

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

LAND CASE NO. 24 OF 2019

MONEY BRIDGE PROPERTIES (E.A) LTD PLAINTIFF

Versus

MERU DISTRICT COUNCIL DEFENDANT

RULING

16th September & 6th November, 2020

Masara, J.

This Ruling follows preliminary objections raised by the Defendant, Meru District Council, against the Plaintiff's suit. The Plaintiff is suing the Defendant claiming to be declared the lawful owner of nine plots (herein referred to as 'suit plots') with the following descriptions:

- a) Plot No. 70 Block "A", Leganga Usa River, Arumeru District with Title No. 18889;
- b) Plot No. 71 Block "A" Leganga Usa River, Arumeru District with Title No. 18888;
- c) Plot No. 72 Block "A", Leganga Usa River, Arumeru District with Title No. 18891;
- d) Plot No. 73 Block "A", Leganga Usa River, Arumeru District with Title No. 18895;
- e) Plot No. 74 Block "A", Leganga Usa River, Arumeru District with Title No. 18892;
- f) Plot No. 75 Block "A", Leganga Usa River, Arumeru District with Title No. 18893;
- g) Plot No. 76 Block "A", Leganga Usa River, Arumeru District with Title No. 18894;
- h) Plot No. 77 Block "A", Leganga Usa River, Arumeru District with Title No. 18890; and
- i) Plot No. 78 Block "A", Leganga Usa River, Arumeru District with Title No. 23702.

The Plaintiff claims to have bought the suit plots from one Dinesh Chandra Meghji Shah on 26/9/2012 for the purpose of constructing a special Gynecology and Pediatric hospital. According to the Plaintiff, the Plaintiff could not transfer titles to the suit plots to herself for the reason that the transfer was unreasonably obstructed by the Defendant. Responding to the suit, the Defendant, in the Written Statement of Defence filed in this court on 8/11/2019, raised three points of Preliminary Objections as follows:

- a) That, the suit is completely incompetent and bad in law for the Plaintiff has failed to join the seller who is the necessary party to this suit;*
- b) That, the Plaintiff has no locus standi; and*
- c) That, the Plaintiff does not have sufficient cause of action to institute this suit.*

It is imperative that these objections be determined prior to hearing of the suit on merits. The Plaintiff is represented by Mr. John J. Lundu, learned advocate while the Defendant is represented by Mr. Peter J. Musetti, learned State Attorney. Hearing of the Preliminary Objections proceeded through filing of written submissions. In the course of submissions, Mr. Musetti decided to drop the second point of Preliminary Objection and argued the remaining points in seriatim.

Submitting in support of the first Preliminary Objection, Mr. Musetti contended that the cause of action as per the Plaintiff, is directly linked to the Commissioner for Lands and the seller of the suit plots. According to the learned State Attorney, the two are directly responsible for the transfer of the right of ownership from the vendor to the purchaser. It was Mr. Musetti's contention that the Defendant in this case has no legal mandate to deal with

the process of transfer of ownership from the former owner, Dinesh Meghji Shah, to the Plaintiff. The learned State Attorney was of the view that failure to implead proper parties in a case exonerates the Defendant from liability while paralyzing the court's ability to adjudicate the issues raised in the plaint. To support his argument, he cited the case of ***Departed Asians Property Custodian Board Vs. Jaffer Brother Ltd*** [1999] 1 E.A 55.

Mr. Musetti submitted further that according to Land (Forms) Regulation G.N 71 of 2001, it is the vendor/seller's duty to apply for transfer of the property intended to change ownership. In the case at hand, since the seller did not discharge that duty, he ought to be joined as a necessary party so that if the case is decided in the Plaintiff's favour, the decree can easily be enforceable. On the procedure, the learned State Attorney argued that the seller fills in form No. 29 which is made under section 36(3) of the Land Act, Cap. 113 [R.E 2019], and Form 30 made under section and 39(1). Mr. Musetti called the Court's attention to Order 1 Rule 9 of the CPC, which states that 'no suit shall be defeated by reason of mis-joinder or non-joinder of the necessary party', but quickly pointed out that there are exceptions where non-joinder of a necessary party becomes fatal. He cited the following decisions which solemnize the exceptions: ***Stansiaus Kalokola Vs. Tanzania Bullding Agency and Another***, Civil Appeal No. 45 of 2018; ***Mary Sirii Chuwa Vs. Ministry for Constitutional and Legal Affairs and Attorney General***, Civil Application No. 32 of 2019 (both unreported). He concluded that failure to implead the Commissioner for Lands and the vendor as necessary parties is fatal to the Plaintiff's case.

