IN THE HIGH COURT OF THE UNITED REUBLIC OF TAZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 27 OF 2020

THE REGISTRED TRUTEES OF TANZANIA YOUNG MEN'S CHRISTIAN ASSOCIATION (formally known as The Registered Trustees Tanzania National Y.M.C.A).....PLAINTIFF

VERSUS

LINETH OSWALD TEMU

@ MRS. OSWALD STANSLAUS TEMU.....RESPONDENT

RULING

23.2.2022 & 04.03.2022

MZUNA, J.:

The Plaintiff, above mentioned, filed a suit against the defendant herein, claiming for vacant possession of the suit land on the Plot Number (110A & 110A/2 combined) at Block 'E', Arusha City; with certificate of title No. 055025/20 registered in the name of the plaintiff herein, allegedly that it was unlawfully invaded by the defendant herein. The Plaintiff claims to be the lawful owner of the disputed land, a fact which is strongly disputed by the defendant.

This court is invited to make a ruling on one issue as to *whether it is proper to add one Mr. Felix leon Temu, the administrator of the estate of the late Stanlaslaus George Temu, as a necessary party (defendant).*

The prayer to join him was made by Mr. Ombeni Kimaro, the learned counsel who represent the plaintiff, the view which was strenuously opposed by Mr. Lengai Nelson Merinyo, the learned counsel for the defendant.

The main reasons which were advanced by Mr. Kimaro being that the disputed suit land was initially owned by Stanslaus George Temu, who passed away in 1999. That the defendant who got married to the son of the said deceased, one Osward Stanslaus Temu acquired the suit land through inheritance at the time when the administration of the deceased's estate had not been done to the beneficiaries despite the fact that the defendant's husband was appointed to administer the deceased's estate. Mr. Kimaro emphatically insisted that though the suit was filed in court in August, 2020, they could not join him because the process of administration was still ongoing and only recently they managed to get the administration of the estate.

That even the defendant under paragraph three of the written statement of Defence admitted that the suit land had its origin from the

late Stanslaus George Temu. It is therefore on that account that the learned counsel urged the court to allow his prayer based on the provisions of Order V1 Rule 17 of the Civil Procedure Code Act, Cap 33 RE 2019 (CPC) which emphasises that amendment can be made at any stage of the proceedings. The case of **George M. Shambwe vs Attorney General & Another** [1996] TLR 334 was also cited to glue his argument.

Opposing the prayer, Mr. Merinyo submitted that:- **One,** that the suit is based on a claim for land which has the time limitation of 12 years regardless of the date of appointment of the administrator. That, according to paragraph 8 of the plaint, it is alleged that a cause of action arose in 2009, however their submission does not show when the deceased (Stanslaus G. Temu) passed away. That it is not proper to join the administrator in the present matter. He made reference to the case of **Yusuf Same & Another vs Hadija Yusuf** [1996] TLR 347 that limitation time accrues regardless of when the administrator was appointed.

Two, that even the appointed administrator had not been conclusively determined because there is a pending appeal on his appointment.

Three, that they never joined the late Stanslaus George Temu as a necessary party in previous cases between them notably Land case No. 101/2009.

It was his view that the proper remedy if they had any cause of action against the deceased (Stanslaus G. Temu) they could have joined him under a separate suit under Order 1 Rule (2) of the CPC. More so, when PW1 tendered exhibit P 9 he said that the land in dispute does not belong to the deceased (Stanslaus G. Temu) and he did not submit on how the said administrator interfered with their interest.

He therefore prayed for the court to dismiss the prayer and to proceed with the hearing as scheduled as to do otherwise may delay the matter.

In rejoinder, Mr. Kimaro contended that, order 1 rule (2) of the CPC has no connection with joining the defendant and that they want to join the administrator as a co- defendant and not co-plaintiff as per the law. He submitted further that, they want to join the administrator because the deceased was the first trespasser as they acquired the said plot since 1968. Regarding the issue of cause of action, he says they were within time limitation as the cause of action herein arose in 2009 and they instituted Land Application on the same year in (Land Case No. 101 of

2009) against the defendant herein. Further to that the High Court vide Land Appeal No. 41/2017 nullified all the proceeding of the tribunal on the ground that the tribal acted without jurisdiction which led them to file the present case.

He submitted further that, they find it necessary to join the administrator who was appointed on 10/12/2021 and the allegation that there is an appeal pending is only a future event which cannot move the court not to act.

In his sur-joinder, in response to some new issues Mr. Merinyo told the court that at the DLHT the defendant was sued alone there is nothing to show how the deceased (Stanslaus G. Temu) took part on it. That since it is more than 12 years from when the deceased passed away (2021-1999=22) the proceedings of 2009 cannot be used to exempt time because the intended administrator was not joined in the suit.

More so, he told the court that order 1 Rule 3 of the CPC cannot be used because the series of act had already been broken. Regarding the issue of closing of Probate, he submitted that it was supposed to be dealt with in Probate matters and the cited case of **George M. Shambwe** (supra) which was cited to backup Order VI Rule 17 is distinguishable as

the controverse of the deceased was not pleaded and they cannot infer a fact which was not pleaded in the plaint.

