

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO.228 OF 2022

MUSLIM YUSUFALI ALI BHARWANI T/A

NYERERE ROAD SERVICE STATIONPLAINTIFF

Vs

GAPCO TANZANIA LIMITEDDEFENDANT

RULING

Date of last order: 30-6-2023

Date of Ruling: 9-8-2023

B.K.PHILLIP, J.

It is the plaintiff's case that sometimes in 2009 he leased the defendant's premises located at Plot No.9932, Pugu road. Kamata area, Ilala District, Dar es Salaam Region (herein after to be referred to as "the suit premises"), through the license for retail shop and dealership agreement. The dealership agreement was renewed in August 2014 for three years up to July 2017 whereas the latest agreement for license of the retail shop was from 2016 to 31st May 2017. Under the dealership agreement the plaintiff was appointed as the defendant's dealer for the purpose of purchasing petroleum products from the defendant and re-selling the same at the Retail Outlet. On 25th March 2017 while going on with his business and without prior notice from the defendant, the suit premises was

demolished by the then Railways Holding Corporation ("Rahco") whose duties were later on taken over by Tanzania Railways Corporation ("TRC"). The plaintiff did not manage to rescue anything from the suit premises since the demolition of the same was done without prior notice. Consequently, the plaintiff suffered huge losses which paralyzed his business. Upon follow-ups the plaintiff discovered that the defendant was aware of the threats on the aforesaid demolition of the suit premises since it was served with a thirty days (30) demolition notice by Rahco and thereafter instituted a Land Case against Rahco, to wit; Land Case No.235 of 2016 at the High Court of Tanzania, Land Division. The plaintiff was neither informed about the aforesaid threats for the demolition of the suit premises nor the existence of the aforesaid Land Case No.235 of 2016. After the demolition of the suit premises the defendant informed the plaintiff that the losses suffered following the demolition of the suit premises are covered in aforementioned Land Case No. 235 of 2016. Later on, the plaintiff learnt that the said Land Case No. 235 of 2016 was withdrawn. The plaintiff demanded the defendant to compensate him for the losses suffered due to the demolition of the suit premises but the defendant did not heed to the plaintiff's demands. The plaintiff took the necessary steps as per the terms of the dealership agreement by initiation of a discussion for amicable settlement of the dispute, but the same was not successful. The plaintiff took further step by referring the dispute to Arbitration but the same was not successful too. The plaintiff's prayer in this case are reproduced verbatim hereunder;

- i) A declaratory order that the defendant misrepresented and mislead the plaintiff to enter into the agreement referred herein.*
- ii) A declaratory order that the defendant breached the duty of care by not notifying the plaintiff on the existence of the 30 days' demolition notice and thus, acted negligently.*
- iii) An order that the defendant by allowing demolition of the property it leased for business rendered the plaintiff to suffer loss of his business good will and thus, entitled to compensation to the sum of USD.350,000/=.*
- iv) An order that the plaintiff is entitled to be paid a sum of Tshs.411,926,122.63 only being actual value of loss, properties and products suffered by the plaintiff because of the unlawful demolition.*
- v) An order directing the defendant to pay the plaintiff general damages at such sum as may be assessed by this Honourable court.*
- vi) Costs of the this suit be paid by the defendant,*
- vii) Any other relief(s) this Honourable court may deem just to grant*

In response to the plaintiff's claims the defendant raised two points of preliminary objections, to wit;

- i) That this Honourable court lacks jurisdiction entertain the case before it.*
- ii) That the suit is bad in law for non-joinder of the parties.*

And further alleged as follows; that the plaintiff deals with selling of petroleum related products in retail and wholesale as well as providing automobile services. Under the license agreement the defendant is the developer and owner of the suit premise. The demolition of the suit premises was conducted by TRC which is a the Government Agency. The defendant did not commit any wrong since TRC is an independent Government Agency not affiliated to the defendant in anyway. The plaintiff has been in occupation of the suit premises since 2009 under a dealership and lease agreement between him and the defendant thus, it was aware of the circumstances which led to the unlawful demolition of the suit premises which took place in 2017. The defendant had dispute with Rahco since it wrongly marked the suit premises "X" which indicated that it was subject to demolition. The defendant filed Land Case No. 178 of 2012 at the High Court of Tanzania at Dar es Salaam against Rahco in which Rahco admitted that it wrongly marked the suit premises "X" and requested the defendant to withdraw that case. Consequently, that case was withdrawn. Later on, TRC served the defendant with a thirty (30) days demolition notice which prompted the defendant to file Land Case No.235 of 2016 praying for a declaration that the defendant is the rightful owner of the suit premises among other things and application No.603 of 2016 praying for an order for temporary injunction restricting the demolition of the suit premises. On 24th and 23rd March 2017 TRC carried out the demolition of the suit premises in contempt of the court order. Thereafter, the defendant withdrew the said Land Case No.235 of 2016 in order to file a fresh case covering the claims which had arisen following the demolition of the suit

premises. The defendant prayed for the dismissal of the plaintiff's case with costs.

