UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

LAND APPEAL NO. 56 OF 2022

(Originating from Civil Application No. 28 of 2019 in the District Land and Housing Tribunal for Iringa at Iringa)

CHARLES GEORGE MLELWA.....APPELLANT

VERSUS

JOHN SILUNGWE .....1ST RESPONDENT

REHEMA CHAULA .....2ND RESPONDENT

ANJELINA SANGA ..... 3RD RESPONDENT

BEATUS KINDOLE ..... 4TH RESPONDENT

JUDGMENT

Date of last Order: 21.09.2023

Date of Judgment: 10.10.2023

A.E. Mwipopo, J.

The appellant, Charles George Mlelwa, sued John Silungwe, Rehema Chaula, Anjelina Sanga and Beatus Kindole, the respondents, for trespassing into a suit land in Application No. 28 of 2019 before the District Land and Housing Tribunal for Iringa at Iringa (DLHT). The suit land is registered as Plot No. 06, Block "A" Ipogolo Street within Iringa Municipality. After a full

trial, the case ended in favour of the respondents. The appellant was aggrieved with the decision of the District Land and Housing Tribunal, and he preferred this appeal with a total of six (6) grounds of appeal as follows:-

1. *That, the learned trial District Land and Housing Tribunal Chairman grossly erred in facts and law invoking the principle of adverse possession while the appellant had constantly made diligent follow-up with regards to the disputed surveyed plot of land, including payment of land rent as testified by the appellant.*
2. *That, the learned trial District Land and Housing Tribunal Chairman erred both in facts and law in deciding the case against the weight of evidence adduced before it by the appellant, which clearly and irresistibly showed that the plot of land in dispute belongs to the appellant, instead of basing his judgment on a misconceived notion that the appellant claim was time-barred while there was enlargement of time issued to the appellant.*
3. *That, the learned trial District and Housing Tribunal Chairman erred in law and facts for departing from the valid and lucid opinion of one assessor who had analyzed and evaluated the facts of the case and offered their opinion that the respondents had trespassed on the appellant's plot of land.*
4. *That, the trial District Land and Housing Tribunal Chairman erred in fact and law in dispossessing the appellant of the ownership of the land in dispute without any justification whatsoever while the same is against justice, equity and good conscience with complete*

disregard of the testimony of the appellant and his witness (land officer) who testified that the appellant holds a valid Certificate of Occupancy.

5. *That, the learned trial District land and Housing Tribunal Chairman erred in facts and law for disregarding the evidence adduced by the appellant's witnesses at the trial, which clearly and irresistibly showed the suit land belongs to the appellant and instead based his judgment on weak, unfounded, unsubstantiated evidence adduced by the defence side, while not considering the evidence of DW4 (SU4) who testified that he and other respondents are trespassers to the appellant's plot of land.*
6. *That, the decision and proceedings of the trial District and Housing Tribunal are tainted with illegalities and irregularities.*

Advocate Amandi Isuja appeared for the appellant at the hearing, whereas Advocate Jassey Mwamgiga appeared for the respondents. The appeal proceeded by way of written submissions. Both parties submitted their submissions within the time scheduled by the Court.

Mr. Amandi Isuja abandoned the 3rd and 6th grounds of appeal and submitted on the 1st, 2nd, 4th and 5th grounds. His submission on the 1st ground of appeal showed that the dispute before the trial tribunal involved a surveyed and registered plot of land, which is Plot No. 06, Block "A", Ipogolo Area within Iringa Municipality. The appellant pleaded and testified

that the plot in dispute was allocated to him, and he was issued a certificate of occupancy (Exhibit P3). Hence, it was wrong for the trial Chairman to raise the issue of adverse possession automatically while the suit land is surveyed and registered land. The trial tribunal failed to observe that the doctrine of adverse possession is applied differently in the surveyed and registered land compared to unregistered land. To support his stance, he referred to the case of **the Hon. Attorney General vs. Mwahez Mohamed and 3 Others**, Civil Appeal No. 391 of 2019, Court of Appeal of Tanzania at Tanga (unreported), on page 10.

