

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**LAND CASE NO. 19 OF 2017**

**1. CHRISTINA JALISON MWAMLIMA.....1<sup>ST</sup> PLAINTIFF**

**2. ROBERT JALISON MWAMLIMA .....2<sup>ND</sup> PLAINTIFF**

**(Administrator/administratrix of the Estate of  
the Late JALISON MWAMLIMA)**

**VERSUS**

**1. HENRY JALISON MWAMLIMA.....1<sup>ST</sup> DEFENDANT**

**2. CRDB BANK PLC.....2<sup>ND</sup> DEFENDANT**

**3. DANI GAMBI (TEKISO).....3<sup>RD</sup> DEFENDANT**

**4. OSEMO TWEVE.....4<sup>TH</sup> DEFENDANT**

**5. BOSCO MBILINYI.....5<sup>TH</sup> DEFENDANT**

**6. DEBORA CHALAMILA.....6<sup>TH</sup> DEFENDANT**

**7. PATRICK KINDOLE.....7<sup>TH</sup> DEFENDANT**

**RULING**

**23. 07 & 1. 10. 2020.**

**UTAMWA, J:**

In this land case, CHRISTINA JALISON MWAMLIMA (the 1<sup>st</sup> plaintiff) and ROBERT JALISON MWAMLIMA (the 2<sup>nd</sup> plaintiff) administratrix and administrator of the estate of Jalison Mwamlima (the deceased) respectively, sue the defendants for some claims related to land. The defendants are HENRY JALISON MWAMLIMA, CRDB BANK PLC, DANI GAMBI (TEKISO), OSEMO TWEVE, BOSCO MBILINYI, DEBORA CHALAMILA and PATRICK KINDOLE (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendant respectively).

In the plaint, the plaintiffs, as administrators of the estate of the deceased alleged, *inter alia*, that, the first defendant fraudulently influenced the relevant land authorities and caused the transfer of the title for a piece of land namely Plot No. 4 Block C, Tunduma from the deceased name to his own name. He then fraudulently engaged into a mortgage deed with the second defendant. In that transaction, the second defendant advanced a loan to the first defendant who put the landed property mentioned above as a collateral. The first defendant also unjustifiably rented some rooms to the 3<sup>rd</sup>, 4<sup>th</sup> -7<sup>th</sup> defendants and collects rent for himself.

The plaintiffs are thus, seeking for the following reliefs:

- i) That, this court be pleased to order for nullification of the Tittle Deed for Plot No. 4 Block C (the suit land) which was illegally obtained in the 1<sup>st</sup> defendant's name and order for vacant possession of the disputed premises which the 1<sup>st</sup> defendant is running a Hotel and collecting rents from tenants.
- ii) That, this Court be pleased to nullify the purported mortgage arrangement (between the first and second defendants) in respect of the suit land and order that, the lawful properties of the 1<sup>st</sup> defendant situated in Mbeya be attached by the 2<sup>nd</sup> defendant as collateral for any outstanding balance between them.
- iii) That, this court be pleased to order the 3<sup>rd</sup> to 7<sup>th</sup> defendants (the six defendants) pay arrears of rent at the tune of TZS. 1,800,000/= (One Million and Eight Hundred Thousands) per

annum from January, 2017 till the date of full payment after the decree.

- iv) That, this court be pleased to order Permanent injunction against 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering with the plaintiffs' interest in the suit land.
- v) An order for vacant possession of the rooms in use by the 3<sup>rd</sup> to 7<sup>th</sup> defendant.
- vi) An order against the six defendants for payment of general damages to be assessed by this court for non use of the disputed premise by the plaintiffs.
- vii) Interest at the court's rate on the decretal sum from the date of judgment until payment in full.
- viii) An order against the six defendants for costs of the case, and
- ix) Any other relief this court may deem fit and just to grant.

The defendants objected the claims through their respective written statements of defence (WSDs). The six defendants filed a joint WSD. The 2<sup>nd</sup> defendant filed his separate WSD. They also raised preliminary objections (POs). The six defendants raised four limbs of PO as follows:

1. That, the suit is bad for being filed out of limitation period.
2. That, the suit is bad for non-joinder of the Necessary Party, which is the commissioner for land.
3. That, the plaintiffs have no *locus standi* to sue as administrators as their term of appointment is out of limitation period.

