IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND REVISION NO. 10 OF 2022

(Originating from the District Land and Housing Tribunal for Kiteto at Kibaya, Application No. 21 of 2022)

ASHA OMARY ..... 1ST APPLICANT

SAKINA MUHANDO ..... 2ND APPLICANT

VERSUS

APLONIA NICODEMUS MANDA (Suing as the Administratrix of the Estate of the late NICODEMUS TLUWAY MANDA) ..... RESPONDENT

RULING

06/02/2023 & 15/03/2023

KAMUZORA, J.

Asha Omary and Sakina Muhando, the Applicants herein, preferred this application under sections 41(1) and 43(l)(b) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], moving this Court to call for records of the District Land and Housing Tribunal for Kiteto (hereinafter "the trial tribunal") in Application No. 21 of 2022 and satisfy itself as to the correctness, legality or propriety of the same and revise the proceedings, decision and order resulting therefrom.

The application is supported by affidavit of Ayubu David Suday, learned advocate for the Applicant. The Respondent contested the application through a counter affidavit deponed by herself. In order to appreciate issues of contention, I find it dutiful to outline background facts of the dispute giving rise to this application as gathered from the affidavits and the record generally.

The Respondent successfully sued the 1st Applicant in the trial tribunal for trespassing in a farm land measuring 76 acres, located at Napilikunya-Kimana Village, Partimbo Ward within Kiteto District in Manyara Region (hereinafter "the suit land"). According to the evidence by the Respondent and her witnesses, the suit land belonged to her father Nicodemus Tluway Manda, who died in 2022. After her father's death, the Respondent was appointed administratrix of the deceased's estate on 22/04/2022 vide Probate and Administration Cause No. 9 of 2022. Among the accounted deceased's properties was the suit land alleged to have been purchased from Maria Origidi in 2012. The sale agreement was tendered and admitted as exhibit P2.

It was alleged that before his death the deceased occupied and used the suit land peacefully without interference until 2022 when the 1st Applicant trespassed therein, developed and cultivated the same. On 28/04/2022 the Respondent referred the dispute at Partimbo Ward

Tribunal for mediation, wherein mediation failed. The dispute was referred in the trial tribunal for adjudication.

In her defence, the 1st Applicant denied trespassing into the suit land and claimed that the same belonged to the 2nd Applicant who owned a total of 124 acres. She asserted that the 2nd Applicant bought the suit land in 2014 and the sale agreement was tendered and admitted as exhibit D1. Initially, in her written statement of defence, the 1st Applicant raised preliminary objection to the effect that the suit was unmaintainable for failure to join the necessary party, the 2nd Applicant. However, the preliminary objection was overruled.

After full trial, the tribunal chairman was satisfied that the Respondent's evidence was heavier compared to that of the 1st Applicant. The Respondent was declared lawful owner of the suit land whereas the 1st Applicant and her agents were ordered to give vacant possession of the same. In addition to that, the 1st Applicant was ordered to pay costs of the case. Being aggrieved and in considering that the 2nd Applicant was not made party to the case in the trial tribunal, the Applicants preferred this revision application imploring this Court to revise the said decision for failure to join the 2nd Applicant as necessary party whose rights were being determined in that case.

At the hearing of the application, the Applicants were represented by Mr. Ayubu David Suday, learned advocate while the Respondent was represented by Mr. Edwin Silayo, learned advocate. By consensus, it was resolved that hearing of the application be argued by way of written submissions. Counsel for both parties complied with the filing schedule and they both adopted affidavits in support of their positions to form part of their submissions.

Submitting in support of the application, Mr. Suday contended that since the 1st Applicant was not legal owner of the suit land she was wrongly sued as the Respondent ought to have joined the 2nd Applicant who was necessary party in the suit. He maintained that the 1st Applicant notified the trial tribunal through the preliminary objection raised that the suit land belonged to Sakina Muhando, the 2nd Applicant, but the trial tribunal disregarded by overruling the preliminary objection. He referred Order I Rule 3 of the CPC stating that the provision does not give the Applicant choice of a person to be sued, but it creates mandatory condition for all persons to be joined where any right to relief in respect of the same act, transaction or series of acts alleged to exist, and whether if separate suits are preferred any common question of law or fact would arise.