The counsel went on to submit that the claim for adverse possession on a registered land can only be proved after complying with the provision of section 37 of the Law of Limitation Act, Cap. 89 R.E. 2019, which provides that: -

> "37. *Where a person claims to have become entitled by adverse possession to any land held under a right of occupancy or for any other estate or interest, he may apply to the High Court for an order that he is registered under the relevant law as the holder of the right of occupancy or such other estate or interest, as the case may be, in place of the person then registered as such holder, and the High Court may, upon being satisfied that the applicant has become so entitled*

to such land, make an order that he be registered accordingly, or may make such other order as the High Court may deem fit"

The appellant can only claim ownership over the suit property by adverse possession after following the legal procedure under section 37 of the Law of Limitation Act. The trial tribunal erroneously relied on the case of **Christina Mbaruku vs. Peter Mpalanzi,** Misc. Land case appeal No. 16 of 2013, High Court at Iringa, (unreported), which is distinguishable to this case, as in that case, the land was unregistered.

The counsel for the appellant submitted jointly on the 2nd and 5th grounds of appeal that the evidence adduced by the appellant (PW1) during the trial was much heavier than that of the respondents. PW1 said Plot No. 6, Block "A". Ipogolo Area, within Iringa Municipality, was allocated to him by the Iringa Town Council, now known as Iringa Municipal Council since 1978. PW1 used the plot as collateral to obtain a loan from the Tanzania Housing Bank (THB). The loan agreement was admitted as Exhibit P1. In 1981, he was issued a certificate of occupancy (Exhibit P3). The appellant could not institute a claim after discovering the respondents had trespassed on his land as the certificate of occupancy was in possession of the Tanzania Investment Bank. After the Mortgage was discharged, the appellant applied

and was granted leave for an extension of time to institute a suit by the Minister for Constitution and Legal Affairs admitted (Exhibit P5).

The testimony of land Officer (PW2) on page 24 of the typed proceedings of the tribunal supported the appellant's evidence that the owner of the Plot of land No. 6, Block "A", Ipogoro, Iringa Municipality, is Charles George Mlelwa of Iringa (appellant), the title deed is 38 DLR, K.O. No. 55910, the use of land is residential. The payee of rent is the appellant. The appellant continued to service the said plot of land by paying the relevant fees, including land rent. The 1st respondent's (DW1) evidence shows that the land is not surveyed. DW2 and DW3 testimony indicates that there was a failed transfer. The 4th respondent (DW4) testimony favoured the appellant that the appellant owns the land in dispute, and he encroached into the land by a few meters. The appellant's evidence was much heavier than that of the respondent. The case was proved on the balance of probability.

The appellant's submission on the 4th ground of appeal is that the trial tribunal dispossessed the appellant of the land in dispute without any justification. The testimony of PW1 and PW2 proved that the suit land is

surveyed and registered in the appellant's name. The plot has been serviced by the appellant, who is paying fees and taxes. The decision of the trial tribunal completely disregarded the valid title contrary to section 2 of the Land Registration Act, Cap. 334 R.E. 2019. The prima facie proof of ownership of land is a registration and, in our country, in most cases, is by letters of offer or certificates of title. He cited the case of **Said Mtomela vs. Mohamed Abdallah Mohamed,** Land case No. 8 of 2015, High Court at Dar es Salaam, (unreported), on page 10, to support the position. The counsel added that the proof of ownership of land is by whose name is registered, as it was held in the case of **Salum Mateyo vs. Mohamed Mateyo [1987] TLR 111**. The certificate of the title is conclusive proof of land ownership as it was held in **Nacky Esther Nyange vs. Mihayo Marijani Wilmore and Another**, Civil Appeal No. 2017 of 2019, Court pf Appeal of Tanzania at Dar Es Salaam, (unreported). The counsel also cited the case of **Amina Maulid Ambali and 2 Others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2018, and **Frank Safari Mchuma vs. Shaibu Ally Shemndolwa [1998] TLR 280.**

