IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT KIGOMA

LAND APPEAL CASE NO. 12 OF 2019

(From the Decision of District Land and Housing Tribunal for Kigoma at Kigoma in Land Case No. 99 of 2015)

OLIVA MALIATABU @ MAMA MANENO.....APPELLANT

VERSUS

ROBISON FULGENCE LEMBO.....RESPONDENT

JUDGMENT

Dated: 19th February, 2020

Before: Hon. A.K. Matuma– Judge

The Respondent **Robison Fulgence Lembo** had sued the appellant **Oliva Maliatabu @ Mama Maneno** in the District Land and Housing Tribunal for Kigoma over a dispute of land in respect of plots No. **13, 14, 15 and 16 Block "B" Mwandinga Kigoma** District Council.

At the trial tribunal, the Respondent who was the applicant testified to have been allocated the suit land by the District Council in 2006 after the area was surveyed.

The appellant who stood as the respondent at the trial, on her party testified that the area in question is her lawful property as the same was purchased by her late husband in 1986 from one Hussein Majaliwa and that they used the same as a shamba until 1994 when her husband passed

away. She then built a dwelling house which prompted to the dispute at hand.

The trial tribunal after hearing both parties and their witnesses adjudged for the respondent as it believed him that he was dully allocated by the District Council while on the other hand the Appellant had no documentary evidence.

The appellant was aggrieved hence this appeal with four grounds whose main complaints are;-

i. ***Failure to consider the long possession of the suit land by the appellant since 1986.***
ii. ***None joinder of a necessary party at the trial tribunal.***
iii. ***Un-procedural survey over the suit land.***
iv. ***Reallocation without any compensation.***

At the hearing of this appeal, I thought it important to have the second ground of appeal determined first before resorting to the remaining grounds. I further noted that there is a legal issue worth to be considered on whether the trial chairman obtained and considered the opinion of assessors before reaching to his decision as mandated by section 24 of the Land Disputes Courts Act, No. 2 of 2002. I therefore, invited the parties to address me on the issue and its effect thereof.

Starting to address the court on the ground of none joinder of the necessary party Mr. Sadiki Aliki learned advocate submitted that Kigoma District Council was a necessary party to be sued in the circumstances of this case as it was her alleged to have allocated the suit property to the Respondent. He further argued that the said party was necessary so as to

explain on the alleged unprocedural survey and subsequent allocation of the dispute property. He cited to me the case of **Obed Mtei v. Rukia Omari (1989) TLR 111**. He again argued that a necessary party in terms of the definition made in the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman, Civil Revision no. 6 of 2017** is whose in absence the court cannot pass an effective decree or whom the decision might be pronounced against him. He concluded this by arguing that the none joinder of the District Council was fatal and rendered the proceeding and judgment of the trial tribunal a nullity as it was decided in the case of **Shahibu SalimuHoza vs. Helena Mhacha (Legal representative of Amerina Mhacha), Civil Appeal no. 7/2012.**

Mr. Damas Sogomba learned advocate for the Respondent resisted such ground as the same was not raised at the earliest possible time during trial as required for under **Order 1 Rule 13 of the Civil Procedure Code, Cap. 33 R.E 2002.** He further argued that even though under Order 1 rule 9 of the CPC supra none joinder and misjoinder of parties is not fatal. He backed up his argument by the decision of this case by **Lugakingira, J in the case of Nuru Hussein v. Abdul Ghani Ismail Hussein (2000) TLR 217**. He finally rested his submission by drawing the attention of this Court to the provisions of section 45 of Act no. 2 supra.

