresented; whereas Mr. Mark Mulwambo, learned Principal State Attorney assisted by Mr. Erigh Rumisha, learned State Attorney entered appearance for the fifth respondent.

Having heard the parties' submission and thoroughly scrutinized the record of appeal, we are of the considered view that this appeal can be disposed of based on procedural irregularity rather than substantive grounds of appeal reproduced above, as we shall demonstrate below. This stand was also taken by the Court in **Christopher Makata and Betty Makata v. Remedius Edington Kisasi and Grace Kisasi**, Civil Appeal No. 8 of 1996 (unreported).

It is noted that, in the course of the submission of the appellant's counsel in support of the appeal, particularly the first and second grounds of appeal, we posed a question on whether in view of the pleadings, the evidence on record and the impugned decision of the High Court, it was not necessary to join Judica Teri as a party to the suit to facilitate an effectual and complete decision on the dispute between the parties.

For his part, Mr. Vedasto agreed that in view of the pleadings and the record of appeal it was important to implead Judica Teri as a necessary party. However, the learned advocate quickly and briefly argued that the failure of the appellant and the trial court to join Judica Teri as a party is not fatal to the proceedings in the circumstances of the case at hand. He strongly contended that the dispute between the parties herein could still be decided in favour of the appellant against the first, second, third and fourth respondents in respect of the disputed land based on the pleadings and evidence on record in the absence of Judica Teri. He thus urged the Court to ignore the omission and proceed to decide the appeal on merit as the evidence on record suffices to reach an effectual and complete decision on the disputed land. To this end, he supported the appeal by explaining briefly on the substance of the written submission and reiterated his earlier prayer to have the appeal allowed with costs.

On the other hand, the first, second, third and fourth respondents, being unrepresented, did not wish to say anything concerning the issue of non-joinder of Judica Teri as one of the parties to the suit. They essentially reiterated their arguments contained in their joint written submission in opposing the appeal. In the end, they pressed the Court to

dismiss the appeal with costs on the contention that the High Court rightly decided that Plot No. 2166 which came into existence after Plot No. 508 was resurveyed belonged to them in view of the evidence on record.

For the fifth respondent, Mr. Rumisha supported the argument of Mr. Vedasto that the non-joinder of Judica Teri did not affect the determination of the suit in respect of the dispute between the appellant and the first, second, third and fourth respondents over Plot No. 506. He equally pressed the Court to disregard the omission and proceed to determine the appeal on merit as non-joinder of Judica Teri is not fatal to the trial court proceedings. In this regard, the learned State Attorney supported the decision of the High Court which dismissed the appellant's suit and proceed to decide the appeal on merit based on the fifth respondent's arguments in the written submission in respect of all the grounds of appeal.

Having heard the parties and thoroughly perused the record of appeal, we are of the considered opinion that for the interest of justice and fair hearing of the dispute between the parties, it was important to join Judica Teri as a necessary party in Land Case No. 9 of 2013.

Basically, though there is no standard criteria for determining who are the necessary parties to a suit, we strongly hold a view that in the circumstances of the case which was placed before the High Court and the resultant decision, the presence of Judica Teri in the proceedings was necessary. Her presence, we hasten to state, was necessary for the trial court to have effectually and completely adjudicated upon the questions involved in the suit concerning the ownership of Plot No. 506 Block H, Mbezi. We must emphasize that it is settled law that all those who seem to be interested in a controversy are necessary parties to a suit involving that controversy so that a complete disposition of the dispute may be made by the court competent to try it. In this regard, based on the parties' pleadings on record, we entertain no doubt that the joining of Judica Teri as a party was not only a matter of convenience and expedience but also a necessity in view of the relief claimed by the appellant in respect of Plot No. 506 Block H, Mbezi. Indeed, in terms of Order 1 Rule 9 of the Civil Procedure Act, Cap. 33 R.E. 2019 (the CPC), we are increasingly of the view that the absence of Judica Teri as a party, to a great extent disabled the trial court to pass an effectual decree.

Certainly, even without going into the detailed evaluation of the evidence on record to avoid miscarriage of justice, considering the parties' pleadings, it is not clear as to how the alleged resurvey of Plots No. 506 and 508 produced Plots No. 2164 and 2166 which were allocated to Judica Teri and the first, second, third and fourth respondents respectively.