In his reply, Mr. Jersey Mwamgiga submitted that the suit led to the instant appeal was time-barred at the time of its institution before the

tribunal. Consequently, the tribunal had no jurisdiction to entertain the same. The letter filed by the appellant as proof that he has been granted an extension of time by the Minister for Constitution and Legal Affairs is dubious. The letter does not have a heading which suggests the same does not come from the Ministry of Constitution and Legal Affairs or the Minister responsible for Constitution and Legal Affairs. There is no stamp that signifies that it is authentic. The cause of action that gave rise to the suit arose in 1995. Considering the case is concerning a land matter, the appellant was duty bound to take up his matter to the court /tribunal by 2007 before the lapse of 12 years of limitation, as per Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. The trial tribunal was wrong to entertain the matter, which was filed out of time.

The counsel for the respondent said further that going through the records, the appellant claimed to be the owner of a suit land and mentioned the suit land to be plot No. 6 Block "A" located in the Ipogoro area. On the other hand, the 3rd respondent (DW1) alleged the suit land is not Plot No. 6 as said by the appellant, but instead, it is Plot No. 7 Block MD, Ipogolo. DW1 produced an offer of a right of occupancy to that effect. DW1 evidence signifies that the area was double allocated because the appellant had a right

of occupancy and on the other side, the 3rd respondent had a right of occupancy too. The 1st respondent testified that he obtained a building permit from the Iringa Municipal Council over the suit land. The Commissioner for Lands or Iringa Municipal Council was supposed to be a necessary party to clarify who has a valid right of occupancy. The question of who is the rightful owner of the suit premises where two or more rights of occupancies have been granted cannot be resolved without an allocating authority. The Commissioner for Lands or the Municipal Council in this regard was supposed to be a necessary party as it was held in the case of **Tanzania Railways Corporation (TRC) vs. GBP (T) Ltd,** Civil Appeal No. 218 of 2020, Court of Appeal at Tabora (unreported), at page 17. Joining the Commissioner for Lands or Iringa Municipal Council as a necessary party in this case would have affected the jurisdiction of the DLHT as the Attorney General must also be made a party to that suit, and the suit must be instituted in the High Court as per Government Proceedings Act.

As to the 1st ground of appeal, Mr. Jersey Mwamgiga submitted that the ground is devoid of merit as the claimed Plot No. 6, Block "A", Ipogolo is Plot No. 7, Block "M". Ipogolo. DW1, the 3rd respondent, proved sufficiently that she is the owner of Plot No. 7, Block "M", Ipogolo, which is the suit land,

after obtaining it in 1990. The 3rd respondent (DW1) produced the letter of offer of a right of occupancy (exhibit D2). Before acquiring the right of occupancy, DW1 asked the Iringa Municipal Council to survey the suit land, as proved by a letter to the Council (exhibit D1). The 3rd respondent built a house in the suit land after following all procedures, and she has occupied it for 20 years. The 3rd respondent proved her case on the balance of probabilities. The appellant failed to prove his case on the balance of probabilities because, in 1978, there were no certificates of occupancy. Rather, there were offers of a right of occupancy. No independent witness was ever called to corroborate his evidence or to have seen him at the suit land. The appellant should have produced receipts to show that he was paying land rent. The appellant has never developed the area, and lastly, the right of occupancy of the appellant is a typed one. In 1978, there were no computers. Instead, typewriters were used. The right of occupancy of the appellant is a forged one. Under the circumstances, it was correct for the tribunal to pronounce judgment in favour of the 3rd respondent.