In my view, it is a settled law that all necessary parties must be brought in an action/suit to enable the court conclusively determines the matter and that none joinder of any would be fatal with an effect of rendering the proceedings a nullity. There is untold number of authorities to that effect among them that of **Abdulatif Mohamed Hamis supra and Shahibu Salim Hoza supra.**

Mr. Damas Sogomba learned advocate tried to take refuge into the provisions of Order 1 Rule 9 and 13 of the CPC supra, but it is my firm findings that the said provisions provides for a general rule as to none joinder and misjoinder of parties as it was rightly construed in the case of **Nuru Hussein supra**. It has however been developed through case laws as I have herein stated that if the omitted party was the necessary one then the omission is fatal and the proceedings cannot be cured. That is to say with the general rule that none joinder of parties is not fatal, the same if fatal when the none joined party is the necessary one. Even when the none joined party is not the necessary one still the proceedings may be vitiated if the none joinder causes miscarriage of justice.

The issue is therefore, was Kigoma District Council a necessary Party in the circumstances of this case? My answer is yes, it was. The Appellant complained as the owner of the dispute plot before the alleged survey but the Respondent claimed ownership after being allocated by the said District Council after the survey. The District Council was thus a necessary party to explain the due processes of the survey and how it distinguished the interests of the indigenous thereof and or how did it come into acquisition of the area before its survey and its subsequent allocations thereafter. That would assist the trial court to reach a just decision between the parties.

In the case of **Shahibu Salim Hoza supra,** the Court of Appeal in a matter of a similar nature held that the none joining of Dar es salaam City Council was fatal as the suit could not proceed effectively to enable the court to effectually and completely adjudicate upon the issue raised in regard to the actual and real owner of the suit land. Kigoma District Council would be of interest to both parties as it would either confirm that it really

allocated the land to the Respondent and justify thereof or it would deny such allocation and enter a defence against the said allocation. It was wrong therefore for the trial court to assume the allocation on mere documents as in a number of cases we had the Land Authorities denying recognition of land documents purported to be issued by them.

I therefore rule out that the none joining of the Kigoma District Council in this suit was fatal as it was subject to discussion on the central issue without being accorded opportunity to be heard. See the case **of Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy, Civil Application no. 33 of 2002.**

In respect of the issue raised by the court **suo motto**, the parties did not agree. While the learned advocate for the Appellant **Mr. Sadiki Aliki** argued that the trial chairman had predetermined the matter when he visited the locus in quo before according opportunity to assessors to give their respective opinion as mandated by section 24 of Act no.2 supra, Mr. Damas Sogomba learned advocate for the Respondent was of the view that the observations made by the trial chairman at the locus in quo was a mere wrong which is curable under the provisions of section 45 of Act no. 2 supra. He cited the case of **Magoiga Gichele v. Penina Yusufu, Civil appeal no. 55 of 2017** on the importance of the courts of law to adhere to the overriding objective to reach just decisions.

It is quite clear that the proceedings of the trial tribunal does not reflect as to whether the assessors were accorded any opportunity to give their opinion.

It is however reflected at page 3 of the judgment of the trial tribunal that;

"Before I proceed let me consider the opinion of lay assessors but unfortunately, Mama Maria Katuku is unable to opine as her term of service as a tribunal member has come to an end, but the other assessor Mzee Msechu Kafinikati opined alone as per the room available via section 23 (3) of the Land Dispute Courts Act, Cap. 16 R.E 2002.

Mzee Msechu had the view that since the applicant was dully allocated the land by the government therefore, Respondent be compensated to the land so as the land to remain to the hands of the applicant".

The judgment of the trial tribunal is thus trying to reflect that one of the assessors opined. Even though the said judgment was dated 16/7/2019 while the proceedings ended way back on the 30/9/2016.

During the visiting on the locus in quo on the same date 30/9/2016 by the trial tribunal, the trial chairman had made some observations including that;

"Considering the area is surveyed and the Respondent had no any evidence to support for her ownership. In that, the Respondent is the trespasser to the area".