It was counsel's argument that right from the ward tribunal, the 1st Applicant notified the tribunal that she was not the legal owner of the suit land, rather the 2nd Applicant. According to Mr. Suday, during hearing of the case in the trial tribunal, the 1st Applicant testified that the suit land was owned by the 2nd Applicant who purchased it in 2014. The sale agreement was admitted as exhibit D1. The 2nd Applicant testified as DW2 and informed the trial tribunal that she was the lawful owner of the suit land which she bought in 2014 and acknowledged exhibit D1. He argued that under Order I Rule 3 of the CPC, failure to join the 2nd Applicant who was necessary party was a fatal irregularity that led to injustice.

Relying on Order 1 Rule 10(2) of the CPC, Mr. Suday contended that failure to join the 2nd Applicant in the case lead to failure to settle all questions involved in the suit. It was his further contention that a person who without his presence, the questions in the suit cannot be completely decided or where such a person, who is necessary or proper party to a suit has not been joined as a party, the court is empowered to join him. To reinforce his argument, he referred the Court of Appeal decisions in; **Mussa Chande Jape Vs. Moza Mohamed Salim**, Civil Appeal No. 141 of 2018 and **Tang Gas Distributors Limited Vs Mohamed Salim Said & 2 Others**, Civil Application No. 68 of 2011 (both unreported), which underscored the above position. In his view, the trial tribunal erred in

holding that the Respondent had no cause of action against the 2nd Applicant. He concluded by praying for the Court to allow the application with costs.

On his part, Mr. Silayo contended that the Respondent instituted the dispute in Partimbo Ward Tribunal vide Shauri Na. 7 of 2020 wherein the 2nd Applicant was not a party. The ward tribunal mediated the matter between the Respondent and the 1st Applicant and referred the same to the trial tribunal, therefore the 2nd Applicant could not be joined in the trial tribunal as she was not a party at the ward tribunal. He intimated that since the 2nd Applicant did not participate in the mediation, she could not be joined in the trial tribunal as she was supposed to participate in the case just from the mediation process as per the requirements of the law.

Regarding the preliminary objection raised in the trial tribunal, Mr. Silayo fortified that whether the 2nd Applicant was the lawful owner of the suit land, that required evidence contrary to the principles propounded in the famous case of **Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors Ltd** (1969) E.A 696. In his view, it was justifiable to overrule the preliminary objection. According to Mr. Silayo, the Respondent sued the 1st Applicant for trespassing into her land without any colour of right hence she did not have cause of action against the 2nd Respondent who

was unknown to her and who did not trespass in her land. It was his further submission that it was the 1st Applicant who trespassed into the suit land hence breached the Respondent's right to enjoy ownership of the suit land. To underscore his argument, the learned advocate for the Respondent referred the Court to the case of **Mashado Game Fishing Lodge Limited & 2 Others Vs the Board of Trustees of Tanganyika National Parks (TANAPA)** [2002] TLR 319.

Mr. Silayo strenuously insisted on the settled position of the law that a person has the right to choose who to sue, relying on the authoritative decision of the Court of Appeal in the case of **Farida Mbaraka and Another Vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported). It was his view therefore that it was the 1st Applicant who was the proper party since she was the one found trespassing into Respondent's farm.

Regarding Order 1 Rule 3 of the CPC, it was Mr. Silayo's contention that the legislature used the word "may" which confer discretion and not mandatory as counsel for the Applicants purports. That, despite the fact that in her evidence the 1st Applicant mentioned the 2nd Applicant as the owner of the suit land, she did not state whether she trespassed in the suit land on the 2nd Applicant's instruction, to warrant joining the 2nd Applicant as necessary party.

Underpinning the principles on who is a necessary party in a suit, Mr. Silayo pointed out two tests underlined by the Court of Appeal in the case of **Abdullatif Mohamed Hamisi Vs Mehbob Yusuph Othman & Another**, Civil Revision No. 6 of 2017 (unreported). In that case, the Court stated that in order to find a person necessary party in a suit, there has to be right or relief against such party in respect of the matters involved in the suit and the Court must not be in a position to pass effective decree in the absence of such a party. Based on the above principles, Mr. Silayo asserted that Respondent herein had no any relief against the 2nd Applicant since the 2nd Applicant never trespassed on the suit land. That, there was no dispute of ownership of the suit land between the Respondent and the 2nd Applicant.