On his part, Mr. Kimaro reiterated what he had already submitted that amendment under Order VI Rule 17 of the CPC can be made at any stage of the proceedings.

Having examined closely the submissions made by the learned counsel for both parties, I now turn to the question whether the administrator of the estate is a necessary party to be joined in the suit, Land Case No. 27 of 2020.

In the present matter, counsel for the plaintiff prayed to join the administrator of Stanslaus G. Temu who was the father-in-law of the defendant on the ground that before his death he was alleged to have trespassed into the disputed land. Now the question before the court is whether there is a common question of law or fact between the defendant and the one who want to be joined as a co-defendant or plaintiff that would arise.

The plaintiff's counsel alleged that under paragraph 3 of her Written Statement of Defence (WSD) the defendant admitted that a suit land belongs to the deceased (Stanslaous G. Temu) and later on survived by his Son Oswald Stanslaous Temu who also died in 2009. In reply Mr.

Merinyo was of the view that cause of action against the deceased (Stanslaus G. Temu) has already lapsed as per the law of limitation Act, therefore the administrator of the estate of the late Stanslaous G. Temu is not a necessary and a proper party to be joined in this matter.

It is common ground that the question of joining a party or otherwise to the proceedings is geared at resolving the questions arising in the suit. This obligation to join the necessary party can either be done by the court itself or either of the parties including the plaintiff who is by law enjoined to prove his/her case. The law foresaw this need as well stated under Order 1 Rule 10 (2) of the CPC which provides:

> *" 10. -* (2) *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, 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 added).*

Similarly Order 1 Rule (3) of the CPC put it clear on who may be joined as a defendant. The Rule reads as follows;

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

alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."

The above cited provisions of the law clearly show that the administrator of the estate of the late Stanslaus G. Temu is a necessary party and ought to be joined in this case. This is due to the fact that even if a separate suit was filed against such person(s), though a common question of law and fact would also arise in a cause of action, still it could be on the same disputed land and therefore may lead to "multiplicity of suits", see **Tang Gas Distributors Limited Salim Said and 2 Others,** Civil Application for Revision No. 68 of 2011 CAT (unreported).

Therefore, his presence before the court is necessary to enable the court ***"effectually and completely"*** to adjudicate upon and settle the questions involved in the suit failure of which the suit may be dismissed on appeal. I am fortified to this view by the decision of the Court of Appeal in the case of **Godfrey Nzowa v. Seleman Kova and Another,** Civil Appeal No. 183 of 2019, CAT at Arusha, (unreported). In that case, the court ordered for a retrial after resolving on one of the key issues as to the implications of non-joinder and misjoinder of parties. The court found that it was utmost important to join the Permanent Secretary, Ministry of Works *"as an essential party to the suit",* notwithstanding that the second defendant was the Tanzania Building Agency and the matter involved sale

agreement of a Government house between two police Officers who had exchanged their work stations. The suit property is at Arusha. The court reiterated the holding in the case of **Abdulatif Mohamed Hamis v. Mehboob Yusuf Osman and Another,** Civil Revision No. 6 of 2017 (unreported) that:-

> "To say the least the non-joinder of the necessary party was *'a serious procedural in-exactitude which may, seemingly, breed injustice'* ".

The argument that the plaintiff never pleaded the late Stanslaus George Temu or that his children never said about their late father as per exhibit P9 is a point which touches on evidence. It cannot be resolved at the preliminary stage. Similarly, to say that even in the Land case No. 101/2009 the plaintiff never joined the administrator, I have an answer based on the old adage that *"Two wrongs don't make a right."*

Regarding the issue of time limitation, section 24 (2) of the law of Limitation Act, Cap 89 R.E 2019 is clear on this. It reads;

> *"Where a person dies after a right of action in respect of any proceeding accrues against him, in computing the period of limitation for such proceeding, there shall be excluded the period of time commencing from the date of the death of the deceased and expiring on the date when there is a legal representative of the deceased against whom such proceeding may be instituted."*

This provision shows that the alleged time limitation does not hold water because there was an administrator who administered the deceased's property (that is the defendant's husband). After his death another administrator was appointed. The cited case of **Yusuf Same & Another vs Hadija Yusuf** (Supra) with due respect, is distinguishable.

For the foregone reasons, I hereby invoke the provisions of Order 1 Rule 3 and 10 (2) of the CPC, and order that the administrator of the late Stanslaus G. Temu, being a necessary and a proper party in the proceedings in Land Case No. 27 of 2020 be joined in this suit.

That said, the raised preliminary objection stands dismissed. I give the plaintiff seven (7) days within which to amend the plaint in order to join the administrator of the late Stanslaus G. Temu as one of the defendants or as the case may be. Costs to be in the course.

By Order.

M. G. MZUNA

JUDGE.

4/03/2022.