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

**LAND DIVISION**

**AT MOSHI**

**LAND APPEAL NO. 38 OF 2021**

*(Originating from Land Application No. 28 of 2021 of the District Land and Housing Tribunal of Moshi at Moshi)*

**GISELA GODFREY MOSHA..... APPELLANT**

**VERSUS**

**M/S SIDAI SELECT SAFARI.....1ST RESPONDENT**

**UCHUMI COMMERCIAL BANK LTD.....2ND RESPONDENT**

**INDEPENDENT AGENCIES AND COURT BROKER LTD.....3RD RESPONDENT**

**JUDGMENT**

*22/6/2022 & 9/8/2022*

**SIMFUKWE, J.**

The appellant Gisela Godfrey Mosha unsuccessfully instituted a land matter before Moshi District Land and Housing Tribunal on allegation that on 2nd March 2021 the 3rd respondent issued a notice that they had been instructed by the 2nd respondent to sell the suit house by way of public auction on 05th March 2021. The said auction was conducted on 06th March 2021. The appellant alleged before the trial tribunal that he had neither acquired any loan from the 2nd respondent nor mortgaged the suit

premises to any financial institution. In his Written Statement of Defence, the 1st respondent raised a preliminary objection on two points of law:

1. *That the applicant has no locus standi to institute the application.*
2. *That the application is bad in law by failing to join the necessary party.*

The trial tribunal upheld both points of objection and dismissed the application of the appellant. Aggrieved by the decision of the trial tribunal, the appellant preferred the instant appeal on five grounds of appeal:

1. *That, the Honourable Chairman erred in law to decide issues of fact which require proof of evidence, as preliminary objections on point of law.*
2. *That, the Honourable Chairman erred in law to declare the Appellant has no Locus Standi in her claim of ownership of land.*
3. *That, the Honourable Chairman erred by misinterpreting the Appellant's claim that she have (sic) more than one name while she claimed that she is not the same person and did not acquire any loan from the 2nd Respondent's bank.*
4. *That, the Honourable Chairman erred in law to uphold a point of law that non joinder of a purported necessary party defeats a suit.*
5. *That the honourable Chairman erred in law by denying the Appellant right to be heard in her claim over a property she claimed to be her personal property.*

The appellant prayed that the matter should be remitted back to the trial Tribunal to be heard on merit.

The appeal was heard viva voce whereas Mr. Muhammadou Majura appeared for the appellant while Ms Jeniffer Sintala learned counsel appeared for the 1st respondent and Mr. Martin Kilasara learned counsel represented the 2nd and 3rd respondents.

On the 1st ground of appeal, Mr. Majura submitted that the facts of the application are very clear and the names of the applicant/appellant were clearly stated in the application as Gisela Godfrey Mosha. That, in his decision the Hon. Chairman went further to scrutinize evidence which is contrary to the basic rules in relation to preliminary objections. Mr. Majura quoted from page 2 and 3 of the typed ruling of the trial tribunal where the Hon. Chairman stated that:

> *"Pamoja na kwamba Mdai na. 2 Uchumi Commercial Bank Limited, hakuleta maelezo kwenye hoja za pingamizi, lakini ukisoma majibu yake kwenye shauri la msingi amejibu kwamba, majina yote yaliyo tajwa hapo juu yanatumiwa na mdai kwenye shughuli zake."*

From the above quoted paragraph, the learned counsel for the appellant opined that the same was pure evidence which was wrongly considered by the Tribunal and was contrary to the law governing preliminary objections as set in the case of **Mukisa Biscuits Manufacturing Co. Ltd versus Westend Distributors Ltd [1969] EALR** in which Sir Charles Bold, J stated that:

> *"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that ail the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

Mr. Majura averred that, according to the above authority it is quite clear from the record that the Hon. Chairman did not draw the assumption that all the facts pleaded by the other side are correct, rather he determined the correctness of the facts thereon.

