

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 69 OF 2022

(Originating from the District Land and Housing Tribunal for Mbeya, at Mbeya in
Application No. 82 of 2019)

- 1. AMANYISYE MBILINYI.....1ST APPELLANT**
- 2. GOD MWINUKA..... 2ND APPELLANT**
- 3. ISRAEL G. MWAMPEGETE.....3RD APPELLANT**
- 4. SOPHIA SANGA.....4TH APPELLANT**
- 5. VICK SANGA.....5TH APPELLANT**
- 6. KENEDY JOB.....6TH APPELLANT**
- 7. TIMOTH SIMONV7TH APPELLANT**
- 8. EZEKIA MWAKIPOSA.....8TH APPELLANT**
- 9. RAPHAEL SANGA.....9TH APPELLANT**
- 10. ALOYCE MSEMWA.....10TH APPELLANT**
- 11. REV SIAME.....11TH APPELLANT**
- 12. WILLY MWAIJANDE.....12TH APPELLANT**
- 13. ROMAN CATHOLIC AND REGISTERED TRUSTEE OF CATHOLIC
CHURCH.....13TH APPELLANT**
- 14. TANZANIA ASSEMBLIES OF GOD AND REGISTERED TRUSTEE OF
TAG.....14TH APPELLANT**
- 15. CHURCH OF CHRIST AND REGISTERED TRUSTEE OF CHURCH OF
CHRIST.....15TH APPELLANT**
- 16. MOROVIAN CHURCH AND REGISTERED TRUSTEES OF MOROVIAN
CHURCH.....16TH APPELLANT**
- 17. PENTECOST CHURCH AND REGISTERED TRUSTEES OF PENTECOST
CHURCH.....17TH APPELLANT**

VERSUS

USANGU FARMER'S COOPERATIVE

SOCIETY (UFACO) 2003 LTD.....RESPONDENT

JUDGEMENT

Date of last Order: 14/12/2022

Date of Judgement: 17/02/2023

Ebrahim, J;

In the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT), USANGU FARMERS COOPERATIVE SOCIETY (UFACO) 2003 LTD filed an application suing the Appellants together and severally for trespassing into their titled land with Plot No. 6 Block "G" Isitu Village in Chimala Ward within Mbarali District (the disputed land). The decision was made in favour of the Respondent. Aggrieved the Appellants preferred the instant Appeal.

The back ground of the matter as can be discerned from the records is that; it was alleged before the DLHT by the Respondent that she is the successor of UMACHI TRANSPORT COOPERATIVE JOINT ENTERPRISE (UMACHI) who also succeeded Usangu Farmer Cooperative Society (hereinafter to be referred to as the former UFACO) which was formed in 1960's. It was also alleged that the former UFACO was allocated the disputed land in 1963 by the then President of Tanzania (Mwl. Julius Kambarage Nyerere). Further that UMACHI inherited the disputed land from the Former UFACO. Thereafter, in 1991 UMACHI was availed with a Certificate of Right of Occupancy in respect of the

same land and later on the Respondent inherited it from UMACHI. It was again alleged that the Appellants invaded the disputed land at different times from 1985 to 1996.

In turn, the Appellants maintained that they were allocated the disputed land by Isitu Village Council in 1985 and 1986. They also claimed that they had built their houses and churches since then. They further maintained that they have been lived peacefully without any interruption until the Respondent instituted the Application against them.

Having heard the evidence of the parties, the DLHT made the decision in favour of the Respondent. It declared the Respondent as the rightful owner of the disputed property since she has a Certificate of Right of Occupancy and that the Appellants are invaders.

Dissatisfied, the Appellants appealed to this Court raising seven grounds of appeal as follows:

- 1. That the Trial Chairman erred in law and facts by entertaining the incompetent matter for non-joinder of necessary party.*
- 2. The trial Chairman erred in law and facts by declaring the respondent as the lawful owner of the disputed land while it(sic) acquired the certificate of right of occupancy vide illegal process.*

3. *That the trial Chairman erred in law and facts to entertain the application prosecuted by the advocate who had no locus to prosecute the same as she was not appointed by the respondent's board resolution.*
4. *That the trial Chairman erred in law and facts to entertain the matter against non-existing persons.*
5. *That the trial chairman erred in law and facts by his failure to assess, analyse and evaluate evidence of each witness in record hence reached into erroneous decision.*
6. *The trial Chairman erred in law by admitting the document (P. Exhibit P1) which was improperly tendered.*
7. *That the trial Chairman erred in law and facts by deciding the matter in favour of the respondent basing on weak and contradictory evidence adduced by respondent's witnesses.*

At the hearing of the appeal the appellants were represented by advocate Felix Kapinga whereas the respondent preferred the service of advocate Mary Paul Gatuna and Caroline Mseja. The appeal was heard by way of written submissions. Counsel for the parties duly filed their respective submissions.