On the side of the 1st respondent, who testified as DW2 in the trial DLHT, the counsel said that the 1st respondent proved he bought the piece of land from Elonora Charles Msangi in 2010 and constructed a house where

he lives with his family. He has never conflicted with anyone during his stay at the suit land. The 2nd and 3rd respondents were his neighbours when he bought the land. 1st respondent tendered a deed of transfer (exhibit D3) to support his case. The 2nd respondent (DW3) said in her testimony that she had bought the suit land in 1996 from Edward Stimu as per the sale agreement (exhibit D4). She has never been in conflict with her neighbours over the suit land. She has occupied the suit land for over 20 years and has constructed a house in the suit land. This evidence proved, on the balance of probabilities, respondents' ownership of the suit land.

On the applicability of the doctrine of adverse possession, the counsel said the trial chairman was correct to uphold the principle of adverse possession since the appellant's title is questionable. The respondents lived and built their permanent houses at the suit land for 20 years.

In a rejoinder, the counsel for the appellant stated the matter was not time-barred because it was clearly shown and proved that the appellant obtained an extension of time from the requisite authority and was admitted into evidence as Exhibit P5 without any objection from the respondents or their counsel. On the authenticity of the right of occupancy tendered by the

appellant at the trial, he said the same is an afterthought and the counsel for the respondents was supposed to raise it during the trial. At the same time, there was an ample time at the trial to challenge the said document through cross-examination, and not raising the same at this stage.

As to the necessity of joining the Iringa Municipal Council and Commissioner for Lands, the appellant said the same is unfounded, misconceived and quite misleading. The disputed property is Plot No. 6, Block "A", Ipogoro, with certificate title No. 1238DLR and Land Office No. 55910, as was stated in the evidence of the appellant (PW1), land officer (PW2), and the content of the certificate of occupancy (exhibit P3) which was admitted in evidence. The respondents had no title. He submitted a letter which was not a title and not substantiated by the appropriate authority. The latter refers to Plot No. 7, Block "M", Ipogoro, while the disputed property was Plot No. 6, Block "A", Ipogoro, with certificate title No. 12338 DLR and Land Office No. 55910.

Having read the rival submissions by parties and having passed through the trial court's record, the Court is called to determine whether this appeal has merits.

It is pertinent to deal first with the issue of jurisdiction of the trial DLHT to entertain the matter raised by the respondents in the submission. The respondents claimed in the submission that the trial DLHT had no jurisdiction to entertain the case as the same was time-barred. The letter filed by the appellant as proof that he was granted an extension of time by the Minister for Constitution and Legal Affairs is dubious. The letter was not headed with the Ministry heading, and there is no stamp that signifies that it is authentic. The cause of action that gave rise to the suit arose in 1995. Considering the case concerns a land matter, the appellant was duty bound to take the matter to the court /tribunal by 2007 before the lapse of 12 years of limitation, as per Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. The appellant replied in the rejoinder submission that he obtained the extension of time as exhibit P5 proved. Exhibit P5 was tendered without objection from all respondents.

As submitted by the respondents, the time limitation for extension of instituting a dispute over land ownership is 12 years from the date the cause of action arose according to section 3(1) read together with Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. The Act provides further in sections 44 (1) and (2) that the Minister responsible for

Constitutional and Legal Affairs may, by order under his hand, extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation prescribed by the Law of Limitation Act. Such extended period commences to run immediately upon the expiry of the period prescribed by the Act. The provision reads as follows:-

> *"44.-(1) Where the Minister is of the opinion that in view of the circumstances in any case, it is just and equitable to do so, he may, after consultation with the Attorney-General, by order under his hand, extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation prescribed by this Act for such suit.*
>
> *(2) Where an order under subsection (1) is made in relation to any suit, the provisions of this Act shall apply to such suit as if references herein to the period of limitation were references to the aggregate of the period of limitation prescribed for such suit by this Act and the period specified in such order, such later period commencing to run immediately upon the expiry of the period prescribed by this Act."*