Mr. Majura cited another case of **Sameer Mohamed versus Sophia Bakari Imonje, Land Case No. 75 of 2017,** HC, Land Division at Dsm (unreported) at page 5 and 6 of the ruling where the Court listed the principles developed to guide courts in dealing with preliminary objections, which are:

a) There must be point of law either pleaded or arising by implication from the pleadings.
b) There must be a pure point of law which does not need scrutiny of evidence.
c) Determination of point of law in issue should not depend on the discretion of the court.
d) If sustained should dispose of the matter.

The learned counsel for the appellant contended that in this case the points raised were based on facts and not points of law and the Hon. Chairman scrutinized evidence before reaching to the decision.

In support of the 2nd, 3rd and 5th grounds of appeal, Mr. Majura stated that the name of the appellant was clearly stated in the application as Gisela Godfrey Mosha. He alleged that, the appellant was the rightful owner of the disputed land and her national identity card was attached to the application. It was alleged further that, the appellant stated that she never acquired loan from the 2nd respondent. The learned counsel was of the opinion that the appellant is entitled to fair hearing so that her rights in

relation to the disputed land are determined. He commented that, it was absurd for the Tribunal to hold that the appellant had no locus standi which contravened the right of the appellant to be heard under **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977** as amended from time to time. He commented further that the consequences for such holding that the appellant has no locus standi is to hold her incapable of pursuing her rights in relation to the disputed land which is contrary to the law.

On the 4th ground of appeal; Mr. Majura submitted that the appellant sued the respondent for auctioning her property without her consent or being engaged in any transaction as indicated in paragraph 6 (iv) of the application which is to the effect that the appellant was not aware of the loan agreement in relation to the suit land and could not have joined the person who was not in her knowledge in relation to loan transactions. He averred that non-joinder of a party to the dispute is not as fatal as to confer the Chairman with power to dismiss the application. That, the only relief for non-joinder of parties is amendment of pleadings to join the party pursuant to **Order I Rule 9 of the Civil Procedure Code, Cap 33, R.E 2019,** which provides that:

> *"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."*

Basing on the cited provision Mr. Majura was of the view that the Hon. Chairman had the duty to be governed by the overriding principle of the **Civil Procedure Code** under **section 3A and 3B** which is to facilitate

the just, expeditious, proportionality and affordable resolution of civil disputes governed by the Act.

In conclusion, Mr. Majura prayed that this appeal should be allowed with costs and the appellant be afforded with right to be heard, so that ownership of land may be determined by the Tribunal.

Opposing the appeal for the 1st respondent, Ms Jennifer Sintala submitted that this appeal is misconceived and an abuse of court process. She said that it is apparent on the face of the pleadings that two people were claiming ownership over the same piece of land. On the affidavit of the applicant at paragraph 3, she stated that she was the owner of the land in dispute. At paragraph 6 of the affidavit in Miscellaneous Application the applicant stated that the said land was sold to the 1st respondent. The 1st respondent in his counter affidavit at paragraph 5 stated that he purchased the house through auction after the original owner Gisela Geofrey Mosha obtained loan from the 2nd respondent and failed to repay it. That, the 2nd respondent instructed the 3rd respondent to sell it by public auction. He further stated at paragraph 6 that the said Gisela Geofrey Mosha acquired that land by way of purchase and not inheritance. The 2nd and 3rd respondent in their joint counter affidavit stated that the said Gisela Geofrey Mosha obtained loan from the 2nd respondent as per paragraph 8, the same person defaulted. At paragraph 10, the land was sold and the 1st respondent bought it. Ms Sintala submitted further that, as can be seen from the respective affidavits, it was apparent on the face of pleadings that two people were claiming ownership of one piece of land.

