IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LAND APPEAL NO. 55 OF 2022

(Originating from the District Land and Housing Tribunal for Dodoma at Dodoma in Land Application No. 187 of 2015)

VENCHA FABIAN MAGANGA.....APPELLANT

VERSUS

MWANAHAWA RASHID SELEMANI.....RESPONDENT

JUDGEMENT

Date of Last Order: 27/04/2023
Date of Judgment: 21/07/2023

A. J. Mambi, J.

Parties herein were at logger heads at Dodoma District Land Housing Tribunal (herein *the DLHT*) over the un-surveyed two acres of land located at Nyamihanga street at Veyula Area within Dodoma City Council (herein *the suit land*). It was the respondent herein in the capacity of administratrix of the estate of her late husband Mrisho Shaban Abdallah in 2015 sued the appellant at the DLHT claiming that the appellant had trespassed into her late husband's property, the suit land. The appellant on the other hand, maintained that the complained parcel of land was his property.

Having heard on both parties, the DLHT on 14/09/2016 decided in favor of the respondent. Dissatisfied, the appellant appealed before this Court. This Court (Kwariko, J as she then was) on 9/3/2018 nullified and quashed the proceedings of the DLHT and set aside its orders for the reason of failure of the DLHT to visit the locus in quo. This court further ordered for a retrial of the matter before another chairman and set of assessors. Pursuant to this order the DLHT conducted a retrial which culminated to the judgment subject of this appeal which was delivered on 20/7/2022. In his appeal the appellant raised six grounds of appeal to wit;

1. *That, the learned Chairman did err in law and in fact for entertaining the matter while the same suffered from misjoinder or non-joinder of parties.*
2. *That, the learned Chairman erred in law by deciding the matter before him basing on wrongly framed issues.*
3. *That, the learned Chairman erred in law and in fact by not considering the evidence adduced by the Appellant and his witnesses to the effect that the suit land belongs to the Appellant who came into ownership of the said land after had purchased the same from one Anna Bulogwa.*
4. *That, the learned Chairman erred in law and in fact for failing to adhere to the procedures and objective governing visit at the locus in quo.*

5. *That, the learned Chairman erred in law and in fact by declaring that the suit land belongs to the Respondent while there is no evidence on record to prove the same.*
6. *That, the learned Chairman misconceived the pleadings and evidence adduced by the Appellant and his witnesses as a result did arrive at a wrong decision.*

Submitting for the appellant Mr. Bwire-Learned Advocate with respect to the first ground of appeal contended that the DLHT was wrong for non-joinder of parties since the respondent alleged that her late husband bought the suit land from Mr. Mruma whereas the appellant on the other hand stated that he bought the suit land from one Anna Bulongwa. It was the learned counsel's view that Mr. Mruma and Ms. Anna Bulongwa should have had joined in the suit under Order 1 Rule 1 and 3 of the Civil Procedure Code, [Cap 33 R: E 2019] (*the CPC*).

In relation to the second ground of appeal the learned counsel for the appellant submitted that the DLHT failed to raise properly the issue for determination. It was Mr. Bwire's submissions that the main issue for determination was who was the owner of the suit land between Mr. Mruma and Ms. Anna who were alleged to be the sellers of the suit land.

Mr. Bwire further contended that the appellant proved his properly through the documents and evidence from his witnesses. The learned counsel referred this Court on **Hemed Said vs Mohamed Kambona** (1984) TLR 113.

With regard to the fourth ground of appeal Mr. Bwire for the appellant argued that when the DLHT visited the land in dispute it did not follow the procedures. The learned counsel submitted that since during the day when the DLHT visited the suit land there was no any witness then the visit in his view should have been postponed to another date. Reference was made on **Barnabas R vs Registered Trustees of Acidaosis of Mwanza**, Land Appeal No. 67 of 2021 (Tanzlii 11624), **Nizar Mh vs Gulamali F. J Mohamed** (1980) TLR 29 and **Kimani vs Azim and 14Others,** Civil Case No. 4 of 2018.

Finalizing, Mr. Bwire submitted that the DLHT misdirected itself on the location of the suit land and thus prayed for this Court to allow this appeal.

