

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND CASE NO. 2 OF 2022

SIKUJUA JOHN-----PLAINTIFF

VERSUS

1. HELENA SALITIEL @ HERENA

LUHUVYA MSANIGWA

2. KIGOMA/UJIJI MUNICIPAL COUNCIL

3. HON. ATTORNEY GENERAL

-----DEFENDANTS

RULING

25/5/2022 & 31/5/2022

F.K. MANYANDA, J

This is a ruling in respect of preliminary objections raised by the Defendants. The 1st Defendant objection is on point of law that;

- 1. "That the plaintiff's case is bad in law for non-joinder of necessary party to wit, a seller of Matrimonial home and one John Pius who is the ex-husband of the 1st Defendant who sold the suit matrimonial home to the Plaintiff without*



obtaining the consent from the 1st Defendant as per section 59 (1) of the law of Marriage Act, [Cap. 29 R.E 2002] and Order 1 Rule 13 of the Civil Procedure Code, [Cap. 33 R.E 2019] and as per judgment in matrimonial Cause No. 37 of 2025”.

The 2nd, 3rd and 4th Defendant also raised a similar point of objection which reads as follows; -

“This suit is legally incompetent since the plaintiff failed to join a necessary party Pius John who was the husband of the 1st Defendant and the one who sold the disputed plot to the plaintiff as per Order 1 Rule 13 of the Civil Procedure Code, [Cap. 33 R.E. 2019]”.

Briefly, the Plaintiff in this suit is suing all the Defendants for ownership of a land on plot No. 681 Block “HD” Mwasenga Area, Kigoma Ujiji Municipal hereafter “the Suit land”. It is averred in the plaint that the Plaintiff purchased the suit land from a person known as John Pius for consideration of Tshs 9,300,000/=. After purchasing the said land the John Pius became reluctant to hand the suit land to the plaintiff until when he was forced by the District land and Housing Tribunal for Kigoma.

The 1st Defendant contend that the sale was unlawful for want of spousal consent, the suit been a matrimonial property per the provisions of section 59(1) of the Law of Marriage Act.

Meanwhile the 2nd and 3rd Defendants acting on an order of the Ujiji Primary Court which had declared the 1st Defendant a lawful owner of the same suit land effected changes of the suit land from Plot No. 681 to Plot No. 598 in the name of the said 1st Defendant.

Hence the plaintiff preferred the current suit.

At the hearing of the preliminary objection, the plaintiff was represented by Mr. Sadiki Aliku, learned Advocate the 1st Defendant was represented by Mr. Sylvester D. Sogomba, learned advocate and the 2nd, 3rd and 4th Defendants enjoyed the services of Mr. Alan Shija learned State Attorney.

Arguing in support to the 1st Defendants objection Mr. Sogomba submitted that the objection is based on section 59(1) of the Law of Marriage Act and Order 1 Rule 13 of the Civil Procedure Code. He explained that pursuant to the Ujiji Primary Court which was between John Pius and the 1st Defendant, sale of the suit land was stopped because the said suit land was a matrimonial property between them. However, later on the said John Pius defied the order and sold the same to plaintiff. It was the views

of the counsel that it is necessary to join the said John Pius, a seller of the suit land.

Mr. Sogomba cited the case of **Juma Kadalaha vs Joseph Mkande**, [1983] TLR 103 which insists that the buyer and seller in a suit must be joined as necessary parties' failure of which renders the proceedings and judgment a nullity. he also cited the case of **Mohamed Idd Mjasiri vs Jayalaxmi Joshi** [1993] TLR 274 where a father gifted matrimonial properties to his son without wife's consent was nullified.

The counsel was of the views that in the circumstances of this case the seller John Pius is a necessary party as he could not have sold the property without the requisite spousal consent.

Allan Shija submitted in support of their objection arguing that basing on the Ujiji Primary Court decision in Civil Case No. 37 of 2015 between John Pius and 1st Defendant has not been vacated to date conclusively decided that the suit property is matrimonial property, hence requires spousal consent for its disposal.

He was of the views that in this suit, it was necessary to have the said John Pius made a necessary party. He cited the case of **Leonard Peter vs Joseph Mabao and 2 others**, Civil Case No. 4 of 2020 (unreported).



However, he didn't supply a copy thereof this court will not act on it.

Mr. Aliko reacting to the Defendants submissions, argued against the objection submitting that the objection fails to meet the test for preliminary objection which require the same to be on pure point of law which when successfully argued is capable of disposing of the case.

he referred this court to the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd**, [1969] EA 696.

He went on elaborating that the plaintiff is questioning the reason for the 2nd, 3rd and 4th Defendants effecting changes on the registration of the subject matter after finalization of execution of the land case which the plaintiff had filed against the said John Pius. That the plaintiff is disputing the contention that parties in the Ujiji Primary Court were married couples.

Therefore, John Pius is not a necessary party.

He distinguished the cases cited by the counsel for the Defendants that they concerned and issue of matrimonial properties which is not the case here.