The learned advocates Nazario Michael and Hamisi Mikidadi appears in this case for the plaintiff and defendant respectively. Upon being invited to address the court on the merit of the points of preliminary objections, Mr. Mikidadi prayed to withdraw the 1st point of preliminary objection and the same was marked as withdrawn accordingly thus, this ruling is in respect of the 2nd point of preliminary objection only. The same was disposed of by way of written submissions. Mr. Mikidadi's submission was as follows; that the defendant acquired the suit premises from Caltex Company which was the lawful owner of the same holding a certificate of title No. 9931 obtained in 1995. The plaintiff leased the suit premises. Surprisingly, Rahco issued a notice of demolition of the suit premises and finally Rahco's successor, TRC demolished the suit premises. Prior to the issuance of the notice of demolition Caltex together with three parties had filed Land Case No. 178 of 2012 against Rahco following the dispute over the ownership of the suit premises. In September 2012, Rahco issued a letter of apology to the defendant and promised to rectify the situation. Consequently, the aforesaid Land Case No. 178 of 2012 was withdrawn. Mr. Mikidadi contended that the facts stated in the plaint reveal that TRC is a necessary party since there are serious issues on the ownership of the suit property and payment of compensation for the demolition of the suit premises, to wit; whether compensation was paid to the defendant by TRC. He pointed out that paragraph 11 of the plaint indicates that the suit premises was demolished by TRC. He went on submitting

that the position of the law is that non-joinder of a necessary party in a case renders the case incompetent and the same has to be struck out. To cement his argument he cited the provisions of Order 1 Rule 3 and 10 of the Civil Procedure Code ("CPC"), the case of **Tanzania Railways Corporation (TRC) Vs GBP (T) Ltd , Civil Appeal No. 218 of 2020** and **Musa Chande Jape Vs Moza Mohamed Salim, Civil Appeal No. 141 of 2018** (Both unreported). In conclusion of his submission, Mr. Mikidadi maintained that this case is untenable. It deserves to be struck out for non-joinder of TRC.

In rebuttal, relying on the provisions of Order 1 Rule 1 of the CPC Mr. Nazario argued that a case cannot be defeated for non-joinder of a necessary party. He pointed out that this suit arises from a lease agreement in respect of the suit premises entered into by the parties herein and that the defendant had a dispute with Rahco pertaining to the ownership of suit premises. He conceded that the suit premises was demolished by TRC (Rahco's successor). However, he was of the view that the defendant can move this court to join TRC in this case through a third party procedure on the reason that in order for this court to establish whether or not TRC is a necessary party in this case it has to establish that the defendant has claims against TRC and has a right to be indemnified by TRC for the compensation claimed by the defendant if the defendant's claims will be successful. He conceded that the suit premises were demolished by TRC. However, he argued that if there is any dispute pertaining to the justification for demolition of the suit premises by TRC, the same is between the defendant and TRC. It has nothing to do with the

plaintiff's claims which are based on misrepresentation, negligence and breach of duty of care. He was emphatic that the plaintiff's claims have nothing to do with TRC and/or the ownership of the suit premises.

Responding to Mr. Mikidadi's prayer that this suit should be struck out for non-joinder of a necessary party, Mr. Nazario submitted that Mr. Mikidadi's prayer is not in line with the provisions of Order 1 Rule 9 of the CPC. Relying on the case of **Fatman Amani karume Vs AG and Jaji Kiongozi, Civil Application No.434/01 of 2019** (unreported), Mr. Nazario argued that the remedy for non-joinder of a necessary party in suit is amendment of the pleadings so that the necessary party can be joined not to strike out the case. He distinguished the case of **Musa Chande** (supra) on the ground that in the case at hand the dispute between the parties is whether the defendant was negligent and breached the duty of care whereas in the former case the dispute was over the ownership of the suit property. Moreover, Mr. Nazario, cited that case of **Mohamed Masoud Abdallah and 42 others Vs Tanzania Road Haulage (1980) Ltd , Consolidated Civil Appeal Nos. 150 & 158/2019** (unreported), to cement his arguments. In conclusion of his submission he maintained that the point of preliminary objection has no merit thus, it has to be over ruled.