Thus, considering the pleadings and the evidence which was placed by the parties to this appeal at the trial, even at a later stage in the proceedings an application could have been made to join Judica Teri as a necessary party in accordance with the law. Unfortunately, this was not done by any party or ordered by the trial court.

For clarity, Order 1 Rule 10 (2) of the CPC provides as follows: -

*"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, **or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all***

the questions involved in the suit, be added". (Emphasis added)

It is abundantly clear that under the reproduced Rule, a party who ought to have been joined as plaintiff or defendant but is not joined; or who without his presence the questions in the suit cannot be completely decided may be added as party either by application of party to the suit or by the order of the trial court (see **Farida Mbaraka & Farida Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006, **Tanga Gas Distributors Ltd v. Mohamed Salim Said and Two Others**, Civil Revision No. 6 of 2011 (both unreported)).

Therefore, in the circumstances of the case at hand, as there is no dispute that no party applied to join Judica Teri as a party, we have no hesitation to state that in terms of the provisions of Order 1 Rule 10 (2), considering the pleadings and the evidence on record the trial court had power to order the joining of that party to facilitate the effectual and complete adjudication of the dispute. Deliberating on the power of the court under that Rule, in **Farida Mbaraka and Farida Ahmed Mbaraka v. Domina Kagaruki** (supra) the Court made reference to the decision of

the Supreme Court of India in **Razia Begum v. Anwar Begum** AIR 1958 SC 886 where the law was summed up thus: -

"(i) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject matter of the litigation;

(ii) Where the subject matter of a litigation is a declaration as regards the status or legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position to effectually and completely adjudicate upon the controversy".

With regard to the failure of the court to adjudicate upon the rival claims of the parties more effectually and completely in the absence of a necessary party, the Court in the same appeal made reference to the decision in **Amon v. Raphael Track and Sons** (1956) 1 ALL. ER 273 where Devlin J, while construing Order 16 Rule 11 of the Rules of the Supreme Court (RSC), which is similar to our Order 1 Rule 10 stated at page 287 as follows: -

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settle unless he is a party.

His Lordship continued –

*"It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; **he must be directly or legally interested in the answer.***

A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights". (Emphasis added)

*"See also: CAT Civil Appeal No. 91 of 2003 between **21st Century Food and Packaging Limited and Tanzania Sugar Producers Association and Two Others** (unreported)."*

In the case at hand, we note from the plaint, which is the core base of the suit by the appellant, that involvement of Judica Teri in the dispute and the appellant's resolve to institute the case at the High Court is vividly

averred in paragraphs 14, 15 and 16 in connection with the ownership of Plot No. 2164, Block H, Mbezi which was formerly Plot No. 506 Block H, Mbezi, the subject of the dispute. On the other hand, the first, second, third and fourth respondents were connected in respect of Plot No. 2166 Block H, Mbezi which the appellant held the brief that it is the same plot which he paid rent following the information he obtained from the office of the Commissioner for Lands. Besides, though the information was disputed by the fifth respondent in paragraph 4 of the written statement of defence who contended that the resurvey of the disputed land was done for the proper management of land without mentioning the owner, the situation was different at the trial. It is noted that Elias Ndalichako, an Assistant Commissioner Legal Section in the Ministry of Lands who testified as DW4 tendered a letter which was admitted as exhibit P8 showing that the resurvey resulted in a change of Plot No. 506 to 2164 in which the owner is Judica Teri.

More importantly, though the trial judge in his judgment did not declare the appellant as the owner of the plot which was changed during resurvey, he reasoned and concluded that the information contained in exhibit P8 showing that Plot No. 2164 Block H, Mbezi belonged to Judica

Teri was completely incorrect. However, the fact remains that, that finding was, with respect, made without hearing Judica Teri as she was not legally joined in the suit as a party and therefore not before the trial court to defend her interest. Indeed, that was contrary to the principles of natural justice of condemning a person unheard.

It is in this regard that given the nature of the suit, the pleadings and the evidence of the parties, particularly DW4 from the office of the Commissioner for Lands, since no party applied for the joining of Judica Teri as a necessary party, the trial court had the obligation to act in accordance with the law to enable it reach an effectual and complete decision of the suit. However according to the record of appeal, it seems to us that the trial judge did not, with respect, take into account the averment in the plaint and the evidence on record to ensure that Judica Teri was so joined to enable him to settle the issues raised in the suit.