In rejoinder, Mr. Sogomba, so did Mr. Allan Shija, basically re-iterated his submission in chief and added that it is important for John Pius to tell how

he sold the suit land which was a subject in the case at Ujiji Primary Court that declared to be owned by the 1st Defendant.

Tests for necessary party were spelt out by the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed vs Mahboob Yusuf Othman and Another**, Civil Revision No. 6 of 2017 where it stated as follows;-

"a necessary party is one 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 upon facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joinder, the nature of the reliefs claimed as well as whether or not in absence of the party, an executable decree may be passed".

From the citation above of the Court of Appeal, it can be seen that it set a duo tests for necessary party as follows;


- a. There has to be a right of relief against such a party in respect of the matters involved in the suit; and
- b. The court must not be in a position to pass an effective decree in absence of such a party.

In the matter at hand it is not disputed that the plaintiff purchased the suit land from a person known as John Pius. It is also not disputed that after such purchase, John Pius was unable to effect the transfer until was compelled by an order from the DLHT for Kigoma in Land Application No. 83 of 2015. Still he could not manage to effect the said transfer because it was found that already the suit land was registered in the name of the 1st Defendant.

The re-registration of the suit land was effected by the 2nd and 3rd Defendant basing on a judgment and decree in matrimonial Cause No. 37 of 2015 which stopped any sale of the suit land on reasons that it was a property of the 1st Defendant. Such a decision is unvacated to date hence valid.

The plaintiff's Counsel argument is that the suit was declared to be the property of the said John Pius, hence the objection proceedings by the 1st Defendant were dismissed, leaving an option to her to file a suit order to establish her ownership. The Defendants contention is that while the 1st Defendant was processing to file a suit, the plaintiff came to this Court dragging her alone as a Defendant without the said John Pius.

I have asked my self whether the tests stated in the case cited above fits in this case.



The first test is whether this court can determine this case without affecting the rights of the said John Pius over the suit land. In my firm opinion I answer this in negative. I say so because, in order to determine the first relief in the plaint by declaring the plaintiff a lawful owner will depend on the lawfulness of ownership by the seller John Pius. This is also because of the fact that it is a position of the law that a person without good title can not pass good title to another.

As regard to the second test, whether this court can pass an effective and executable decree, without presence of the seller John Pius, is also answered in negative. I say so because such a decision may be adverse to him, a situation which demands his right to be heard.

A right to be heard is not only a cardinal natural justice but also fundamental right constitutional guaranteed such that no decision should be left to stand in contravention of it even if the same decision would be reached had the party been heard.

There is plethora of authorities on this position of the law including the cases of **DPP vs Sabini Inyasi Tesha and Another**, [1993] TLR 237 **National Housing Corporation vs Tanzania Shoe Company Ltd and Others** [1995] TLR 251, **Mbeya- Rukwa Autoparts and Transport vs Jestina Mwakyoma** [2003] TLR 257, **Abbas Sherally**

and Another vs Abdul Sulatan Haji Mohamed Fazalbyo, Civil Application No. 33 o 2002 and **Dishon John Mtaita vs DPP**, Criminal Appeal No. 132 of 2004 (both unreported).

In **Abbas Sherally and Another's** case (supra) for example the Court of Appeal stated as follows;

"The right of a party to be heard before adverse action or decision is taken against such a party, has been stated and emphasized by the courts in number of decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice".

It follows therefore that both tests for necessary party are met in this suit.

The Plaintiff's Counsel argument that the objection are factual and subject to proof by evidence is unfounded. The reason is that the Plaintiff dispute Plaintiff he contests is about existence or otherwise of marriage status of the 1st Defendant and the seller John Pius. However, the seller claimed the suit belonged to him at the same time the 1st Defendant also claims the same suit land belongs to her.



The established fact is that John Pius is a seller of the suit land to the plaintiff; and the latter requests this court to declare him a lawful owner. It can be seen that his claim emanates from the said John Pius. He is supposed to be a party so that this court can properly determine this matter.

It is trite law that as a general rule, a person has a right to choose who to sue.

However, this rule is not without exception for Order 1 Rule 3 of the Civil Procedure Code, provides for defendants who may not be left out in institution of a suit.

Limit of right to choose who to sue was well elaborated in the case of **Farida Mbaraka and Farid Ahmed Mbaraka vs Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) where the Court of Appeal stated as follows;

*"Needless to say, the respondent is the **dominus litis** and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim an relief. However, it is abundantly clear to us that the Tanzania Building Agency who purportedly*

sold the disputed property to the respondent cannot be left out of the picture.

The Agency says that it is the owner of the property. This has to be established clearly since it is challenged by the appellants”.

In the matter at hand as explained above, John Pius is mentioned in the plaint as a person who sold the suit land because it belonged to him. He is supposed to be joined as a necessary party.

In the result I find the preliminary objection meritorious, the plaint is incompetent for leaving out a necessary party.

Consequently, I do hereby strike out the plaint for non-joinder of a necessary party.

The plaintiff is at liberty to file a properly drawn plaint. Costs to be borne by the plaintiff. Order accordingly.




F.K. MANYANDA

JUDGE

31/5/2022