4. That, this honourable court has no jurisdiction to entertain the claim against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> defendants. They thus, prayed for the dismissal of the suit with costs.

On the part of the 2<sup>nd</sup> defendant, she raised a total of five grounds of the PO as follows, that,:

1. This suit is hopelessly time barred under The Law of Limitation Act, Cap. 89 R: E 2002.
2. The plaint offends the mandatory provisions of Order VII Rule 1 (e) of the Civil Procedure Code, Cap. 33 R: E 2002 (the CPC).
3. The plaint offends the mandatory provisions of Order VII Rule 6 of the CPC.
4. The suit is bad for non-joinder of Tunduma Town Council, Commissioner for Lands and the Honourable Attorney General as necessary parties.
5. Tunduma urban court primary court did not have jurisdiction to entertain application for letters of administration regarding the estate of the late Jalison Mwamlima which includes registered landed properties among them being the suit land.

The second defendant thus, also prayed for this suit to be dismissed with costs.

Both plaintiffs were represented by Ms. Marry Gatuna, learned advocate, whereas six defendants were represented by Ms. Rose Kayumbo assisted by Mr. Kelvin Gamba, both learned advocates. The 2<sup>nd</sup> defendant had the services of Mr. Mika Mbisse, learned advocate. The POs were argued by way of written submissions.

I will firstly determine the fourth point of P/O raised by the counsel for the second defendant related to the non-joinder of necessary parties. Indeed, this point is similar to the second point raised by the six defendants. This plan is based on the fact that, if the point will be upheld, it will be capable of disposing of the whole matter without even testing the rest of the points.

The counsel for the second defendant, in his submissions regarding the point on non-joinder of necessary parties, argued that, the plaintiffs pray for *inter alia*, the nullification of the Title Deed in respect of suit land. Since the title deed is an agreement between the Government of the United Republic of Tanzania represented by the Commissioner for Land and the first defendant (Henry Jalison Mwamlima), no effective order for nullification can be issued by this court without joining Tunduma Urban Council, the Commissioner for Land and the Attorney General as necessary parties. The learned counsel for six defendants also made an argument similar to the one highlighted above. Both counsel fortified their respective contentions by citing the decision of this court in the case of **Oil Com Tanzania Limited v. Christopher LetsonMgalla, Land Case No. 29 of 2015, HCT at Mbeya** (unreported).

Moreover, the counsel for the six defendants contended that, in case the court grants the order for nullification of the title deed without joining the Commissioner for Land as a necessary party, the course will amount to condemning him without being heard. In support of this contention, she cited a decision by the Court of Appeal of Tanzania (the CAT) in the case of **Ngerengere Estate Company Ltd v. Edna William Sitta, Civil**

**Appeal No. 209 of 2016, CAT** (unreported) that essentially underscored the respect to the right to be heard. Both counsels thus, urged this court to strike out the suit with cost.

In response, the counsel for the plaintiffs argued that, the plaintiffs' claims are not against the allocating authority or the commissioner for land. She also contended that, the said commissioner for land can be called as witness to testify in favour of the plaintiffs during the trial. She referred this court to the practice demonstrated in the case of **Abdallah Said Masoud v. Gharib Suleiman and 5 Others, High Court of Tanzania (HCT), Land case No. 398 of 2016** (unreported). She contended further that, the case of **Oil Com Tanzania Ltd** (supra) cited by all defendants' counsel is distinguishable. This was because, in that case there was double allocation and the title deed of the parties contained different plot numbers unlike in the case at hand. She thus, prayed for this court to overrule the POs and hear the suit on merit.

I have considered the submissions by the parties, pleadings and the law. The issues here are two as follows: **One**, *whether or not there was a non-joinder of necessary party*. **Two**, if the answer to the first issue will be affirmatively, then *what is the legal effect of the omission to the suit at hand*.

Regarding the first issue (of *whether there was a non-joinder of necessary parties*), I am of the view that, it is incumbent to firstly define who is a necessary party in law. I did not find any definition of the term "necessary party" in the statutes of this land. However, case law has

strived to plug the *lacuna*. The CPC also gives a guidance on who may be joined in a suit as plaintiff and as defendant.