Supporting the appeal, advocate Kapinga prayed to the court to combine grounds 1 and 2 and argue them together while abandoning ground seven. However, the plan was not adhered to as he argued ground 1 only. He submitted regarding ground one that since the Appellants claimed to be allocated the suit land by Isitu Village Council

the same was a necessary party. He stated that if Isitu Village Council would have been joined it would have stated to whom the disputed land belonged and whether the village was the one that allocated the land to the Appellants. He also argued that Isitu Village Council would have assisted the Tribunal to decide if the respondent complied with procedures pertaining to survey and issuance of certificate of occupancy. According to him the trial Tribunal could not pass an executable decree since the Respondent is going to face obstacles from the village council in executing the decree. Citing the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuph Osman & Another**, Civil Appeal No. 06 of 2017 Court of Appeal of Tanzania at Dar es Salaam (unreported), he argued that a necessary party is the one whose absence would lead to inexecutable decree.

Arguing the 3rd ground of appeal advocate Kapinga submitted that the advocate who prosecuted the case of the respondent had no *locus standi* since she was not appointed by the respondent's board resolution. Relying on the case of **Ursino Palms Estate Ltd vs Kyela Valley Foods Limited & 2 others**, Civil Application No. 28 of 2014 Court of Appeal of Tanzania, at Dar es Salaam (unreported) he argued that for an advocate to represent a company he/she must be appointed

by a board resolution failure of which renders the suit to be dismissed. He said the application by the Respondent should have been dismissed.

As to the 4th ground of appeal advocate Kapinga submitted that the Respondent sued the non-existing persons. According to him the 13th, 14th, 15th, 16th and 17th appellants were wrongly sued. This is due to the reason that they are registered churches with certificate of incorporation therefore they ought to be sued under their legal capacities. He gave an example of the 13th Appellant in this matter that there is no institution called Roman Catholic and Registered Trustees of Catholic Church. He stated that the known institution is the Registered Trustees of Catholic Church Diocese of Iringa. He contended further that the effect of suing a non-existing person is to render the suit incompetent and inexecutable decree. Advocate Kapinga therefore, prayed for this court to visit **Order 1 Rule 10(1) and (2) of the Civil Procedure Code, Cap. 33 R.E 2022**. He rested his argument by stating that the suit before the DLHT was incompetent supposed to be struck out ab initio.

As to the 5th ground of appeal counsel for the Appellants submitted that the Tribunal committed irregularity for only analysing the evidence of all witnesses of the Respondent but failed to do so on the

evidence of each witness of the Appellants. Relying on the case of **Leonard Mwanshoka vs Republic**, Criminal Appeal No. 226 of 2014 CAT at Bukoba (unreported) he argued that failure to analyse and evaluate the evidence of each witness renders a judgment a nullity. He added that it was against the law for the learned Chairman of the DLHT to generalize the evidence of the Appellants' witnesses while each witness gave the testimony in support of each Appellant. Thus, their evidence ought to be evaluated independently. Advocate Kapinga submitted also that had the trial Tribunal considered the evidence of DW3 it would have reached to a different decision. According to him DW3 gave the testimony as to how the village council allocated the land to individuals and religious institutions.

Regarding the 6th ground of appeal advocate Kapinga submitted that exhibit P1 was admitted in evidence contrary to the law. He contended that PW2 tendered the document without telling the Tribunal how it came into his possession as he was neither the custodian nor a maker of that document. He complained that PW2 tendered a document claiming to be handled by the Respondent's leaders hence he was not a person holding any position in the society. Therefore, he had no capacity to tender the document. Advocate Kapinga further stated that when he raised an objection against PW2 tendering exhibit P1, counsel for the

Respondent replied on his behalf that PW2 was a member of the Respondent. He referred this court to the decision in the case of **Juma Idd @ Dude vs Republic**, Criminal Appeal No. 558 of 2020 CAT at Dodoma (unreported) where it was held that a document can be tendered by a possessor, custodian or actual owner which was not the case in the instant matter. The Appellants' counsel thus, prayed for this court to allow the appeal with costs.

