

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND CASE NO. 26 OF 2022

1. ATTORNEY GENERAL
2. NATIONAL RANCHING CO. LTD
3. O.C. INDUSTRIAL HOLDINGS LTD }**PLAINTIFFS**

VERSUS

MILANGA HAMKA AND 40 OTHERS.....**DEFENDANTS**

RULING

Date of Last Order: 06/04/2023

Date of Ruling: 15/06/2023

Ndunguru, J.

This is the ruling in respect of the preliminary objection (PO) raised by Mr. Simon Mwakolo, learned advocate for the defendants. The plaintiffs herein above have instituted a land suit against the Defendants who are 41 in number for trespass into farm named as Block No. 721/9 comprised in Title Deed No. 13957 NBYLR, Land Office No. 332775, Farm No. 721 USANGU RANCH in Mbarali District. The Defendants, through their counsel Mr. Simon Mwakolo filed a joint written statement

of defence. Alongside, the learned counsel has raised preliminary objection in three limbs as follows:

- i. That the plaint is fatal defective for non-joinder of necessary parties who are the allocating authority of the suit land to the second plaintiff.
- ii. That the verification clause of the plaint is fatal as it contravenes the provision of Order VI rule 15(2) of the Civil Procedure Code, Cap. 33 R.E 2022 (the CPC).
- iii. That Mr. Samson Suwi, advocate has no locus to appear and defend the third plaintiff for want of board resolution appointing him so to act.

Through the consent by the parties and leave of the court the PO was argued by way of written submissions. The plaintiffs were represented by Mr. Joseph E. Tibaijuka learned State Attorney and Samson Suwi learned advocate whereas the defendants have the service of advocate Simon Mwakolo from Mwakolo & Co. Advocate.

Supporting the PO, in regard with the 1st limb that the plaint is fatal defective for non-joinder of necessary parties who are the allocating authority of the suit land to the second plaintiff. Counsel for the defendants argued that according to the claim by the plaintiffs that

she was allocated the suit land, the allocating authority was a necessary party. That though it was not specifically pleaded by the plaintiffs, either the Commissioner for Lands or Mbarali District Council is a necessary party in this case.

Counsel for the defendants contended further that assuming that the plaintiffs succeed in their case who is going to compensate the defendants for the improvements effected in the land, or should the plaintiffs lose the case who will compensate them. According to him in any result of the case will trigger one to institute another suit against the allocating authority which will amount to multiplicity of suits. He cemented his argument with the observation made by the Court of Appeal of Tanzania in the case of **Tanzania Railways Corporation vs GBP (T) Ltd**, Civil Appeal No. 218 of 2020 CAT at Tabora (unreported). In his view without joining the allocating authority the suit cannot be completely resolved.

On the 2nd limb that the verification clause of the plaint is fatal as it contravenes the provision of Order VI rule 15(2) of the Civil Procedure Code, Cap. 33 R.E 2022, counsel for defendants argued that the plaint is defective in the verification clause contrary to Order VI rule 15(2) of the CPC. According to the counsel, the information under paragraphs 49, 50

and 51 cannot be in the knowledge of the State Attorney appearing for the 1st and 2nd plaintiffs while it is obvious that it is the information in the knowledge of the 3rd plaintiff. That in the case of **Samwel Kimaro vs Hidaya Didas** [2013] TLR 39 a plaintiff wrongly verified renders the plaintiff fatally defective the effect of which is to strike it out.

About the 3rd limb he argued that advocate Samson Suwi was not nominated by the board resolution of the 3rd plaintiff. Citing the case of **Bugerere Coffee Growers Ltd vs Sebaduka and Another** [1970] EA 147 he said that though there is resolution authorizing commencement of the suit, there is none appointing advocate Suwi to act on the company's behalf. According to him the situation of this case is akin to that of **Ursino Palms Estate Ltd vs Kyela Valley Foods Ltd** [2018] TLR 48 where it was held that in order to qualify to represent a company an advocate has to be appointed by a resolution. Short of the resolution appointing the advocate to represent it renders the entire suit defective and liable to be struck out he argued.

In summing up, counsel for the defendants submitted that the defects in the plaintiff cannot be served by the overriding principle since they go to the root of the case and are contravening the mandatory

provisions of the law. He thus implored this court to uphold all limbs of the preliminary objection and that the plaint be struck out with costs.

In response against the PO, counsels for the plaintiffs started submitting on the 1st limb that a suit should not be defeated by reason of non-joinder of parties as per Order I rule 9 of the CPC. They also gave meaning of necessary party as given in the case of **Claude Roman Shikonyi vs Estomy A. Baraka**, Civil Revision No. 4 of 2012 CAT at Dar es Salaam (unreported). In that case necessary party was ascribed to be a person who has to be shown that orders what the plaintiff seeks in the suit would legally affect the interest of that person and it is desirable for avoidance of multiplicity of suits to have such a person joined so that he is bound by the decision of the court in that suit.