In this case, the appellant attached and tendered the order (exhibit P5) of the Minister for Constitutional and Legal Affairs dated 04.02.2019, extending the limitation period for the appellant to commence proceedings against respondents between 20.01.2019 and 30.06.2020. The order was

tendered without objection from the respondents. The respondent's allegation that the order is dubious as it does not contain a Ministry heading and there is no stamp that signifies that it is authentic has no basis. This Court does not receive new evidence at this stage. There is no evidence in the record to show that the order of the Minister (exhibit P5) is a forged document. The respondents had ample opportunity to inquire and bring evidence on the authenticity of exhibit P5 if they were in doubt with its authenticity, as it was attached in the application before the trial DLHT. During trial, the appellant tendered it as evidence. Respondents had opportunity to object its tendering and had opportunity to cross-examine the witness who tendered the minister's order.

The law does not say that the order has to be stamped and headed. But, it says the order must be made by the Minister in his own hand. The order is a public document and the respondents could easily inquire about its authenticity. After the order for an extension of time to file a suit is issued by the Minister of Constitutional and Legal Affairs, such an extended period commences immediately upon the expiry of the period prescribed by the Act. Thus, although the cause of action to some respondents arose in 1995 and the 12-year time limitation ended in 2007, the time was extended from 2007

to 30.06.2020 upon the Minister's order. Thus, the trial DLHT had jurisdiction to entertain the matter.

Turning to the main of appeal, the appellant abandoned grounds of appeal No. 3 and 6 and submitted on the remaining grounds of appeal. In the 1st ground of appeal, the appellant raised the issue of applicability of the doctrine of adverse possession as held by the trial DLHT. He said the trial DLHT erred in applying the principle of adverse possession in this case as the condition for the applicability of the doctrine in registered land was not followed. In contention, the counsel for the respondent said that the claimed Plot No. 6, Block "A", Ipogolo is Plot No. 7, Block "M". Ipogolo. The 3rd respondent proved she is the owner of Plot No. 7, Block "M", Ipogolo, which is the suit land, after obtaining it in 1990. He said that the land authority (Iringa Municipal Council), which issued both occupancy rights, was supposed to be joined in the case as a necessary party.

The respondents said further that the 3rd respondent built a house in the suit land after following all procedures, and she has occupied it for 20 years. The right of occupancy (exhibit P3) tendered by the appellant is forged as in 1978, there were no certificates of occupancy. Instead, there were

offers of a right of occupancy, and a typewriter was used to prepare the document. The appellant's right of occupancy was printed by computer. The appellant failed to produce receipts to show that he was paying land rent. The appellant has never developed the area.

I have to say something on the principle of adverse possession. Adverse possession is occupation of land inconsistent with the title of the true owner, that is, inconsistent with and in denial of the right of the true owner of the premises as it was held in **Registered Trustees of Holly Spirit Sisters Tanzania vs. January Kamili Shayo & Others,** Civil Appeal 193 of 2016, Court of Appeal of Tanzania at Arusha, (unreported). It is a process recognized by the law whereby a non-owner occupant of a piece of land gains title and ownership of that land after occupying it for a particular time. In Tanzania, the time limitation of instituting the suit for claims or recovery of the land is 12 years according to Section 3 (1) and Item 22 of Part 1 of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. After the expiry of 12 years of continuous occupation of the land without interruption, the occupier has the right to acquire the title of the respective land upon fulfilment of certain conditions. The principle was stated in the case of **Bhoke Kitang'ita vs. Makuru Mahemba**, Civil Appeal No. 222 of

2017, Court of Appeal of Tanzania at Mwanza (unreported), where it held that: -

> *"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession."*

In private or unregistered land, the applicability of the doctrine of adverse possession is by non-owner occupier of land to use the abandoned land for not less than 12 years in the knowledge of the owner without interference. In **Registered Trustees of Holly Spirit Sisters Tanzania vs. January Kamili Shayo & Others** (supra), the Court of Appeal held on page 25 of the judgment that:

> *"Thus, on the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -*
>
> *(a) that there had been the absence of possession by the valid owner through abandonment;*
>
> *(b) that the adverse possessor had been in actual possession of the piece of land;*
>
> *(c) that the adverse possessor had no colour of right to be there other than his entry and occupation;*

(d) that the adverse possessor had openly and without the consent of the true owner, done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;

(e) that there was a sufficient animus to dispossess and an animo possidendi;

(f) that the statutory period, in this case, twelve years, had elapsed;

(g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

(h) that the nature of the property was such that, in the tight of the foregoing, adverse possession would result."

