

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE DISTRICT OF BUKOBA

AT BUKOBA

MISC. LAND CASE APPEAL No. 55/2015

*(Arising from Bugene Ward Tribunal in Civil Case No. 7/2012 and District
Land and Housing Tribunal in Land Appeal No. 253/2013)*

ELIYA MINYAGO ----- APPELLANT

VERUS

SELESTINE BIITAMAKA ----- RESPONDENT

JUDGMENT

22/9/2017 & 2/3/2018

KAIRO, J.

This appeal is the result of the decision delivered by the District Land and Housing Tribunal in land case appeal No. 253/2013 delivered on 18/06/2015 whereby the Tribunal quashed the proceedings, and set aside orders issued by the Bugene Ward Tribunal in Civil Case No. 7/2017.

It all started when the Respondent instituted a complaint at Bugene Ward Tribunal claiming that the Appellant had encroached into his piece of land which he has bought from one Mzee Deogratias Kaganda and Mohamed

Miburo. The claims were refuted by the Appellant who claimed to have been given the land in dispute by his deceased father one Paulo Mugangara. The Tribunal after hearing the evidence from both and visiting the *locus in quo*, decided in favor of the Appellant. Being dissatisfied, the Respondent appealed to the District Land and Housing Tribunal which made a finding that the appellant therein (Respondent herein) alleges to have bought the suit since 1987, but the respondent therein (Appellant herein) has been in possession of the suit land since 1976 and further that, the vendor was not joined as a necessary party. The Chairman of the District Land and Housing Tribunal thus quashed the whole proceedings of the Ward Tribunal and set aside the orders issued there in for non-joinder of the necessary party. The Tribunal further ordered rehearing of the matter. This is the decision which aggrieved the Appellant hence this appeal.

The Appellant originally raised two grounds of appeal. However when he was amplifying the said grounds in his written submission he decided to abandon the second one and left with the following:-

That the first appellate court erred in law to quash the trial proceedings for want of joining vendors as a necessary parties as the said decree could be executed without affecting their interest.

Though the Advocate for the Respondent has addressed “*on passing*” the abandoned ground of appeal, I wish to put it clear that this court will confine itself in analyzing the argued ground of appeal by the Appellant.

The Appellant is being represented by the Learned Counsel Advocate Chamani while the Respondent is receiving legal service of the Learned Counsel Advocate Lameck Erasto. In his written submission to amplify the grounds of appeal, Advocate Chamani started by defining the term necessary party that; *“is a party against whom relief is sought or without whom an effective decree cannot be passed by the court”*. He cited the case of *Suryakant D. Ramji vrs Saving and Finance Ltd (2002) TLR 121* which so held. He went on citing the case of *Magdalena Daniel vrs Godwin Tabula: High Court Land Case Appeal No. 37/2013* (Bukoba, unreported) to which he contended that the court had a similar opinion. The Advocate further argued that, the court in the case of *Magdalena Daniel (supra)* referred to Order 1 Rule 9 of the CPC Cap 33 RE 2002 which requires the courts to deal with the matters in controversy so far as with regards to the rights and interest of the parties before it and not to defeat the suit for the reason of *mis-joinder* or *non-joinder* of parties adding that it is the applicant who determines a party to sue. He went on that there is a misconception on the part of the Respondent with regards to the decision of the case of *Juma Kadala vrs Laurent Mnkanda (1983) TLR 103* wherein the court struck out the lower court’s Judgment for *non-joinder* of a necessary party.

He went on clarifying that in the cited case, the court held that, *in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller as necessary party defendant*. The Advocate explained that in the circumstance of *Juma Kadala’s* case, the legal stance was correct as the

plaintiff therein sued the vendor of the suit land who was no longer occupying the said land without joining a third party (Omary Kiziwe) who was in actual possession of the suit land. Which means the decree thereto could not be effected without affecting the interest of the buyer who by that time was occupying the suit land.

Advocate Chamani went on that, in the case at hand, the vendor who sold the land to the Appellant cannot be affected while executing the trial tribunal's decision. He further added that, if the trial tribunal believed the evidence tendered by the Appellant, then there was no reason for the District Land and Housing Tribunal to quash the said proceedings and set aside the orders thereto. He thus prayed this court to set aside the District Land and Housing Tribunal's decision and confirm the Ward Tribunal's decision.

Advocate Erasto for the Respondent in his reply contended that, it was established at the trial Tribunal that, the same suit land was sold to the Respondent by one Deogratias Kayanda. He argued that it is a principal of law that in a suit for the recovery of land sold to a third party; the buyer should be joined with the seller as a necessary party defendant, adding that *non-joinder* will render the proceedings fatal and cited the case of *Juma Kadala* (supra) to bolster his argument. He concluded that in the case at hand, the *non-joinder* of the vendor; one Deogratias Kayanda contravened the established precedent which the trial court couldn't accommodate.

He went on that, the Appellant was required to comply with court's orders and has the opportunity of filing the dispute as it was directed by the appellate Tribunal for the purpose of properly determining the rightful ownership. He cited the case of *Ayubu Ritti vrs Registrar Industrial Court of Tanzania and High Court of Tanzania: Misc. Civil Cause No. 51/2001 Dar es Salaam* (unreported) to support his argument. He added that the Appellant didn't consider the order given by the District Land and Housing Tribunal to join the vendor as a necessary party, and prayed the court to struck out the submission by the Counsel for the Appellant.