Canvassing the last point of Objections, Mr. Musetti relied on the following decisions which define cause of action: ***John M. Byombalirwa Vs. Agency Maritime Internationale (Tanzania) Ltd*** [1983] TLR 1 and ***Mashando Game Fishing Lodge and 2 Others Vs. Board of Trustees of TANAPA*** [2002] TLR 319. He contended that for the Plaintiff to succeed in this suit, it has to be proved that they suffered loss or damage due to infringement of their rights by the Defendant. According to Mr. Musetti, the only person vested with powers to transfer land is the Commissioner for Lands, except where he delegates such powers to another officer in accordance with Regulation 3 of G.N 71 of 2001. The Local Government is not vested with powers to approve transfer of land; therefore, the Plaintiff does not have cause of action against the Defendant. The learned State Attorney prayed that the suit be struck out and the costs be borne by the Plaintiff.

Contesting the Preliminary Objections, Mr. Lundu contended that the cause of action of the Plaintiff against the Defendant is provided in paragraphs 5, 6, 7 and 8 of the Plaint. Mr Lundu states that as soon as the Defendant became aware of the transaction between the Plaintiff and the former owner of the suit plots vide annexure "C" to the Plaint, she started interfering with the suit land. It was Mr. Lundu's contention that there is no dispute between the Plaintiff and the Commissioner for Lands or between the Plaintiff and the vendor, Mr. Shah. The learned advocate maintained that the two are not necessary parties to the suit as their presence is not necessary for the court to effectively and adequately adjudicate the questions involved in the suit. In his view, the acts done by the Defendant as stated under paragraphs 6

and 7 of the Complaint makes her the right person to sue. In the alternative, the learned counsel submitted that even if there was to be an issue of non-joinder of the party, the same fall under Order I Rule 9 of the Civil Procedure Code in which the suit cannot be defeated for non-joinder of a necessary party. In that stance, he insisted that the cases cited by Mr. Musetti are distinguishable.

Submitting against the last point of the Preliminary Objections, Mr. Lundu reiterated that the Plaintiff's right to sue the Defendant is contained under paragraphs 3 and 4 of the Complaint. That the acts of the Defendant as shown under paragraphs 6 and 7 of the Complaint signify that the Plaintiff's rights were infringed by the Defendant and that the Plaintiff suffered loss. On that account, it was Mr. Lundu's view that the preliminary objections raised are devoid of merit, he thus prayed that they are dismissed with costs.

Having gone through the Preliminary Objections raised and the submissions of the learned counsels in support and against the Preliminary Objections, I am settled in my mind that the two points of objection culminates in only one issue: whether the suit should be struck out for non-joinder of the Commissioner for Lands and the Vendor, one Dinesh Chandra Meghji Shah, who are necessary parties in this suit.

Mr. Musetti asks this Court to struck out the suit as necessary parties were omitted by the Plaintiff thus rendering any decision of this Court unenforceable. To determine whether the Commissioner for Lands and the

seller of the suit plots are necessary parties that ought to have been impleaded in the plaint, one has to first answer the question of who is a necessary party in a suit and whether this suit falls squarely on the said definition. This question was determined by the Court of Appeal in the case of ***Claude Roman Shikonyi Vs. Estomy A. Baraka and 4 Others***, Civil Revision No. 4 of 2012 (unreported), where the Court quoted the decision of the Supreme Court of Uganda in ***Departed Asians Property Custodian Board Vs. Jaffer Brothers Ltd*** (supra) and commented as follows:

*"I have not laid my hands on any reported decision in East Africa directly on the point of criteria for determining that the presence of a person is necessary under Order 1, rule 10 (2) of the Civil Procedure Rules ... However, taking leaf from authorities in other jurisdictions having similar and even identical rules of procedure, I would summarize the position as follows: For a person to be joined on the ground that his presence in the suit is necessary **for effectual and complete settlement of all questions involved in the suit, one of two things has to be shown. Either it has to be shown that orders which the Plaintiff seeks in the suit would legally affect the interests of that persons, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit.** Alternatively, a person qualifies (on application of Defendant) to be joined as a co-Defendant, where it is shown that **the Defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person**". (emphasis added).*

In the same vein, the court also referred the case of ***Tang Gas Distributors Ltd Vs. Mohamed Salim Said and Two Others***, and further observed:

