

**IN THE HIGH COURT OF TANZANIA
(IN THE MWANZA SUB-REGISTRY)**

AT MWANZA

LAND CASE NO. 23 OF 2022

ABEED MINAZALI MANJI (The Administrator

of the Estate of the Late Nadir Minaz Manji).....PLAINTIFF

VERSUS

MKURUGENZI MTENDAJI HALMASHAURI

YA MANISPAA YA ILEMELA.....1ST DEFENDANT

THE REGISTERED TRUSTEES OF MABINTI

WA MARIA KIPALAPALA TABORA.....2ND DEFENDANT

SR. YULITA BURA.....3RD DEFENDANT

LILIAN KWOFIE SYKES (The Administrator

of the Estate of the Late Dr. Michael Mtebe).....4th DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Date of Last Order: 16/06/2023

Date of Ruling: 16/06/2023

Kamana, J:

The plaintiff has instituted this suit against the defendants jointly and severally for a declaration that he is the lawful owner of the land property located at Plot No. 1475 Block M, Kiseke, Ilemela Municipality.

During the preliminaries, the first, second and third defendants raised several preliminary objections.

For this Ruling, I think it is logical to dwell on the ground raised by the second and third respondents regarding the non-joinder of the necessary party as it determines the fate of the suit at hand. Arguments for and against the preliminary objections were submitted by written submission at the instance of the parties and leave of the Court.

Submitting in support of the preliminary objection, Dr. George Mwaisondola, learned counsel for the second and third accused argued that the plaintiff's case is incompetent for failure to join the Commissioner for Lands as a necessary party. In substantiating his argument, Dr. Mwaisondola contended that since the subject matter of the suit hinges on the transfer and ownership of suit property which was facilitated by the first defendant, the plaintiff needed to join the Commissioner for Lands as a necessary party.

The learned counsel went on to submit that by section 26 of the Land Act, Cap. 113 [RE. 2019], the Commissioner for Lands is the one vested with the powers to determine the suitability of the applications for lands before allocation of the same. He contended that the Municipal Director does not in any way involved in receiving the applications for

lands or determining their suitability before land allocation. Given that, Dr. Mwaisondola reasoned that the plaintiff was supposed to include in his case the Commissioner for Lands and the omission is fatal and makes the suit incompetent.

Responding, Ms. Judith Nyaki, learned counsel for the plaintiff assailed the arguments of her counterpart as they are oblivion of the provisions of Order 1 Rule 9 of the Civil Procedure Code, Cap. 33 [RE.2019]. She argued that according to the Order, non-joinder of the parties does not vitiate the suit and in that regard, she invited the Court to consider the provisions of Order 1 Rule 10(2) of the Code which confers powers upon the Court to add a necessary party as a remedy for non-joinder of the necessary party. Fortified by that position, Ms. Nyaki contended that the remedy for the non-joinder of the necessary party is not to strike out the suit. To buttress her position, she cited the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman**, Civil Revision No. 6 of 2017.

The learned counsel argued further that for the party to be considered necessary, there are preconditions to be met. One, there has to be a right or relief against such a party regarding the matter in dispute. Two, the Court should not be in a position to issue an effective

decree in the absence of the party. In bolstering her argument, Ms. Nyaki invited the Court to peruse the cases of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman** (Supra) and **CRDB Bank Public Company Limited v. UAP Insurance Company Limited**, Civil Appeal No.32 of 2020. She summed up her submission by contending that Dr. Mwaisondola failed to show how is necessary for the Commissioner for Lands to be joined as a necessary party; which reliefs claimed by the plaintiff are against the Commissioner for Lands; and how his presence is mandatory to allow the Court to pass an effective and executable decree.

Rejoining, Dr. Mwaisondola was brief as he argued that Ms. Nyaki seemed to agree that the Commissioner for Lands is a necessary party and his absence can be cured by an order for amendment of the plaint. He argued further that an order for amendment of the plaint is unsuitable in this case as such an order will offend the provisions of the Government Proceedings Act, Cap. 5 [RE. 2019] as the ninety days notice ought to be issued to the Commissioner for Lands before being sued as a necessary party.

Having heard the competing arguments, the issue for my determination is whether the preliminary objection is meritorious.

In so doing, it is imperative as a matter of logic to first determine whether the Commissioner for Lands is a necessary party in the circumstances of the suit at hand. As a matter of principle, for a party to be necessary whether as a plaintiff or defendant, the absence of such party in the suit should be of the extent of making the Court unable to determine the dispute in its entirety and there are reliefs claimed against him. Over the years, the courts of law have developed the test as to whether a party is necessary or otherwise. In the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman** (Supra), the Court of Appeal had this to state:

*'Thus, over the years, courts have made a distinction between necessary and non-necessary parties. For instance, in the case of Departed Asians Property Custodian Board v Iffer Brothers Ltd [1999] 1 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 one whose presence before the court was necessary for it to effectively and completely***

adjudicate upon the questions involved in the suit.'

(Emphasis Added).

In the same case, the Court of Appeal went on to elucidate the conditions to be met for a party to be considered necessary. First, there should be reliefs claimed by the plaintiff against the party over the matters in dispute in the given suit. Second, the presence of such a party in a suit is necessary for the court to determine the same. The Court of Appeal stated:

*'Although there is no definite test to be applied in this connection, in the Indian case of Benares Bank Ltd. v. Bhagwandas, A.I.R. (1947) All 18, the full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings: **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.**' (Emphasis Added).*

Guided by that position, this Court is required to determine whether there is a right of relief against the Commissioner for Lands in respect of the suit at hand; and whether the Court is in a position to pass an effective decree in the absence of the Commissioner for Lands.

