

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

**CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 309 OF 2021**

**BUNDA TOWN COUNCIL ..... 1<sup>ST</sup> APPELLANT**  
**TANZANIA NATIONAL ROAD AGENCY ..... 2<sup>ND</sup> APPELLANT**  
**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> APPELLANT**  
**THE MINISTER FOR LANDS, HOUSING AND**  
**HUMAN SETTLEMENTS ..... 4<sup>TH</sup> APPELLANT**  
**COMMISSIONER FOR LANDS ..... 5<sup>TH</sup> APPELLANT**

**VERSUS**

**ELIAS MWITA SAMO ..... 1<sup>ST</sup> RESPONDENT**  
**FRANCIS NYERERE SAID ..... 2<sup>ND</sup> RESPONDENT**  
**MUSSA EMMANUEL (Administrator of Estate**  
**of the Late PAULINA STEPHANO) ..... 3<sup>RD</sup> RESPONDENT**  
**MICHAEL THOMAS KWEKA ..... 4<sup>TH</sup> RESPONDENT**  
**JOHN MWITA CHACHA ..... 5<sup>TH</sup> RESPONDENT**  
**MGERI MATUTU ..... 6<sup>TH</sup> RESPONDENT**  
**JULIUS ODERA ..... 7<sup>TH</sup> RESPONDENT**  
**MSAFIRI MAGIRARI MAJIGE ..... 8<sup>TH</sup> RESPONDENT**  
**PHARES MAGERE ..... 9<sup>TH</sup> RESPONDENT**  
**MUSA BUDERA NZUGIRA ..... 10<sup>TH</sup> RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania  
at Musoma)**

**(Kisanya, J.)**

**dated the 19<sup>th</sup> day of March, 2021**

**in**

**Land Case No. 07 of 2019**

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**RULING OF THE COURT**

*7<sup>th</sup> & 9<sup>th</sup> June, 2023*

**MAIGE, J.A.**

In the High Court of Tanzania at Musoma ("the trial court"), the respondents were the plaintiffs and the appellants the defendants in a joint

claim for compensation arising from the second appellants' intended demolition of their landed properties alongside Bunda-Nyamuswa Road. Upon full trial, the trial court pronounced a judgment in favour of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents as against the appellants to the effect that, they were entitled to compensation in accordance with the arrangement and agreement to be determined under the Land Acquisition Act in the event that the said properties were demolished. It however dismissed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claims for want of merit. The appellants were aggrieved and hence the instant appeal.

As the record of appeal indicates, the suit at the trial court was initially instituted by the respondents against the first three appellants. Conversely, on 15<sup>th</sup> day of April, 2020 when the case came for hearing, the first three appellants through their counsel prayed to amend the written statement of defence under order VI rule 17 of the Civil Procedure Code [Cap. 33 R.E. 2019], (the CPC) so as to add the 4<sup>th</sup> and 5<sup>th</sup> appellants. The counsel for the respondents did not object but was in doubt whether that was a proper cause. The trial court neither granted nor refused the prayer. Instead, it ordered the appellants to file a list of additional witnesses and scheduled the matter for hearing.

Subsequently and without any further order, an amended joint written statement of defence was filed which in effect added the 4<sup>th</sup> and 5<sup>th</sup> appellants as defendants. Eventually, the trial was conducted with the 4<sup>th</sup> and 5<sup>th</sup> appellants participating as parties and a judgment pronounced against all of them. It has also to be noted that, the trial proceeded without the final pretrial conference being conducted and thus in the absence of framed issues on the record.

Therefore, when the matter came before us for hearing in the presence of Messrs. David Zakaria Kakwaya, learned Principal State Attorney, Saddy R. Sevingi and Usaje A. Mwambene, learned Senior State Attorneys and Kitia Turoke, learned State Attorney for the appellants and Mr. Cosmas Tuthuru, learned advocate for the respondents, we invited the parties to address us whether the apparent irregularities pointed out herein above did not affect the substantial validity of the judgment and proceedings of the trial court and if they did, what should be the appropriate way forward.