Ms Sintala supported her argument with the case of **Abdullatif Mohamed Hamis versus Mehboob Yusuf Osman and Fatma Mohamed, Civil Revision No. 6 of 2017,** CAT, at Dsm at page 26 paragraph 2 where it was stated that:

> *"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 the suit and in whose absence no effective decree or order can be passed."*

From the above decision, it was commented that in the circumstances of the application before the Land Tribunal, in the absence of the person who mortgaged her property and failed to pay, consequently that land was sold. It could be impossible to pass an effective decree without joining the her. That, without joining her, the 1st respondent will have to institute another application to claim his right of the land in dispute. This would cause multiplicity of suits and no end to litigation.

Concerning the submission that non-joinder of the party does not defeat a suit, Ms Sintala cited the case of **Abduliatif** (supra) at page 27 paragraph 2 from line No. 5 where the Court of Appeal stated that:

> *"Viewed from that perspective, we take the position that Rule 9 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."*

Regarding the right of the appellant to claim ownership of the suit land, it was never blocked. The application was struck out as per page 3 of the ruling, which reads:

*"Hivyo pingamizi limekubaliwa na shauri* ***limeondolewa.***" Emphasis added

Ms Sintala said that, had the appellant been blocked, it would have been said:

"Hivyo pingamizi limekubaliwa na shauri **limefutwa.**" Emphasis added

The learned counsel for the 1st respondent contended that the appellant still had the opportunity of bringing the matter again to the Land Tribunal provided that she joined the necessary party.

Responding to the argument that the appellant could not join the person who took the loan and caused the land in dispute to be sold; Ms Sintala humbly submitted that the appellant had deliberately chosen not to implead the person who took the loan because she was his mother. That, she never provided in her affidavit or in her application that she had taken measures to find out the person who took loan so as to join that person.

Furthermore, it was submitted that, the decision of striking out the application was not appealable as per **section 74 (2) of the Civil Procedure Code,** (supra) which provides that:

> *"74 (2) Notwithstanding the provisions of subsection (1) and subject to subsection (3), no appeai shall lie against or be made in respect of preliminary or interlocutory decision or order of the district court, Resident Magistrate's Court or any other Tribunal, unless such decision or order has the effect of finally determining the suit."*

Ms Sintala supported the above provision with the Court of Appeal decision in the case of **Generator Logic versus Eli Mukuta, Civil Appeal No. 272 of 2019,** at page 6 whereby the Court stated that:

> *"From the above, it is our view that an order or decision is final when it finally disposes of the right of parties. That means that the order or decision must be such that, it could not bring the matter to the same court."*

In this case, Ms Sintala pointed out that the appellant could bring the same matter back to the same court because the order did not slum the door on the appellant's face completely.

At page 7 last paragraph of the cited case, the Court of Appeal stated that:

> *"It is our conclusion that the appeal attempts to challenge an interlocutory decision of the High Court against the dictates of* ***section 5 (2) (d) of the AJA.*** *It is therefore improperly before us, so, we strike it out."*

The learned counsel went on to state that it is clear that nothing would warrant to poke defects of the decision of the Hon. Chairman.

On the issue that the appellant appended the copy of her national identity card, Ms Sintala said that to her knowledge that was not the case. She reiterated that this appeal is misconceived and an abuse of the court process. She prayed that it should be dismissed with costs.

Contesting the appeal for the 2nd and 3rd respondents, on the 1st ground Mr. Kilasara submitted that preliminary objections should base on the pleadings together with the annexures. He said that in this case, in the

pleadings the appellant is Gisela Godfrey Mosha. In the application before the tribunal at paragraph 6 (a) (ii) the appellant referred to her surname as Geofrey John Mosha and not Godfrey as referred in the title of the case. That, there is no other document in the said application showing that the appellant is called Gisela. At paragraph 3 of the same application the disputed land is referred as 105 meters x 70 meters located at Njiapanda. In the Written Statement of Defence of the 2nd and 3rd respondents herein, they explained that the said Gisela Geofrey Mosha is the one who took a loan from the Bank who is their client. All the identity cards which he issued had the same names. Mr. Kilasara said that they object the allegations of the appellant that the Tribunal determined the preliminary objection by referring to evidence. Thus, the preliminary objection was justified in law.

