

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

LAND APPEAL NO. 39 OF 2018

(Arising from Judgment of the District Land and Housing Tribunal for
Tabora in Land Application No. 7 of 2017 – Waziri M. H – Chairman
dated 5/11/2018)

KHADIJA ALLY ALMASI APPELLANT

VERSUS

THE TABORA MUNICIPAL COUNCIL.....1ST RESPONDENT
ABDALLAH ALLY REMTULA.....2ND RESPONDENT
ERIC ANTHONY BAHARIA.....3RD RESPONDENT

JUDGMENT

Date of Last Order: 28/05/2021

Date of Delivery: 14/07/2021

AMOUR S. KHAMIS, J:

Khadija Ally Almasi instituted a suit in the District Land and Housing Tribunal for Tabora against the Tabora Municipal Council, Abdallah Ally Remtula and Eric Anthony Baharia for declaration that she was the lawful owner and thus entitled to administration or rather occupation of Plot No. 94, Block “DD”, Gongoni Street in Tabora Municipality.

She also moved the tribunal to make an order of eviction against the respondents from the suit premises measuring 866m² and for an order of perpetual injunction to restrain the respondents, their workmen, servants, agents, assigns and whosoever acting through them from interfering with her peaceful enjoyment of the suit plot.

According to her pleadings, she owned the suit plot by virtue of a certificate of title and paid land rents up to date for the period between 2013 and 2017.

She averred that in an unknown date, Tabora Municipal Council without revoking her ownership over the disputed land, re - allocated the plot to Abdallah Ally Remtula who then sold it to Eric Anthony Baharia.

She contended that Abdallah Ally Remtula and Eric Anthony Baharia unlawfully occupied the disputed land and prevented her from exercising her proprietary rights over the plot.

It was further pleaded that in or about the year 2008, Abdallah Ally Remtula trespassed into the suit plot and heaped building materials (rocks) and took possession of the plot regardless of her good title.

In a Written Statement of Defence, the Tabora Municipal Council vehemently disputed claims by Khadija Ally Almasi and challenged her to a strict proof thereof.

No Written Statement of Defence was filed by Abdallah Ally Remtula but Eric Anthony Baharia pleaded that he

bought the disputed plot from one Shiraz A. Remtula on 19th February 2007 and not from Abdallah Ally Remtula as alleged.

Trial started on 16/10/2017 before Hon. M. Nyaruka, Chairman whereby PW 1 Khadija Ally Almas testified.

On 20/11/2017 parties appeared before Hon. Waziri, M.H, Chairman. It was reported that Hon. Nyaruka was transferred to Kigoma.

Trial continued on 7/05/2018 before Hon. Waziri M. H, Chairman whereby Stumai Ally Almas (PW 2) testified.

Subsequently, Lazaro John (DW 1) Stanley Nathaniel Yungu (DW 2), Eric Anthony Baharia (DW 3) and Juma Maganga (DW 4) testified.

In its Judgment, the trial tribunal chose to believe a version of story given by the Tabora Municipal Council and declared Eric Anthony Baharia as the lawful owner of the disputed plot.

Disgruntled, Khadija Ally Almasi entreated this Court to revisit the trial tribunal's findings on seven grounds of attraction that can be conveniently rephrased as hereunder:

1. That the trial tribunal erred in law and in fact in failing to evaluate the evidence before it thus arriving at a wrong judgment.
2. That the trial tribunal erred in law and fact to hold that Eric Anthony Baharia bought the house

on 19/02/2008 while there was no evidence to prove the same.

3. That the trial tribunal erred in law and in fact to hold that Eric Anthony Baharia has a right of use of the plot while there was no proof that he bought the plot.
4. That the trial tribunal erred in law and in fact to rely on a story based solely on hearsay, irrelevant and speculative evidence contrary to the evidence on record and consequently arrived in a wrong judgment.
5. That the trial tribunal erred in law and in fact to nullify the registered plan no. 67891 which was not an issue before it and affecting occupants to other plots who were not parties contrary to the principle of natural justice.
6. That the trial tribunal erred in law and in fact in failing to evaluate the evidence before it as it failed to consider a document tendered by the third respondent which had nothing to do with the land in dispute hence ordering re-survey was unjust decision.
7. That while considering that Plot No. 94 belonged to the appellant, the trial tribunal erred in law and in fact in holding that the appellant's right

was limited to her house and its boundary and not otherwise.

Both in the trial tribunal and before this Court, Khadija Ally Almasi was advocated for by Mr. Emmanuel Musyani, learned advocate.

