

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LAND CASE NO.6 OF 2016**

**LUHUMBO INVESTMENT LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF COMMERCE LTD.....DEFENDANT**

*Date of Last Order: 10/02/2020*

*Date of Ruling 28/02/2020*

**RULING**

**C. P. MKEHA, J**

Following official transfer of the predecessor judge who had been earlier assigned to hear and determine the present matter, the same was re-assigned to me. In the course of complying with the provisions of Order XVIII Rule 10(1) of the Civil Procedure Code, the learned counsel for the parties informed the court that, all the preliminaries were over, including framing of issues. The learned counsel asked the court to proceed from where the predecessor judge left the matter, at hearing stage. Indeed, the

record indicated that, on previous date, the court, had framed issues and set the matter for hearing. **See:** Order I Rule 13 of the Civil Procedure Code.

Whereas Professor Safari learned advocate appeared for the plaintiff, Mr. Kange learned advocate appeared for the defendant.

In terms of the plaint, the plaintiff is a limited liability company incorporated under the Companies Act, whose duties include dealing in cotton oil and plastic manufacturing in Shinyanga Municipality. On the other hand the defendant is a limited liability company dealing in banking business.

Between 19<sup>th</sup> September 2005 and 5<sup>th</sup> July, 2006 the plaintiff company obtained a loan of TZS. 400,000,000/= from the defendant through mortgaging its property on Plot. No.168 Block "KK" Mhumbo Industrial Area, Shinyanga Municipality. According to the plaintiff, on 29<sup>th</sup> June, 2009, without notice and without any lawful demand to the plaintiff's company to settle the amount due and payable, the defendant illegally sold and transferred the plaintiff's property on Plot No.168 Block "KK" Mhumbo

Area, Shinyanga Municipality to Bundaa Oil Industries Limited at Tshs. Four Hundred Million (400,000,000/=) only.

The Plaintiff claims that, the defendant sold and transferred to Bundaa Oil Industries Limited the plaintiff's property on Plot No.168 Block "KK", Mhumbo Industrial Area, Shinyanga Municipality at a very low price and without actual valuation as to the true market value at the time of sale.

In particular, the Plaintiff claims that, at the time of the purported sale, the property sold had a market value of over Tshs. One Billion (1,000,000,000/=).

Amongst other things, the plaintiff prays for an order nullifying the sale between the Defendant and Bundaa Oil Industries Limited of the plaintiff's property on Plot No.168 Block "KK", Mhumbo Industrial Area, Shinyanga Municipality. The plaintiff also prays that, a declaratory order be issued to the effect that, she (the plaintiff) is still the lawful owner of the disputed property.

After the learned counsel for the parties had closed their respective cases through adduction of evidence, I sat to reflect whether an effective decree

could be passed in the absence of Bundaa Oil Industries Limited, the purchaser of the disputed property as per the plaintiff's pleadings.

I invited the learned counsel for the parties to address the court on the effects of non joinder of a necessary party, in this case, Bundaa Oil Industries Limited. The learned counsel were reminded not to forget the requirements of the law under Order XXXII Rule 1 and Order I Rules 9, 10 and 13 of the Civil Procedure Code. The learned counsel's attention was also drawn to the recent Court of Appeal's decision in **Abdullatif Mohamed Hamis Vs Mehboob Yusuf Osman & Another, Civil Revision No.6 of 2017**, decided on 1<sup>st</sup> August, 2018. The said decision lays down the most current position on effects of non-joinder of a necessary party.

Professor Safari learned advocate submitted that, Order XXXII Rule 1 of the Civil Procedure Code aims at avoiding multiplicity of suits by parties interested in mortgages. The learned advocate insisted that, the said view, is also held by Mulla, while interpreting Order XXXIV Rule 1 of the Indian Civil Procedure Code which is in parimateria with our Order XXXII Rule 1 of the Civil Procedure Code.

The learned advocate went on to submit that, the issue is whether, in the circumstances of our case, is there any other person interested in the Mortgage. According to the learned advocate, the only close person was Bundaa Oil Industries Limited who had already sold the disputed property to other persons when the present suit was instituted in court. The learned advocate submitted that, since the plaintiff had lost interest in the disputed property (the Industry), it was considered necessary to only sue the defendant so as to be compensated.

The learned advocate went on to submit that, the case of **Abdullatif Mohamed Hamis** (supra) is different with the present case since the former has nothing to do with mortgages. It was the learned advocate's submission that, it would not be easy to trace all those who bought the Industry before instituting the present case. In view of the learned advocate an order for special damages could remedy the situation without affecting ownership.

Mr. Kange learned advocate submitted that the prayers sought in the plaint include nullification of sale and repossession of the disputed property to the plaintiff. According to Mr. Kange learned advocate, an order for payment of special damages is dependent upon grant of the prayers for

nullification of sale and repossession of the disputed property to the plaintiff.

