

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

**(CORAM: LILA, J.A., MASHAKA, J.A., And MGEYEKWA, J.A.)**

**CONSOLIDATED CIVIL APPEALS NO. 135 & 427 OF 2020**

**OMARY ALLY FUKU (Administrator of the Estate  
of the Late ALLY RAJABU) ..... APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**MOROGORO MUNICIPAL COUNCIL ..... 3<sup>RD</sup> RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania  
(Land Division) at Dar es Salaam)**

**(Mohamed J.)**

**dated the 30<sup>th</sup> day of October, 2019**

**in**

**Land Case No. 226 of 2015**

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**JUDGMENT OF THE COURT**

*17<sup>th</sup> August & 16<sup>th</sup> October, 2023*

**MGEYEKWA, J.A.**

These are two consolidated appeals whereas, Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) lodged a Civil Appeal No.135 of 2020 and the National Microfinance Bank lodged a cross appeal *vide* Civil Appeal No.427 of 2020. They both arise from the decision of the High Court of Tanzania (Land Division) dated 30<sup>th</sup> October, 2019 in Land Case No. 226 of 2015. Since the two appeals arise from the same case between the same parties, we consolidated them under Rule 110 of the

Tanzania Court of Appeal Rules, 2009 (the Rules). For the avoidance of confusion, the title of the appellant and respondents in the appeal, will remain the same across the judgment.

Before we go further, we think that it is important first to provide the background facts that have resulted in this appeal. The facts in a nutshell are as follows. On 21<sup>st</sup> July, 2015, Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) initiated a suit against the National Microfinance Bank (the NMB) for vacant possession of Plot No. 41 Block 'C' Uhuru Street, Morogoro Township. According to the plaint, the appellant claimed that his late father Ally Rajabu was granted a right of occupancy over the suit plot way back in the year 1969. He alleged that the NMB trespassed into the suit plot and constructed a building thereon. In the plaint, the appellant sought for the following orders: -

- 1. Vacant possession of Plot No. 41 Block 'C' Uhuru Street, Morogoro.*
- 2. Tshs. 40,000,000/= as general damages.*
- 3. Costs of the suit.*
- 4. Any other relief (s) the Honourable court may think fit and just to grant.*

In response to the appellant's claims, the 1<sup>st</sup> respondent filed a written statement of defence vehemently denying all the claims raised by the appellant. She claimed that Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) had no cause of action against them. She

further claimed that the suit land which is situated at Uhuru Street in Morogoro Township belongs to NMB by virtue of the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, Cap.404 [R.E 20220]. The 1<sup>st</sup> respondent averred further that, the Government through the Legislature granted the suit land to the NMB, and in the year 1997, they obtained a letter of offer which was issued by Morogoro Municipal Council.

The record bears out that after the pleadings were completed and before the hearing of the suit commenced, the NMB on 26<sup>th</sup> June, 2017 moved the High Court for leave to issue and serve a third party notice upon the Attorney General and Morogoro Municipal Council, which was granted. Consequently, the Attorney General and Morogoro Municipal Council were joined as third parties.

At the conclusion of the trial, the High Court decided the case in favour of Omary Ally Fuku (administrator of the estate of the late Ally Rajabu). Aggrieved, the appellant and 1<sup>st</sup> respondent have preferred the instant appeals. The appellant in Civil Appeal No. 135 of 2020, raised two (2) grounds of appeal. However, for the reasons which will be apparent shortly, we deem appropriate to reproduce them herein.