Such observation is a clear indication that the trial chairman had pre - determination of the matter even before inviting his assessors to opine. It thus goes without saying that even the purported opinion of one of the assessors as reflected in the judgment three years later after the trial chairman had already ruled in writing that the current appellant was a trespasser as she had no documents in her support was a mere sham. It had no effect in the minds of the trial chairman and it cannot be said to

have been taken for the purpose really envisaged in the law. Under section 24 of Cap. 216 it is provided that;

> ***"In reaching decisions the chairman shall take into account the opinion of the assessors*** *but shall not be bound by it,except that the chairman shall in the judgment give reasons for differing with such opinion."*

This provision was completely not adhered to as the Trial Chairman reached his decision on the same very day when he visited the locus in quo and adjudged the Appellant as a trespasser. Up to that time no assessor was called for giving the opinion. The judgment which was drafted three years later after the conclusion of the trial was a repetition of the already made decision in writing way back in 2016 against the appellant. The reflected opinion of the assessor therein was thus useless and a mockery of justice.

In the case of **Edina Adam Kibona v. Absolom Swebe (Sholi), Civil appeal No. 286/2017** the Court of Appeal held that the decision reached by the trial tribunal without involving the assessors to obtain their opinion is a nullity. The court had itself raised the concern **suo motto** as I have herein above done after realizing that the assessors at the trial tribunal were not fully involved. It thus remarked in the first page;

> ***"At the hearing of the present appeal, Mr. Justinian Mushokororwa, the learned counsel who appeared for he appellant, after a dialogue which took some considerable time, conceded to the concern raised by the court on its own motion on the propriety or otherwise of the assessors not***

being fully involved at the trial in the District Land and Housing Tribunal."

Likewise, in this case before the trial chairman could have declared the appellant a trespasser ought to have obtained the opinions of the lay assessors failure of which was fatal.

Not only that but also as I have herein cited section 24 of Act no. 2/2002, the trial chairman is mandatorily required to consider the opinion of the assessors although he is not bound by it. But if need arises to differ with such opinion it is necessary that he gives the reasons for such difference;-

> *"In reaching decisions the chairman shall take into account the opinion of the assessors but shall not be bound by it,* ***except that the chairman shall in the judgment give reasons for differing with such opinion."***

In this case one of the alleged assessor if at all opined as purported in the judgment was reflected to have opined:

*"..... the other assessor Mzee Msechu Kafinikati opined alone as per the room available via section 23 (3) of the Land Dispute Courts Act, Cap. 16 R.E 2002.****Mzee Msechu had the view that since the applicant was dully allocated the land by the government therefore, Respondent be compensated to the land so as the land to remain to the hands of the applicant".***

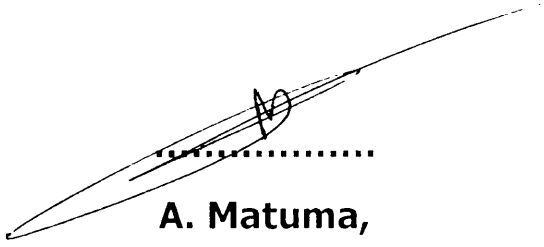
Despite of that opinion, the trial chairman did not consider it, he did no make any finding to the opinion that the current appellant be compensated as opined or not. The opinion if at all was there, then it gone ignored completely. Under the above cited law, it is immaterial that, the Hon.

Chairman has advanced good reasons and has properly evaluated the evidence on record in reaching to his decision if the opinion of the assessors or assessor have been disregarded or rejected without assigning reasons for such disregard or differing.

In the final analysis I am of the view that the trial by the trial tribunal was a nullity on the herein above grounds and the same cannot be left to stand. I subsequently declare the proceedings of the trial court a nullity and set aside the judgment reached thereof. I further direct the Respondent that if he is eager to continue contesting for his interest in the dispute plot, he must commence the suit afresh in the trial tribunal against not only the appellant but also against the alleged land authority which allocated him the dispute plot as a necessary party. Any suit to be commenced shall be subject to relevant requirements of the laws governing land disputes and litigations such as time limitation, requirement of statutory notice to sue etc.

This appeal is therefore allowed with costs on the afore two grounds. Whoever feels aggrieved is hereby informed of his right to further appeal to the Court of Appeal of Tanzania subject to the relevant governing laws.

It is so ordered.



A. Matuma,

Judge

19th February, 2020