Advocate Lameck Erasto further argued that, the relied cases by the Appellant of *Suryakant D. Ramji and Magdalena Daniel (supra)* are also precedents like that of *Juma Kadala (supra)* and thus the Chairman was justified to comply with.

The Advocate concluded that, the decision by the District Land and Housing Tribunal is sound thus this appeal should be dismissed with cost.

Having gone through the ground of appeal and the rival arguments to clarify and reply thereto, the main issue for determination is whether or not there was a *non-joinder* of the necessary party. The court has found it imperative to understand/ define who is a necessary party in a suit. The term has been defined in the text book titled: **Civil Procedure with Limitation Act 1963 by C.K Takwani, 7th Edition Published by Eastern Book Company Lucknow** at page 162 as follows:-

“a necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed”.

The said position was also echoed in the case of **Food and Packaging Ltd vrs Tanzania Sugar Producers Association and another: Civil Appeal No. 91/2003 CA Tanga** (unreported) wherein the court observed and I quote;

“A necessary party is one whose presence is prescribed by law and in whose absence no effective decision can be given, without such a party, the action appeal or proceedings in not property constituted”.

The District Land and Housing Tribunal has ordered for the rehearing of the matter by the Ward Tribunal after making its finding that there was a *non-joinder* of a necessary party as the vendors were not joined. According to record, one Deogratias Kayanda and another by the name of Mohamed Miburo were the ones who sold the land in dispute to the Respondent who was a claimant at the Ward Tribunal. According to the meaning of the District Land and Housing Tribunal’s decision, these were to be joined being the vendors of the disputed land. This finding was attacked by the Appellant arguing that the vendors in the matter at hand do not fall within the meaning of the necessary parties as per the case of *Suryakant D. Ramji* (supra). The rival argument by Advocate Erasto for the Respondent was to the effect that the buyer and seller should be joined as necessary party

defendants in a suit for the recovery of the land sold to a third party and cited the case of *Juma Kadala* (supra) to support his argument.

It is interesting to note that in the matter at hand, the complainant at the Ward Tribunal was the Respondent herein who for his own reason and interest chose to sue the Appellant alone without the vendor. It is a sound judicial principle to keep in mind that the Plaintiff is "*a dominus litis*" that is best judge of his interest, thus he has a right to choose his opponents from whom to claim the relief as he did. Thus it is not correct in my conviction to come back and use his omission, if any in his favor or as shield. After all it is on record that the vendor was called to testify in favor of the claimant who is a Respondent herein.

But further to that, another question to address is whether the vendor falls within the category of necessary party in the matter at hand.

I am aware that courts have wide powers with regards to joining of parties, and reading between the line, the decision of the District Land and Housing Tribunal has the intention of reminding the Ward Tribunal of having used the said powers to order for the joining of the vendor in the said matter even though the claimant has omitted to include the vendor. However the court can only do that if satisfied that the presence of a particular person is necessary to effectively and completely adjudicate all the disputes between the parties. In other words, the one against whom the relief is sought or without whom an effective decree cannot be passed by the court. **(Refer the**

definition in C.K Takwari) (supra). In the current dispute, the Appellant was claimed to have encroached the land of the Respondent, the land which was bought from one Deogratias Kayanda.

The record reveals that after selling the same he shifted to another place (Chonyonyo).

According to record, the claimant (Respondent herein) sought his relief from the Appellant. The reliefs sought at the Ward Tribunal was a declaration that the Appellant trespassed into the Respondent's land and further order for his eviction accordingly. Applying the said definition of a necessary party to the above facts it is not disputed that the claimant (Respondent) herein sought this reliefs from the Appellant. Even if the reliefs sought would have been granted in favor of the Respondent (which was not the case any way) the same would not have been unable to be executed or affect the interest of the Deogratias Kayanda (vendor). The reason is not far fetched; the vendor was not in occupation of the land in dispute as he has already moved to another place after selling the same.

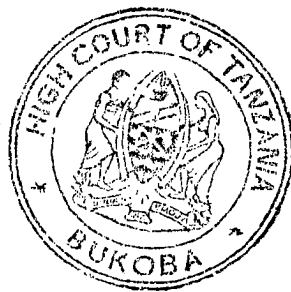
The Advocate for the Respondent has based his argument on the decision of the case of ***Juma Kadala*** (supra) that the buyer and seller should be joined as necessary party defendants. In the cited case only the vendor of the suit land was sued while the buyer of the land in dispute who was in occupation of the suit land was not included in the suit, as such a decree against the vendor would definitely affect adversely the interest of the buyer. I thus join

hands with Advocate Chamani's argument that the argument by Advocate Lameck Erasto is a misconception as the case of *Juma Kadala* is distinguishable from the one at hand with much respect. In the circumstance, I found nothing to fault the decision of the Ward Tribunal not to join the vendor. Further to that, the vendor has no interest over the land in dispute after selling the same as such he couldn't have been joined as a necessary party plaintiff for want of *locus standi*. As earlier stated, the vendor was called as a witness of the Respondent/ claimant at the Ward Tribunal which was a proper move in the circumstance of this case.

It is the finding of this court therefore that the vendor was not a necessary party thus there was no *non-joinder*. The decision of the District Land and Housing Tribunal is hereby quashed and set aside; instead the decision of the Ward Tribunal is hereby upheld. Appeal allowed with cost

It is so ordered.

R/A explained.



L.G. Kairo
Judge

At Bukoba

2/3/2018