Concerning the 2nd, 3rd and 5th grounds which were argued together, Mr. Kilasara contended that no document was attached by the appellant showing that she was not the one who took a loan from the bank or that the appellant and the person who took the loan were two different people. The pleadings are self-explanatory. It was alleged that the Gisela they are talking about is the same person who opened a bank account, applied for the loan, issued a sale agreement of the disputed land and it is the same land which was proclaimed to be sold. There was no objection to restrain the auction of the disputed land. The learned counsel for the 2nd and 3rd respondent was of the view that the appellant is estopped from complaining as it will be abuse of court processes.

On the 4th ground of appeal which is in respect of joinder of necessary parties; Mr. Kilasara said that for the sake of argument let's assume that Gisela Godfrey Mosha and Gisela Jofrey Mosha are different people, he

submitted that Gisela Jofrey Mosha was a necessary party in the said application. Thus, he was supposed to be joined as a party to the suit as argued by the 1st respondent.

It was submitted further by Mr. Kilasara that in her pleadings the appellant denied to have secured a loan from the 2nd respondent. For the same to be determined, Gisela Jofrey Mosha should have been joined as a party to the suit. On that basis, the learned counsel concurred with the cited case of **Abdullatif Mohamed Hamis** (supra) as it fits the circumstances of this case, specifically from page 26 to 30 of the judgment.

Concerning the wording at page 3 of the ruling of the trial tribunal that:

***"…. shauri limeondolewa;"*** Mr. Kilasara was of the view that the words in English would be to strike out the application which is different from ***"kufukuza shauri"*** which means to dismiss an application. Thus, since the matter was struck out, that means the application was incompetent to be determined by the tribunal. Since there was no order to rectify the application, its effect is as good as no application had ever been filed. On that basis, what should have been done by the appellant was to rectify the error and refile the application. In other words, that does not give the appellant an automatic right to appeal. Mr. Kilasara subscribed to the case of **Singida Sisal Products and General Supply versus Rofal General Trading Limited and 4 Others, Commercial Review No. 17 of 2017,** Commercial Division at Dar es Salaam at page 4 and 5 which discusses the terms "**to strike out**" vis a vis "**to dismiss.**"

Regarding the words of the Hon. Chairperson of the tribunal that Right of Appeal explained, Mr. Kilasara submitted that the same does not suffice to give the appellant an automatic right to appeal. He assumed that the

Hon. Chairperson misdirected himself. He proposed two remedies: first is to apply for review before the same tribunal or apply for revision before the High Court. That, since what is before this court is an appeal and not revision, the learned counsel was of the view that the appeal is incompetent before the court or rather premature. Its effect is to strike out the appeal so that the appellant should file a competent application before the tribunal or High Court to be determined on merit.

Mr. Kilasara prayed that this appeal should be dismissed without costs.

In his rejoinder, Mr. Majura submitted that the last paragraph of the ruling of the tribunal clearly indicates that the points of preliminary objection were discussed collectively and decided collectively. All points of objection were sustained, meaning that the appellant was declared to have no locus standi. The consequences for such decision were that the appellant was incapable of pursuing her rights in relation to the disputed land. That, the tribunal at page 3 of the ruling expressed the right of appeal which was a confusion that's why they are here.

The learned counsel for the appellant stated further that Gisela Godfrey Mosha her name was clearly stated in the application and she attached her identity card. He said that Gisela Godfrey Mosha was the rightful owner of the disputed land and that she never secured a loan from the 2nd respondent. Thus, the appellant is entitled to fair hearing so that the right over the disputed land is determined.

Concerning the cited case of **Singida Sisal Products** (supra), Mr. Majura prayed the court to disregard it as the same has not been supplied to him. He said that the case of **Abdullatif** at page 26 paragraph 2 is distinguishable to this case. He argued further that, the wording of the

tribunal is ambiguous that's why they appealed against the said ruling as they had no other alternative.

