

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

MISC. LAND APPLICATION NO. 20 OF 2019

(Originating from the High Court of the United Republic of Tanzania Arusha District Registry, Land Case No. 2 of 2019)

TOM MORIO APPLICANT

Versus

MAIMUNA MOHAMED 1ST RESPONDENT

ATHUMAN HASSAN 2ND RESPONDENT

RULING

27th November & 15th December, 2020

Masara, J.

The Applicant has preferred this application under Order I Rule 10(2) of the Civil procedure Code, Cap 33 [R.E 2002] seeking to be joined as a co-Defendant in Land Case No. 2 of 2019 pending before this Court. The application is supported by the affidavit of Applicant himself. The first Respondent did not oppose the application. The 2nd Respondent contested the application by filing a counter affidavit deponed by Ms Edna Mndeme, learned counsel for the 2nd Respondent.

The brief facts leading to this application are as follows: The Applicant is said to have bought a house in Plot No. 39, Certificate of Title No. 23262, Block "G", L.O No. 253173 within Arusha City (the suit property) from one Hassan Mohamed Siara on 27/9/2013. The 2nd Respondent is the son of the late Hassan Mohamed Siara, as well as the administrator of the estate of his late

father. Having bought the suit property, the Applicant applied for and managed to transfer ownership and procured Certificate of Occupancy of the suit property in his own name on 3/12/2013. Thereafter a dispute ensued between the Applicant and the 2nd Respondent. The 2nd Respondent was the Plaintiff in Land Case No.40 of 2014 while the Applicant, Wilfred Justine Mollel and Azania Bank Ltd were Defendants therein. In that case, it was alleged that Mr. Wilfred Justine Mollel forged the signature and pretended to be the late Hassan Mohamed Siara and sold the suit property to the Applicant in 2013 while the late Hassan Mohamed Siara had died in 2011. This Court Opiyo, J, declared the sale agreement dated 17/9/2013 void. The Applicant was ordered to surrender the certificate of title No. 23262 regarding the suit property to the Assistant Registrar of Titles for cancelation. On the other hand, the Registrar of Titles was ordered to revoke the certificate of title in the name of the Applicant and issue a new certificate in the name of the late Hassan Mohamed Siara. The Applicant was ordered to recover the purchase price of Tshs. 284,000,000/= from the fraudster, Wilfred Justine Mollel.

The Applicant was dissatisfied, he lodged an appeal to the Court of Appeal vide Civil Appeal No. 179 of 2019. While the appeal is pending in the Court of Appeal and the certificate of Title is still in the name of the Applicant, the 1st Respondent, on 21st December, 2018, entered a caveat in the land register claiming interest on the suit property. The 1st Respondent's interest over the suit land was premised on the grounds that prior to the death of the late Hassan Mohamed Siara, the suit property belonged to the 1st Respondent's mother, the late Aziza Langututi, and it was registered in her

own name. The late Hassan Mohamed Siara and the 1st Respondent are brother and sister respectively. After the death of their mother, the late Hassan Mohamed Siara processed a new certificate of title in his own name, therefore being the beneficiary of the late Aziza Langututi's estate and the only surviving daughter, the 1st Respondent claims her share in the property that belonged to her mother. Having noted the caveat in the Land register, the 2nd Respondent instituted Land Case No. 2 of 2019 against the 1st Respondent before this Court seeking declaration that the suit property belongs to the estate of the late Hassan Mohamed Siara and the 1st Respondent be stopped from interfering with the suit property.

It is at that juncture that the Applicant also sought to be joined in Land Case No. 2 of 2019 as a party on 5/9/2019 considering that the title over the suit property is in his name and the interest he has over the suit property. At the hearing of the application, the Applicant was represented by Mr. Steven Mushi, learned advocate, the 1st Respondent was represented by Mr. Daniel Lyimo, learned advocate while the 2nd Respondent was represented by Ms. Edna Mndeme, learned advocate. The application was heard orally. As hinted earlier, the first Respondent did not oppose the application.

Mr. Mushi prayed to adopt and rely on the affidavit in support of the application forming it part of his submission. Submitting on the substance of the application, Mr. Mushi contended that the Applicant seeks to be joined as a defendant in Land Case No. 2 of 2019 because he has an interest over the suit property which is subject of the suit. Mr. Mushi added that the

certificate of title is in the Applicant's name and the nature of the reliefs sought in the suit are about declaration of the ownership of the suit property which if granted he will be adversely affected. In support of his argument, he cited the case of ***Claude Roman Shikonyi Vs. Estomy A. Baraka***, Civil Revision No. 4 of 2012 (unreported) which interpreted Order I Rule 10(2) of the CPC.