In reply, counsel for the Respondent started by imploring this court to dismiss with costs grounds 2 and 7 of the appeal which were abandoned. He contended that failure to argue the grounds of appeal which was firstly raised amounted to non-appearing and non-prosecution of the case.

On the 1st ground of appeal, she submitted that Isitu Village Council was not a necessary party as claimed by the Appellants' counsel. According to her it was upon the Appellants to call the village council as their witness. However, the village council would not have helped them since the Respondent has a certificate of occupancy, she argued.

Counsel for the Respondent submitted further that the Appellants' counsel raised a point of both law and facts which makes the complaint to be of no value since in appeal, court deals with a matter that was

determined by the lower court. To buttress her argument, she cited the case of **Galus Kitiya vs Republic**, Criminal Appeal No. 196 of 2015 CAT at Mbeya (unreported).

Alternatively, counsel for the Respondent submitted that the Respondent could not join Isitu Village Council since she had no claim against her. She distinguished the cited case of **Abdullatif Mohamed Hamisi** (supra) on the reason that there was no claim against the village council and the decree is executable even in its absence. To her, the judgement was proper and did not prejudice the Appellants.

Responding to the ground that the advocate had no *locus standi* counsel for the Respondent stated that the Respondent is neither a company nor a corporate rather a cooperative society which has its own mandate of suing or being sued after her incorporation. She based her argument under **section 35 of the Cooperative Societies Act, 2013**. Counsel for the respondent argued that the **Companies Act, Cap. 212 R.E 2002** is inapplicable to the Respondent as per **section 148 of the Cooperative Society Act, 2013**. She said the cited case of **Ursino Palms Estate Limited** (supra) dealt with the issue of company and not a cooperative society as it is the case in the instant matter. She submitted that cooperative societies are guided by their

own by-laws whereas the Respondent's by-law does not provide for the requirement of resolution to nominate an advocate to represent her. Counsel for the Respondent was of the view that this ground of appeal be dismissed.

As to the 4th ground of appeal counsel for the Respondent contended that the Respondent performed her duty of suing the registered trustees of the 13th, 14th, 15th, 16th, and 17th Appellants as per the requirement of **section 5 and 8 of the Trustees Incorporation Act, Cap. 318 R.E 2002**. Her argument being that what the law requires is suing the registered trustees. As the board is within the church, there is no fatality committed by suing them both.

Alternatively, she submitted that if suing the name of the church is irregular, the same is not fatal to the suit as it did not go to the root of the matter and did not cause any miscarriage of justice so long as a proper party was impleaded. She cited the case of **Tongeni Naata vs Republic** [1991] TLR 54 where it was held that the irregularity is not fatal if parties are not prejudiced.

Replying to the 5th ground of appeal, counsel for the Respondent submitted that the trial Tribunal managed to evaluate and analyse evidence of the parties and reached to a just decision. She was

convinced that the respondent managed to prove the case as per **section 110(1) of the Evidence Act, Cap. 6 R.E. 2022** on the elementary principle of the law that "*he who alleges must prove*". She contended that there is no harm in generalizing the evidence of multiple witnesses as long as the Chairman stated in the impugned judgement that the testimonies of the Appellants' witnesses resembled. She again implored this court to consider the fact that each magistrate or judge has his/her own style of writing a judgment as it was observed in the case of **Amir Mohamed vs Republic** [1994] TLR 138.

According to the counsel for the Respondent, the respondent had strong evidence than the Appellants as she was able to state that she was apportioned the disputed land since 1963.

Submitting on the 6th ground of appeal counsel for the Respondent fortified on the competence of PW2 in tendering exhibit P1 as he was a custodian of the same. To support her argument, she cited the case of **Fatuma Said Mahanyu vs Republic**, Criminal Appeal No. 323 of 2019. Counsel for the respondent concluded by urging this court to dismiss the appeal with costs.

I have dispassionately considered the rival submissions of the parties' counsels and the proceedings on record. First and foremost, I

find it apt to make my observation on the Respondent's Counsel's prayer that the appeal be dismissed for want of prosecution on the reason that the appellants' counsel did not argue the 2nd ground of appeal which he said will be combined together with ground one. Indeed, the 2nd ground of appeal was not argued. However, the only resultant consequence is not to be dealt with by this court. What I could learn, counsel for the Respondent misconceived the law on failure to file written submission on the scheduled date the consequence of which is to dismiss the matter for want of prosecution; which is not the case for abandoning some grounds of appeal. Thus, the prayer by counsel for the Respondent is baseless.