In the circumstances, we think that the need for the trial judge to have Judica Teri accorded the right to be heard after being joined as a party would not only have been in accordance with the spirit of the provisions of Rule 10 (2) of Order 1 of the CPC but would also be in conformity with the principles of natural justice because she had interest in

the disputed land. The right to be heard has been emphasized by various decisions of the Court including **Selcom Gaming Limited v. Gaming Management (T) and Gaming Board of Tanzania** [2006] T.L.R. 200 and **Mire Artan Ismail and Another v. Sofia Njati**, Civil Appeal No. 75 of 2008 (unreported).

To this end, we are increasingly of the view that as no party applied to join a necessary party, had the trial judge taken into account the averment in the plaint which featured Judica Teri in connection of the ownership of the plot which was allegedly changed from Plot No. 506 to Plot No. 2164 and the evidence on record, he would have come to the conclusion as we hereby do, that the presence of Judica Teri as a necessary party was inevitable. There is no doubt that the presence of that party in Land Case No. 19 of 2013 was necessary to enable the trial court to effectually and completely adjudicate upon the issues raised in the suit regarding the lawful owner of Plot No. 506 Block H, Mbezi, the subject of the dispute.

We are alive to the position that the plaintiff being a master of his case, cannot be compelled to litigate against anybody he does not intend to implead. However, depending on the circumstances, where someone

who is left out of the suit expresses or seems to have interest in the matter in dispute, the interest of justice demand that such a necessary party should be impleaded to defend her interest against the others joined in the case.

It is thus instructive to reiterate what the Court stated in **Farida Mbaraka & Farid Ahmed Mbaraka v. Domina Kagaruki** (supra) when dealing with the provisions of Order 1 Rule 10 (2) of the CPC thus: -

"...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 the relief. However, it is abundantly clear to us that the Tanzania Housing (sic) 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."

Similarly, in the case at hand, we hold the view that in the light of the pleadings and the evidence on record, Judica Teri could not be left out

of the picture as to what transpired in the dispute between the parties as she is connected in respect of the ownership of Plot No. 2164 which was allegedly changed from Plot No. 506. Basically, in the decision of the Court we have alluded to above it proceeded to conclude as follows: -

"For the foregoing reasons, we set aside the entire proceedings and decision of the trial court. We remit the proceedings to the High Court, Land Division, with direction to proceed with the hearing of the case after the Tanzania Building Agency has been added as a party in terms of Order 1 Rule 10 (2) of the Civil Procedure Act, the suit in Land Case No. 51 of 2004."

In the event, we respectfully take leave to differ with learned counsel for the appellant and fifth respondent arguments that the non-joinder of Judica Teri in Land Case No. 19 of 2013 is not fatal to the proceedings. It is in this regard that the appeal cannot proceed to hearing on merit in the light of the irregularity which is fundamental and has impacted the fair determination of the case at the trial court. We cannot also heed to similar plea of the first, second, third and fourth respondents though they did not express their position on the consequences of the pointed out omission.

For the foregoing reasons, we have no option than to nullify and quash the entire proceedings and decision of the trial court. Consequently, we remit the file in Land Case No. 19 of 2013, and direct that a fresh trial be conducted after Judica Teri has been joined as a party in terms of Order 1 Rule 10 (2) of the CPC.

Finally, as the retrial has been necessitated by the omission of the trial court and on the issue raised by the Court, we order that parties shall bear their respective costs.

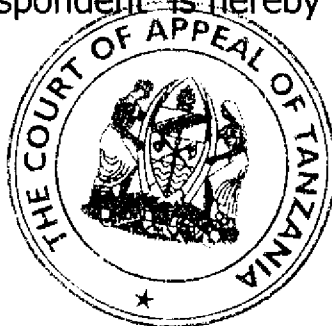
DATED at DAR ES SALAAM this 22nd day of April, 2022.


F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 29th day of April, 2022 in the presence of Mr. Victor Kessy who holding brief of Mr. Audax Vedasto, learned counsel for appellant and 1st, 2nd, 3rd, and 4th Respondents in persons and in the absent of 5th respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL