**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LAND REFERENCE NO 02 OF 2020**

***(Arising from Land Application No. 84 of 2018 of Shinyanga District Land and Housing Tribunal)***

**YUSUPH MAKUNGA.....1ST APPLICANT**

**JOLAM MASHAMBA.....2ND APPLICANT**

**VERSUS**

**SERIKALI YA KIJIJI CHA MWAMALASA..... RESPONDENT**

**RULING**

***25th March & 23rd April, 2021***

**MKWIZU, J.**

This is a ruling on a matter that was refereed to this court by the Chairperson of the District Land and Housing tribunal through its ruling dated 18th March 2020 in which several issues were raised and forwarded for this court's determination.

Before I go to determining the pointed issues, I think it pertinent to set the background fact of the matter. Gathered from the records is that One person named **JOLAM MASHAMBA** had on 8/9/2016 filed Land Application No 47

of 2016. The application was against **BENJAMIN JOEL** and **ISONGA IZENGO.**

The application was for the claim of land situated at Mwamalasa Village in Mwamalasa Ward in Kishapu District measuring 75 acres worth 7,500,000/=. The cause of action was said to be interference/ trespass on the suit land by the respondents which happened in the year 2015 and that the amicable settlement means proved futile.

On 17/10/2016 Respondents, **BENJAMIN JOEL** and **ISONGA IZENGO.** filed their joint Written Statement of Defence in which they admitted each and every claim on the application. They in paragraph 7 of the Written Statement of Defence specifically expressed their willingness to hand over the suit land to the applicant.

In its judgement, the Tribunal granted the application and ordered "**Serikali ya Kijiji cha Mwamalasa**" to be hand over the suit land. This order was followed by a tribunal's letter dated 31/10/2016 to the WEO for Mwamalasa Ward for handing over of the suit land to the applicants . It seems execution was not carried out. **Yusuph Makunga** and **Jolam Mashamba**, filed execution application vide Misc. application No 84 of 2018 against the

respondent in the proceedings - **SERIKALI YA KIJIJI CHA MWAMALASA**. Respondent through Mr.Bernard Kandaga Solicitor for Kishapu District council raised a preliminary objection that ***the judgement debtor was not a party to the application and that the proceedings and the judgement copy inclusive contains serious irregularities.*** He on hearing, contended that respondent was not a part to the application and therefore could not be made a part to the judgment or execution proceedings. He requested the tribunal to set aside its decree . Decree holder's advocate opposed the preliminary objection and argued that at any rate the tribunal cannot set aside its own decree for it is functus official.

While agreeing with Mr. Frank, advocate for the decree holder that the tribunal cannot set aside its own decree, the tribunal chairperson was of the view that the records are silent on how the Judgement debtor was included in the proceedings , judgment and decree. He on that bases, refereed the matter to this court for directions under section 77 of the Civil Procedure Code (Cap 33 R:E 2002). Six issues were drawn and forward as follows:

i. *Whether it was proper to include the judgement debtor who was not pleaded on the suit filed, in the proceedings, judgement and decree issued by this Tribunal. More far without being heard.*

ii. *Whether it was proper to include the 1st decree holder in the proceedings, judgement and decree in this tribunal while he was not a part to the filed proceedings*

iii. *Whether the decree can be executed against judgement Debtor who is not a legal entity*

iv. *Whether parties can be joined on the suit without amendment of pleadings*

v. *Whether the mode of execution preferred against the Government is proper in law and in procedure*

vi. *Other order as the court shall deem proper to be issued in the circumstances of the suit which proceeded before the tribunal being application no 47 of 2016*

When the matter was called on for hearing, Mr Frank Samwel learned advocate appeared for the applicant while Mr. Solomoni Lwenge, learned senior State Attorney assisted by Musa Mpogole and Geofrey Kalenda all State Attorneys appeared for the respondent

In his submissions, Mr. Frank, first attacked the reference arguing that, the ruling that referred the matter to this court had no opinion of the referring Chairperson per Order XLI Rule I, of the CPC.

Arguing the 1st 2nd and 4th issues raised by the tribunal, Mr. Frank said, the original suit contained no name of Mwamalasa village or the 1st Decree

Holder as parties, but they were impleaded later on, through amendment of the pleading. The representative of the village admitted the facts/claim in the plaint leading to the judgment in admission when asked on whether he has a copy of the alleged amendment of the application at the trial tribiunal, Mr Frank said he had no copy he was just so informed by his client.

