

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND CASE NO. 02 OF 2023**

SILYVESTRY FRANCIS KOKA PLAINTIFF

VERSUS

TANGANYIKA COFFEE CURING CO. LTD 1ST DEFENDANT

MATHIAS CHUWA t/a KILL CRAALS SAFARIS

& COURT BROKER 2ND DEFENDANT

RAYMOND MMBANDO @ GUSTAV..... 3RD DEFENDANT

VICTOR MICHAEL TESHA 4TH DEFENDANT

RULING

26/7/2023 & 23/08/2023

SIMFUKWE, J.

In this ruling the court has been called upon to determine two sets of preliminary objections raised by the 1st defendant and the 2nd, 3rd and 4th defendants. The 1st defendant raised the following grounds of objection:

- 1. The suit is bad for non-joinder of the Assistant Registrar of Titles.*
- 2. The suit is time barred*
- 3. The suit is barred by estoppel*

The 2nd, 3rd and 4th defendants raised the following grounds of objection:

1. *That, the suit is improperly before this Honorable court as it was preferred prematurely without exhausting remedies under Order XXI Rule 57 and 62 read with section 38 (1) of the Civil Procedure Code, Cap. 33 R.E 2019.*
2. *That, the suit is improperly before this honorable as it seeks to impugn auction ordered, carried, supervised and consecrated by this Honorable Court in **Execution Number 160 of 2020 between Onesmo Paul Maro and 44 Others versus Tanganyika Coffee Curing Co. Ltd** which successfully sought for attachment and sale of landed property with C.T Number 12254.*
3. *That, in light of the Proclamation for Sale issued by this Honorable court for disposition of suit property with C.T Number 1225 and eventual issuance of Certificate of Sale, this Honorable Court is Functus Officio.*
4. *That, the suit is improperly before this honorable court and thus unmaintainable as it offends the mandatory prerequisites of section 6 of the Government Proceedings Act, Cap. 5 R.E 2019.*
5. *That, the Plaintiff has no cause of action against the 3rd Defendant.*
6. *That the suit is unmaintainable for failure to join the Registrar of Titles and individuals referred in paragraph 8 (viii) and (ix) of the Plaint.*

7. That the suit is abuse of court process.

Briefly, as per the pleadings, the plaintiff herein instituted a case against the defendants claiming that the defendants had trespassed in his land at Plot No.18 Block B Farm No. 148/1 with certificate of Title No. 12254 located at Chui Street Shanty Town within Moshi Municipality and conducted unlawful auction on 30th day of December,2022.

In their Written Statement of Defence, the defendants raised the above noted grounds of objection which the court ordered to be argued through filing written submissions. The plaintiff was represented by Mr. Emmanuel Antony, learned counsel, the 1st defendant was represented by Mr. Elikunda George Kipoko learned counsel and the 2nd, 3rd and 4th defendants were represented by Mr. Wilson Ezekiel, learned counsel.

In support of his first ground of objection which is in respect of non-joinder of the Assistant Registrar of Titles, Mr. Kipoko submitted that under paragraph 8 (viii) and (ix) of the Plaint read together with paragraph 7 of the written statement of defence, the plaintiff stated that he surrendered the disputed property; while paragraph 7 of the Written Statement of Defence especially **Annexure TCCCO 1** the official search shows that the Assistant Registrar of Titles has registered the first defendant as owner of the suit premises. Basing on such facts, Mr. Kipoko was of the opinion that the Assistant Registrar of Titles is a necessary party for effective decree to be issued. That, the Assistant Registrar of Titles ought to have been joined and failure of which renders this suit incompetent and should be struck out.

On the second ground of objection, it has been stated by Mr. Kipoko that the suit is time barred. Reference was made to paragraph 8(viii) and (ix)

of the plaint which are to the effect that the plaintiff was required to surrender his title to the first defendant in the year 2018 and went on to surrender the title but failed to take action. It was the opinion of Mr. Kipoko that such act of surrendering the title if any amounted to trespass and the Plaintiff ought to have taken action on or before the lapse of three year.