Mr. Majura reiterated his prayer in chief that this appeal should be allowed so that the appellant may be accorded right to be heard.

Having considered submissions of the learned counsels of both parties and the grounds of appeal, I wish to make it clear from the outset that according to what I gathered from the records of the trial Tribunal, there are four issues to be considered basing on advanced grounds of appeal. Thus, whether the so-called preliminary objections which were raised before the trial Tribunal were worth to be determined as preliminary objections on point of law. Second, whether there was non- joinder of a purported necessary party in this matter. Third, whether the decision of the trial tribunal was ambiguous as alleged by the learned counsel for the appellant. The last issue is the way forward.

Starting with the first issue, the following points were raised as preliminary objections against the applicant (appellant herein):

1. *That the Applicant has no locus standi to institute the Application*
2. *That the Application is bad in law by failing to join the necessary party.*

On the 1st point of objection the learned trial Chairman conceded that in law the appellant could not institute the suit without joining the person who had mortgaged her disputed property to the 2nd respondent. For the sake of clarity, I wish to quote the words of the learned trial Chairman at page 1 and 2 of his ruling:

*"Nikianza na hoja ya kwanza ambayo naona inaunganika na ya pili, nakubaliana na hoja ya wakili wa mdaiwa Na. 1 kwamba shauri hili ni batili kwani aliyeleta shauri hili ambae ni GISELA GODFREY MOSHA (mdai) kisheria ni mtu tofauti na GISELA GEOFREY MOSHA na kwakuwa aliyeingia mkataba na Benki ni GISELA GEOFREY MOSHA ni kweli kwamba kisheria anakosa mamlaka ya kuleta maombi haya kwani hawezi kuthibitisha haki kwenye eneo lililowekwa dhamana Benki bila kumuunganisha GISELA GEOFREY MOSHA."*

According to the record, the point of law should have been non joinder of necessary party only. The appellant as a purported owner of the disputed land had a locus standi except that her suit could not be maintainable in law without joining a necessary party. Thus, the so-called GISELA GEOFREY MOSHA. Otherwise, as it was held in the case of **Abdullatif** (supra), a decree passed would be of no practical utility to the appellant. At page 27 of the same decision the Court held that:

*"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."*

That said, I conclude the first issue in the affirmative that issues raised before the trial Tribunal were points of law worth to be determined as preliminary objections.

The second issue whether there was non-joinder of a purported necessary party in this matter; is simple as a foundation has already been laid on the first issue which I have just determined. At paragraph 6 (vi) of Land Application No. 28 of 2021 of the trial Tribunal, the appellant stated that:

*"That, the applicant had neither acquired any loan from the 2nd Respondent nor mortgaged the suit premises to any financial institution."*

On the other hand, the 2nd and 3rd respondents appended a loan agreement to their Written Statement of Defence which is to the effect that the suit premises were mortgaged to the 2nd respondent by one GISELA GEOFREY MOSHA. The said loan agreement has a passport size picture of the said GISELA GEOFREY MOSHA, which is different to the picture on the copy of the identity card of the appellant which she appended to her application before the trial tribunal. Mr. Majura for the appellant, in his submission in chief alleged that the appellant could not join a necessary party because she did not know her. This court is of considered opinion that after being served with the Written Statement of Defence, she could have prayed for leave of the Tribunal to join the person mentioned in the loan agreement as the person who mortgaged her suit premises without her consent. I therefore concur with the learned counsels for the respondents that there was non-joinder of a necessary party in this case.