On the 3rd issue Mr Frank was of the view that at the village level, the village and the Village council have no difference. The omissions to name the Judgment Debtor as a village instead of Village Council is not fatal . It is curable under the principles of overriding objectives.

On the 5th issue which questioned whether the mode of execution preferred was a proper mode against the Government, Mr Frank submitted that it was proper in law. He elaborated that, Execution against the Government goes the same way like other normal executions. He prayed for the remission of the file to the DLHT to enable parties proceed with the Execution of the decree.

On the other hand, Mr. Geofrey Kalenda , learned State Attorney supported the reference. He submitted that the issues before the court were refereed in accordance to the provisions of Order **XLI**. On its ruling, stated Mr Kalenda, the DLHT, Chairperson drew up the case, pointed out the doubts and drew up the issues for this court's determination and therefore it is proper.

On the 1st and 3rd issues, the Learned State Attorney stated that the judgment debtor was included as a party on the proceedings and judgment without being a party to the pleadings .He was of the view that, the judgment was improper on two aspect, one, that Judgment debtor being not a party, she was not afforded an opportunity to be heard contrary to the rules of natural justice as enshrined under Article 13 (6) (a) of the constitution of the United Republic of Tanzania. Secondly, stated Mr. Kalenda, the respondent was cited as Serikali ya Kijiji cha Mwamalasa which is not the legal entity. He stressed that the legal entity is Mwamalasa Village council. He refereed the court to the written Laws (Misc. Amendment) Act of 2002, Act No 1 Part IX section 30 which amends section 26 of the Local Government District Authority Act, Cap 287 and cited the case of **National**

On the 2nd and 4th issue, Mr Kalenda said, 1st Decree Holder was improperly included in the judgment and that parties cannot be joined in the suit without amendment of the pleading. He cited to the court section 16 (1) (2) of the Government Proceeding Act, Cap 5 which provided for the proper execution procedures against the government stressing that the procedures were not followed and invited the court to quash the proceedings, decree and judgment of the DLHT and give any interested part an option to file a fresh suit against a proper party if so wishes .

I have given the reference and the parties submissions a due consideration. I will begin with the issue of competency or otherwise of the reference as raised by the applicant's counsel. As hinted earlier on, this application came about by reference by the Trial tribunal via its ruling dated 18th March 2020 made under section 77 of the Civil Procedure Code (Cap 33 RE 2002 now RE 2019). The section reads:

> *"Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of*

*the High Court and the High Court may make such order thereon as it thinks fit."*

In his submissions, Mr Frank faulted the tribunal for not stating the case and express its own opinion before making the said reference contrary to the provisons of Order XLI rule I of the CPC. The rule says:

> **"** *Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties,* ***draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court."( Emphasis added)***

I have gone through the ruling which initiated this matter. With due respect to the applicant's counsel, the tribunal did what it was required of. As rightly submitted by Mr. Kalenda, in its ruling, trial tribunal did draw up the statement of the facts of the case, pointed out the doubt on the proceedings and made reference with its opinion. This is indicated at page 1 and 2 of the tribunals' ruling. The applicant's worries on the competence of the reference is therefore without merit.

I will now move to the tribunals raised issues . 1st, 2nd and 4th issues are connected. I will therefore determine them together. In these issues, the court is called upon to determine whether it was proper to include the 1st decree Holder and judgement debtor, who were not pleaded on the suit, in the proceedings, judgement and decree without an amendment.

I have perused the entire proceedings nothing on the records indicates how the 1st Applicant and the judgment debtor came into the proceedings. It is evident on the records that application No 47 of 2016 was filed on 8/9/2016. The application partly reads:

***"IN THE DISTRICT LAND AND HOUSING TRIBUNAL***

***FOR SHINYANGA***

***AT SHINYANGA***

***APPLICATION NO 47 OF 2016***

***JOLAM MASHAMBA.....APPLICANT***

***VERSUS***

***1.BENJAMINI JOEL.....RESPONDENT***

***2.ISONGA IZENGO***

***APPLICATION***

***1. Name and address of the applicant***

*That the applicant named above, JOLAM MASHAMBA, is ana adult person, the resident of of Kishapu District, Mwamalasa Ward in Mwamalasa Village and for the purpose of service of any document concerned with this suit, is in the care of:-*
*WEO,*
*Mwamalasa ward,*
*Kishapu District.*

