

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 132 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Kilosa, at Kilosa in Land Application No. 2 of 2018 delivered on 19th April, 2021)

BETWEEN

HAMIS KIZENGAAPPELLANT

VERSUS

LITHER KANYANGA 1ST RESPONDENT

MANENO MASHAKA 2ND RESPONDENT

LEKANI KONDOWE 3RD RESPONDENT

JUDGMENT

19th Dec, 2022

CHABA, J.

This appeal emanates from the decision of the District Land and Housing Tribunal for Kilosa, at Kilosa (the DLHT) in Land Application No. 02 of 2018 where the application was struck out for failure to join necessary parties. The appellant herein was ordered to re-institute a fresh suit with proper parties. The applicant, Hamisi Kizenga was gravely dissatisfied by the decision of the trial tribunal, hence this appeal.



In the memorandum of appeal before this court, the appellant presented seven (7) grounds of appeal which can be summarized as follows:

1. That, the trial Chairman erred in law and facts in holding that the sellers of the disputed suit land namely, Paulo Mussa and Fidelis Kalori who had extinguished their rights/interests over the disputed land before they passed away, were necessary parties to be sued while the applicant had no cause of action against them.
2. That, the trial Chairman erred in law in interpreting the decisions of **John Edward Mwangosi Vs. Salum Majid Seif and others**, Civil Appeal No. 56 of 2016 (unreported) and **Juma B. Kudala Vs. Laurent Mnkande (1983) TLR 103** which are distinguishable to the circumstances of present case / appeal;
3. That, the trial Chairman erred in law and facts in holding that sellers or administrators of the estate of Paul Mussa and Fidelis Kalori were necessary parties;
4. That, the trial Chairman erred in law and facts for not composing the judgment based on the evidence adduced before the trial tribunal as the appellant managed to prove his case on balance of probabilities that he is a lawful owner of the disputed land as rightly opinioned by the honourable two wise assessors;

5. That, the trial Chairman erred in law for failure to give reason (s) for departing from the opinion of the wise assessors;
6. That, the trial Chairman erred in law and in facts holding that there could be no effective decree to be made in respect of this case when the sellers and administrators are not joined as necessary parties in terms of the case of ***Abdullatif Mohammed Hamis Vs. Mehboob Yusuf Osman;***
7. That, the trial Chairman erred in law and facts by holding that ownership of the disputed land could only be proved by the sellers or administrators.

During the hearing of the appeal, the 2nd and the 3rd respondents did not enter appearance in court and the court decided to proceed in their absence. Both parties (the appellant and the 1st respondent) appeared in persons, unrepresented and argued the appeal orally.

As usual, the appellant was the first person to kick the ball rolling in support of the appeal. However, upon going through the appellant's oral submission, I realized that the appellant argued only one ground of appeal, that is fourth ground and silently dropped other grounds of appeal, i.e, grounds 1, 2, 3, 5 and 6 respectively. The fourth ground of appeal revolves around the issue of failure of the trial tribunal to consider the evidence



adduced before the tribunal as the appellant allegedly managed to prove his case on balance of probabilities. He contended that, the chairperson erred in law and in fact when he failed to consider the evidence of the sellers of the disputed parcel of land namely, Paulo Mussa and Fidelis Kalori.

He argued that, after Paul Mussa and Fidelis Kalori sold the disputed parcel of land in 2002, there have been no dispute till when they passed away in the year 2017. According to him, the respondents are less concerned with the disputed parcel of land as they have no any interest over the disputed parcel of land.

He added that, the fact that the Village Chairperson one William Mdemu appeared before the DLHT and testified that the disputed parcel of land was sold to him, the appellant by the late Paulo Mussa and Fidelis Kalori, is a proof that he legally obtained and acquired the same.

He continued to argue that, the Tribunal Chairperson denied the exhibits shown by the 1st respondent that he witnessed a certain document expressing to the effect that, the 1st respondent acquired the disputed parcel of land from their parents. He pointed out that, even the gentlemen assessors were not in agreement with the documentary exhibits tendered in evidence by the first respondent, which allegedly showed that the 1st respondent is the owner of the disputed parcel of land. According to him, the assessors proved that the appellant's documents were genuine.

He submitted further that, the 1st respondent told the assessors that he had never filed any probate case before the court and appointed as an administratrix, and she sold the two acres while the matter was still pending for determination before the DLHT. More-over, the applicant averred that, the DLHT proved that the disputed parcel of land is his property and added that the 1st respondent has no genuine documentary exhibits to prove ownership of the disputed parcel of land.

He concluded by asking the court to declare him (appellant) as the real and lawful owner of the disputed parcel of land.

In reply, the 1st respondent didn't have much to submit. She highlighted that the appellant is lying or deceiving the court and his story is not true. She elaborated that, her parents bought the disputed parcel of land from one Mzee Mwambarasi in the year 1973/1974 and the sale transactions took place before the Village Chairperson. She conceded the fact that, the late Paulo Mussa and Fidelis Kalori sold their parcel of land to the appellant, but not her parcel of land. She described that, the distance from her farm to the area (parcel of land) in which the appellant bought is about 3 acres. That means, the said three acres demarcates the two parties over their parcels of land.