The above-cited case provides criteria for a person seeking to acquire title to land by adverse possession to prove. As the appellant rightly submitted, the doctrine of adverse possession does not apply automatically to registered land. The land must be abandoned by the owner of the right of occupancy. Under section 51 of the Land Act, Cap, 113 R.E. 2019, it is the land Commissioner who may issue a notice of abandonment that the land is abandoned. After the expiry of the notice, the Commissioner shall issue the declaration that the land is abandoned. Then, the Commissioner shall proceed to revoke the right of occupancy. Further, the Law of Limitation Act

provides in section 37 (1) that a person claiming to be entitled to the land by adverse possession held under a right of occupancy may apply to the High Court for an order that he be registered under the relevant law. The section reads as follows:-

> *"37.-(1) Where a person claims to have become entitled by adverse possession to any land held under a right of occupancy or for any other estate or interest, he may apply to the High Court for an order that he is registered under the relevant law as the holder of the right of occupancy or such other estate or interest, as the case may be, in place of the person then registered as such holder. The High Court may, upon being satisfied that the applicant has become so entitled to such land, make an order that he be registered accordingly, or may make such other order as the High Court may deem fit."*

Thus, for the adverse possession to apply to the registered land, the land has to be abandoned, and the adverse possessor has to apply to the High Court for the order to be registered as the holder of the right of occupancy.

In the case at hand, the respondents had been in actual possession of the piece of land and had the actual intention to dispose of the land from the appellant by constructing houses in the suit land. The 3rd respondent

(SU1) has used the land since 1994, after she bought it. The 1st respondent (SU2) said he bought the land from the family of Elenora Charles in 2010, and he has used the land for ten years. The 2nd respondent (SU3) said in his testimony that he bought the land in 1996 from Edward Stimu Msigwa, and in the same year, the appellant complained to the street office that they had trespassed on his land. The 2nd respondent said she had used the land for 23 years until the case was instituted. The 4th respondent said he bought the land in 2008 and has used it for 11 years. Thus, all respondents have been in occupation of the suit land for sometime. But some of them have been in possession for less than 12 years. The nature of the suit land, a registered land, does not allow automatic applicability of the adverse possession principle. The respondents were supposed to file suit to the High Court for a claim of right under adverse possession as per section 37 of the Law of Limitation Act. The same was not done. Thus, the trial DLHT erred to hold that respondents are rightful owners of the suit land by adverse possession.

Regarding the issue that the trial was a nullity for failure to join Iringa Municipal Council, which was a necessary party, the respondent said that the 3rd respondent testified that the suit land is Plot No. 7, Block "M", Ipogolo and she has a letter offer of right of occupancy hence there was double

allocation of the suit land. The appellant said that the suit land is Plot No. 6, Block "A", Ipogolo, thus, the issue of double allocation does not arise.

Under the provisions of the Order I Rule 3 of the Civil Procedure Code Act, Cap. 33 R.E. 2019, a person 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 alternative where, if separate suits were brought against such persons, any common question of law or facts would arise. Generally, a suit is not defeated because of the misjoinder or non-joinder of parties. The Court has to deal with the matter in controversy in a suit regarding the rights and interests of the parties actually before it as per Order 1 Rule 9 of the Civil Procedure Code Act. The Act provides in Order 1 rule 10 (2) for the joinder of the necessary party or parties to the suit. The said rule 10 (2) of Order 1 of the Civil Procedure Code Act provides as follows:-

> *"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, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be*

necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

From the above-cited rule, some persons may be added as a party to the suit and others who must be added as a party to a suit. A person must be added to the suit when, without his presence, the questions in the suit cannot be completely decided. The said party is necessary party. In the case of **Mussa Chande Jape vs. Moza Mohammed Salim**, Civil Appeal No. 141 of 2018, Court of Appeal of Tanzania at Zanzibar (unreported), on page 9 of the judgment, it was held that:

"Therefore, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed."