Now, as to the merits of the appeal, I will start with ground one of the appeal which is to the effect that the matter before the DLHT was incompetent for non-joinder of a necessary party. According to the Appellants' counsel the application before the trial Tribunal could not be justly resolved without Isitu Village Council being joined as a necessary party. While counsel for the Appellant is of the view that the same vitiated the proceedings of the trial Tribunal; counsel for the Respondent is diametrically opposed to that position.

Conversely, a party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party. This is the position of the law under **Order 1 Rule 10(2) of the Civil Procedure Code, Cap. 33 R.E 2019** which reads as follows:

*"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)

Again, the Court of Appeal of Tanzania when confronted with the issue pertaining to who may be considered as a necessary party in **Abdullatif Mohamed Hamis vs Mehboob Yusuph Osman & Another** (supra) set two tests for determining the question: **First**, there has to be a right of relief against such a party in respect of the matters involved in the suit and; **second**, the court must not be in a position to pass an effective decree in the absence of such a party.

In the matter under consideration, the Respondent who was the applicant before the DLHT preferred her application against the Appellants jointly and severally claiming that they invaded her land. The Appellants in their joint Written Statement of Defence evasively denied the claim while pressing the Respondent to the strict proof. Nonetheless, during the hearing of the application the Appellants' witnesses came with the defence where each gave evidence to the effect that he was allocated the disputed land by Isitu Village Council.

Some witnesses said they were allocated the disputed land in 1985 while others said in 1986. The Appellants then called the current Village Chairman of Isitu Village as their witness. That witness testified that the Village recognises the Appellants as the lawful owners of the disputed land. He also disassociated his knowledge on the Certificate of Occupancy held by the Respondent. The Appellants also called the then Party and Government Secretary (DW3) commonly known as "Katibu wa Chama na Serikali" who testified how the Appellants made their application to the Village to be allocated the disputed land. He further gave evidence that the Isitu Village convened a meeting to discuss the application of the Appellants and then allocated the disputed land in 1986. DW3 tendered minutes of the meeting. Again, he said he had no knowledge of the Certificate of Occupancy held by the Respondent.

Moreover, there are other disturbing issues which in my considered opinion are directly related to the parties to a suit in the matter at hand. The issues have been gained after going through the entire record of the instant matter from both oral testimonies and documentary evidence. They can be laid as follows; **First**, the Respondent tendered the Certificate of Occupancy of the disputed land (i.e., Exhibit P1) then called PW3 one Sadick Dyombanga from the office of the Registrar of Titles of Mbeya Region. PW3 testified that the Respondent is the registered owner of the disputed land according to the Certificate of Occupancy. He also testified that previously the disputed land was registered in the name of UMACHI since 1991 and that UMACHI changed the name to the Respondent's name making the Respondent the lawful owner.

Second, on their part, the Appellants called the village government leaders. **One** was a leader among those who allocated the disputed land to the Appellants in 1986 i.e., Said P. Mwatovena (DW3) and **two** the current leader Neso Ambi Mwambipile (DW2). In their testimonies DW3 said that Isitu Village allocated the disputed land to the Appellants because it was a village land. He further testified that Isitu Village was formed in 1975 and after its formation all land in it became a village land. On his part DW2 said according to the records in his office

(the Isitu Village office) the Appellants legally acquired the disputed land. Therefore, the village government recognises them as lawful owners.

DW2 also tendered exhibit D3, a letter from the Respondent to the office of the District Director Land Department of Mbarali District dated 14/09/2006. In that letter the Respondent informed the addressee that in 12/8/1975 the Parliament of Tanzania enacted the law on Villagization (Vijiji vya Ujamaa) and that in 1977 the whole land was handed to those villages. The letter further informed the addressee that Isitu Village Council allocated the land to religious institutions and individual persons in 1986.

Owing to those circumstance as given above I am of the concerted position that though the Respondent did not implead Isitu Village Council, but she was aware that Isitu Village Council was the one who allocated the disputed land to the appellants. Seemingly (though not intending to assume) the respondent purposely omitted to join Isitu Village Council as a party to the suit. Counsel for the respondent was of the view that it was upon the Appellants to call the village council as their witness. It is now my position that calling leaders of the village government as witnesses as the appellants did for DW2 and DW3 was

not sufficient. This is because the village council as an institution would have been in a better position to give the account as to how it handled the cooperative societies in the village and how it should have been involved before the respondent obtained the certificate of occupancy.