The 1<sup>st</sup> respondent's quest to impugn the High Court (Land Division) decision is founded upon five (5) grounds of appeal that:-

- 1. The High Court erred in law in determining the status of allocation of the disputed plot to the appellant by merely basing on the letter of offer and not the Act of Parliament.*
- 2. The High Court erred in law when found the appellant liable for damages and compensation payable to Omary Ally Fuku (administrator of the estate of the late Rajabu Fuku) without attributing the same to the Attorney General and the Morogoro Municipal Council as third parties. IN THE ALTERNATIVE,*
- 3. The High Court erred in law in determining the liability of third parties in the case.*
- 4. The High Court erred in law when entertained the appellant's claims which were time barred.*
- 5. The High Court erred in law when treated Ally Rajabu Fuku under the administration of the estate of Rajabu Fuku to be the same person as Alli Rajabu of Dar es Salaam reflected on the title deed.*

When the appeal was placed before us for hearing, the appellant was represented by Mr. Mkoba, learned counsel whereas the 1<sup>st</sup> respondent was represented by Prof. Binamungu, learned counsel, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Ms. Lupondo, learned State Attorney. We are indebted to them for their incisive and focused oral submissions.

Upon taking the floor to expound on the grounds of appeal, Prof. Binamungu, learned counsel abandoned the second ground of appeal and consolidated grounds number one and four. Grounds number three and five were argued separately. The same style was adopted by Ms. Lupondo, learned State Attorney, and Mr. Mkoba, learned counsel.

Submitting on the fifth ground of appeal, Prof. Binamungu argued that, the issue in controversy is the name of the owner of the suit plot. He asserted that the trial court erred in treating Ally Rajabu appearing in the letter of administration as the owner. Supporting his submission, he referred the Court to page 12 of the record of appeal. It was Prof. Binamungu's further contention that Omary Fuku was appointed to administer the estate of Ally Rajabu Fuku, however, looking at other documents, the deceased's name is not the same. He went on to clarify that in the Certificate of Title and the Death Certificate, the owner is Ally Rajabu and in the official search the owner is referred to as Ali Rajabu, and in the Death Certificate, the deceased name reads Ally Rajabu while the name appearing in the letter of administration is Ally Rajabu Fuku. He further argued that, the respondents at the trial court raised a preliminary objection contesting the deceased's name, however, the learned trial judge overruled their objection and held that all the deceased's names appearing in various documents portray the same person. To buttress his

contentions, he referred the Court to pages 13, 132, 167 and 168 of the record of appeal. The learned counsel implored us to find that a proper letter of administration over the suit plot was not in place.

Ms. Lupondo embraced the submission made by Prof. Binamungu. She argued that the learned trial judge impliedly held that, all names appearing in various documents tendered before the court, portray the same person without giving any explanation. She added that Omary Fuku was required to tender a Deed Poll to prove his assertion.

On his part, Mr. Mkoba adamantly defended the holding of the trial court in respect of the deceased's name as sound and reasoned. He first, admitted that the documents in the record bear different names of the deceased such as Ally Rajabu, Ali Rajabu and Ally Rajabu Fuku. However, in his view, he finds that the said documents portray the same person and Fuku is the deceased's surname. He argued that the confusion about the deceased's name are immaterial and minor defects which do not go to the root of the matter as properly decided by the learned trial judge. He invited us to consider the issue in dispute is land ownership regarding Plot No. 41 Block 'C' Uhuru Street, Morogoro Township not otherwise.

The 1<sup>st</sup> respondent's grounds one and four of the complaint hinge on the course taken by the learned trial judge to adjudicate on the matter

which was time-barred. The crux of the learned counsel's submission was that the suit was lodged out of time. His argument was based on Item 22 to the 1<sup>st</sup> Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019 (the LLA) that the time limit for an action to recover land is 12 years. He further unveiled that the plaintiff is silent as to when exactly the appellant was deprived of his right. He referred us to page 30 paragraph 8 of the record of appeal. He went on to submit that counting from the year 1976, when NMB acquired the suit plot to the year 2015, when the appellant lodged the suit before the High Court, the suit was late for forty (40) years. Thus, he implored us to find that, the suit at the High Court (Land Division) was instituted out of time.

On ground one, Prof. Binamungu stated briefly that the trial court erroneously determined the status of land allocation. He also faulted the learned trial Judge for not having observed the gist of the arguments by learned counsel for the 1<sup>st</sup> respondent.

