

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

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**LAND CASE NO. 4 OF 2020**

**LEONARD PETER ..... PLAINTIFF**

**VERSUS**

**JOSEPH MABAO ..... 1<sup>ST</sup> DEFENDANT**

**EPHRAIM STANLEY FIMBO..... 2<sup>ND</sup> DEFENDANT**

**GEOFREY JOSIAH MUSHEMA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*25<sup>th</sup> August, & 4<sup>th</sup> November, 2021*

**ISMAIL, J.**

A suit is pending in this Court, touching on the ownership of pieces of land, known as Plots No. 277 and 278 Block "G" Ilemela, Mwanza. The dispute pits the plaintiff against the defendants, and the plaintiff's prayer is for declaration that the said land lawfully belongs to him; and that the defendant's ownership is unlawful. This Court is urged to nullify the defendants' ownership.

The suit has encountered an impediment, coming by way of preliminary objections, raised by the counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The objections are to the effect that:



- 1. To the extent that the Plaintiff seeks orders for nullification of Certificate of Right of Occupancy in respect of Plots Nos. 277 & 278, Block "G", Nyakato, Mwanza, declaration that he is the lawful owner and rectification of the land register in respect of the said property, and to the extent that the Plaintiff has not joined the relevant land allocation authorities and the Register of Titles, this suit is incompetent; and*
- 2. In the alternative to ground number (i) above, this suit is incompetent for want of joinder of and/or failure to implead the Attorney-General and Registrar of Titles being necessary parties as per the mandatory provisions of sections 6 and 10 of the Government Proceedings Act (Cap. 5 R.E. 2019).*

These preliminary objections were argued by way of written submissions, filed by the counsel consistent with the drawn schedule. Kicking off the discussion was Mr. Malick Hamza, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He submitted that, given the nature of the reliefs sought by the plaintiff, need arises for impleading the land allocation and registration officers. This is in view of the fact that the said authorities are necessary parties, and that no effective decree can be passed by the Court without affording the said parties a hearing. Mr. Hamza took the view that Mwanza City Council and the Registrar of Titles are necessary parties whose word on how the land was allocated to the 1<sup>st</sup> defendant, the previous occupier, is

important and decisive. The said parties would also shed some light on the propriety or otherwise of the transfer of the disputed land to 2<sup>nd</sup> defendant and then to the 3<sup>rd</sup> defendant. Learned counsel argued further that a glance at paragraphs 5, 15 and 17 of the plaint, together with the reliefs point to the fact that the nullification and/or rectification of the title to the suit plots; and the declaration of ownership in the plaintiff's favour are drastic orders which would call for hearing of the said authorities. To buttress his contention, Mr. Hamza cited the decisions of the Court of Appeal in ***Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another***, CAT-Civil Revision No. 6 of 2017; and ***Shaibu Salim Hoza v. Helena Mhacha as a Legal Representative of Amerina Mhacha (Deceased)***, CAT-Civil Appeal No. 7 of 2012 (both unreported). In both of the decisions, it was emphasized that non-inclusion of necessary parties rendered the suit unmaintainable.

Referring to the decision of this Court in **Efratha J. Mlay v. Josephin Rasieli Mremi & Another**, HC-Land Case 31 of 2019 (unreported), learned counsel argued that the consequence of non-joinder is to render the suit liable to striking out.

With respect to the 2<sup>nd</sup> limb, the contention is that the suit is incompetent for want of joinder of the Attorney General and the Registrar of

Titles, they being necessary parties. The defendants' counsel premised his counsel on the provisions of sections 6 (3) and 10 of the Government Proceedings Act, Cap. 5 R.E. 2019. He contended that such failure has the effect of vitiating the proceedings, as was held in the case of ***The Attorney General v. The Trustees of Tanzania National Parks, Machanya Nemba Singu & Ugumba Igembe***, HC-Civil Revision No. 1 of 2021 (unreported); and ***Efratha J. Mlay*** (supra). Mr. Hamza concluded by urging the Court to strike out the suit with costs.

Submitting in rejoinder, Mr. James Njwelwa, counsel for the plaintiff, argued that these two points of objection, which are, in his view, about the same point, are predicated on decisions of the Court of Appeal both of which are distinguishable. These are ***Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another***, and ***Shaibu Salim Hoza v. Helena Mhacha as a Legal Representative of Amerina Mhacha (Deceased)*** (supra). With respect to the former, Mr. Njwelwa argued that the anomaly addressed was the applicant's decision to sue in his personal capacity instead of suing as a legal representative; whilst in the latter, Dar es Salaam City Council was pleaded in paragraphs 5, 6 and 7 of the plaint but was not impleaded as a party. He argued that, in the instant case, Mwanza City Council features in none of the paragraphs of the plaint. It was his bold contention that the cited

decisions have no direct application to the instant matter, mainly because the prayer in this case is for rectification of the register by the Registrar of Titles, to include the plaintiff's name instead of the 3<sup>rd</sup> defendant. This, argued the plaintiff's counsel, would not prejudice the Registrar of Titles by any means, as doing so is in conformity with the provisions of section 99 (1) (a) of the Land Registration Act, Cap. 334 R.E. 2019. In his view, this Court is empowered to grant an order for rectification of memorial where it is proved that the memorial was obtained by fraud. He contended that the rectification can be done without necessarily impleading the Registrar.