It was Mr. Mushi's further contention that if the Applicant is joined in the main suit, it will enable the Court to answer all questions involved in the suit, which is condition precedent under Order I Rule 10(2) and the Court of Appeal decision in ***21st Century Food and Packaging Ltd Vs. Tanzania Sugar Producers Association and 2 Others***, Civil Application No. 91 of 2003. Mr. Mushi substantiated that the Applicant's inclusion will be vital in giving answers to vital issues especially relating to the ownership, thus avoiding multiplicity of suits and according the Applicant the right to be heard which is fundamental right.

Contesting the application, Ms Mndeme contended that she opposes the application basing on the fact that the Applicant was the defendant in Land Case No. 40 of 2014 and the 2nd Respondent was the plaintiff. Therefore, if this application is allowed, there will be a possibility of having two judgments which may be conflicting. The learned counsel continued to state that the decision was made by a High Court Judge where the Applicant lost the case and the 1st Respondent was declared the lawful owner of the suit property. Therefore, two judgments on the same subject from the same court are not

called for. Ms. Mndeme challenged the authorities cited by Mr. Mushi stating that they are distinguishable because the Applicants in those cases were never heard. Regarding the pending appeal, Ms Mndeme was of the view that the same involves different parties. The learned advocate invited the court to dismiss the application with costs.

On a short rejoinder, Mr. Mushi reiterated his earlier submissions adding that there is no possibility of having two conflicting decisions as the High Court is not the final Court in determining the parties' rights since the Court of Appeal can revise the same. Further, Mr. Mushi argued that the cause of action in Land Case No. 40 of 2014 and that of Land Case No. 2 of 2019 are different, the reliefs sought are also different. The possibility of having two conflicting judgment does not, in his opinion, arise.

I have given considerable weight to the Applicant's affidavit and the counter affidavit both in support and against the application and the arguments of the rival counsel for the parties. The pertinent issue for consideration is whether the Applicant qualifies to be joined as a defendant in Land Case No. 2 of 2019.

The joinder of a necessary party in a suit is procedural in nature and, accordingly, the person who ought to have been joined has to demonstrate his/her interest to the extent that his presence in the suit is necessary to enable the court to effectually and completely adjudicate upon and settle all

questions involved in the suit. The application is made under Order 1 Rule 10 (2) which provides:

*"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.**"* (emphasis added)

From the above provision of the law, the decisive factor to consider before a person is joined as a defendant in a suit is whether his presence in that case will enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The above provision was well construed by the Court of Appeal in the case of **21st Century Food and Packaging Ltd Vs. Tanzania Sugar Producers Association and 2 Others** (supra) where the Court had the following to say regarding Order I Rule 10(2):

*"On a proper construction of Order I Rule 10(2) of the Civil Procedure Code and application of the guiding principles as discerned from Mulla's commentaries to the facts of the case, we are increasingly of the view that the appellant's presence before the court was necessary in Civil Case No. 85 of 2003. In our view, **the appellant's presence in court in this case would enable the court to effectually and completely adjudicate upon issues raised in the suit regarding tax exception of imported industrial sugar. All the more so, where, as in this case, the appellant centrally featured in the plaint and had applied to be joined in the suit.**"* (emphasis added)

In the case of ***Claude Roman Shikonyi Vs. Estomy A. Baraka***, (supra), the Court of Appeal quoted the ancient decision of the defunct East African Court of Appeal in ***Departed Asians Properties Custodian Board Vs. Jaffer Brothers Ltd*** [1999] EA 55 which is persuasively instructive. In that case, the Supreme Court of Uganda, Mulenga, JSC, made the following observation-

*"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].

