

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

LAND DIVISION

LAND CASE NO. 26 OF 2021

KELVIN S/O CHARLES MAGHEMBE PLAINTIFF

VERSUS

HAMIS S/O JUMANNE 1st DEFENDANT

SAID S/O BIDIGA BILAGAJE 2nd DEFENDANT

KIGOMA UJIJI MUNICIPAL 3rd DEFENDANT

ATTORNEY GENERAL 4th DEFENDANT

RULING

27th July, 2022 & 05th August, 2022

MANYANDA, J

This is ruling in respect of a preliminary objection raised by the 1st Defendant's Counsel to the hearing of the suit on one point of law that the plaint is bad in law for non-joinder of the Commissioner for Lands as a necessary party who issued a certificate of right of occupancy.



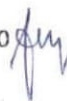
In this suit, the plaintiff is suing the defendants jointly and severally for ownership of a Plot No. 206 Block MD, Bangwe in Kigoma – Ujiji Municipal. That the right of occupancy granted to the 1st Defendant be cancelled been unlawfully obtained and general damages of Tshs 20,000,000 be paid by the defendants.

The defendants in their respective written statements of defence dispute all the plaintiff's claims. In addition, as explained above, the 1st Defendant raised the **plea in limine litis** stated above, that is, non-joinder of a necessary party.

With leave of this court hearing of the objection was argued by way of written submissions. Mr. Silvester Damas Sogomba, learned Advocate drafted and filed the submission for the 1st Defendant and those of the Plaintiff were drawn and filed by Mr. Eliutha Kiviyiro, learned Advocate.

Arguing in support of the objection Mr. Sogomba argued that in his pleadings the plaintiff is complaining about, **inter alia**, the act of the Commissioner for Lands to issue a Certificate of Right of Occupancy requesting to have it cancelled. That such an order cannot be granted without hearing the said Commissioner for Lands.

The Counsel referred to the facts averred in Paragraph 13 of the plaint that it is complained the Commissioner for Land issued Certificate of Right



of Occupancy to one Hamisi Jumanne Ngofa not Hamis Jumanne, therefore, the Commissioner for Lands will be required to clarify on the name.

The Counsel referred this court to the provisions of Order I Rule 3 of the Civil Procedure Code which require all persons against whom any right to relief in respect of the same act or transaction if separate suits were brought against would arise to be joined as Defendants. He also referred this Court to the Provisions of Order I Rule 10(2) of the Civil Procedure Code which empowers this Court at any stage of the proceedings upon or **suo moto**, to order a name of any party improperly joined as a plaintiff or defendant to be struck out or order a name of any party ought to be joined as a plaintiff or defendant in order to enable it to effectually and completely adjudicate the case.

Moreover, the Counsel referred this Court to the Provisions of Order I rule 13 which requires objections on non-joinder and mis-joinder of parties to be raised at the earliest possible opportunity, that therefore, the counsel has timely raised this objection.

To bolster his argument, he cited the case of **Sikujua John vs. Helena Salitiel @ Herena Luhuvya Msanigwa and 2 others**, Land Case No. 02 of 2022 in which I relied on the case of **Abdullatif Mohamed vs.**



Mahboob Yusuf Othman and Another, Civil Revision No. 6 of 2017 (unreported) where the Court of Appeal gave two tests for non-joinder of a necessary party namely reliefs sought against that party and that the court cannot give an executable relief in absence of that party.

In **Sikujua's case (supra)** also the right to be heard was stressed and that the right of the plaintiff to chose a person to sue is controlled by the law; hence in that case non-joinder of a Commissioner for Lands was found to be incurable defect.

The Counsel also cited the case of **Dr. Anthony Ambikile Nsojo vs. Adam Mwakyembe and Another** where this Court Hon. Dr. Mongella, J. found that non-joinder of the Commissioner for Lands was found to be incurable irregularity. He prayed the objection to be sustained.

In reply Mr. Kiviyiro for the Plaintiff opposed the preliminary objection arguing that the Plaintiff has no claim against the Commissioner for Lands. It was his argument that the Plaintiff is a bonafide purchaser for value of the suit land from the 2nd Defendant who owned customarily. That the Plaintiff prevented him from developing the land because had registered with the Commissioner for Lands and obtained a Certificate of Right of Occupancy over it. That the 1st Defendant did all these while there were

cases trending in land tribunals, hence the act of issuance of the said Certificate by the Commissioner for Lands was unlawful.

The Counsel was of views that the Plaintiff condemns the process of allocation of the suit land to the 1st Defendant by the 3rd Defendant. He added that the law is permissible, in case the 1st Defendant feels he has rights over the Commissioner for Lands he may sue him through 3rd party notice under order I rule 14(1) of the Civil Procedure Code.