Lastly, on the third point of objection, Mr. Kipoko stated that the plaintiff's suit is barred by estoppel. It was contended that reading the contents of the plaint and that of the first defendant's Written Statement of Defence, it is clear that the plaintiff surrendered the alleged title to the government and promised not to claim from the government of the United Republic of Tanzania or Tanganyika Coffee Curing Company Limited any compensation or any other costs resulting from surrendering of the property.

For the above reasons, it was Mr. Kipoko's prayer that this suit be found to be incompetent and this court strike it out with costs.

Mr. Wilson Ezekiel, started to argue the **4th and 6th** preliminary objections which are to the effect that, the suit is improperly before this court and thus unmaintainable as it offends the mandatory prerequisites of **section 6 of the Government Proceedings Act, Cap. 5 R.E 2019** and the suit is unmaintainable for failure to join the Registrar of Titles and individuals referred in paragraph 8 (viii) and (ix) of the Plaint. In support of his argument, the learned counsel referred to the ruling of this court in the case of **Silyvestry Francis Koka versus Tanganyika Coffee Curing Co. Ltd and others**, Misc. Land Application Number 1 of 2023, HC-Moshi, arising from this suit. He argued that the 4th defendant raised similar sets

of preliminary objections, as the present one and this court on 10th February, 2023 upheld the said objections and struck out the application.

It was submitted that the agreement which led to the findings in Misc. Land Application No. 1 of 2023 is still in place. That, in the meantime, neither the Government nor the Registrar of Titles is impleaded in this suit. For the foregoing reasons, the learned counsel called upon this court to find merit in these two objections, rule the present suit as incompetent and strike it out with costs. It was argued that the reasons for joining them is to protect right to be heard and for them to provide answers to the allegations and resultant questions levelled against them by the Plaintiff under Paragraphs 8 (viii), (ix) and (x) of the Plaint. Moreover, considering the gravity of the allegations of sanctioned coercion aimed at the sovereign Government of the United Republic of Tanzania. Furthermore, he was of the opinion that it would be unwise to proceed without benefit of their explanation and audience as it is very likely no effective judgment or order can be rendered by this court without their presence. Reference was made to the decision of the defunct East Africa Court of Appeal in the **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] EA. 55** (SCU) which had this to say in respect of the role of a Necessary Party:

"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 person, 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."

It was argued further that the Government's role and motive for returning the Title in respect of the disputed property to the 1st Defendant are unknown and unclear. That, there are more questions than answers. The questions like: "Why did the Plaintiff agree to return the Certificate of Title?" "Where was he from 2018 up to now 2023 and why is he in court now?" "What was the consideration in that agreement?" "Who were the persons involved - in coercing the Plaintiff if at all?" "What documents did the Registrar of Title consider in endorsing the transfer and from who?" That, to avoid speculations, the said parties should be joined in this suit.

Mr. Wilson argued the 1st 2nd, 3rd and 7th grounds of objections collectively. He submitted to the effect that under **section 38 (1) of the Civil Procedure Code, Cap. 33 R.E 2019** all questions arising from and or in connection with execution should be determined by the executing court. Also, **Order XXI Rule 57 of the CPC**, gives power to the executing court to launch investigation into any claim preferred by third parties in respect of properties incorrectly attached in execution or interests. That, under **Order XXI Rule 62 of the CPC**, a person aggrieved by the order in objection proceedings may proceed by way of a suit as such order is conclusive save for the outcome which may be preferred in a new suit. It was asserted that, before any suit is filed in contention of a title to property wrongly attached in execution in which a third party has interests, the route provided for under **Order XXI rule 57 and 58 of the CPC**, must first be pursued and exhausted and not otherwise. That, **Order XXI rule 57 (1)** provides for two different aspects; one, an objector, normally a third party to the court proceedings, is permitted to

access the executing court in order to object to any attachment of the property in which he has interest, and; two, the rule vests jurisdiction in the court that passed a decree to hear the objector on his objection as if he was a party to the suit. Reference was made to the case of **Sosthenes Bruno Dianarose Bruno Versus Flora Shauri, Civil Appeal No. 249 of 2020**, (Unreported), CAT page 12 – 13. Thus, the remedy of preferring a new suit by an objector cannot be pursued before the route so provided is concluded.