***2. <u>Name and address of the respondents</u>***

i. *That the 1st respondent, Benjamini Joel is an adult person, the resident of of Kishapu District, Mwamalasa Ward in Mwamalasa Village and for the purpose of service of any document concerned with this suit, is in the care of:-*
*WEO,*
*Mwamalasa ward,*
*Kishapu District*

ii. *That the 2nd t respondent, ISONGA IZENGO is an adult person, the resident of of Kishapu District, Mwamalasa Ward in Mwamalasa Village and for the purpose of service of any document concerned with this suit, is in the care of:-*
*WEO,*
*Mwamalasa ward,*
*Kishapu District."*

The application was admitted, registered and file was processed. The registration of the case, however, indicated parties as **Yusuph Makunga** and **Jolam Mashamba** as applicant and **Serikali ya Kijiji cha**

**Mwamalasa** as respondent contrary to the application that was filed on the same day by the 2nd applicant.

Mr Frank Samwel submitted that these parties were impleaded through amendment. On being asked on whether he has a copy of the same, he claimed to have been so informed by his client and that he had no copy. I find this assertion to be a naked lie. If that was the case, then parties on the initial stages of the application would have read as indicated on the pleading. The records as they are, do not suggest any possibility of having being amended because the inclusion of the 1st applicant (decree holder) and the respondent (judgment debtor) to the proceedings was done on the first day of the proceedings without explanation.

The suit as it is, was initiated by Jolam Mashamba, no document in the court by the 1st Decree holder( applicant) was filed in court. In other words, there is no claim in the records by the 1st applicant against any person.

More shocking, is that while the application No 46 of 2016 was registered on 8/9/2016 as against Serikali ya Kijiji Cha Mwamalasa, **Benjamini Joel** and **Isonga Izengo filed their** Written Statement of Defence on 17th

October 2016 almost 40 days later admitting the whole claim brought by the 2nd applicant

It should be noted here that this is a civil matter where a case is instigated by one party against another party and the court or tribunal decides the rights and liabilities of the parties. For a party to appear as a plaintiff or applicant must have a claim against the other named person, and for a party to appear as defendant or respondent there must be a legal claim against him or her presented for courts determination.

Th claim before the tribunal was so detailed that it accused the respondents **Benjamini Joel** and **Isonga Izengo** mentioned on the pleadings for trespass on the suit land. Paragraph 6 of the application stipulated thus:

*"Par 6 (a)* ***Cause of Action and facts constituting the claim***

i. *The cause of action arose at Mwamalasa Village in Mwamalasa ward in Kishapu district*
ii. *That, historically, the disputed property was in the ownership of the late Mbigili Mpume*
iii. *That the applicant acquire the said property on the 5th June 1999 by being allocated the same from the former owner ( his father) of the disputed property in paragraph 6(a)(ii) before their death*
iv. *That, from the date the applicant was allocated, the disputed property the applicant enjoyed the use of the land in question by cultivating and growing several crops until the November,*

*2015 when the respondent's entered in the disputed property and started cultivating the disputed property and renting the same to other residents*

v. *That, the applicant has used all his endeavor to have this dispute solved amicably without success*

vi. *That, the cause of action arose in Kishapu District and therefore this tribunal has both pecuniary as well as territorial jurisdiction"*

Item iv of paragraph 6 above direct the claim against the respondents who are not part of these proceedings today.

In the proceedings YUSUPH MAKUNGA was indicated as 1st applicant and JOLAM MASHAMBA as the 2nd applicant. Respondents also changed, instead of the two named respondents above, the proceedings indicated SERIKALI YA KIJIJI CHA MWAMALASA as respondent. How they got out of the proceedings, and why is not disclosed. And how and why the 1st applicant and respondent came in the proceedings ,the records is also silent.

In our jurisdiction, parties to a suit are governed by Order I of the CPC. I understand that to join a party as a plaintiff, provisions of Order I rule I must be fulfilled. Order I rule 10 allows substitution or addition of parties to the suit whether plaintiff or defendant at any stage of the proceedings but for

this to be done the court must be satisfied that the suit has been so instituted through a bona fide mistake, and that the addition or substitution of a party is necessary for the determination of the real matter in dispute . This is not the case here.