The CPC provides under Order 1 rule 3 for example, that, all persons may be joined as defendants against whom any right to relief which is alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise. The provisions of law just cited above, were emphasised by the CAT in the cases of **Farida Mbaraka and another v. Domina Kagaruki, Civil Appeal No. 136 of 2006, CAT at Dar es Salaam** (unreported) and **Abdullatif Mohamed Hamisi v. MehboobYusuph Othman and another, Civil Revision No. 6 of 2017, CAT at Dar es Salaam** (unreported).

The law also recognises two kinds of parties among those who can be joined in one suit. These are necessary parties on one hand, and non-necessary parties on the other; see the **Abdullatif case** (supra) taking inspiration from a decision by the Supreme Court of Uganda in the case of **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55**. In deciding this case, the Ugandan Supreme Court had considered the English case in **Amon v. Raphael Tuck and Sons Ltd [1956] 1 All ER 273**. It is therefore, imperative to clearly differentiate between the two kinds of parties before I describe in detail who a necessary party is.

According to the holding in the **Abullatif case**, a non-necessary party is a person who has merely to be joined in the suit. He is also commonly referred to as a proper party. However, on the other side a necessary party is a person who has to be joined in the suit yes, but whose presence before the court is necessary for it to effectively and completely adjudicate upon the questions involved in the suit. In other words, a court can effectively and completely adjudicate upon the dispute between the parties even in the absence of the non-necessary party. Nonetheless, the court cannot do so without the necessary party. The following two tests have therefore, been set by courts for determining whether or not a particular person is necessary party (as defendant):

- a. There has to be a right or relief against such a party in respect of the matters involved in the suit and;
- b. The court must not be in a position to pass an effective decree in the absence of such a party.

These dual tests were underlined by the CAT in the **Abullatif case** (supra) following the Indian case of **Benares Bank Ltd, v. Bhagwandas, A.I.R. (1947) All 18**, (by the full bench of the High Court of Allahabad). That decision was approved by the Supreme Court of India in the case of **Deputy Comr., Hardoi v. Rama Krishna, AIR. (1953) S.C. 521**. The CAT in the **Abullatif case** therefore, defined a necessary party in the following words which I quote for a readymade reference:

"...a necessary party is one in whose absence no effective decree or order can be passed. Thus, the determination as to who is a 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 include the particulars of the non-joined party, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.”

In our jurisdiction, statutory law also recognises the existence of a necessary party to a suit before the court and the significance of joining him where he is not joined. It gives powers to the court to join such the necessary party. Order 1 rule 10 (2) of the CPC for example, demonstrates such cognisance by guiding thus; and I quote it for a quick reference:

“The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or **whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.**” (Bold emphasis is mine).

This court (Othman, J. as he then was) in the case of **Kennedy Kamwela v. Sophia Mwangulangu and Director of Mbeya Municipality, Misc. Civil Application No. 31 of 2004, HCT at Mbeya** (unreported) at page 2, also observed that, the provisions of Order 1 rule 10 (2) and those of Order 1 rule 9 of the CPC are the guiding stars for misjoinder and non-joinder of parties to suits.

Moreover, discussing the provisions of Order 1 rule 10 (2) of the CPC, the CAT in the **Farida case** (supra) observed that, a person may be joined as party to a suit under two circumstances:

- A. When he ought to have been joined as plaintiff or defendant, but he is not joined, and;

B. When, without his presence, the question in the suit cannot be completely decided.

Considering the requirement for joining necessary parties in a suit under circumstances of Order 1 rule 10 (2) of the CPC, the CAT, in deciding the **Farida case** (supra), adopted the position set in an English case of **Amon v. Raphael Tuck and Sons (1956) 1 ALL ER. 273** (by the Supreme Court). The English case interpreted Order 16 rule 11 of the Rules of the Supreme Court which is similar to our Order 1 Rule 10 of the CPC. The Supreme Court observed at page 287 thus:

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question **to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party**...it is not enough that the intervener should be commercially or indirectly interested in the answer to the question; **he must be directly** or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally- that is by curtailing his legal rights." (Bold emphasis is provided).