In the premises, counsels for the plaintiffs averred that in this suit the plaintiffs are suing the defendants for trespass and seek for declaration order that the suit land is lawfully owned by the plaintiffs. In the counsels' view nothing in this suit will affect the Commissioner for Lands or Mbarali District Council. They further argued that if the need will arise the allocating authority would be called as witness to prove the embarkments of the suit land. The counsels distinguished the situation

in the case of **Tanzania Railways Corporation vs GBP (T) Ltd** (supra) with this case due to the fact that the plaintiffs do not complain over the allocation of the suit land but trespass by the defendants.

Replying against the 2nd limb of the PO, counsels for the plaintiff submitted that the plaint does not offend Order VI rule 15(2) of the CPC since the said information is not only in the knowledge of the director of the 3rd plaintiff but also in the knowledge of the State Attorney about both the disputed area and the discussion between the 3rd plaintiff and the defendants.

In the alternative, they argued that any defect in the verification clause does not make the pleading fatal defective to lead the struck out of the same but is a mere procedural irregularity which is curable by amendment. They supported their argument with the case of **Sanyou Service Station Ltd vs BP Tanzania Ltd**, Civil Application No. 85/17 of 2018.

Reacting against the 3rd limb, counsels for the plaintiffs submitted that the requirement for a resolution in institution of the legal proceedings under section 147 (a) and (b) of the Companies Act, Cap 212 R.E 2002 and the case of **Bugerere Coffee Growers Ltd** (supra) is not a mandatory requirement since the law uses the word "may".

Alternatively, they argued that in the instant case under paragraph 47 of the plaint it was pleaded that one David Kaaya a Ranch Manager was authorized by the board resolution to institute the suit. That, it is also the same manager who signed the pleadings as required by Order XXVIII of the CPC. Further that engaging Advocate Suwi for legal assistance needed no resolution but a matter of right. Counsel for the plaintiffs pleaded this court to find the circumstances in the case of **Ursino Palms Estate Limited vs Kyela Valley Foods Ltd** (supra) cited by the defendants' counsel distinguishable with this case since in that case there was no company or board resolution to authorize the director or advocate to institute the suit. In the conclusion they urged this court to overrule the PO with costs.

It is now the task of this court to determine the merits or otherwise of the PO. I will determine the limbs of the PO in the same sequence as raised and argued by the counsel for the parties.

Starting with the 1st limb, I find it incumbent to firstly explain who is a necessary party in law. There is no any legislation in the land which defines the term "necessary party". However, case law has strived to plug the *lacuna*. The CPC also gives a guidance on who may be joined in a suit as plaintiff and as defendant.

The CPC provides under Order I Rule 3 that, all persons may be joined as defendants against whom any right to relief which is alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise. The provisions of the CPC cited above were emphasised by this court and the Court of Appeal of Tanzania in a number of decided cases including the cases of **Tanzania Railways Corporation vs GBP (T) Ltd** (supra), **Godfrey Nzowa vs Selemani Kova & Others** Civil Appeal No. 183 of 2019 CAT at Arusha (unreported), **Farida Mbaraka and Another vs Domina Kagaruki**, Civil Appeal No. 136 of 2006, CAT at Dar es Salaam (unreported) and **Abdullatif Mohamed Hamisi v. Mehboob Yusuph Othman and another**, Civil Revision No. 6 of 2017, CAT at Dar es Salaam (unreported). In the latter for example, the CAT was inspired by the decision from India in the case of **Benares Bank Ltd vs Bhagwandas**, A.I.R. (1947) All 18, in which the full bench of the High Court of Allahabad provided two tests for determining whether a party is necessary party to the proceedings that: **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.

Conversely, as vowed by the plaintiffs' counsel none-joinder or miss-joinder of parties in itself does not render the suit incompetent as per Order I rule 9 of the CPC. Nevertheless, for avoidance of giving unenforceable decisions or causing multiplicity of suits in some circumstances none-joinder or misjoinder of necessary party may lead to the incompetence of the matter. This spirit was underscored by the CAT in **Stanslaus Kalokola vs Tanzania Building Agency and Another**, Civil Appeal No. 45 of 2018 (unreported) that:

"...there are non-joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential."

Also, in **Tang Gas Distributors Limited vs Mohamed Salim Said and 2 Others**, Civil Application for Revision No. 68 of 2011 CAT (unreported) stated that:

"(b)... his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.."

In that same case it added that:

"... it is now an accepted principle of law (see Mulla Treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party therefore is fatal (MULLA at p 1020)"

Critically observing to the above decisions, it is without difficult to adjudge that the necessity of the party or otherwise depends on the facts and circumstances available in each case. My view is aligned with that of the CAT made in **Godfrey Nzowa vs Selemani Kova & Others** Civil Appeal No. 183 of 2019 CAT at Arusha (unreported) where it said:

"While alive to the provision of Order 1 Rule 9 of the CPC, it is important to also take into account the fact each case has to be determined in accordance with its peculiar circumstances."