Submitting in support of the preliminary objection, Dr. Mwaiondola concentrated on describing the duties of the Commissioner of Lands in allocating lands and non-joinder of him was fatal. As rightly contended by Ms. Nyaki, he did not submit on how necessary the Commissioner for Lands is necessary as a party to the suit; which reliefs claimed by the plaintiff are against the Commissioner for Lands; and how his presence is mandatory to allow the Court to pass an effective and executable decree.

Though Dr. Mwaiondola did not direct his mind toward arguing the preliminary objection in that line, I see no reason for this Court to shun away from determining whether the Commissioner for Lands is a necessary party so far as the suit is concerned. I hold so while mindful of the fact that the Court needs to satisfy itself as to whether the decree to be issued will be effective or otherwise.

As to whether there is a right of relief against the Commissioner for Lands, paragraph 33 of the plaint states that the first defendant

transferred ownership of the disputed land to the second defendant after deceiving the Commissioner for Lands about the said land. Further, the plaintiff's prayers include the declaration that he is a lawful owner of the disputed property; the declaration that the sale, transfer of ownership or allocation of the disputed land to the second or third defendant is illegal; and the revocation of the Certificate of Title in respect of the land in question. The reliefs claimed, in my opinion, are against the Commissioner for Lands as he is responsible for issuing a Certificate of Occupancy and approving the transfer or allocation of the land including recommending revocation of the Certificate of Title. In other words, the plaintiff impleaded the Commissioner for Lands without making him a necessary party.

Discerning the plaint specifically in paragraph 33 and the prayers I listed hereinabove, any decision of this Court that have the effect of granting them amounts to condemning the Commissioner for Lands unheard. That is a serious breach of the constitutional right to be heard.

Concerning whether the decree to be issued will be effective, it is my considered view that in the absence of the Commissioner for Lands, the decree will be ineffective. Principally, I am satisfied that there is a non-joinder of the necessary party who is the Commissioner for Lands

as per the position of the Court of Appeal in the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman** (Supra).

Concerning the way forward, Dr. Mwaisondola, learned counsel for the second and third defendants implored this Court to dismiss the suit as it is incompetent. On the other hand, Ms. Nyaki, learned counsel for the plaintiff opined that the non-joinder of the party does not affect the suit as per Order 1 Rule 9 of the Code and that the defective is curable under Order 1 Rule 10 of the Code as the Court may order the addition of the necessary party to the suit. The learned counsel cited the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman** (Supra) where, according to her, the Court of Appeal had this to state:

'the trial court ought to struck out the name and substitute it with the name of the necessary party during the initial stages of trial.'

With due respect to Ms. Nyaki, learned counsel for the plaintiff, my perusal of the cited case did not take me to the passage quoted hereinabove which is reflected in her submission. Nonetheless, I partly agree with her that as per Order 1 Rule 9 of the Code, the suit is not vitiated by a non-joinder of the parties. That position is also reflected in the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman**

(Supra). However, I feel obliged to borrow the wisdom of the Court of Appeal in the same case where it was stipulated that the provisions of Order 1 Rule 9 only apply to the non-joinder of the non-necessary party. In other words, when a non-joinder of the non-necessary party takes place, the recourse is to add the necessary party as per Order 1 Rule 10(2) of the Code.

According to the Court of Appeal, the provisions of Order 1 Rule 9 of the Indian Code of Civil Procedure Act V of 1908 were the same as the provisions of Order 1 Rule 9 of the Code. However, from 1976, through the Amendment Act No. 105 of 1976, Order 1 Rule 9 of the Indian Code Civil Procedure was amended by adding a proviso that serves as an exception to the general rule contained in the said Order. Essentially, the proviso to the Indian Code excludes non-joinder of the necessary party from the ambits of Order 1 Rule 9. The Order reads:

*'No suit shall be defeated by reason of the misjoinder or nonjoinder 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:
Provided that nothing in this rule shall apply to nonjoinder of a necessary party.'*

Embracing that position, the Court of Appeal reasoned that as the necessary party is key to the determination of the suit, its absence is incurable under the auspices of Order 1 Rule 9. The apex Court observed:

'Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff.'

I am aware of the position of the Court of Appeal in the recent case of **CRDB Bank Public Company Limited v. UAP Insurance Company Limited**, Civil Appeal No. 32 of 2020 that the remedy for non-joinder of the necessary party, when neither the plaintiff nor defendant applies for the party to be joined, is for the Court, upon such discovery, to direct that such party be added. However, the Court in the said case stated in clear terms the following:

'We are also aware that in terms of Order 1 rule (9) of the CPC a suit cannot be defeated for the reason of non-joinder of a party or parties but every case must be decided according to the circumstances prevailing in that particular case.'

Applying the principles, I do not hesitate to find that the suit is incompetent for non-joinder of the necessary party for the reasons stated herein. As a consequence, fortified by the position of the Court of Appeal in the case of **Abdulatif Mohamed Osman v. Mehboob Yusuf Osman** (Supra), I strike out the suit with costs.

While doing that I am aware that as per the case of **CRDB Bank Public Company Limited v. UAP Insurance Company Limited** (Supra), the application of Order 1 Rule 9 of the Code depends on the

circumstances of each case, I find it difficult to order the addition of the Commissioner for Lands as a necessary party. This is due to the fact that the necessary party is a government institution whereby for such a party to be sued, the provisions of the Government Proceedings Act, Cap. 5 [RE.2019] prevail.

That being the position, I find no reason to determine other preliminary objections. The plaintiff is at liberty to file a fresh suit upon fulfilling the requirements of the law. Order accordingly.

DATED at MWANZA this 3rd day of July, 2023.



KS KAMANA

JUDGE