Ms. Lupondo adopted the submission made by Prof. Binamungu on grounds one and four of the cross-appeal. She added that the appellant's suit before the High Court (Land Division) was related to vacant possession, and the same was brought out of time. She further submitted that, in determining the issue of time limitation, the Court in **Moto Matiko Mabanga v Ophir Energy PLC & 6 Others**, Civil Appeal No.119

of 2021 [2021] TZCA 599 (22 October 2021) TanzLII faced a similar situation whereas, it looked at the pleadings, written statements of defence and reply to written statements of defence.

It was the contention of the learned State Attorney that the appellant was aware of the dispute over his late father's property, but he waited until 2015, when he instituted the case at the High Court (Land Division) while time to do so had already lapsed. To buttress her contention, she referred us to paragraph 14 of the plaint. She continued to submit that, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their written statement of defence explained that the NMB acquired the suit land by virtue of the Act of Parliament. To support her argumentation, she referred us to page 31 of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' written statement of defence.

The assertion by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is disputed by Mr. Mkoba. He asserted that, in determining whether the suit was lodged out of time, the court is required to look at the plaint and its annexures. He cited the case of **Moto Matiko** (supra) to cement his assertion. The learned counsel objected to the respondents' contention that the appellant was aware that the NMB was in possession of the suit plot. He responded by stating that the appellant under paragraph 5 of the plaint clearly stated that, all the time, he was the lawful owner of the registered



land. Therefore, he took the view that, the issue of time limitation does not arise.

Mr. Mkoba shifted the blame on the NMB for failure to lodge her claim in court, as a result, in their arguments they have raised a ground of adverse possession. Submitting on dispossession process, he contended that, the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, No.23 of 1997 Cap. 404 [R.E 2002] cannot diminish the fact that a Certificate of Title was already issued to Ally Rajabu before the enactment of the said law. Therefore, it was his view that, in the instant case, the issue of dispossession cannot arise.

With respect to the third party procedure, Prof. Binamungu threw a scathing attack on the learned trial judge for failure to determine the liability of thirty parties in accordance with Order I Rule 18 of the Civil Procedure Code Cap. 33 [R.E 2002] (the CPC). He argued that the record shows clearly that, the NMB formally prayed to join the Attorney General and Morogoro Municipal Council as third parties to the suit. However, the learned trial judge did not give any direction on how to proceed with hearing in accordance with third party procedure. To buttress his contention, he relied on the decision in **January Mshimba v The Registered Trustees of Daughters of Mary Immaculata and Collaborators**, Civil Appeal No. 127 of 2018 [2022] TZCA 225 (28 April

2022) TanzLII. He stressed that it was a fundamental error condemning the 1<sup>st</sup> respondent alone in this case without considering the liabilities of the thirty parties.

On the strength of the above, Prof. Binamungu urged the Court to nullify the judgment and proceedings starting from the date when the appellant sought directions from the learned trial judge to join the third parties to the suit.

Ms. Lupondo on her part conceded to the grievance expounded by Prof. Binamungu on the trial court's failure to comply with the third party procedure. To support her stance, she referred us to the case of **Registered Trustees of Vignan Education Foundation, Bangalore, India and Another v National Development Corporation and the Hon. Attorney General**, Civil Appeal No. 88 of 2020 [2022] TZCA 225 (28 April 2022) TanzLII. She urged the Court to exercise its revisional power, quash the judgment and respective proceedings and order a retrial.

Briefly but to the point, Mr. Mkoba, admitted firstly that, the learned trial judge did not comply with third party procedure. However, he countered that the issue of third party did not deprive the 2<sup>nd</sup> and 3<sup>rd</sup>

respondents' rights because after consultation, parties framed issues for determination and they had an opportunity to testify in court.

We have duly considered the submissions made by the learned counsel for the parties. We do not intend to consider all grounds of appeal but only grounds five and three which in the circumstances of this matter are sufficient to dispose of this appeal for reasons which will unfold in the course of this judgment.