After its filing on 8/9/2016, the records shows that the application was adjourned for issuance of summons to the parties. Only applicant was present in court on that date. The application was set for mention on 29/9/2016. On 29/9/2016, both parties were present. However, the records is silent as to who represented the respondent on the matter. The application was on this date adjourned to 6/10/2016 for mention where parties were marked absent and the matter was set for mention on 20/10/2016

On 20/10/2016 applicants and respondent were present before the tribunal. Isonga Izengo and Benjamini Joel original respondents in the application were indicated to have appeared for the respondent. They again, admitted the claim, this time on behalf of Serikali ya Kijiji cha Mwamalasa.

The proceedings of that date go thus:

*"20/10/2016*

*Corum*

*E.F.Sululu- Chairman*

*Applicants-Present*

*Respondent-Present*

*Clerk-Upendo S, Chalamila*

*Isonga Izengo (VEO) and Benjamini Joel (Village Chairman) for the Respondent.*

***Tribunal:*** *The application comes for hearing*

***Applicants****: your honour, we are ready to proceed with the hearing. We pray to proceed.*

***Respondent's Representatives****: Your honour, we have no objection with regard to the application filed by the applicants. We are ready to hand the suit land to the applicants herein. That is all.*

***Tribunal:****Since the respondent's Representatives do not object the applicant's application with prayers prayed in it, let judgement date be fixed.*

***Order:***

*i. Judgement on 24/10/2016*
*ii. Parties dully informed*

*E. F. Sululu*
*Chairman*
*20/10/2016"*

Generally, the record is silent on how and why parties changed. This, in my view is incorrect, first of all, the new parties are not a reflection of the applicant's original claim. This is a civil suit which must find its base on a cause of action against the defendant / respondent. As defined in several

cases in our jurisdictions, a cause of action means every fact, which, if traversed it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. It is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant . See for instance **John Mwombeki Byombalirwa v Agency Maritime Internationale(T) LTd ( 1983)** TLR1. In this case, though the cause of action brought for the tribunals determination was against **Benjamini Joel** and **Isonga Izengo**, the application proceeded against a different entity, Serikali ya Kijiji cha Mwamalasa whose presence in the application is incomprehensible. She was brought in without any claim by any party.

Secondly, 2nd Decree holder YUSUPH MAKUNGA was brought in the proceedings without justification as he had not filed any claim against the respondent or anybody. He for that matter had nothing in expression indicating the infringement of his rights by the respondent. In an English decision of **R v Paddington, Valuation Officer, ex-parte Peachey Property Corpn Ltd** [1966] 1QB 380 at 400-1 it was observed that:

*"The court will listen to anyone whose interests are affected by what has been done."*

The tribunal had nothing brought before it by the 1st decree holder ( applicant) for adjudication and therefore it could not award something which was not asked for. Reading the pleadings and the proceedings, there is no connection between applicants and the respondent. But more seriously, there is no connection whether express or limpidly between the filed application by the 2nd applicant, 1st decree holder and the respondent in the proceedings under scrutiny. The pointed out irregularities above in my considered view, are serious and fatal. They cannot be saved by the oxygen principle as suggested by Mr Frank for the applicants.

The 3rd and 5th issues require this court to determine if the execution is proper for being directed to a person not a legal entity and whether the execution procedures against the government were followed. I think these issues should not detain the court. Having concluded above that 1st applicant and respondent (judgement debtor) was not a party to the suit, the proceedings are a nullity and therefore determining of the rest of the

issues would be just an academic exercise which I am not proposing to assume.

That being the case, I allow the reference, I quash the proceedings of the trial court in Land application no 47 of 2016, its judgment, decree and the resultants orders. Given the circumstances of the confusion and the proceedings, I think retrial would not be an appropriate order. On its stead the matter is nullified on its entirety, an interested party, may, if so wishes, file in the appropriate registry land matter in respect of the suit land, of course subject to the Law of Limitation.

Given the circumstances and the general nature of the matter, each party is ordered to bear owns costs.

It is so ordered.

**DATED** at **SHINYANGA** this **23rd h** day of **April, 2021**.


**E.Y. MKWIZU**
**JUDGE**
**23/4/2021**