"... it is now an accepted principle of law (see MULLA's treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case

*in the absence of a necessary party. **Failure to join a necessary party, therefore is fatal** (MULLA at p. 1020)". (emphasis added)*

In ***Stanslaus Kalokola Vs. Tanzania Building Agency and Another*** (supra) as cited to me by Mr. Musseti, the Court had this to say on the same aspect:

"Similarly, in this case, there is no way that the suit of trespass, which the appellant intends to prosecute against the second respondent, may proceed without questions about the contract of sale being raised. Therefore, for an effectual disposal of the real controversy involving the house in this case, the cause of action and issues arising therefrom must be tried together. With that, it is our conclusion that the learned High Court Judge was correct in finding the non-joinder in this case fatal. This in our view, is the category of no-joinder which, according to Mulla's Commentary, may render the decree ineffective."

From the above prescripts, the question to pose is whether in the suit at hand, the Commissioner for Lands and the Vendor are necessary for an effectual and complete settlement of issues and real controversy involving the suit plots. Paragraph 4, 5, 6, 7 and 8 of the Plaint depict that the suit plots are still in the name of the seller, Dinesh Chandra Meghji Shah, as the title could not pass from him to the Plaintiff for the reasons contained in annexure "C". It is therefore in this court's view that the decision of this court in the event the suit fails, will also affect the rights of the seller as he may be required to repay the sale price.

It is also prevalent that the said transfer was not delayed by the Defendant as the Defendant seem to have forwarded the matter to the Assistant Land Commissioner for Lands in Moshi, to proceed with the transfer. This means that the Defendant's role has been discharged. The only concern put forward

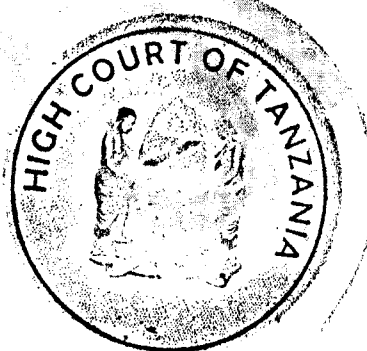
by the Defendant is in respect of plots No. 70, 71, 73,74, 75 and 77 Block "A" whose surveys were nullified and the owner is said to have been compensated. If that is the case, then the Commissioner for Lands becomes a necessary party. According to section 10 and 11 of the Land Act, Cap 113 [R.E 2019], the Commissioner and Assistant Commissioners for Lands are entrusted to be the overall in charge of lands in Tanzania on the behalf of the President of the United Republic of Tanzania. The procedure for a person to apply for a granted Right of Occupancy is stipulated in section 29, as rightly as stated by Mr. Musetti. According to that procedure, it is the Commissioner for Lands who is empowered to grant the certificate of Occupancy and forward the same to the Registrar of Titles for the same to be entered in the land register.

Local Government authorities are prohibited from authorizing any transfer of land. Their authority is limited to forwarding the information and relevant documents to the Commissioner for Lands, who is responsible for carrying out the transfer. This, in my view, is the reason that made the Defendant to write to the Assistant Commissioner notifying him of the compensation so that the Commissioner could proceed with the transfer. On that account, the Commissioner for Lands is also a necessary party as he is the one responsible to approve the transfer of the suit plots from the vendor to the Plaintiff.

I also agree with the learned State Attorney that the seller of the suit plots, Dinesh Chandra Meghji Shah is a necessary party since the title in the suit plots had not passed from him to the Plaintiff and the surveys of the suit

plots was nullified by the government. It cannot be discounted that the Plaintiff may have a cause of action against the Defendant, but a decision against him may not be enforceable unless the other necessary parties are impleaded. Mr. Lundu has submitted that failure to join a necessary party in the suit is cured by Order I Rule 9 of the Civil Procedure Code. I agree with him. The best this Court can do is to order that the two identified necessary parties be included as Defendants in this case. However, the fact that one of the parties to be impleaded is a statutory body who can only be sued upon fulfilment of certain conditions, the provisions cited by Mr. Lundu may not be of much help.

For the reasons I have endeavoured to discuss above, I find merits in the two Preliminary Objections. In lieu of striking out the suit with costs, I direct that the Plaintiff, if he still wishes to pursue his claims, is advised to sue the Defendant plus the other necessary parties. The suit is accordingly struck out with leave to refile, subject to limitation. Each party to bear their own costs.




Y. B. Masara

JUDGE

6th November, 2020