Further reference was made to the case of **Saida Mohamed Mbaraka Litanda and Christina Ntumigwa Mwakifulefule Vs. Equity Bank Tanzania Limited and others, Land Case No. 46 Of 2020**, HC, (Unreported), at page 4, and the case of **Kuringe Real Estate Ltd Vs Nmb Bank Plc and Two Others, Land Case No. 132 of 2020**.

Mr. Wilson condemned the plaintiff for failure to adhered to the above provisions. He argued that at Paragraph 7 of the Plaint, the Plaintiff is claiming for trespass and conducting of what he termed as "unlawful auction" of his supposedly suit land. The learned counsel was of the view that the immediate question is which auction? That question takes us to paragraph 8 (xv) of the Plaint, which made reference to an affidavit filed by the 2nd Defendant in an attempt to stop the auction in Misc. Land Application Number 34 of 2022, Annexure Sk-9. However, the order which granted and permitted the said execution to proceed remain unchallenged to this day. No appeal or revision and no objection proceedings, properly so called was preferred against it.

On that basis it was argued that this suit has been preferred prematurely. The learned counsel recited the case of **Sosthenes Bruno Dianarose**

Bruno v. Flora Shauri (supra) at page 12 where the Court of Appeal stated the purpose of objection proceedings as follows:

*"....to provide for a procedure on **how to carry out investigation of claims** and objections which may be presented to court by **third parties** who may be adversely affected by attachments arising from decrees born out of proceedings to which the objectors were not parties."*

Mr. Wilson continued to state that the Plaintiff claims to be the true owner of the suit property; the property which this court has ordered to be sold in an execution entrusted on its officer, the 2nd Defendant. It was observed that it would be irrational for the same court to entertain parallel proceedings on the same property, preferred by a party who has opted to disregard the procedures provided under **Order XXI rule 57, 58 and 61 of the CPC**. Therefore, the court is functus officio and the present suit is nothing short of abuse of the process of the Court. Otherwise, people who purchase property being sold by the court should be protected instead of being entangled in endless suits by scrupulous litigants as the Plaintiff. That, this court, having ordered the sale to proceed as it did, its hands are tied from opening a parallel proceeding aiming at revisiting its own orders, in respect of the same property other than in a manner provided under **Order XXI rule 57, 58, 61 and 62 of the CPC**. It was added that the Certificate of Sale has already been issued to the 4th defendant as held in **Kamundu v. R (1973) EA 540 the E.A**, by the Court of Appeal that:

"A court becomes functus officio when it disposes of a case by a verdict of a guilty or passing sentence or making some orders finally disposing of the case. "

Supporting the 5th point of preliminary objection which concerns failure to disclose cause of action against the 3rd defendant, Mr. Wilson referred to the case of **Mashado Game Fishing Lodge Ltd & Two Others Vs. Board of Trustee of Tanganyika National Parks (t/a TANAPA) [2002] T.L.R 319**, in which at page 320 the court held that:

"A person is said to have a cause of action against another where that person has a right and the other person has infringed or breached that right with the result that the person with the right suffers material loss or any other loss;"

Also, the learned advocate cited the case of **Musangang'andwa vs. Chief Japhet Wanzagi and Eight Others [2006] T.L.R. 351** at page 352 to support the above position.

Equating the above authorities with the present suit, Mr. Wilson submitted that the only place the third Defendant is mentioned is at paragraph 8 xix of the Plaint as a person who was a successful bidder. That, nothing is mentioned thereafter to indicate and show if any claim is preferred against him. It was the opinion of Mr. Wilson that the 3rd defendant's presence in this suit is unwarranted and uncalled for. Thus, he ought to be expunged from the plaint and the suit as there is no cause of action against him.

To sum up what has been submitted, the learned advocate said that this suit is incompetent and it should crumble on that ground alone. He said, the Defendants should as of right be entitled to costs of the suit.