In **Abdullatif Mohamed Hamisi vs. Mehboob Yusuph Othman and another**, Civil Revision No. 6 of 2017, Court of Appeal at Dar Es Salaam (unreported), it was held that:-

"...a necessary party is one in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from 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 the relief claimed, as well as whether or not, in the absence of the party, an executable decree may be passed."

The Court of Appeal in the above-cited case went on to state that the effects of non-joinder of a necessary party to suit renders the suit incompetent. The exact position was stated in the case of **Tang Gas Distributors Limited vs. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported), was stated:-

"... 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)."

In the present case, the respondents say that the appellant did not join as necessary part to the suit the Iringa Municipal Council, which allocated the suit land to the appellant and 3rd respondent. However, looking at the evidence in the record, the appellant sued respondents for trespassing into Plot No. 6, Block "A", Ipogolo. The appellant tendered a right of occupancy of the plot in his name, and PW2, the land officer of the Iringa Municipal Council, testified that the plot is registered in the appellant's name. This evidence proved that Plot No. 6, Block "A", Ipogolo, is owned by the appellant. The claim that the land was double allocated has no basis. Double

allocation occurs when one plot of land is allocated to more than one person. The 3rd respondent said in her testimony that she has the offer of Plot No. 07, Block "M", Ipogolo. It is without doubt that these are two different plots. It could not be said that Plot No. 07, Block "M", Ipogolo, and Plot No. 6, Block "A", Ipogolo are the same.

The 3rd respondent produced as exhibit a letter of offer dated 02.01.1990 issued to her and a letter from the Prime Minister's Office with Ref. No. IRF/15288/4/ASM dated 29.11.1994. In the letter from Prime Minister's Office, the 3rd respondent was informed that the land he built her house was not registered. The letter raises doubt about the authenticity of the offer. The letter of offer for Plot No. 7, Block "M", Ipogolo, shows that it was issued to 3rd respondent in 1990. However, the land couldn't be allocated in 1990 by the Iringa Municipal Council since, by then, the land was not registered according to the letter from Prime Minister's Office.

Further, the content of the letter of offer contradicts the testimony of 3rd respondent that she bought the land in 1995. The question is, if the 3rd respondent was issued with the letter of offer in 1990, why did she buy the land in 1994? Thus, the 3rd respondent's evidence is not sufficient to prove

her ownership of the suit land. There is nothing in record to show that there was a double allocation. There was no need to join the Iringa Municipal Council in the suit as necessary party.

In the 2nd, 4th and 5th grounds of appeal, the appellant said his evidence was much heavier than the respondents. He proved that Plot No. 6, Block "A", Ipogolo Area, within Iringa Municipality, was allocated to him by then Iringa Town Council, now known as Iringa Municipal Council since 1978 and was issued with a certificate of occupancy (Exhibit P3) in 1981. The testimony of PW2 supported his evidence. In contention, the respondents said their evidence was heavier than the appellant's. The 1st respondent (DW2) proved he bought land from Elonora Charles Msangi in 2010 and constructed a house where he lives with his family. The 2nd and 3rd respondents were his neighbours when he purchased the land. 1st respondent tendered a deed of transfer (exhibit D3) to support his case. The 2nd respondent (DW3) proved that she bought the suit land in 1996 from Edward Stimu as per the sale agreement (exhibit D4). She has occupied the suit land for over 20 years and constructed a house in the suit land. 3rd respondent bought the suit land in 1994, and she has a letter of offer for the

suit land. This evidence proved, on the balance of probabilities, respondents' ownership of the suit land.