The Tabora Municipal Council was represented by Mr. Kullaba Doto, learned solicitor while Mr. Mugaya Kaitila Mtaki and Ms. Theresia Fabian, learned advocates, acted for Eric Anthony Baharia, the third respondent.

The appeal proceeded *ex parte* against Abdallah Ally Remtula who was served with the summons by way of publication in the Mwananchi Newspaper of 29th August 2020.

Both sides complied with the order of the Court for filing written submissions on the grounds of appeal.

I have exhaustively read the parties' rival submissions as presented by their respective counsel. For convenience purposes, relevant excerpts will be referred to in the course of addressing the grounds of appeal.

It is trite law that the first appellate Court has the duty to review the evidence on record. This legal position has a direct bearing to the first ground of appeal in which the trial tribunal was faulted for failure to evaluate the evidence before it.

I therefore intend to start with the first ground of appeal which from its substance, is directly related to the second,

third, fourth and sixth grounds. These grounds of appeal will therefore be tackled jointly.

However, before I do that, I am constrained to address the issue that glaringly featured on the face of the record but was not attended to by the trial tribunal. This is in relation to non - joinder of Shirazi A. Remtula, one who allegedly sold the disputed land to Eric Anthony Baharia.

For no apparent reasons, the trial tribunal heavily employed steps to ensure appearance of Abdallah Ally Remtula despite of clear allegations in the Written Statement of Defence by the third respondent that the property in dispute was sold to him by Shiraz A. Remtula and not Abdallah Ally Remtula.

It is trite law that when one party affirms and the other party denies a material proposition of fact or law, then an issue arise. If there is no specific denial, the question of framing issues does not arise.

It is mandatory on the part of a trial Court to frame all necessary issues arising from pleadings i.e material proposition of fact and law affirmed by one party and denied by the other.

In the present case, pleadings show that Khadija Ally Almasi who was the applicant in the trial tribunal alleged that:

"6. (a) (ii) That on a date unknown to the applicant and without any notice to the applicant, the

first respondent purported to have relocated the applicant's land to one Abdallah Ally Remtula (the 2nd respondent) without any revocation and the second respondent sold the same disputed land to Eric Anthony Baharia (the 3rd respondent). The applicant submits that such re – allocation in whatsoever manner and which has not been revoked to date was illegal.”

In a Written Statement of Defence, Eric Anthony Baharia replied to the above allegation in the following manner:

“5. (a) (ii) That the vague allegation by the applicant in paragraph 5 (a) (ii) of the application that on an unknown date the 1st respondent allocated the applicant's land to one Abdallah Ally Remtula is denied and the applicant is put to strict proof of such allegations. The 3rd respondent further denies the allegation that he purchased the applicant's piece of land from Abdallah Ally Remtula (2nd respondent) but states that he purchased the house on Plot No. 34, Block J, Manyema Street, Gongoni area in Tabora Municipality from one SHIRAZ A. REMTULA as per deed of transfer executed on 19th February 2007 a photocopy of which is herewith attached and marked “BAHARIA” for reference.”

Three issues were framed by the trial tribunal, to wit:

- i) Whether the 2nd respondent had trespassed to the applicant's land.

- ii) Who between the applicant and 2nd respondent is the lawful owner of the disputed land.
- iii) To what reliefs does (sic - are) the parties entitled (to)?

From the above framed issues, it is obvious that the trial chairman did not pay attention to the allegation relating to Shiraz A. Remtula who was assumed to be identical to Abdallah Ally Remtula. This was wrong.

It is generally accepted by judges and other legal professionals that framing of proper issues is an absolute necessity for effective disposal of the matter in dispute.

However, the law is that mere non - framing of a specific issue will not be sufficient ground to set aside a judgment if parties have led evidence and gone into trial knowing the real nature of dispute involved.

In the present matter, the issue was not mere non - framing of an important issue but rather a non - joinder of a necessary party to the case.

Order 1 Rule 3 of **THE CIVIL PROCEDURE CODE, CAP 33, R.E 2019** provides that all persons may be joined as defendants against whom any right to relief respect of or arising out of the same act or transaction is alleged to exist.

A party may be joined jointly, severally or in the alternative where common questions of law or fact would arise.

Order 1 Rule 9 of **THE CIVIL PROCEDURE CODE** (supra) provides that no suit shall be defeated by reason of the misjoinder or non - joinder of a party 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.