Submitting on this, Mr. Kakwaya quickly conceded that, neither joinder of parties nor amendment of pleadings can be made without leave of the trial court. He submitted further that even if there was such leave, it

would be worthless as an action to apply for addition of a party as a defendant is not available to a defendant. The defendant can only apply in fit cases for addition of a non-party through third party procedure, he added.

The counsel further criticized the trial court for conducting the trial without the final pretrial conference being held and as thus, without issues to control what evidence should be adduced. He added that, it was wrong for the trial Judge to frame the issues on his own motion in the course of composing the judgment.

He concluded, therefore, that the foregoing irregularities are fatal to the judgment and proceedings. He thus, urged us to, in terms of section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], ("the AJA") quash the judgment of the trial court and nullify the proceedings thereof. Mr. Tuthuru for the respondents was in full subscription of Mr. Kakwaya's submissions.

We have considered the counsel's concurrent submissions and we are, in the first place, in agreement with them that in terms of order VI rule 17 of the CPC, the right to amend pleadings is not automatic. It is upon leave being granted by the trial court after it has satisfied itself that,

the amendment is necessary for the purpose of determining the real questions in controversy between the parties. Equally in agreement with them is the fact that, addition of parties does not come just as a direct consequence of amendment of pleadings but it is upon an order of the trial court in terms of order I rule 10 of the CPC being granted. On top of that, it is correct, as Mr. Kakwaya submitted that, an action to join a party as defendant is not available to the defendant. The reason being that, the defendant is not the originator of the case. The trial court, therefore, can give such order on application by the plaintiff or on its own motion in terms of order 1 rule 10(2) of the CPC where it finds that, the presence of a non-party is necessary for effectual and complete adjudication of the dispute.

As we understand the law, the defendant has only two ways through which he may cause joinder of a non-party in the proceedings. **One**, through third party procedure under order I rule 14 of the CPC in relation to claims for contribution or indemnity or any claims relating to or connected with the subject matter of the suit which is substantially the same thereto. **Two**, by way of a counterclaim under order VIII rule 10 of the CPC where the defendant has a claim against the plaintiffs or either of them along with a non-party which accrued before the institution of the

suit in which case, the non-party must be pleaded in the counterclaim along with the plaintiff or either of them.

Besides, it is a mandatory procedural requirement under order VIII rule 40(1) of the CPC that, where there is, like in the instant case, failure to resolve the dispute by way of pretrial negotiation, conciliation, mediation or arbitration as the case may be, the trial Judge or magistrate must conduct a final pretrial conference for setting out future events and steps towards the actual trial, including framing of issues.

It may also be worthy to note that in terms of order VIII rule 24 of the CPC, the trial court cannot grant an order for amendment of proceedings or addition of parties after a scheduling conference order has been made, unless it is satisfied, which was not in this case, that such a grant, in so far as it has the effect departing from or amending the scheduling conference order, is necessary in the interest of justice.

In our opinion, therefore, as the fourth and fifth appellants were added in the proceedings without leave of the court and in total violation of the law and procedure and, because the trial was conducted without the mandatory final pretrial conference being conducted, the judgment and proceedings thereof were nullity.

On that account, therefore, we invoke our revisional powers under section 4(2) of the AJA and quash the judgment of the trial court and nullify the proceedings thereof up to 15<sup>th</sup> April, 2020 when mediation was marked failed. The matter shall be remitted to the trial court for the continuation of the suit in accordance with the law before another Judge. As the issue was raised by the Court on its own motion, we shall not give an order as to costs.

**DATED** at **MUSOMA** this 8<sup>th</sup> day of June, 2023.


R. K. MKUYE  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

I.J. MAIGE  
**JUSTICE OF APPEAL**

The Ruling delivered this 9<sup>th</sup> day of June, 2023 in the presence of Mr. Kitia Turoke, learned State Attorney for the appellants and Mr. Cosmas Tuthuru, learned counsel for the Respondents, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**