

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)**

AT MOROGORO

LAND CASE NO. 21 OF 2022

BETWEEN

MADUKI EDWARD SOZI.....PLAINTIFF

VERSUS

SME IMPACT FUND TANZANIA LIMITED.....DEFENDANT

RULING

29th Nov, & 12th Dec, 2022.

CHABA, J.

The Plaintiff, **MADUKI EDWARD SOZI** instituted a suit against the Defendant, **SME IMPACT FUND TANZANIA LIMITED** for the declaration that the House in Plot No. 439, Block C at Vibandani Street situated at Ifakara in Kilombero District purported to be sold to the value of Tshs. 500,000,000/= (Five Hundred Million) belongs to the plaintiff and the purported sale is unlawful and illegal.

Wherefore, the plaintiff prayed for orders, judgment and decree against the defendant as follows: -



1. That, the purported sale of the mortgaged property is null and void.
2. That, the Auction of the mortgaged property is illegal as there was no public auction which was conducted,
3. That, the plaintiff is the owner of the mortgaged property,
4. Costs of this suit, and
5. Any other relief(s) as this honorable court may deem fit and expedient to grant.

After being served with the plaint, the defendant through Mr. Helmes Marcell Mutatina, learned advocate and the one who drew and filed the Written Statement of Defence (the WSD), coupled with a notice of preliminary objection on points of law to the effect that: -

1. That, this suit is bad in law for non-joinder of a buyer as a necessary party-defendant who is in occupation of the suit property as a decree against the defendant herein will definitely affect adversely the interest of the buyer.
2. The, plaint is incurably defective for offending the provision of Order VII, Rule 1 (e) of the Civil Procedure Code [Cap. 33 R. E, 2019] for failure to disclose when the cause of action arose.


When the matter was called on for hearing on 19/10/2022, parties agreed to argue the preliminary objections on points of law by way of written submissions. I proceeded to schedule the dates within which the written submissions by the parties could be lodged in Court. Thus, the defendant had to file her written submission in chief on or before 26th October, 2022, the plaintiff had to file reply to written submission on or before 2/11/2022 and rejoinder (if any) had to be filed by the defendant on or before 9/11/2022. Ruling was fixed on 29/11/2022. The defendant's written submission was drawn and filed by Mr. Helmes Marcell Mutatina, learned advocate. Unfortunately, for reasons better known by the plaintiff, did not file his reply to written submission in chief.

It is trite law that, failure to file a written submission as ordered by Court is tantamount to failure to enter appearance in court when the case is fixed for hearing. This position of the law has been explicated by the Court of Appeal (T) in a number of cases including the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal No. 41 of 2014 (unreported) wherein the Court cited its previous decisions in **National Insurance Corporation of (T) Ltd & Another v. Shengena Limited**, Civil Application No. 20 of 2007 and **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011 (both unreported).

Since the plaintiff did not file reply to the written submission in chief as per court's scheduled order dated 19/10/2022, it is apparent that the plaintiff has therefore failed to challenge the preliminary objection on points of law lodged by the defendant. In the circumstances, I proceed to determine the preliminary objections raised by the defendant based on the defendant's written submission only.

However, I will not reproduce the whole submission, but I will refer to them whenever necessary.

Submitting in support of the 1st point of preliminary objection, Mr. Mutatina commenced by referring this Court to paragraphs 2, 7 and 8 of the plaint and paragraphs 2 and 3 of the WSD and highlighted that these paragraphs are glaring clearly that the suit land had already been sold and transferred to the third party before the filing of this suit and the said party is not party to this suit. He accentuated that the plaintiff's act to sue the defendant, the seller of the suit land and who is neither occupying nor possessing the suit land without joining the buyer who is in actual possession of the suit land, is against the established principles of the law pertaining to necessary party to the suit. He averred that at any rate, if the decree will be granted by the court, obvious the same will not be executed/effectuated without affecting the interest of the buyer who by now is



occupying and possessing the suit land. To buttress his argument, he cited the case of **Juma Kadala v. Laurent Mnkenda (1983) TLR 103.**

He underlined further that, though the plaintiff has unfettered prerogative and freedom to join a party whom does not feel to be a party to the case, but such a freedom is limited if the un-joined party is a necessary party. To reinforce his argument, he cited the case of **Tanzania Railways Corporation (TRC) v. GBP (T) Ltd**, Civil Appeal No. 218 of 2020, CAT at Tabora, at pages 15 - 17 (unreported) to cement the point.

Mr. Mutatina submitted that despite the fact that he is aware of the provisions of Order 1, Rule 9 of the Civil Procedure Code (Cap. 33 R. E, 2019) (the CPC) which provides that a suit shall not be defeated by reason of misjoinder or non-joinder of parties, but the Court of Appeal of Tanzania sitting in Dar Es Salaam in the case of **Abdullatif Mohamed Hamis v. Mehbood Yusuf Osman and Fatma Mohamed**, Civil Revision No. 6 of 2017 (unreported) held *inter-alia* that:

"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 holds good with respect to the misjoinder and non-joinder of necessary parties."