In rejoinder, Mr. Mikidadi reiterated his submission in chief and contended that Mr. Nazario did not dispute the fact that TRC is a necessary party in this case and that this court has powers to order a necessary party to be joined in a case. He was emphatic that the point of preliminary objection has merit.

Having analyzed the rival arguments made by the learned Advocates appearing herein, let me proceed with the determination of the merit of the point of preliminary objection. To start with, I find it apposite to point out the position of the law on the remedy available for failure to join a necessary part to a case, to wit; a suit cannot be defeated by failure to join a necessary party since the court has powers to make an order for joining a necessary party to a suit *suo motto* to enable it to decide the really dispute between the parties in a case. [See Order 1 Rule 10 (2) and the case of **Abdullatif mohamed Hamis Vs Mehbood Yusuf Osman & another , Civil Revision No.6 of 2017** (unreported)]. The provisions of Order 1 Rule 10 (2) of the CPC, provides as follows;

*Order 1 Rule 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)

From the above provisions of the law as well as the case laws cited by the both learned Advocates in their submissions, the guiding criteria in deciding the necessary party to be joined in a suit is whether his /her presence is necessary for effective and complete determination of the dispute between the parties in a case, and execution of the court

orders/decrees. The real dispute between the parties in a case can be established by looking at the pleadings filed since the same are the basis for the framing of issues for determination by the court. It is also noteworthy that the issues framed are the ones which upon their determination culminate in decrees/orders of the court.

Back to the pleadings in the case in hand, as it can be discerned from the pleadings, the plaintiff's claim is basically based on negligence, misrepresentation and breach of duty of care on part of the defendant. The plaintiff's claim that the defendant did not inform him about the existence of the 30 days' notice for demolition of the suit premises thus, the plaintiff's claim is not on the appropriateness of the procedure on the demolition of the suit premises conducted by TRC rather, it is the defendant's reaction upon being served with the 30 days' notice of demolition of the suit premises as the owner of the same and lessor under the dealership agreement, and the steps it took in notifying the plaintiff on the intended demolition of the suit premises. I am in agreement with Mr. Nazario that in this case there is no any claim or dispute over the ownership of the suit premises. The pleadings also reveal that the plaintiff herein has no any legal relationship with the TRC since the lease agreement was between the plaintiff and the defendant.

In addition to the above, none of the reliefs sought by the plaintiff are levelled against TRC thus, this court can make effective /executable orders/ decrees without TRC being joined in this case. In other words, it is not necessary for TRC to be a party in this case for this court to make

effective / executable orders/ decree. In fact, Mr. Mikidadi did not explain how the non-joinder of TRC in this case will lead to the failure of this court to determine the dispute between the parties effectively and conclusively.

I have perused the case of **Tanzania Railways Corporation** (supra) and found it distinguishable from facts of the case in hand since, as alluded earlier in this judgment, in the determination of the dispute in the case in hand it is not necessary for TRC to be joined thus, it cannot be termed as a necessary party in this case, whereas in the former case the Land Allocation Authority was termed as a necessary party in the case because the plaintiff's claim was on the right of ownership of the suit land thus, it was imperative for the Land allocation Authority to be joined in the case to enable the court to determine the dispute between the parties effectively. With regard to the case of **Mohamed Masoud Abdallah and 42 others** (supra), the Court of Appeal held that the Government was a necessary party in that case because there was an issue on the payment of compensation to the appellants by the Government. To the contrary, in the case in hand the plaintiff is not claiming any compensation from TRC thus,TRC cannot be termed as the necessary party in this case in hand. Likewise, the case of **Musa Chande** (Supra) is distinguishable from the case in hand because it has different facts. In the former case the issue was whether or not it was right for the trial court to raise an issue on non-joinder of a necessary party when he was composing the judgment and made his decision without according the parties the right to be heard on that issue, whereas in the case in hand the issue is whether or not TRC is a necessary party to this case. In its judgment the Court of Appeal

held that the trial Judge erred to determine the issue of non-joinder of a necessary party raised *suo motto* without according the parties the right to be heard on the same. In addition, it held that non-joinder of a necessary party could not have defeated the suit before the trial court.

I am in agreement with Mr. Nazario that non-joinder of a necessary party to a case is curable by the amendment of pleadings and this court has powers to order a necessary party to be joined in the case [see the **Fatuma Amani karume** (supra)]. However, since I have made a finding that TRC is not a necessary party in this case, the point of preliminary objection is hereby dismissed.



Dated this 9th day of August 2023

A handwritten signature in black ink, appearing to read "B.K. Phillip".

B.K.PHILLIP

JUDGE.