Those are the submissions by the counsel for both parties, I thank them all for with the usual real and eloquence have argued their positions; it is now my turn.

The issue here is whether the preliminary objection is meritorious.

It is a position of the law in civil litigations that a Plaintiff is **a dominus litis** that is a master of litigation, she or he cannot be compelled to choose who to sue. However, this general rule is not without checks, under the Civil Procedure Code. Order I Rule 3 of the Civil Procedure Code provides as follows;

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the an

alternative where, if suits were brought against such person any common question of law or facts would arise"

Order I rule 10(2) of the same law provides that;

"The Court may at any stage of 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 a 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 questions involved in the suit, be added."

Interpreting Order I Rule 10(2) of the Civil Procedure Code, the superior Court of this Land, the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed (supra)** stated as follows:-

*"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 vs. Jaffer Brothers Ltd, [1990] 1EA 55**, the Supreme Court of Uganda held that there was a clear distinction between the **joinder of a part 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 the question involved in the suit". (emphasis added)

Then, the Court of Appeal of Tanzania, with help of an Indian Case of **Benares Bank Ltd vs. Bhagwandas** [1974] AIR went on propounding two tests for detection of a necessary party as been:-

- a) There has to be a right of relief against such a party to the proceedings.
- b) The court must not be in a position to pass an effective decree in the absence of such a party.

In the case at hand there is a complaint by the Plaintiff in paragraph 13 of the plaint that the Commissioner for Lands unlawfully granted a certificate of occupancy to one HAMISI HUMANNE, and therein a prayer for having the certificate cancelled is made.

For ease of reference the same is reproduced herein.

*"13, That, the Plaintiff noticed that one HAMISI JUMANNE unlawfully while he knew that the matter was before the tribunal in Land Application No. 36 of 2020 he applied for certificate of occupancy and was granted, the certificate of occupancy **was unlawfully granted by the Commissioner for Lands** to one*



*HAMISI HUMANNE and **pray for the certificate of occupancy be cancelled** since it was unlawfully obtained" (emphasis added).*

The Counsel for the Plaintiff argues that the Plaintiff does not have any claim of relief from the Commissioner for Lands, the Counsel for the 1st Defendant says the plaintiff have a claim.

In my views, as from the highlighted words in para 13 of the Plaint, it is plainly clear that the Commissioner for Lands is impleaded. However, as it can be seen, is not made a party.

The Counsel for the Plaintiff argues that if the 1st Defendant thinks it fine to him, he may join the Commissioner for Lands as a Co-Defendant via 3rd party notice under the provisions of Order 1 Rule 14(1) of the Civil Procedure Code.

I think the Plaintiff's Counsel has in mind that the Commissioner for Lands may be joined as a non-necessary party. With due respect that view in my firm opinion is not correct. I say so because if what is averred in paragraph 13 of the plaint and the reliefs prayed for by the plaintiff are granted, then the Commissioner for Lands will be condemned unheard. This is in complete violation of his basic and constitutional right of been heard before any adverse action is taken against him.

In fact, the circumstances of this case point to a fact that no effective decree capable of been fully executed can be unleashed by this court without affecting the rights of the Commissioner for Lands. In other words the tests in **Abdullatiff Mohamed's case** squarely fits in the facts of this case. Declaring the Plaintiff as a lawful owner of the suit Plot No. 206 LD Kamala currently Plot No. 1211 Block "B" Kamala Area will entail cancellation of the certificate of Right of Occupancy on grounds of illegality which act is the responsibility of the Commissioner for Lands. However, he will have no opportunity to be heard.

It is on the reasons stated above that I find the Commissioner for Lands as necessary party in this case.

In Abdullatiff Mohamed's case (supra) the Court of Appeal of Tanzania said that non-joinder of a legal representative in that suit found to be a necessary party was a serious procedural in exactitude which could breed injustice. On the way forward, it invoked its revisionary powers and struck out the improperly joined defendant, nullified the entire proceedings, judgment and set aside the decree. It ordered that case to be heard de-novo.

This means the pleadings on which the case rested were also a nullity.



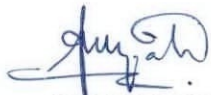
In the circumstances of the case at hand the Counsel for the 1st Defendant prayed the suit be struck out.

Consequently, on the strength of the authority in the case of **Abduilatif Mohamed (supra)** and the facts of this case, also on reasons sated above, I do hereby strike out the plaintiff for non-joinder of a necessary party. Costs to be borne by the Plaintiff.

Order accordingly.

Dated at Kigoma this 05th day of August, 2022




MANYANDA

JUDGE