In his reply to the preliminary objections raised by both defendants, Mr. Emmanuel Anthony commenced his submission by notifying this court two issues/concerns: **First**, he informed this court that the second defendant has not filed his Written Statement of Defence and never prayed for extension of time to file the same. **Second**, that the 2nd defendant has never raised any point of law against the plaint as he has yet filed his pleadings as required under **Order VIII rule 2 of the CPC**. Basing on such notifications, the learned advocate prayed any outcome of the preliminary objections raised by the first, third and fourth defendants be in exclusion of the second defendant and that the plaint be heard and determined ex parte against the second defendant. Also, he prayed the court to ignore the submissions by Mr. Wilson since it includes the 2nd defendant who did not file Written Statement of Defence.

Third, Mr. Emmanuel notified this court that paragraphs 7,10 and 17 of the Written Statement of Defence by Mr. Kipoko for the 1st defendant violate the provisions of **Order VI rule 3 of CPC** which requires pleadings to state material facts and not evidence. He made reference to the case of **Salim Said Mtomekela vs. Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019**, CAT at Dar-Es-Salaam at page 5 to cement his argument. He argued that the noted paragraphs contain evidence since annexure TCCCO 1, 2, 3 and 4 are typically documentary evidence. He prayed the said paragraphs to be expunged from the pleadings of the 1st defendant. That, if such paragraphs are expunged then the preliminary objection raised by the first defendant will lack legs to stand. He cited the case of **Ali Shabani and 48 Others vs. Tanzania National Roads Agency (TANROADS) and Another, Civil Appeal No. 261 of 2020 (CAT)** to support his contention.

Concerning annexure TCCCO 2 from the 1st defendant's Written Statement of Defence, it was argued that the same cannot afford to support the pleadings because it was annexed irregularly.

Mr. Emmanuel averred that, determining the essence of that document at this stage will be contrary to the requirement of preliminary objection since the said document requires to be proved through evidence. He referred to the case of **Shose Sinare vs. Stanbic Bank Tanzania Limited and Another, Civil Appeal No. 89 of 2020 CAT**. That, the issue that the Plaintiff entered into a contract with the government of the United Republic of Tanzania or not, is a question of fact since under paragraph 8 viii and ix of the Plaintiff's plaint he states about surrendering the title to the first Defendant and the order to surrender was engineered by people who were not known in the contract of disposing the suit property to the Plaintiff.

Responding to the 3rd and 4th preliminary objections on the prayer by Mr. Wilson to adopt the previous decision of this court which struck out the application for failure to join necessary party, Mr. Emmanuel contended that in the previous ruling, some of the points of objections were overruled and one preliminary objection was upheld. Thus, it was the duty of the learned advocate to bring out the gold from the dust in order to make this court to see that there is reason to depart from the previous decision made.

It was stated further that the previous decision was delivered on 10/02/2023. However, on 27/06/2023 the Court of Appeal in the case of **Fatma Amani Karume vs. The Attorney General and Another, Civil**

Application No. 434/01 of 2019, CAT at Dar es Salaam at page 13 (unreported) held that:

"Truly, the applicant has left some of the parties in the case who would otherwise want to defend their rights, but as rightly maintained by Mr. Sanga, the remedy which we also associate ourselves with the correct exposition of the law, if at all found necessary in the circumstance of this case, is to allow an amendment not to declare the application incompetent and strike it out."

On the strength of the above authority, Mr. Emmanuel submitted that the prayer of striking out the suit cannot stand. The learned advocate cemented further his argument with **Order I rule 9 of CPC** and the case of **CRDB Bank Public Company Limited vs. UAP Insurance Company Limited, Civil Appeal No. 32 of 2020**, CAT at Dar-Es-Salaam (unreported) at page 125.

It was further submitted that among the rights and interests of the Plaintiff in this suit is to choose who to sue and what to claim. That interest and right cannot be defeated for failure to join the Registrar of Titles or the Attorney General. He supported his argument with the case of **Constantine B. Assenga vs. Elizabeth Peter & 4 Others, Civil Appeal No. 70 of 2019**, CAT at Dar-Es-Salaam (unreported) at page 22 which was also quoted in the case of **Tanzania Railways Corporation (TRC) vs. GBP (T) Limited, Civil Appeal No. 218 of 2020**, CAT at Tabora (unreported) at page 15.