Referring to the evidence in record, Respondent's counsel contended that the Respondent claimed that the suit land measured 76 acres while the Applicants' adduced evidence that the 2nd Applicant's land measured 124 acres, making it different from the land claimed to have been trespassed by the 1st Applicant. On the same account, the land that was trespassed according to the Respondent's evidence bordered Lolomo Lerongo in the North, traditional road in the west, Yohana Lalaisa in the south and Sananda Hill in the east. That, exhibit D1 which purported to prove the 2nd Applicant's ownership of the suit land showed that it

bordered Park Road in the north, Water gorge in the west, hill in the south and Dr. Kimaro in the east. It was therefore Mr. Silayo's view that the land the Respondent sought to be declared the lawful owner, is different from the land that the 1st Applicant claimed to be the 2nd Applicant's property. That, it was therefore not justifiable to join the 2nd Applicant in the case since they own quite different pieces of land. Alternatively, he was of the view that the 2nd Applicant ought to have filed an application seeking to be joined in the suit or she ought to have filed a case against the Respondent claiming for the 124 acres of land.

Regarding Order 1 Rule 9, Mr. Silayo fortified that the 2nd Applicant was not a necessary party because her absence in the trial tribunal did not make the tribunal fail to deal with the suit. On who is a necessary party in a suit, Mr. Silayo relied on the decision in **Abdi M. Kipoto Vs. Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017 (unreported). It was counsel for the Respondent's contention that a suit cannot be defeated merely for the reason of misjoinder or non-joinder of parties. In conclusion, Mr Silayo amplified that the 2nd Applicant was not a necessary party to the suit as she had no dispute of ownership against the Respondent therefore her rights were never affected by the trial tribunal decision.

In rejoinder submission, Mr. Suday contended that pursuant to Orders 1 Rules 3 and 10(2) of the CPC, the court is mandated to order a party to be joined in a suit as necessary party in that dispute. He maintained that dispute over a piece of land should be instituted against the person claiming to be lawful owner of that land thus, non-joinder of the 2nd Applicant was fatal. He reiterated prayers made in the submission in chief.

I have gone through the record of the trial tribunal and given serious consideration of the affidavits for and against the application. The main issue for determination in this application is whether the 2nd Applicant was a necessary party to be joined in the case before the trial tribunal. Under Order 1 Rule 10(2) of the CPC, the court or Tribunal may join any part where it finds necessary to do so for proper determination of the matter in dispute. The said provision reads;

> *(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, 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.*

The above provision gives wide chance for the court to add any party whom it finds necessary for effectual determination of dispute. The question is whether the 2nd Applicant in this application was a necessary party to be joined in this matter. In order to respond to that issue, it is important to know as to who is a necessary party in a suit.

Fortunately, both counsel for the parties are at one stand that a necessary party in a suit is such person whose presence in the suit is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. They however, locked horns on whether the 2nd Applicant was a necessary party. Several decisions of the Court of Appeal as well as this Court have cemented the definition on who is a necessary party in a suit. In the case of **Claude Roman Shikonyi Vs. Estomy A. Baraka**, Civil Revision No. 4 of 2012 (unreported) the Court of Appeal quoted with approval decision of the defunct East African Court of Appeal in **Departed Asians Properties Custodian Board Vs. Jaffer Brothers Ltd** [1999] EA 55 which is persuasively instructive. In that case, the Supreme Court of Uganda, per Mulenga JSC, made the following observation:

"I have not laid my hands on any reported decision in East Africa directly on the point of criteria for determining that the presence of a person is necessary under Order 1, rule 10 (2) of the Civil Procedure

Rules ... However, taking leaf from authorities in other jurisdictions having similar and even identical rules of procedure, I would summarize the position as follows: For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit, one of two things has to be shown. Either it has to be shown that ***orders which the plaintiff seeks in the suit would legally affect the interests of that persons, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application of Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person"*** [Emphasis added].