In my further view, there is rationale for the holding in the **Amon Case** that the only reason which makes it necessary to make a person a party to an action is, so that he should be bound by the result of the action. The rationale here is that, persons not parties to suits cannot be bound by court orders for fear of deciding their rights or their interests in their disfavour and without them being heard firstly. It is thus, improper and against principles of natural justice for courts to make orders condemning persons who are not parties to court proceedings; see also the **Philip Anania Masasi v. Returning Officer, Njombe North Constituency,**

**Misc. Civil Cause No. 7 of 1995, HCT of Tanzania, at Songea**  
(unreported).

Having seen who is a necessary party in law and the rationale for joining him in a suit, I now consider the issue posed above (in the matter at hand). Under paragraph 8 of the plaint, the plaintiff pleaded that, the suit land was a property of the deceased who died in 1977 and was registered in his name. They also pleaded under paragraph 11 that, in 2014 they become aware that, the first defendant had fraudulently and secretly transferred the same property in his name in 2005. It is upon this fact that, they prayed for this court to order for the nullification of the Title Deed in respect of the suit land erroneously issued in the name of the first defendant.

On the other side, the contents of the plaint (in paragraph 8 and 11 above) were objected through the respective WSDs of all the defendants. Under such circumstances, it is my settled opinion that, the plaint demonstrates that, a mandated authority allocated the suit land to the deceased, and another mandated authority issued the title deed to him. However, the same mandated authority gave title of the same suit land to the first defendant by giving him the title deed. On the other hand, the plaint shows that, while the plaintiffs plead that the transfer was fraudulently performed, the defendants plead that, it was lawfully done.

Indeed, the defendants do not object the fact that, the first defendant caused the title of the suit land to be transferred by relevant authorities from the deceased name into his own name. However, they

plead that, he did so lawfully and with the authority of other members of the family interested in the estate of the deceased.

Owing to the contents of the pleadings just narrated above, it is clear in settled opinion that, any mandated authority which transferred the title of the suit land from the deceased to the first defendant, is a necessary party in the suit at hand. The same applies to the mandated authority which re-allocated the said land from the deceased to the first defendant. It is also clear in my concerted view that, if this court will proceed with the matter and reach to the conclusion by making an order for nullification of the title deed as prayed by the plaintiffs, which said nullification has to be performed by the mandated authority which issued it, the court will do injustice to such the mandate authority that issued it (i. e the commissioner for land) by condemning it unheard.

I have also considered the arguments by the learned counsel for the plaintiffs that, the commissioner for lands can be called as the witness in supporting the plaintiffs' case. With due respect, I do not subscribe to that idea. This is because, as a mere witness, he will not be bound by court orders. Besides, no one is sure at this stage, and according to the pleadings, that, the commissioner will definitely testify in favour of the plaintiffs. His involvement as a necessary party to the proceedings is thus, important. The same applies to any other mandated authority that re-allocated the land or facilitated the transfer of the title of the suit land from the deceased to the first defendant.

I consequently, join hands with the defendants' counsel and answer the issue posed above affirmatively that, in the suit at hand, there is a non-joinder of necessary party, i. e the Commissioner for Lands and/ or any other mandated authority which caused or facilitated the transfer of the title to the first defendant. Moreover, since the commissioner for Land is a principal officer of the Government, joining the Attorney General is also inevitable as per the Government Proceedings Act, Cap. 5 R. E 2019. This findings calls for the determination of the second issue.

The second issue is this: *what is the legal effect of the omission discussed above to the suit at hand.* In order to ascertain the legal effect of non-joinder of necessary party, it is incumbent to firstly discuss the legal effect of "misjoinder" and "non-joinder" of parties to suits. The CPC does not define the two terms. Nonetheless, the CAT in the **Abdullatif case** (supra), described them as follows: a misjoinder of parties occurs where two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1, rules 1 and 3, of the CPC respectively, thought they are neither necessary nor proper parties. On the other hand, a non-joinder is occasioned where a person who is necessary or proper party to a suit has not been joined as a party to it. The CAT in the **Abdullatif case** further observed that, a non-joinder in relation to a necessary party, may involve an omission to join a person as a party to a suit, whether as plaintiff or as defendant, who, as a matter of necessity, ought to have been joined.

Order 1 r. 9 of the CPC in fact, guides for the legal effect of misjoinder and non-joinder of parties to suits generally. It provides that, no

suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may, in every suit, deal with the matter in controversy so far as regards the right and interests of the parties actually before it. However, in interpreting the provisions of the law just cited above, the CAT in the **Abdullatif case** (supra), took inspiration from Order 1 rule 9 (1) of the Indian Code of Civil Procedure Act, V. 1908 as amended by Act No. 104 of 1976, and held as follows: that, Order 1 rule 9 of our CPC only holds good with respect to the misjoinder and non-joinder of non-necessary parties. The CAT thus, meant that, the guidance under these provisions of the law does not apply where a necessary party is concerned. That holding was based on the fact 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.