The law provides under sections 110 (1), (2) and 111 of the Evidence Act, Cap. 06 R.E. 2019 that he who alleges must prove, and the standard is on a balance of probabilities. The position was stated in the case of **Generoza Ndimbo vs. Blasidus Yohanes Kapesi [1988] TLR 73** and in **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**. In the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), it was held on page 14 of the judgment that:-

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap, 6 [R.E. 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities, which simply means that the Court will sustain such evidence which is more credible than the other..."*

Upon perusal of the evidence on record, I'm satisfied that the appellant's evidence was heavier than the respondents'. The appellant testified that he owns Plot No. 6, Block "A", Ipogolo, and he tendered the right of occupancy of the suit land. His evidence is supported by PW2, a land

officer from Iringa Municipal Council, who testified that the plot is registered in the appellant's name. The proof of land ownership is by whose name is registered, as it was held in the case of **Salum Mateyo vs. Mohamed Mateyo** (supra). The certificate of the title is conclusive proof of ownership of registered land as it was held in **Nacky Esther Nyange vs. Mihayo Marijani Wilmore and Another**, Civil Appeal No. 2017 of 2019, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). The appellant had a valid certificate of right of occupancy of the suit land registered in his name which is the proof of his ownership of the land.

The claim by the 1st, 2nd and 3rd respondents that the land in dispute was not registered has no basis. The 1st respondent tendered the transfer deed attached with the seller's affidavit and building permit. Unfortunately, the deed of transfer does not have the number of the land sold. The seller's affidavit attached to the transfer deed shows that the property is a squatter with No. RU/IP/D/235, Ipogolo, Iringa Township. The building permit attached to the deed of transfer show that it was issued to Juma Msangi, and the number of the squatter is RU 1437, Ipogolo. There is a discrepancy in the number of squatter in the seller's affidavit and the building permit. Also, the building permit was issued to Juma Msangi, a person who is not 1st

respondent or the seller of the land in the transfer deed. The evidence of 1st respondent is insufficient to prove the ownership of the suit land.

The 2nd respondent said she bought the land in 1994. She provided the sale agreement (exhibit D4) to support her claims. But, as the land had already been registered at the time, the sale to the 2nd respondent was not lawful. The sale could not have passed the title of the registered land to the 2nd respondent.

The 3rd respondent said in her testimony that she bought the suit land in 1995. She had a title deed (letter of offer) of the suit land issued in 1990, and she wrote a letter in 1994 to the Iringa Municipal Council requesting the land be registered in her name. The Iringa Municipal informed her that the land where she built her house was not registered. However, her evidence in record is contradictory on how she acquired the land. She said she bought it in 1995, and at the same time, she said she was allocated the letter of offer of right of occupancy in 1990. Her evidence is insufficient to prove her ownership of the suit land.

On his side, the 4th respondent said he bought registered land from Ayubu Mbata in 2008. He admitted in cross-examination to have trespassed

to the suit land, which is registered and owned by the appellant. He said the houses of 1st, 2nd and 3rd respondents were built in the suit land. The evidence of the 4th respondent supports the appellant's case that the land in dispute is registered land and it is owned by the appellant.

From the evidence in the record, the appellant's evidence is heavier than the respondents'. He proved on the balance of probabilities to be the rightful owner of Plot No. 6, Block "A", Ipogolo, and he has a certificate of a right of occupancy. The appeal has merits.

Therefore, I allow the appeal. The decision of the trial Iringa District Land and Housing Tribunal is quashed, and its orders are set aside. The appellant is declared the rightful owner of Plot No. 6, Block "A", Ipogolo. The respondents are trespassers in the suit land and are evicted forthwith from Plot No. 6, Block "A", Ipogolo. The respondents are ordered to bear the costs of this suit. It is so ordered accordingly.

THE HIGH COURT OF TANZANIA

A.E. MWIPOPO

JUDGE

10/10/2023