The learned advocate submitted that, whereas the sale agreement was between the defendant and Bundaa Oil Industries Limited, the latter had not been joined as a necessary party. According to the learned advocate, nullification of the sale agreement would affect Bundaa Oil Industries Limited unheard. In view of the learned advocate failure to implead the necessary party is fatal in the circumstances of this case. The learned advocate subscribed to the decision in **Abdullatif's case**. The learned advocate was of the considered view that, Order I Rule 10(2) of the Civil Procedure Code could not apply in this case, considering the stage at which the case had reached trial having been concluded. The learned advocate asked the court to struck out the case.

The learned advocate for the plaintiff had nothing to rejoin rather than reminding the court that the plaintiff had been in court for a long time.

Order XXXII Rule 1 of the Civil Procedure Code provides that, *all persons having an interest either in the mortgage, security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.*

The learned advocate for the plaintiff was of the view that payment of special damages to the plaintiff would remedy the situation. He also submitted that, upon learning that Bundaa Oil Industries Limited had sold the disputed property to other persons, the plaintiff opted not to join the first purchaser of the disputed property. She neither joined the second purchaser in whose ownership the disputed property was, at the time of institution of the present suit. The learned advocate for the plaintiff entertained doubts as to whether Bundaa Oil Industries Limited was an interested party.

On the other hand, the learned advocate for the defendant was of the firm stand that, in no way could the court award damages to the plaintiff without necessarily nullifying the sale between the defendant and Bundaa Oil Industries Limited. According to the learned advocate for the defendant, an order for repossession of the disputed property to the plaintiff would ultimately affect Bundaa Oil Industries Limited unheard. The learned advocate for the defendant considered Bundaa Oil Industries Limited as a necessary party, whose non-joinder is fatal in the circumstances of this suit, since, no effective decree can be passed in her absence (purchaser's).

It can not be disputed that, upon purchasing the plaintiff's property on Plot No.168, Block "KK" Mhumbo Area, Shinyanga Municipality, Bundaa Oil Industries Limited, gained an interest in the mortgage agreement between the plaintiff and the defendant. Therefore, in terms of Order XXXII Rule 1 of the Civil Procedure Code, Bunda Oil Industries Limited was a necessary party to the present suit by virtue of a sale agreement signed between her (purchaser) and the defendant.

The law on effects of non-joinder of a necessary party is fortunately now settled. In the case of **ABDULLATIF MOHAMED HAMIS VS MEHBOOB YUSUF OSMAN & ANOTHER** (supra), the Court of Appeal defined a necessary party as one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. The Court was of the view that, the determination as to who is necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination, according to the decision in the above cited case, include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.



As to the effects of non-joinder of a necessary party the Court held that, in the absence of necessary parties the court may fail to deal with the suit as it shall, eventually, not be able to pass an effective decree. The Court added that, it would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff.

Having quoted the provisions of Order I Rule 9 of the Civil Procedure Code, the Court went on to hold that, *"despite being couched in mandatory language, we should think, there is an exception to the foregoing general rule."* The Court expressed a view that, there ought to be a proviso under Order I Rule 9 of our Civil Procedure Code, that excludes its applicability to cases of non joinder of necessary parties as it was done in India through Act No.104 of 1976.


The Court proceeded holding at page 27 that, *"Our Civil Procedure Code does not have a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that **Rule 9 of Order I only holds***

***good with respect to the misjoinder and non-joinder of non-necessary parties.”***

In terms of what the plaintiff pleaded in her plaint, the disputed property is now being owned by Bundaa Oil Industries Limited, having bought the same from the defendant. An order repossessing the disputed property to the plaintiff if issued, would necessarily invite the purchaser during execution stage. The law is, execution proceedings can only proceed against a party to civil proceedings which resulted into a decree subject of execution. The plaintiff would not be able to execute a repossession order against Bundaa Oil Industries Limited as she is not a party to this suit. It is therefore correct, in my view, to hold as I do that, as per the plaintiff's pleadings, no effective decree can be passed in the instant case, in the absence of Bundaa Oil Industries Limited as a necessary party.

Since the provisions of Order I Rule 10(2) of the Civil Procedure Code can not be invoked at this later stage, and, following the court's holding hereinabove, I am compelled to issue an order that will enable the plaintiff to start afresh if she so desires. For the reasons I have endeavoured to explain hereinabove, the suit is struck out. Each party to bear own costs.

Dated at **SHINYANGA** this **28<sup>th</sup> February, 2020.**

  
**C. P. MKEHA**  
**JUDGE**  
**28/02/2020**

**Court:** Ruling is delivered in the presence of Professor Safari learned advocate for the plaintiff and Mr. Kange learned advocate for the defendant.