She goes on stating that, there was a time the land officers or surveyors and the village leaders in their village were summoned to witness

the exercise of measuring the areas in dispute. She said, the area involves 70 people who are claiming for their rights to redeem their parcel of land and she is the 71st person and her parcel of land is not among the disputed parcel of land. When the exercise of measuring the areas in the village was completed, it was revealed that the appellant had a parcel of land measuring 155.5 acres. She asserted that, the appellant denied to have another parcel of land on the western part. However, the respondent decided to go to the DLHT which took its own initiative to visit the locus in quo and proved that the disputed parcel of land did belong to her and finally pronounced its judgment in her favour.

In re-joining, the appellant submitted that the parcels of land sold to him by Paulo Mussa and Fidelis Kalori comprises of two acres which are among the parcels of land owned by the 1st respondent. The appellant agreed to the fact that, the village leaders visited the disputed parcel of land, but not the one in question.

He added that, the 1st respondent has no documentary evidence to prove ownership of the disputed land, but all relevant documentary exhibits are in his possession (the appellant's possession).

In the end, he reiterated his prayers that his appeal be allowed with costs.



Having heard the rival submissions made by both parties and keenly navigated through the court records, as I have noted earlier on, both parties didn't submit for and against the presented grounds of appeal as listed in the memorandum of appeal, but rather they reiterated what transpired before the trial tribunal. Therefore, in determining this appeal, I will deal with the grounds of appeal raised by the appellant. I will start with the issue of non-joinder of necessary parties which formed the basis of the decision of the trial tribunal, as the same is capable of disposing the entire appeal.

On the issue of mis-joinder of necessary party, over the years, courts have made a distinction between necessary and non-necessary party. For instance, in the case of **Deported Asians Property Custodian Board Vs. Jaffer Brothers Ltd (1999) EA 55**, the Supreme Court of Uganda held that, there was a clear distinction between the joinder of a party who ought to have been joined as a defendant and the joinder of the one whose presence before the court was necessary for it to effectively and completely adjudicate upon the question involved in the suit. That position was restated by the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed Hamis Vs. Mehboob Yusuf Osman & another**, Civil Revision No. 6 of 2017 (unreported). The Court stated further that: -

"The question of joinder of parties may arise either with respect to plaintiffs or the defendants. Speaking of a necessary party to a suit,

whether as plaintiff or as defendant, who, as a matter of necessity, ought to have been joined".

Having in mind this principle of law, I can now be in a position to dispose of this appeal. At the outset, I would like to state that, the choice of who to sue, lies on the plaintiff who has the duty to show the cause of action against the person who she / he sues. In the matter at hand, the appellant chose the respondents as the proper persons to sue for trespassing over his parcel of land upon believing that they all invaded and committed the wrong in their personal capacity. I have examined the records of the trial tribunal and found that in the circumstance of this case, the question of suing the sellers cannot arise as the disputed parcel of land was already been transferred from the sellers to the appellant. In the case like this one, it is enough to call sellers as witnesses where the need arises and not necessarily be made as party to the suit on the same reason that, the appellant may fail to establish a cause of action against the sellers.

In fact, the appellant could not sue the administrators / administratrix of the estates of the late Paulo Mussa and Fidelis Kalori because it was not the deceaseds who invaded the appellant's land. If at all the 1st respondent thought that the administrators / administratrix were necessary parties to defend her interests, it was upon the 1st respondent and others who had the duty to apply before the trial tribunal for the sellers to be joined possibly



through third party notice. On this facet, I thus hold that in the circumstance of this case neither the sellers nor the administrators / administratrix of estates of the deceased persons were necessary parties to the matter at hand. Additionally, it was wrong for the trial tribunal to struck out the matter before it on the ground of non-joinder of the sellers because, in law, a suit cannot be defeated by mere non-joinder of parties. Order 1, Rule 9 of the Civil Procedure Code [Cap. 33 R. E, 2019] provides that: -

"...No suit shall be defeated by reason of the mis-joinder 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".

In other words, the matter was not a nullity by non-joinder of the sellers. If the case could be unmaintainable without joining the other party, then in my view, it could make sense. What matters is, which party has proved a better title over the other in the disputed suit land.

For the finding and reasons, I have endeavoured to discuss herein above, I do not find worth to labour on the other grounds of appeal. Much as I disagree with the finding and reasoning of the trial Chairperson, I proceed to allow the appeal without costs. The proceedings and judgment of the District Land and Housing Tribunal for Kilosa, at Kilosa in Application No. 2 of 2018 are nullified and set aside, respectively. For the interest of

justice, the matter is remitted back to the DLHT to start afresh before another Chairman and a new set of assessors. **It is so ordered.**

DATED at **MOROGORO** this 19th day of December, 2022.




M. J. CHABA

JUDGE

19/12/2022