In my further observation, the respondent could not have been prejudiced by joining Isitu Village Council since the law allows the plaintiff to join any person against whom any right to relief may arise. This is as per the spirit of **Order 1 Rules 3 and 7 of the CPC**. I wish to quote for ease of reference:

"3. 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.

*7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, **he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent**, may be determined as between all parties.*
[emphasis added]

Notwithstanding the above findings, I find that the Respondent though held a Certificate of Occupancy registered by the Registrar of Titles, did not give any evidence or an account about the allocating authority. This means that the Respondent did not even state who was the allocating authority than the evidence of PW1 who stated that the Respondent was apportioned the disputed land by the then President of Tanzania who came to visit the association in 1964. Most importantly I am convinced that this Court in order to completely and exhaustively resolve the dispute between the parties a lot more information was needed not from the Appellants or the Respondent alone, but the official land authority that granted title to the Respondent and the Isitu village council. This is due to the fact that there is undisputed evidence that the Respondent as is now, was Registered in 2003 and also undisputed evidence that the registration of the disputed land was in favour of an enterprise called UMACHI TRANSPORT COOPERATIVE JOINT ENTERPRISE.

I infer to the general principle about the ownership of land in Tanzania that all land is vested with the President – **section 4 of the Land Act, Cap. 113 R.E. 2019** whereas the powers of granting the right of occupancy is vested with the Commissioner for Lands – **section 29 of Cap. 113**. It is however my view that the registration of land in

favour of any person do not fall from the sky like raindrops. There are procedures in place to begin with such as plans, mapping, survey, etc. It is thus, common knowledge that since the disputed land is a registered land in unplanned area i.e., in a village; it would have been in the interest of justice to firstly trace how the land was acquired, when it was surveyed and finally registered in 1991. This is very crucial due to the stated fact that Isitu Village Council allocated the disputed land to the Appellants in 1986. If the land authority (Commissioner for Lands), Registrar of Titles and Isitu Village Council were called as parties to the suit they would have been able to shed light to all questions which in my opinion were left unresolved.

Owing to the findings I have made above, the next question is what could have been done by the Tribunal in consideration of the fact that a plaintiff cannot be forced to sue a defendant that it does want to implead. That is correct and indeed, a plaintiff has that unfettered prerogative and freedom not to join a party it does not feel like joining. However, if a party not joined is a necessary part for resolving all issues raised in the pleadings, then the solution is what has been referred by the Appellants' counsel i.e., the invocation of **Order 1 Rule 10(2) of the CPC**, which provides as follows:

*"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, 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.**"*

I seek inspiration by the position of the apex Court of this country discussed in the case of **Tanzania Railways Corporation (TRC) vs GBP (T) Limited**, Civil Appeal No. 218 of 2020 CAT at Tabora (unreported). In that case the Court quoted its previous decision in the case of **Tang Gas Distributors Ltd v. Mohamed Salim Said and Two Others**, Civil Revision No. 6 of 2011 (unreported) where it stated that:

*"Settled law is to the effect that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, **the Court has a separate and independent duty from the parties to have him added...**" [emphasis added]*

The Court of Appeal of Tanzania in **Tanzania Railways Corporation** (supra) went ahead stating that:

*"We must stress as we wind up, that if a trial court notes that some issues raised in the pleadings call for addition of a party whose absence will lead to such issues of importance to remain unresolved, **then the court cannot fold its arms and assume a role of an onlooker, a bystander or a passer-by only because parties are resistant or unwilling to apply to join a necessary party or parties. The court has a duty to take an active role by taking matters on itself and add such a party or parties to the proceedings in order to facilitate effective and complete adjudication and resolution of all issues of controversy presented before it. That is what we hold to be the position of law.**"* [emphasis added]

Deriving from the above, it is therefore, now a law that non-joinder of necessary party is fatal irregularity to the proceedings and the resultant decision. See also the holding in the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuf Osman & Another** (supra).


In the upshot and for the foregoing reasons, I find the 1st ground of appeal meritorious. The consequence of which renders other grounds

of appeal nugatory. Consequently, I hereby allow the appeal as per the explained reasons above and I set aside and nullify the entire proceedings, the resultant orders and judgment of the DLHT in Application No. 82 of 2019. Any interested party should be at liberty to institute a fresh suit in observance of joining all necessary parties according to the law. Considering the circumstance of this case, I give no order as to costs. Each party shall bear its own.

Ordered accordingly.



Mbeya
17.02.2023



R.A. Ebrahim
JUDGE