Now the question that boils is whether based on the above interpretation, the 2nd Applicant was a necessary party in the suit in the trial tribunal. It is undisputed fact that the 1st Applicant was sued after entering the land in dispute. Exhibit P3 is the mediation form before the Ward Tribunal and the same indicates that Apolonia Manda (the Respondent herein) was complaining against Asha Omary (the 1st Applicant herein) and the land in dispute was 76 acres. Both the Respondent and the 1st Applicant claimed before the Ward Tribunal that they purchased the land in dispute. Mediation was marked failed by the

Ward Tribunal on 24/04/2022 and a certificate to that effect was issued, exhibit P3. The Respondent referred the dispute to the DLHT for trial and the claim was trespass to land. In her written statement of defence before the DLHT and the preliminary objection, the 1st Applicant herein claimed that the land she had entered belonged to the 2nd Applicant herein one Sakina Mhando, her mother. She pressed that the 2nd Applicant being the legal owner of the suit land, ought to have been joined as a necessary party. The trial tribunal decision to both the preliminary objection and main suit was that the 2nd Applicant was not necessary party to be joined in the case before it.

The Respondent sued the 1st Applicant for trespassing into land measuring 76 acres which according to the evidence on record, belonged to the Respondent's father. Although not specifically stated, but gleaning from the evidence, the 1st Applicant entered into the suit land, cultivated it and developed it. In her defence she claimed that the land belonged to the 2nd Applicant herein. Although the 1st Applicant's call to join the 2nd Applicant was ignored by the trial tribunal, the 2nd Applicant was paraded as defence witness and she tendered purchase document with intention to justify the 1st Applicant's claim that the land in question belonged to her. That evidence however, was not accorded weight by the trial tribunal for the reason that she was not a party to the case.

Based on the evidence, it is very clear that both the Respondent and the 2nd Applicant claim to be the owner of the suit land. The Tribunal was made aware of the claim for ownership of the same land by the 2nd Applicant. With such claim, the 2nd Applicant became a necessary party because a determination thereof would legally affect her interests. It was therefore desirable, for avoidance of multiplicity of suits, to join the 2nd Applicant so that she is bound by the decision of the Tribunal in that suit.

It was however argued that the 2nd Applicant could not be joined at the trial stage as she was not a party to mediation proceedings before the Ward Tribunal. Unfortunately, no provision of law that was cited that could bar the Tribunal from joining a party at trial stage. Order 1 Rule 10(2) of the CPC, is very clear 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 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 adjudicate upon and settle all the questions involved in the suit, be added.

The above provision is also applicable to the DLHT, hence the Tribunal had powers to order the 2nd Applicant to be joined in the suit after the allegation arose that she possessed interest over the disputed

land. The fact that she was not a party to mediation proceedings could not preclude the tribunal from issuing an order joining her to the suit as the provision is very clear that at any stage an order could be made to join a party whom the tribunal or court find necessary to be joined for proper determination of the rights of the parties. It must be noted that the Ward Tribunal only mediated the parties and the trial was conducted by the DLHT. As the DLHT was in a position of determining the rights of the parties, it could have ordered the joining of the 2nd respondent as necessary party for proper determination of the matter.

On the argument by Mr. Silayo that the land identified in exhibit D2 is not the same that the Respondent complained that it was trespassed, it is my considered view that such a determination could only be made upon the Tribunal hearing the parties on the same. It must be noted that, the 2nd Applicant's evidence was not accorded weight by the trial tribunal as the 2nd Applicant was not given chance to be a party to defend her interest. It cannot be concluded therefore that the land she was claiming was different from the land claimed by the Respondent. Whether the land in dispute before the trial tribunal was the same as the land claimed by the 2nd Applicant, it is a matter that can only be determined upon joining the 2nd Applicant as a party to the suit and giving her chance to presente her evidence.

Basing on the above analysis, it is my settled mind that although the 1st Applicant was sued for being found developing the disputed land, it became necessary to join the 2nd Applicant after a claim was raised that the land the 1st Applicant had entered belonged to the 2nd Applicant. This is so because the 2nd Applicant herself also appeared to have what she referred as purchase document giving her right over the property, thus for clear determination of the rights of the parties, 2nd Applicant became a necessary party to the suit. It was therefore necessary for the 2nd Applicant to be joined in the case for clear and conclusive determination of the dispute.

I therefore find merit in this application and proceed to nullify the proceedings, quash and set aside the decision and or orders arising therefrom. I hereby direct the DLHT to join the 2nd Applicant to the suit and the same shall proceed before another chairman. Considering the circumstance of this revision application, each party shall bear own costs. Order accordingly.

DATED at **ARUSHA** this 15th March, 2023.

D. C. KAMUZORA

JUDGE