The doctrine of necessary party has been discussed in other jurisdictions as well as it relates to the natural justice principle of *Audi alteram partem* (right to be heard). **Order 1 Rule 9** of the Indian **Civil Procedure Code** (which is *in pari materia* with Tanzanian Civil Procedure Code) provides that:

*"No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in*

*controversy so far as regards the rights and interests of the parties actually before it:*

***Provided that nothing in this rule shall apply to nonjoinder of a necessary party."*** Emphasis added

I am persuaded by the decision of the Supreme Court of India in the case of **S. Yadav v. State of U.P (2011) 6 SCC 570;** in which while discussing the above quoted Order in respect of the doctrine of necessary party, it was held that:

*"No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such party as the same has been passed* ***in violation of the principles of natural justice.*** *"* Emphasis mine

In another Indian case of **Vidur Impex and Traders (P) Ltd v. Tosh Apartments (P) Ltd, (2012) 8 SCC 384**; the meaning of a necessary party was stated to the effect that:

*"...A necessary party is one whose presence is a sine qua non to the constitution of the suit and without whom, no effective order can be passed with respect to the questions arising before the court."*

In addition, in the case of **Kasturi v. Iyyamperumal (2005) 6 SCC 733, 738,** the Supreme Court of Indian stated two tests for determining the question whether a particular party is a necessary party to a proceeding, that:

*"i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and*

*ii) It should not be possible to pass an effective decree in absence of such a party.*

The above two tests were also stated in the case of **Abdullatif** (supra) cited by the learned counsel for the 1st respondent. On the basis of the cited authorities, I cement that, it was necessary to join the person who had mortgaged the disputed landed property in this case.

On the third issue whether the decision of the trial Tribunal was ambiguous as alleged by the learned counsel of the appellant, it is undisputed fact that although the decision of the learned Chairman was composed in Swahili, confusion between **'striking out a suit'** and **'dismissing a suit'** has been occurring occasionally even in decisions which are composed in English. The confusion extends to the learned members of the bar. It's for that reason that we have a plethora of decisions clarifying the difference between the two phrases. In the case of **Ngoni Matengo Co-operative Marketing Union Ltd vs Ali Mohamed Osman (1959) EA 577** It was held that *where the matter is incompetent before the court, it is strike out.* In the case **of Yahya Athman Kisesa vs Hadija Omari Athman and 2 Others, Civil Appeal No. 105 of 2014,** it was held that *having found that the court has no jurisdiction to entertain the case, it was proper to dismiss it instead of striking it out.* In simple words when the matter is struck out, it may be refiled, while the matter which has been dismissed cannot be refiled.

In this case, as well noted by Mr. Kilasara the word used by the learned Chairman meant that the matter was struck out for being incompetent before the Tribunal for non-joinder of a necessary party. If the matter had been dismissed, the trial Chairman could have used the words: **"Shauri**

**limefutwa"** instead of "**Shauri limeondolewa.**" Thus, there was no ambiguity in the ruling of the trial tribunal. The succeeding words after delivery of the ruling: "**Haki ya rufaa imejulishwa**" might have been a copy and paste error of which I am of considered opinion that it is not fatal, and it did not preclude the appellant from filing a competent application before the same tribunal after joining a necessary party GISELA GEOFREY MOSHA.

On the fourth and last issue; thus, the way forward, remedies for non-joinder of a necessary party are provided under **Order 1 Rule 10 (2) of the Civil Procedure Code, Cap 33 R.E 2022,** that:

> *"**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 supplied

On the strength of the above quoted Order, without further ado, it goes without saying that the appellant has no alternative other than filing a proper or competent suit before a court/tribunal of competent jurisdiction after joining a necessary party.

In his submission, Mr. Kilasara was of the view that this appeal is incompetent or premature before this Court. I totally agree with the

learned counsel for the 2nd and 3rd respondents that the instant appeal is incompetent on the reason that it emanates from an interlocutory decision which did not finalize the matter.

On the basis of the above findings, I hereby strike out this appeal with costs for being incompetent before the Court.

It is so ordered.

Dated and delivered at Moshi this 9th day of August, 2022.

**S. H. SIMFUKWE**

**JUDGE**

**9/8/2022**