Responding from the appellant submissions, the respondent who was unrepresented contended that the suit land was belonged to Paul Mruma and it was sold to her late husband in 1991. That due to the work transfer of her late husband they shifted to Dar Es Salaam leaving the suit land under the care of Mr. Omary Hussein. The respondent added that they have been using the suit land since 1991 after the purchase. The went on submitting that her evidence at the DLHT was stronger than that of the appellant to the extent that there was no need of witnesses at the locus in quo.

I considerably gone throughout the grounds of appeal, the submissions of the parties and the records before me. The main issues for determination I find to be first whether there was a mis-joinder or non-joinder of parties at the DLHT, second whether the absence of witnesses at the locus in quo vitiated the proceedings of the DLHT and third whether the DLHT assessed properly the evidence before it.

Starting with the first issue, the question is, was there any misjoinder or non-joinder of the parties at the DLHT? To answer this question, it is incumbent upon this Court to see what the law says. Order 1 Rule 1 and 3 of the CPC provides for circumstances within which a party may be joined in the suit as a plaintiff or defendant, the same reads;

> ***1.*** *All persons may join in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.*
>
> ***2****.....*
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> *.....*
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> ***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.* [Emphasis Supplied]

The provisions above, on the plaintiff's/plaintiffs' side, means that for different plaintiffs to commence one suit they must be claiming on one cause of action against the defendant or defendants. This means both of them they would be inviting a court of law to determine a question of fact they allege the defendant or defendants to have caused. On the defendant's/defendants' side the provisions means that for different defendants to be joined in the suit the said defendants must have had been the source of the cause of action to the plaintiff.

In the present case the respondent/applicant at the DLHT alleged that her late husband bought the suit land from one Paul Mruma and on the other hand the appellant/respondent alleged that he bought the suit land from one Anna Bulongwa. Considering the parties' allegations towards the suit land it is my considered view that there was no mis-joinder or non-joinder. This is because Mr. Paul Mruma having sold the suit land he had no title over it, this means having relinquished the title to the suit land he could no longer sue over it as he had no cause of action to any trespasser. Lacking title over the suit land could not have made him a joint plaintiff in the case at the DLHT doing so he would have been held as a mis-joinder. On the other hand, Anna Bulongwa having sold the suit land to the appellant she relinquished her title (if at all she had) to the appellant. However, despite having relinquished her title she could be joined in the suit at the request of the appellant/respondent at the DLHT

as a necessary party. It was not a duty of the respondent/applicant to join Anna Bulongwa as second defendant in her suit.

A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. The term necessary party is defined in the **Black's Law Dictionary**, 8th Edition to mean;

> ***"a party who, being closely connected to a law suit should be included in the case if feasible,*** *but whose absence will not require dismissal of the proceedings"*

In other words, in absence of a necessary party no decree can be passed. His presence, however enables the court or Tribunal to adjudicate more "effectually and completely". See also ***Shahasa Mard vs Sadahiv ILR (1918) 43 Bom 575 at p 581*** and ***Kasturi v Iyyamperumal (2005) AIR 2005*** at P.738. Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding:

(i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and

(ii) It should not be possible to pass an effective decree in absence of such a party. (See also ***C.K.Takwani on Civil Procedure at page 162-163***).

It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. The Court of Appeal in **Tang Gas Distributors Limited vs Mohamed Salim said & 2 Others,** Civil Application for Revision No. 68 of 2011 (unreported), when considering circumstances upon which a necessary party ought to be added in a suit stated that: -

(i) *".....an intervener, otherwise commonly referred to as a* ***NECESSARY PARTY****, would be added in a suit under this rule.....even though there is no distinct cause of action against him, where:-*

(ii) *(a).....*

(iii) *(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.***

Again, in **Abdullatiff Mohamed Hamis vs. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017(unreported), the Court of Appeal when faced with an akin situation, it stated that: -

'The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the ***particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."***

Similarly, the Court of Appeal in **Juliana Francis Mkwabi Vs Lawrent Chimwaga**, Civil Appeal No. 531 of 2020(unreported), when confronted with the issue of whether the Dodoma Municipal Council was a necessary party in the circumstances of the case, it found that the Council was not a necessary party who ought to have been joined in the proceedings, because;

"in the circumstances of the case subject of this appeal, Dodoma Municipal Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed."