As indicated earlier, the fifth ground assails the names of the purported lawful owner of the suit plot. We understand that misspelling or citing a wrong name in legal documents can lead to an issue, but whether it is considered fatal depends on various factors such as the context and the significance of the error. Minor typographical errors may not be fatal but substantial errors can cause snags. In the instant case, there is no dispute that, the deceased's name is referred differently in various documents which were tendered at the High Court (Land Division) in Land Case No. 226 of 2015. The record shows that Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) lodged a suit at the High Court (Land Division) and the letter of administration bears the name of Ally Rajabu Fuku. The deceased name as portrayed in the plaint, Certificate of Title, and Death Certificate reads Ally Rajabu. In other documents such as in the Official Search, the deceased's name reads Ali

Rajabu and in the letter of administration, the purported surname 'Fuku' was added.

Having scrutinized the documents that portrayed the deceased's name, we have decided to take a diverse swipe in determining this issue. We say so, because what is in controversy is the spelling of the purported deceased's name, the name Ally was misspelled to read Ali and in the letter of administration the surname 'Fuku' was reflected. We had to go through the documents filed in court to find out if the cited names by the appellant are referring to the deceased or another person. A quick glance at pages 13 and 14 of the record of appeal, the Death Certificate shows that Ally Rajabu passed away on 2<sup>nd</sup> December, 2006, and in the letter of administration it shows that Ally Rajabu Fuku passed away on 2<sup>nd</sup> December, 2006. Therefore, we think that Ally Rajabu Fuku who appears in the letter of administration is the same person, who is referred to as Ally Rajabu and Ali Rajabu reflected in the Death Certificate, Certificate of Title and official search. Therefore, as alluded earlier, the confusion about the deceased's name is minor and curable, it does not go to the root of the case as rightly submitted by Mr. Mkoba.

Moreover, as correctly stated by Mr. Mkoba, the confusion was only on the deceased's name but all documents such as the plaint, the Certificate of Title, letter of administration, and official search are

associated with the same Plot No. 41 Block 'C' Uhuru Street located at Morogoro Township.

For the aforesaid reasons, we have reached a firm conclusion that Omary Ally Fuku (administrator of the estate of the late Ally Rajabu) was a proper person to lodge a suit claiming for ownership of Plot No. 41 Block 'C' Uhuru Street, Morogoro Township.

Next for our determination is the third ground of the cross-appeal. The central point for our determination is whether the basic principle on which third party procedure operates was adhered to and its obtaining consequences in the event of its violation. In resolving this ground of appeal, we shall begin by first expounding the principles governing the third party procedure. The same are set out under Order I Rules 14, 15, 16, 17, and 18 of the CPC. Given its importance in the determination of the issue before us, we find it apposite to cite it in extenso thus:-

Rules 14 (1) and 16 (1) of the CPC provides:-

*"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.*

*16.-(1) The court shall cause to be served a copy of a third party notice presented to it on the third party in accordance with rules relating to service of summons.*

*(2) A copy of the third party notice shall also be served on each of the other parties to the suit in accordance with the provisions of rule 2 of Order VI as if such notice were a pleading other than a plaint."*

The above laid down third party procedure is initiated by the defendant. He is allowed to join a person who is not a party to the case whom he believes that he has a right to indemnify him in the event he is found liable in the suit preferred against him.

Further rule 17 provides:-

*17. Where a third party notice has been served on the third party, the third party shall, if he wishes to dispute the plaintiff's claim in the suit against the defendant presenting the third party notice or his own liability to the defendant, within twenty-one days of the*

*service of the third party notice upon him or such longer period as the court may have directed or as the court may, on the application of the third party, direct, present to the court a written statement of his defence."*

After serving the notice to the third party, the court determines the application and once granted in terms of rule 16 (1) of the CPC, a third party notice should be served on the third party as per the rules relating to service of summons. The third party may request to intervene in the case, who in terms of rule 17 of the CPC, may file a written statement of defence either against the defendant bringing him onto the case over his right to indemnification or against the plaintiff's claims over the defendant's liability.