In **ABDULLATIF MOHAMED HAMIS V MEHBOOB YUSUF OSMAN AND FATNA MOHAMED, CIVIL REVISION NO. 6 OF 2017** (unreported), the Court of Appeal had opportunity to analyse various provisions of Order 1 of the Civil Procedure Code.

Among others, the Court of Appeal held that:

“The CPC does not specifically define what constitutes a “misjoinder” or a “non - joinder” but, we should suppose, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1, Rules 1 and 3, respectively, and they are neither necessary nor proper parties, it is a case of misjoinder of parties. Conversely, where a person, who is necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non - joinder. Speaking of a necessary party, a non - joinder may involve an omission to join some person as a party to a suit, whether as plaintiffs or as defendants, who, as a matter of necessity, ought to have been joined.

Thus over the years, courts have made a distinction between necessary and non - necessary parties. For instance, in the case of **Departed Asians Property Custodian Board v Jaffer Brothers Ltd (1999) 1 E.A 55**, the Supreme Court of Uganda held that there was a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of one whose presence before the Court was necessary for it to effectively and completely adjudicate upon the questions involved in the suit (in this regard, the Court had considered and adopted the English case of **Amon v Raphael Tuck and Sons Ltd (1956) 1 ALLER 273**). That prompts the question as to who exactly fits the qualification of a necessary party.

Although there is no definite test to be applied in this connection, in the Indian case of **Banares Bank Ltd V Bhagwandas , A.I.R (1947) ALL 18**, the full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings: First, there has to be a right of relief against such a party in respect of the matters involved in the suit and, second, the court must not be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by Supreme Court of India

in the case of **Deputy Comm. Hardol V Rama Krishna, A.I.R (1953) S.C 521.**

We in turn, fully adopt the two tests and, thus on a parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no defective 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 facts 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.”

Commenting on Order 1 Rule 9 of **THE CIVIL PROCEDURE CODE** (supra), the Court of Appeal reasoned that:

“Despite being couched in mandatory language, we should think, there is an exception to the foregoing general rule. In this regard, it is noteworthy that by an amendment Act No. 104 of 1976, the Indian Code of Civil Procedure, Act V of 1908 added a rider through a proviso to its Rule 9 of Order 1 which, is, incidentally, word to word with our Rule 9. In the proviso, the Indian Rule excludes its applicability to cases of non – joinder of necessary parties. Our CPC does not have such a

corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only hold good with respect to the misjoinder and non-joinder of non – necessary parties. On the contrary, 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. It would be idle for a Court, so to say, to pass a decree which would be of no practical utility to the plaintiff.”

In the present dispute, Shiraz A. Remtula was alleged to have sold the disputed property to Eric Anthony Baharia, the third respondent herein and thus a necessary party for determination of the dispute.

Prior to that, it was averred, he was allocated the disputed Plot No. 94, Block “DD”, situated at Gongoni area in Tabora Municipality by the first respondent, Tabora Municipal Council.

A transfer deed in respect of the property between Shiraz A. Remtula and Eric Anthony Baharia was attached to the pleadings and formed part of the records.

Although this issue was not raised during trial, it presents a material query regarding composition of the suit

below. To ignore such an issue rendered a trial tribunal incapable of adjudicating real issues and passing an effective decree.

The next question is what would be the consequences of these findings.

In that direction, I am well guided by the Court of Appeal in the cited case of **ABDULLATIF MOHAMED HAMIS** wherein it exercised its revisional powers and struck out the plaintiff which had wrongly joined a defendant in personal capacity instead of her position as administratrix of the deceased's estate.

Borrowing a leaf from that decision, I am inclined to exercise the powers of this Court under Section 43 (1) (b) of **THE LAND DISPUTES COURTS ACT, CAP 216, R.E 2019** and Rule 10 of Order 1 of **THE CIVIL PROCEDURE CODE** and strike out the name of Abdallah Ally Remtula from the application for being wrongly pleaded as the second defendant.

Having done so, the entire proceedings in the trial tribunal fall to pieces as the judgment and the resultant decree follow suit and are hereby set aside.

The records are accordingly remitted to the trial tribunal from where the appellant may wish to re - institute the suit to be handed by a different Chairman and assessors. I make no order as to costs.

It is so ordered.



[Handwritten signature]
AMOUR S. KHAMIS
JUDGE
14/07/2021

Judgment delivered in open Court in presence of Ms. Esther Mchele advocate for the appellant and Ms. Elizabeth Kijumbe, advocate for the third respondent. Right of Appeal explained.



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AMOUR S. KHAMIS
JUDGE
14/07/2021