In the instant case as rightly argued by the counsels for the plaintiffs the claim is against the defendants for allegation of trespass. Throughout the plaint I have found nothing referring to the allocating authority which would make her a necessary party whose absence would make this court fail to adjudicate the suit effectually and completely. As the matter have not yet commenced if the need will arise this court in

the course, would order for the name of any party to be joined where it will find to be just and necessary in order to enable it effectually and completely adjudicate upon and settle all the questions involved in the suit in terms of Order I Rule 10 (2) of 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)

In the premises, the 1st limb of the PO has failed.

As to the 2nd limb of the PO about the verification clause, I have gone through the said plaint and the verification clause thereof, it can certainly be said that, determination whether the person who verified the plaint had knowledge of all matters will involve the requirement of evidence which, in law, obliterate the elements of being preliminary objection on pure point of law as held in the famous case of **Mukisa Biscuits Manufacturers Ltd vs Western Limited** (1969) EA 697.

Notwithstanding the above position, even if it can be said and found that, verification is defective as argued by the counsel for the defendants, I do not think as of now, that, guided by the overriding objective principle now enshrined vide The Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, is fatal to the extent of rendering the suit fatal as no any injustice would be occasioned to the parties. Similarly, this court under a similar situation in the case of **Philip Anania Masasi vs Returning Officer of Njombe, North Constituency and Others**, Civil Cause No. 7 of 1995 (unreported) in which Samatta, J.K (as he then was) cited with approval commentaries in the book titled: Principles of Pleadings in India by Sir P. Mogha, 14 edition where the author had this to say:

"...want of signature or verification or any defect ... will not make the pleading void and a suit cannot be dismissed nor can defence be struck out for want of or defect in the signature or verification of the plaint... as these are matters of procedures only. It has been treated to be a mere irregularity and is curable by amendment. The defect may be cured by amendment at any stage of the suit and when it is cured by amendment, the plaint

must be taken to have been presented on the date it was originally presented and not the date on which it was amended."

As above guided, I find 2nd limb of the PO also unmeritorious.

Going to the 3rd and last limb in the list, it was construed by the counsel for the defendants that for an advocate to represent a company there must be a company or board resolution nominating specifically that advocate. The reliance was sought from the **Bugerere Coffee Growers Ltd** case (supra) and **Ursino Palms Estate Limited vs Kyela Valley Foods Ltd** (supra). Fortunately, on 23rd May in this very year 2023 the Court of Appeal has made clear as far as the requirement of company board resolution in instituting legal actions is concern. In the case of **Simba Papers Convertes Limited vs Packaging and Stationery & Another**, Civil Appeal No. 280 of 2017 CAT at Dar es Salaam (unreported) the Court underlined that:

*"Relying on the case of BUGERERE COFFEE GROWERS LTD VS. SEBADDUKA (supra), the court observed that, a reading of that decision reveals that **what is required is not a specific resolution but a general permission. Secondly, a resolution would be***

necessary where the suit involves a dispute between a company and one of its shareholders or directors.”(Emphasis added).

Deriving from the above, the requirement is mostly important where the the suit involves a dispute between a company and one of its shareholders or directors. More so the requirement is required to be general than specific. It is therefore a misconception that in each case involving the company there should be a board resolution mandating one to sue on behalf of the company and resolution appointing a specific advocate as the counsel for the defendants wants this court to hold. A company has its legal personality to sue and be sued which would not necessary be ousted by the reasons that an advocate has been not appointed by a board resolution while there is no internal conflict in the said company. This is also the spirit underlined in the **Simba Papers Convertes Limited** case (supra) where the Court of Appeal quoted the observation made by this court in the case of **St. Benard's Hospital Company Limited vs Dr. Linus Maemba Mlula Chuwa**, Commercial Case No. 57 of 2004 (unreported) where it was held that:

*"Having carefully considered the matter, I have reached a settled conclusion that, **indeed the pleadings***

(plaint) should expressly reflect that there is a resolution authorizing the filing of an action. A company which does not do so in its pleadings, risks itself to the dangers of being faced by any insurmountable preliminary objection as is the one at hand. I should hurriedly add however that in my view the resolution should be of a general nature, that is, it is not necessary that a particular firm or person be specifically to do the task. It suffices if the resolution empowers the company management to take the necessary action. I am making this insistence because from the wording in Bugerere case one may be led to believe that the resolution should point out a particular person or firm.”(Emphasis added)

In this case, as submitted by the plaintiffs’ counsel and conceded by the counsel for the defendants, the 3rd plaintiff (a company) vide para 47 of the Plaint authorized one Davis Charles Kaaya, Ranch Manager to institute the case. In my firm view, the resolution as it is, has authorized the institution of this matter. The subsequent engagement of advocate Samson Suwi in pursuing this matter on behalf of the company needed

no any another board resolution. In the event, this pertinent limb should also fail.

Owing to the above findings, I hereby overrule the preliminary objection raised in this case with no order as to costs. The case shall proceed on merits.

Ordered accordingly.



D.B. Ndunguru
D.B. NDUNGURU,

JUDGE

15/06/2023