According to the CAT in the **Abdillatif case** (supra) and the **Farida case** (supra), therefore, a non-joinder of a necessary party to suit renders the suit incompetent. This stance is supported by the decision of this court in the **Kennedy Case** (supra). At this juncture, it must be born in mind that, decisions by the CAT bind courts and tribunals subordinate to it, including this court. This position of the law is by virtue of the doctrine of *stare decisis*; see also the CAT decision in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146**. I must therefore, follow the holdings in the above cited decisions of the CAT and the very persuasive decision of this court in the **Kennedy case**.

At this juncture, it must be noted in mind that, the above cited precedents, namely; the **Farida case**, the **Abdullatif case** and the

**Kennedy case** decided issues related to land-ownership disputes, which said respective pieces of land had been registered and allocated to the parties by the respective mandated allocating authorities. It follows thus, that, in our law, for purposes of resolving land-ownership disputes effectively, a person who is alleged in the pleadings to have conferred land title to the parties or any of them by one means or another (such as through allocation of a registered land by a mandated authority or through sale by any other person), and the person to whom the title was so conferred, are necessary parties to the suit. All such persons have to be joined, unless the circumstances of the case command otherwise. It was for this spirit that, this court held in the case of **Juma B. Kadala v. Laurent Mnkande [1983] TLR 103** that, in a suit for the recovery of land sold to a third party, the buyer should be joined with the seller or vendor as a necessary party/defendant; otherwise his non-joinder will be fatal to the proceedings.

The requirement just highlighted above, was furthermore cemented by the CAT in the case of **Shaibu Salim Hoza v. Helena Mchacha (as Legal Representative of Amerina Mchacha, deceased), Civil Appeal No. 7 of 2012, CAT at Dar es Salaam** (unreported). In this case, it was held that, it was improper for the suit to proceed before the subordinate and the High Court without the Dar es Salaam City Council which had allocated the land to the deceased. This followed the fact that, the said Dar es Salaam City Council was the necessary party to such proceedings. The CAT thus, quashed and nullified the proceedings and judgements of the

two courts below it, and ordered for fresh proceedings upon joining the Dar es Salaam City Council.

Owing to the above stance of the law I find that, the misjoinder of necessary parties discussed above was fatal to the suit at hand, according to the circumstances of the case shown above. This finding provides for the answer to the second issue posed above. The suit is thus, incompetent. In my further view, the only legal remedy available for an incompetent matter like the suit at hand, is none other than striking it out.

The findings I have just made herein above make it unnecessary to consider the other limbs of objection by all the defendants. This is because, the findings are capable of disposing of the entire matter as shown above.

Owing to the reasons shown above, I strike out the suit. Each party shall bear his own costs. This is because, it does not seem that the plaintiffs frivolously or vexatiously or maliciously filed this suit against the defendants. Instead, it is apparent that they filed it with the view of finding better ways of protecting the deceased estate, save for the non-joinder of necessary parties. Besides, parties have previously, been involved in various proceedings related to the same estate of the deceased as shown in the pleadings. These circumstances, thus, in my view, attract the apportionment of costs as shown above. It is so ordered.



J.H.K. Utamwa.

Judge

16/09/2020

19/10/2020.

CORAM; Hon. JHK. Utamwa, J.

For plaintiffs: Ms. Marry Gatuna, advocate.

For Defendants: present 1<sup>st</sup> defendant and Ms. Rose Kayumbo for 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> defendants, also holding briefs for Mr. Mbise, for second defendant.

BC; Mr. Patrick, RMA.

Court: Ruling delivered in the presence of Ms. Marry Gatuna, advocate for the plaintiffs, the first defendant, Ms. Rose Kayumbo assisted by Ms. Caroline Luhungu, advocates for the first, third - 7<sup>th</sup> defendants, also Ms. Rose Kayumbo holding briefs for Mr. Mbise, advocate for the second defendant, in court, this 19<sup>st</sup> October, 2020.



JHK. UTAMWA.

JUDGE

19/10/2020.