It was the opinion of Mr. Emmanuel that ordering this suit to be strike out will injure the interests of the Plaintiff in terms of time and cost and it will

be like forcing the Plaintiff to sue a person whom he does not want to sue.

He argued that prior to preparation of the plaint the Plaintiff had no knowledge that people who were involved in coercion were from the government. That, from the pleadings of both sides it seemed that the 1st and 3rd defendants are well equipped with knowledge of how the transaction was done. In line with the case of **CRDB Bank Public Company Limited** (supra) the learned advocate was of the view that after discovering that the Registrar of Titles and Attorney General are necessary parties, the court should direct that the said parties be added as enshrined under **Order I rule 10(2) of the CPC**. He also referred to the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & Another, Civil Revision No. 6 of 2017**, CAT at Dar-Es-Salaam (unreported) at page 8 to support his argument.

Responding to the argument that the matter was filed prematurely and that the court cannot determine the matter as it has already issued the certificate of sale, Mr. Emmanuel was of the view that the plaintiff wishes to challenge the auction process only. He explained that it is true that, before reaching to the auction the suit land was attached. However, after being attached the proclamation for sale was issued whose purpose was to give a judgment debtor or any other interested person time and mode to redeem the attached property. He stated that, failure to give a judgment debtor or any other interested person time to redeem the attached property as required by the law is not the question of ownership rather it is the question of validity of the auction.

The learned advocate for the plaintiff asserted that from the available evidence, the Defendants will have the duty to prove as to why proclamation of sale **VC-1** was issued on 5th day of December, 2022 and the auction was conducted on 30th day of December, 2022 as per certificate of sale **VC-2** which is contrary to the provisions of **Rule 67 of Order XXI of the Civil Procedure Code**, (supra) which mandates the auction to take place after 30 days after the proclamation of sale has been issued.

On the issue that this court is functus officio as it had already issued certificate of sale, Mr. Emmanuel alleged that, the Plaintiff challenges the auction for being invalid and not to show this court that the attachment was not proper. That, the cases cited by the learned counsel for the 3rd and 4th defendants are all about attachment thus distinguishable. It was insisted that, as long as the certificate of sale was issued on 25th day of January, 2023 there was no more attachment to lift.

Responding to the argument that there is no cause of action against the 3rd defendant, it was replied that at paragraph **8 xix** of the plaint the 3rd Defendant is said to be the highest bidder. The question that should be answered is how the 4th Defendant became a purchaser, that question cannot be answered without impleading the 3rd Defendant.

Responding to the preliminary objections raised by Mr. Kipoko for the 1st defendant, the learned advocate for the plaintiff reiterated what he submitted while replying similar objections raised by Mr. Wilson.

In reply to the argument that the plaint is time barred, Mr. Emmanuel stated that the argument should be dismissed as it is not backed up by any law or any authority. Nevertheless, Mr. Emmanuel submitted that the

Plaintiff sought order of this Court to declare him as lawful owner of the suit property which is to be claimed within 12 years as provided under **item 22 of the Schedule to the Law of Limitation Act, Cap. 89 R.E 2019.**

On the issue of estoppel, Mr. Emmanuel submitted that the said issue is not backed up by law and the same requires proof. He explained that in his plaint, the Plaintiff stated that, his consent was cohesively obtained while the defendants in their Written Statements of Defence stated that the consent was obtained by signing the agreement. The learned counsel referred to the case of **Muhimbili National Hospital vs. Linus Leonce, Civil Application No. 190 of 2018**, CAT at Dar-Es-Salaam (unreported), at page 89 which held that:

"In other words, the Common Law Doctrine of estoppel bars the parties, in this case the respondent from running away from their previous freely made choices. It bars them denying their previous freely made choices."

It was stated that the question on whether the surrendering of the suit property was freely made by the plaintiff cannot be determined at the preliminary stage without hearing the case and ordering the amendment of the plaint.