He contended further that, looking at the reliefs sought by the plaintiff, if the same will be granted, obviously it will definitely affect adversely the interests of the buyer who is not party to this case and possibly might be condemned unheard which is against the fundamental procedural and constitutional rights as well. He referred this Court to the cases of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma (2003) TLR 251** and **The Director of Public Prosecutions v. Sabinus Inyasi Tesha and Raphael J. Tesha (1993) TLR 237**. For instance, in **Mbeya-Rukwa** (Supra) the Court of Appeal observed that:

"In this Country natural justice is not merely a principle of Common Law, it has become a fundamental Constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law".

Similarly, the CAT in the case of **The Director of Public Prosecutions** (Supra) held *inter-alia* that: -

".... A denial of a right to be heard in any proceedings would definitely vitiate the proceedings".

To conclude, Mr. Mutatina highlighted that as the present suit has been filed in a total violation of the established principles of law for not joining the buyer as a necessary party-defendant, this suit must suffer the natural death by being struck out with costs.

As regards to the 2nd limb of the preliminary objection, the defendant's counsel averred that Order VII, Rule 1 (e) of the CPC (Supra) provides for particulars to be reflected in the plaint and it is couched in mandatory wording using the word **shall**. He asserted that, the plaint filed by the plaintiff fall short of this legal requirement as the same does not specify categorically as to when the cause of action arose. He stressed that the plaint is incurably defective. To bolster his argument, the learned advocate cited the case of **Paulo John Massay and Others v. Hon. Attorney General**, Land Case No. 29 of 2021, wherein this Court had the following to state: -


"It is unfortunate that apart from general denial that the dispute did not arise in the year 2015, no any other date was stated as the date the cause of action arose. The contention by the counsel for the plaintiff that the defendant could have asked for better particulars is unwarranted and an afterthought. As pointed out above, the plaint must show the time/ the cause of action arose and it is not a matter for asking better particulars. But, if we agree

that the dispute did not arise in the year 2015, then the plaint will still remain defective for failure to state as to when the cause of action arose thus contrary to Order VII, Rule 1 (e) of the Civil Procedure Code [Cap. 33 R. E. 2019]”.

Basing on the above submission, Mr. Mutatina accentuated that since the plaint was filed in contravention of the express provisions of Order VII, Rule 1 (e) of the CPC (supra), the plaint must be struck out with costs.

Having gone through the written submission advanced by the defendant in the light of the raised points of preliminary objections, the only question which call for my determination is whether or not the plaintiff's case was improperly filed in before this Court.

Starting with the first limb of preliminary objection on a point of law, the burning issue is whether or not there was a non-joinder of the necessary party in this case. To answer this question, I thought it imperative to define the word who is necessary party by seeking assistance from the Literatures. The term has been defined in the text book titled; **Civil Procedure with Limitation Act 1963 by C.M. K. Takwani, 7th Edition** Published by Eastern Book Company Lucknow at p.162 as follows: -




"a necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed".

In the case of **21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association and Another**, Civil Appeal No. 91/2003 CAT at Tanga (unreported), the Court held that: -

"A necessary party is one whose presence is prescribed by law and in whose absence no effective decision can be given, without such a party, the action in appeal or proceedings is not properly constituted".

It is common ground that, the question of joining a party or otherwise to the proceedings is a matter of applying the applicable law. Whether the purported buyer was a necessary party to this suit or not, the answer to this question can be extracted from the parties' pleadings. On reviewing the plaint, it is plain that at paragraph 8, the plaintiff pleaded and acknowledged to have received a call from the Ministry of Land and Human Settlement to the effect that there was an application lodged by the defendant intending to change the names of the suit property on Plot No. 439, Block "C" at Vibandani Street situated at Ifakara in Kilombero District which belongs to him.

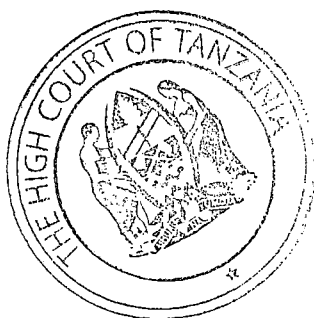


From the above piece of evidence, no doubt that the landed property which is the subject of this preliminary objections was sold to a person who was supposed to be joined as a necessary party and the purchaser, currently is in possession of the land in dispute. In my considered opinion and on the bases of the decision in the case of **21st Century Food and Packaging Ltd** (Supra), the buyer falls within the category of a necessary party.

From the foregoing, I tend to agree and fully subscribe to the 1st limb of preliminary objection raised by the defendant's advocate that the plaint is incurably defective for non-joinder of necessary party. Suffice (it) to say that, the 1st limb of preliminary objection on a point of law is sufficient to dispose of the suit in its entirety. That being the position, I see no need to labour on the 2nd limb of preliminary objection and I accordingly, refrain from delving on it.

In the result, and based on the reasons epitomized above, I am satisfied that the 1st point of preliminary objection has merits. I uphold the same and struck out this case in its entirety with costs. **It is so ordered.**

DATED at MOROGORO this 12th of December, 2022.




M. J. CHABA

JUDGE

12/12/2022