Upon the third party lodging a written statement of defence, rule 18 of CPC, provides the procedure to be followed by the trial court. Rule 18 (1) of the CPC 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 the 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.***

*(2) The court shall cause a notice of the date of giving directions to be served on the defendant presenting the third party notice and on the third party and such other parties to the suit as the court may direct, in accordance with the rules relating to service of summons.*

As provided in the above provision, in case the third party disputes the claims either of the defendant against him or the plaintiff's claim against the defendant presenting a third party notice, then, the trial court is enjoined, either by being moved by the parties or in its own motion, to set a date on which the relevant parties should be notified to attend for the court to give directions on the way forward. If the court finds that there is a need to adjudicate on any dispute/claim by the third party, it shall order the question of such liability to be determined in the course of hearing the original suit or after the conclusion of the trial of the main suit.



In case, the court is satisfied that there is nothing worth determination, it is mandated to pass a decree or make any other order depending on the circumstances of the case.

The above procedure has been well elaborated by the Court in a plethora of authorities to that effect and some of them have been cited by the learned counsel for the respondents. See amongst others, **Registered Trustees of Vignan Education Foundation, Bangalore, India** (supra) and **January Nshimba** (supra). In **Registered Trustees of Vignan Education Foundation, Bangalore, India** (supra), the Court faced a situation similar to the one pertaining in this case, and laid the foundation of third party procedure applicable to determine the rights of the parties.

In the case at hand, as expounded above, the 1<sup>st</sup> respondent at page 229 of the record of appeal raised a claim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who in turn on 3<sup>rd</sup> August 2017, applied for a third party notice which was served to the Attorney General and Morogoro Municipal Council. The trial court notified the third parties to file written statements of defence. The learned trial judge tried to follow the third party procedure, however, he got lost, and proceeded with the full trial without satisfying himself that, there was a proper question to be tried as to the liability of the third parties in respect of the claim made against them by

the 1<sup>st</sup> respondent. That is a clear indication that the case involving the third parties was conducted as an ordinary case involving the third parties as defendants in the original suit.

In the circumstances, we indeed share the same view with the learned counsel's submissions that, it was mandatory for the learned trial judge to conduct the trial in conformity with the third party procedure. Failure to do so meant that, the court was not given enough material to determine the third party liability. Thus, the same caused a miscarriage of justice to the parties, the complaint by the 1<sup>st</sup> respondent that the whole burden of compensating the appellant was left on her.

As grounds three and five are sufficient to dispose of this appeal, we think it becomes unnecessary to deal with the grounds in Civil Appeal No. 135 of 2020 for which we heard their submissions.

In the upshot, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap.141, quash and set aside the judgment, consequent orders, and the proceedings from 20<sup>th</sup> June, 2017 immediately after the NMB sought directions from the learned trial judge to join the third parties to the suit. We remit the record to the High Court (Land Division) to determine the case according to the law before another presiding judge. We direct further that it should be heard expeditiously

taking into account that it is one of the oldest cases in the registry. Given the nature of the infraction leading to this outcome, we make no order for costs.

It is so ordered.

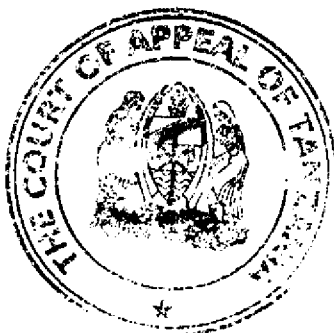
**DATED at DAR ES SALAAM** this 13<sup>th</sup> day of October, 2023.

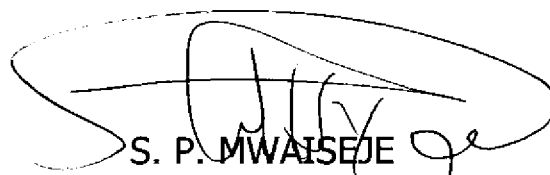
S. A. LILA  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Judgment delivered this 16<sup>th</sup> day of October, 2023 in the presence of Mr. Egidi Mkoba holding brief of the Prof. Cyriacus Binamungu for the Appellant, Mr. Egidi Mkoba, learned counsel for the 1<sup>st</sup> Respondent and Mr. Stephen Kimaro, learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is hereby certified as a true copy of the original.



  
S. P. MWAISEJE  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**