In the end, the learned counsel implored the court to dismiss the preliminary objections with costs. Also, he urged the court to order the amendment of pleadings if it finds that the Registrar of Titles and Honourable Attorney General are necessary parties.

In rejoinder, Mr. Wilson countered the objections raised by Mr. Emmanuel by saying that a person cannot raise preliminary objection on top of

another preliminary objection as stated in the case of **Method Kimomogoro vs Board of Trustees of TANAPA**, Civil Application No. 1 of 2005 (unreported).

Responding to the argument that the court should refrain from looking at the annexures as it is tantamount to making the inquiry into the evidence at this stage, Mr. Wilson was of the view that, Mr. Emmanuel's argument will be contrary to the case of **Ali Shaban and 48 Others** (supra). He argued that the defence filed by the 1st defendant including its annexures should form the basis for determination of preliminary objection since the same is part of pleadings as envisaged under **Order VI rule 1 of the CPC**.

In his rejoinder, Mr. Kipoko for the 1st defendant while responding to the argument that the Written Statement of Defence of the 1st defendant contains evidence particularly under paragraph 7, 10 and 17, Mr. Kipoko also condemned the plaintiff's plaint for containing the annexures which is evidence. He argued that paragraph 8 i, ii, iv, v, vi, vii, xii, xiv, xv, xviii, xix and paragraph 9 should be expunged and if expunged the remaining paragraphs won't be enough to sustain the suit.

Mr. Kipoko distinguished between the evidence and annexures in so far as pleadings are concerned. He argued that the court should be led by what is pleaded and not what is testified outside the pleadings. He added that, annexures attached in the pleadings are not evidence as stated in the case of **Sabry Hafidhi Khalfan vs Zanzibar Telecom Ltd (Zantel) Zanzibar, Civil Appeal No. 47 of 2009** which was quoted with approval by the Court of Appeal in the case of **Total Tanzania Ltd vs Samwel**

Mgonja, Civil Appeal No. 70 of 2018 (CAT) in which at page 9 it was held that:

"Annexures attached to the plaint or written statement of defence are not evidence."

Contesting Mr. Emmanuel's prayer to cure the non-joinder by the plaintiff, Mr. Kipoko submitted that such prayer is unmaintainable since the parties to wit Registrar of Titles and Attorney General who are prayed to be joined are mandatorily required by the law to be given the 90 days statutory notice of the intention to be sued prior to the institution of the case as per **section 6(2) of the Government Proceedings Act**, (supra). Thus, the prayer to amend pleadings is impracticable.

I have keenly considered the submissions of the parties for and against the raised objections as well as their pleadings. The issue is ***whether the raised preliminary objections have merit.***

Before discussing the grounds of objections, I wish to start with the concerns/issues raised by Mr. Emmanuel in his submission while responding to the preliminary Objections. With due respect to Mr. Emmanuel, the preliminary objection cannot be raised on top of another preliminary objection as it will be like pre-empting the defendants' objections as rightly re-joined by Mr. Wilson. This position has been discussed in numerous decisions, including the case of **Standard Chartered Bank & Another vs VIP Engineering & Marketing Ltd & Others** (Civil Application 222 of 2016) [2021] TZCA 344 (2 August 2021) [Tanzlii] at page 8 where the Court of Appeal quoted the case of **Method Kimomogoro v. Board of Trustees of TANAPA** (supra) cited by Mr. Kipoko in which the Court held that:

"This Court has said in a number of times that it will not tolerate the practice of an Advocate trying to pre-empt a preliminary objection either by raising another objection or trying to rectify the error complained of."

On the strength of above authority, this court is of the view that the objections/concerns raised by Mr. Emmanuel while replying the preliminary objections of the defendants are misplaced.

Turning to the first ground of preliminary objection by Mr. Kipoko which is similar to the 4th and 6th points of objection by Mr. Wilson; both learned counsels were of the view that the suit is bad in law for failure to join necessary parties to wit: Assistant Registrar of Titles and the Attorney General. To support this point, Mr. Wilson relied on the ruling of this court in Misc. Land Application No. 1 of 2023 between the present parties where this court struck out the said application for failure to join necessary parties, the Registrar of Titles and Attorney General. On his part Mr. Kipoko, relied on annexure TCCCO 1 official search attached to paragraph 7 of the 1st Defendant's Written Statement of Defence which shows that the Assistant Registrar of Titles has registered the 1st defendant as the owner of the disputed property. He was of the opinion that Assistant Registrar of Titles ought to have been joined.