In the present case the appellant/respondent did not seek the DLHT to join Anna Bulongwa who sold to him the suit land as a necessary party. Having failed to ask the DLHT at the trial he cannot legally raise in appeal by blaming the respondent for having non-joined her. Furthermore, the law requires that matters of non-joinder or mis-joinder of parties to be raised at earliest possible opportunity. Reference can be on Order 1 Rule 13, it provides;

"All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived"

It is my considered view that the law intends to avoid unnecessary inconveniences to a party who is not legally responsible in the suit to be

exonerated at earliest possible moment. It would be injustice to drag a person all the way from the beginning of a suit to finality only to find at the end that he was wrongly joined.

Coming to the second issue of whether the absence of witnesses at the locus in quo vitiated the proceedings of the DLHT. The purpose of visiting the locus in quo is to enable the court or any decision-making body to satisfy its self on what is on the ground *vis a viz* the evidence on record and not to rehear the matter. It is not required to hear the evidence of the parties at the locus in quo but rather to find out whether what was stated in evidence before visiting the locus in quo is actually present on the ground. The aim is to clear the doubts created during the hearing of the case. The essence of a visit to a locus quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of **Evelyn Even gardens NIC LTD and the hon. minister, Federal Capital Territory and Two others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 cited by the Court of Appeal of Tanzania in **Avit Thadeus Massawe vs Isidory Assenga,** Civil Appeal No. 6 of 2017, in which various factors to be considered before the courts decide to visit the locus in quo were stated. The factors include:

1. ***Court should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a***

piece of evidence when such evidence is in conflict with another evidence *(see Othiniel Sheke V Victor Plankshak (2008) NSCQR Vol. 35, p. 56.*

2. *The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbour, and physical features on the land (see Akosile Vs. Adeyeye (2011)17 NWLR (Pt. 1276) p.263.*
3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see Ezemonye Okwara Vs. Dominic Okwara (1997) 11 NWLR (Pt. 527) p.1601).*
4. ***The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not mean to afford a party an opportunity to make a different case from the one he led in support of his claims.*** (Emphasis added).

In the case at hand the DLHT found that at the parties' witnesses and neighbors were not on the site but it nevertheless went on with the visiting processes. It is the finding of this Court that the DLHT was right and absence of witnesses or neighbors at the site during the visitation of the DLHT did not vitiate its proceedings.

With regard to the last issue. It is the finding of this Court that the DLHT properly assessed the evidence on record. This court is satisfied the evidence on the respondent side was heavier than that of the appellant. This is basing on her evidence that her husband bought the suit land on

1st December, 1991 that having bought they continued using it until when they were transfered to Dar Es Salaam leaving it under the care of one Mzee. Omary Misanga the evidence which was supported by **exhibit P1** a sale agreement and corroborated by AW2, Omary Misanga who stated that they allowed different people to build small and temporary businesses houses on the suit land. This means that the respondent was enjoying her suit land peacefully until when the appellant emerged in 2015 when he demolished the said small and temporary houses on reason that he had bought the suit land from Anna Bulongwa. The evidence from the appellant side is weak. This is because the appellant and his witnesses bought the suit land in 2013 from the person whose land was bordering that of the respondent who started owning and using it since 1991. Furthermore, whereas neither the appellant nor Anna Bulongwa, the predecessor has had ever used the suit property, the respondent and Mzee Omary Misanga, her care taker has been in occupation and in use since 1991.

As alluded above, in light of the evidence of the parties, this Court is satisfied that the respondent proved her case on balance of probability that the suit land is the property of her late husband and the appellant trespassed on it after having bought from Anna Bulongwa. It is the finding of this Court that the DLHT assessed properly the evidence before it in reaching its decision.

In view of the foregoing discussions, I have no reason to fault the decision made by Dodoma District Land and Housing Tribunal rather than upholding it. That, said I find that this appeal lacks merit and is hereby dismissed in its entirety. No orders as to costs.

Order accordingly.

A. J. MAMBI

JUDGE

21/07/2023

Judgment delivered in Chambers this 21st day of July, 2023 in presence of all parties.

A. J. MAMBI

JUDGE

21/07/2023

Right of appeal explained.

A. J. MAMBI

JUDGE

21/07/2023