Mr. Njelwa argued that proof that the transfer to the 3<sup>rd</sup> defendant was obtained by fraud does require impleading the Attorney General or Registrar of Titles. He called upon the Court to overrule the objection with costs.

As clearly gathered from the counsel's submission, the tussle revolves around the involvement of the Registrar of Titles and the Attorney General in the pending proceedings. While one believes that, by virtue of their being necessary parties, the duo's involvement is necessary and indispensable, the other party claims it is not. This, then, brings out one critical question that serves as a prelude to the real contention by the parties. It entails establishing who is a ***necessary party***? This is the same question that the Court of Appeal had to contend with, when it sat to determine appeal

proceedings in **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another** (supra), cited by Mr. Hamza. The apex Bench borrowed the description laid down in the Indian case of **Baranes Bank Ltd. V. Bhagwandas**, A.I.R. (1947) All 18, wherein it was guided as follows:

*"... 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 the Supreme Court of India in the case of **Deputy Comr., Hardoi v. Rama Krishna**, A.I.R. (1953) S.C. 521."*

In the end, the superior Court concluded, at page 6 of the judgment, as hereunder:

*"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 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 on upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the*



*particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

Applying the tests accentuated in the cited decisions, the question is whether, in the circumstances of this case, the Registrar of Titles is a necessary party whose joinder in the proceedings is of imperative need. Mr. Njelwa admits that the suit will eventually require the Court to issue an order which will compel the Registrar of Titles to rectify the memorial with a view to erasing the 3<sup>rd</sup> defendant's name, putting in his stead, that of the plaintiff. This is an order whose effectiveness can only be realized by having the Registrar of Titles, the implementing agency, taken on board and be given an opportunity to put up his case, not only on the viability of the orders, but also on the practical possibility of the orders sought to be issued by the Court. As stated in the Court's earlier position in ***Stanslaus Masunga Nkola & 2 Others v. The Board Of Directors, Nyarugusu Mine Company Limited & Others***, HC-Misc. Civil Cause No. 1 of 2021 (MZA-unreported), ***"this implies that no effective order or decree may be passed in the absence of the said party, lest the Court finds itself trapped in the temptation of having the said party ordered to take an action without being heard. It would require taking such a party on board, and have it put a case on"*** [Emphasis added]. I hold the same

view as that of Mr. Hamza, that the Registrar of Titles is, for all intents and purposes, a necessary party whose presence in the proceedings cannot be wished away.

I must also add that the consequences of ignoring the necessary party, in this case the registrar of Titles are dire, as amply underscored by the Court of Appeal in the case of ***Ngerengere Estate Company Limited v. Edna William Sitta***, CAT-Civil Appeal No. 209 of 2016 (unreported). The upper Bench held:

*"In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the **Registrar of Titles ought to have been joined as a party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal.**"*[Emphasis added]

The clear message derived from the fore going excerpt is that failure to join a necessary party, in this case the Registrar of Titles, is a far graver





infraction which is a procedural error that is too humongous to be tolerated. It is a transgression that may occasion a miscarriage of justice.

The discussion on the absence of the necessary party and the adverse consequence that it carries featured prominently in ***Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another*** (supra). The Court of Appeal laid the following specific emphasis:

*"... 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 holds 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.*

*Since, as we have just remarked, the legal representative of the deceased was a necessary party, her non-joinder was fatal and the trial court, either on its own accord, or upon a direction to the 1<sup>st</sup> respondent, was enjoined to strike out the name of the 1<sup>st</sup> respondent and substitute to it her name .... Unfortunately, that was not done and, indeed, the non-joinder of the legal representative in the suit under our*

*consideration is a serious procedural in-exactitude which may, seemingly, breed injustice."*

The fabulous holdings by the Court of Appeal, as quoted above, persuade me to hold that the plaintiff's failure to implead the Registrar of Titles to these proceedings constitutes a non-joinder of a parties. It was an infraction of the law that rendered the suit incompetent.


Noting that that the Registrar of Tittles is a government establishment, it need not be emphasized that his participation in any civil proceedings has to have the Attorney General alongside him. This is, as Mr. Hamza submitted, in line with the imperative requirement as stipulated under section 6 (3) of Cap. 5 and a host of court decisions, including those that have been cited by the defendant's counsel. Since it is apparent that the Attorney General is also a 'no show' in the instant proceedings, the conclusion is that the proceedings are also deficient.

In the upshot, the objections are sustained and the suit is hereby struck out with costs.

Order accordingly.

DATED at **MWANZA** this 4<sup>th</sup> day of November, 2021.



  
**M.K. ISMAIL**  
**JUDGE**

**Date:** 04/11/2021

**Coram:** Hon. C. M. Tengwa, DR

**Plaintiff:**

**Defendants:** } Absent

**B/C:** J. Mhina

**Court:**

Ruling delivered today in the absence of both sides.



*C. M. Tengwa*  
*DR*