Replying the above contention, Mr. Emmanuel argued that the previous ruling of this court is different to the present matter. That, the defendants ought to bring out the gold from the dust in order to make this court to see whether there is a reason to depart from the previous decision. He suggested that even if there is non-joinder of necessary parties the remedy is to allow the amendment of the plaint and not to declare the suit

incompetent and strike it out, as it was held in the case of **Fatuma Amani Karume** (supra).

In scrutinizing this ground of objection, I will be guided by the following issues; ***first***, *whether the remedy for non-joinder of necessary party is to allow amendment* and ***second***, *whether the suit is bad in law for failure to join necessary parties?*

On the first issue on the remedy available on failure to join a necessary party, with due respect to Mr. Emmanuel, the circumstances pertaining this matter are different to those in **Fatuma Amani Karume's** case. The ruling of **Fatuma Karume's** case emanated from the original matter in which parties who were to be joined were parties but were omitted in the subsequent matter. Whereas the parties in the previous matter who ought to have been joined were different from the parties in the filed subsequent matter. To that end, the Court of Appeal was of the view that even if there is such failure to join the necessary party, the remedy was to join the omitted parties.

Also, the case of **Fatuma Amani Karume** is distinguishable to the present matter since it required no other legal action to be taken before joining the parties. Unlike this matter, the parties who ought to be joined are mandatorily required to be given 90 days' notice of intention to sue them as required under **section 6(2) of the Government Proceedings Act** (supra). Thus, under such legal requirement, allowing amendment to accommodate necessary parties will be next to impossible.

Turning to the gist of this objection on the second issue as to ***whether the suit is bad in law for failure to join necessary parties?***

Without further ado, I hasten to state that the suit is unmaintainable for failure to join necessary parties and here are my reasons:

First, I wish to make it clear that preliminary objections should emanate from the pleadings which in this case is the Plaint and Written Statements of Defence. According to paragraph 8 viii of the plaint, the plaintiff stated that he was forced to surrender the title to the first defendant which was previously registered in his name. Also, according to annexure TCCCO 2 annexed under paragraph 10 of the 1st defendant's Written Statement of Defence, there is an agreement between the Government of United Republic of Tanzania and the plaintiff herein to surrender the disputed land to the 1st defendant.

Basing on the above contents of the pleadings, I concur with Mr. Kipoko and Mr. Wilson that in the circumstances of those facts, it was necessary to join the Attorney General as well as Registrar of Titles. I am of considered opinion that the Registrar of Titles is in a good position to state why ownership of the disputed property was returned to the 1st defendant. Also, the Attorney General should be joined in order to defend the allegations that the Government of the United Republic of Tanzania entered into the contract with the plaintiff in respect of the alleged surrender which the plaintiff asserted under paragraph 8 ix of his plaint that he was forced to surrender. Therefore, I am of considered opinion that the suit is bad in law for non-joinder of necessary parties.

On the basis of what has been established above, I find merit in the 1st ground of preliminary objection raised by Mr. Kipoko which is in *par materia* to the 4th and 6th grounds of preliminary objections raised by Mr. Wilson for the 2nd, 3rd and 4th, defendants. In addition, I uphold the 1st

preliminary objection raised by the learned counsel for the 2nd, 3rd and 4th defendants as the plaintiff ought to exhaust the remedies provide under **Order XXI rule 57 and 62 of the CPC** (supra).

Since the findings on those grounds of objections suffice to dispose of the objections, I do not find any reason to consider other grounds of preliminary objections as it will be performing academic exercise. Consequently, I find the suit incompetent and hereby strike it out with costs.

It is so ordered.

Dated and delivered at Moshi this 23rd day of August 2023.



X

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE

23/08/2023