See also ***Stanslaus Kalokola Vs. Tanzania Building Agency and Another***, Civil Appeal No. 45 of 2018; ***Mussa Chande Jape Vs. Moza Mohammed Salim***, Civil Appeal No. 141 of 2018; ***Farida Mbarouk & Another Vs. Domina Kagaruki***, Civil Application No. 79 of 2006 (all unreported)

In the instant application, it is apparent on record that the Applicant was the defendant in Land case No. 40 of 2014. It is also on record that the certificate of title in respect of the suit property in Plot No. 39, Certificate of Title No. 23262, Block "G", L.O No. 253173 within Arusha City is currently registered in the name of the Applicant. Furthermore, the record reveals that there is a pending appeal before the Court of Appeal regarding the same suit property, Civil Appeal No. 179 of 2019, which was filed by the Applicant having lost in Land Case No. 40 of 2014. The question that one needs to ask is whether the presence of the Applicant in Land Case No. 2 of 2019 is necessary to enable the court to effectually and completely adjudicate upon and settle all the questions involved in that suit. As intimated earlier on, in Land Case No. 2 of 2019, the first Respondent prays for declaration that the suit property is entitled to the heirs of the late Aziza Langututi. This has the same effect as determining ownership of the suit property.

In this case, there is no way that the claim of ownership of the disputed property, which the 2nd Respondent intends to prosecute against the 1st Respondent, may proceed without questions about the current ownership of the same being raised. As stated above, the certificate of ownership of the suit property is in the name of the Applicant. Determination of ownership in the said suit in the presence of the Applicant will enable the court to effectually and completely adjudicate all questions involved in the suit property.

In line with this, the presence of the Applicant in Land Case No. 2 of 2019 will bar multiplicity of suits likely to be filed regarding the same property. I hold this view because whoever will be declared the lawful owner of the suit property in that case (between the 1st and 2nd Respondent) may be subsequently required to file a suit claiming ownership of the suit property against the Applicant if his ownership is pronounced by the Court of Appeal. To avoid such a quagmire, it is befitting that the Applicant be allowed standing, as a co-defendant in Land Case No. 2 of 2019.

I note that Ms Mndeme strongly believes that the pending Appeal in the Court of Appeal has no effect over the suit in Land case No. 2 of 2019 as it involves different parties. This may not be exactly true as the intended appeal relates solely on the ownership of the suit property. With that, it is the view of this Court that the Applicant is a necessary party whose presence is unavoidable to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the ownership of the suit property. His non-joinder will render the decree ineffective.

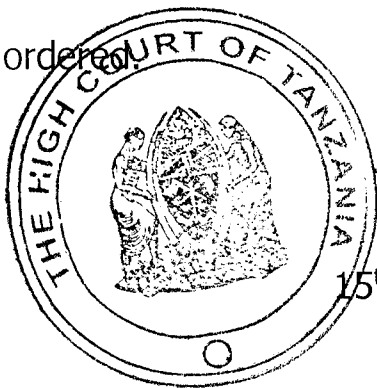
I further note that Ms. Mndeme strongly believes that if the Applicant is joined there will be two judgments which might be conflicting. Ideally, this may happen if a decision is given conflicting with the earlier decision. To avoid this, the Court well aware of the previous decision regarding some of the parties herein, will take cautions necessary to avoid that conflict to occur. Also dismissing the application will amount to denying the Applicant the fundamental right to be heard as enshrined under Article 13(6)(a) of the


Constitution of the United Republic of Tanzania. This was also observed by the Court of Appeal in the case of ***Shaibu Salim Hoza Vs. Helena Mhacha (as a legal Representative of Amerina Mhacha (Deceased))***, Civil Appeal No. 7 of 2012 (unreported); where the Court of Appeal made the following observation regarding non-joinder of a necessary party:

*"With these facts, in our view, the joining of Dar es Salaam City Council in the suit would be necessary to enable the trial court to effectually and completely adjudicate upon the issue raised in the suit regarding the actual and real owner of the suitland. **Above all, it would have afforded, Dar es salaam City Council an opportunity of being heard. To do so, would be in conformity with the principles of natural justice i.e according an opportunity to a party to be heard in a matter which directly affects the party.**"* (emphasis added)

When all is said and applied to the application at hand, it is beyond question that the Applicant has an interest on Plot No. 39, Block "G", Certificate of Title No. 23262, L.O No. 253173 within Arusha City, and therefore he is a necessary party in the High Court Land Case No. 2 of 2019. Taking into account all the above stated factors and the authorities cited, I find merits in the application. In the event, I allow the application. The Applicant to be joined as a co-defendant in Land case No. 2 of 2019 within 30 days from the date of this ruling. The Costs shall abide to the outcome of the main cause.

It is so ordered.




Y. B. Masara
JUDGE

15th December, 2020