

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**REVISION NO. 9 OF 2022**

*(Originating from the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil case no. 69 of 2021)*

**AVODIA ANTIPAS SWAI.....APPLICANT**

**VERSUS**

**SALAAMAN HEALTH CENTER.....1<sup>ST</sup> RESPONDENT**

**SABNIA COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

**MKWIZU, J:-**

This is an interesting case. The respondents are ex-business partners with a duly executed joint venture deed for the capital armament, registration, and operation of the health Centre in Dodoma City which was to be conducted in the name of SABNIA HEALTH CENTRE at DODOMA dated 24<sup>th</sup> February 2021. It was alleged that before the signing of the joint venture agreement, the 2<sup>nd</sup> respondent had borrowed from the 1<sup>st</sup> respondent a total sum of 80,000,000/= way back in 2018. To repay the said, amount, the joint venture agreement required the 2<sup>nd</sup> respondent to surrender the building and its surroundings located in Dodoma to the 1<sup>st</sup> respondent as full payment of the loan and as part of the capital for their newly established business *Sabnia Health Centre* until she reimburses the 1<sup>st</sup> respondent a total sum of Tsh 100 million or Tsh. 120 million.

The building was not to be disposed of anyhow, mortgaged, transferred, or leased without the prior consent of the 2<sup>nd</sup> respondent.

Unfortunately, the joint venture subsisted for only two months. The breach was attributed to the 2<sup>nd</sup> respondent's failure to among other things hand over the ownership documents of the agreed landed property to the 1<sup>st</sup> respondent. On 30<sup>th</sup> April 2021 the 1<sup>st</sup> respondent resorted to a legal proceeding via Civil Case No. 69 of 2021 at the Resident Magistrate of Kisumu at Kisumu claiming for inter alia, breach of the joint venture agreement by the 2<sup>nd</sup> respondent, a declaration order that she is the owner of the land in Plot No 94 Block H Ipagala North Dodoma City Municipality under clause 3.3. 1 of their agreement, an order compelling the 2<sup>nd</sup> respondent to pay her a total sum of Tsh 80,000,000/= costs for the repair and renovation of the house and purchase of the medical equipment.

After hearing the case, the trial court made a finding of fact that the landed property on Plot No 94 Block H Ipagala North Dodoma belongs to the 2<sup>nd</sup> respondent who bought it from **AVODIA ANTIPAS SWAI** at the consideration of 75,000,000/= before she surrendered it to the 1<sup>st</sup> respondent in satisfaction of the debt worth 80,000,000/= as reflected in the joint venture agreement. It rejected the 2<sup>nd</sup> respondent's argument that she was just a tenant to the said building with an oral tenancy agreement with the owner of the building, one AVODIA ANTIPAS SWAI. On that basis, the first respondent was among other things pronounced a winner and was declared a lawful owner of the suit property subject to these revisions' proceedings.

The applicant Avodia Antipas Swai is aggrieved by the said decision. She has preferred the instant application under the provisions of section 79 (1) (c), (2) & (3), 95 of the Civil Procedure Code [Cap 33 R.E: 2019] seeking for revision of the trial courts proceedings, judgment, and decree in Civil case No. 69/2021, quash and set aside the trial court decision and declare her a rightful owner of the property located on plot No. 94 Blok H Ipagala Noth Dodoma Municipality. The application is premised on the following grounds: -

- (a) *The Trial Court violated the rule of natural justice in the nature of ad alterum partem as the Applicant was never summoned to appear and defend her property say; - Plot No. 94 Block H, located in Ipagala North, Dodoma Municipality under which the 1<sup>st</sup> Respondent as a Plaintiff therein was declared a lawful owner against the 2<sup>nd</sup> Respondent as a Defendant from which the Applicant was not a party thereto*
- (b) *The Trial Court vigorously erred in law by not vetting out that' the property say; Plot No. 94, Block H, Ipagala north - Dodoma Municipality is a registered landed property registered in the name of the Applicant and that the same property does and did not belong to the 2nd Respondent (Defendant and Judgment Debtor therein) by virtue of its Registration. However, the Trial Court proceeded to award the same to the 1<sup>st</sup> Respondent while knowing that the Applicant was not a party to the said proceedings.*

The application is supported by the affidavit deposed by the applicant in which she claims to be a registered owner of the landed property: Plot no.94, Block H, Ipagala North - Dodoma City and that the 2<sup>nd</sup> Respondent

is her tenant vide an oral lease agreement commenced way back in November 2016.

The Applicant also acknowledges that the respondent's relationship turned acerbic in the year 2021 leading to the filing of the suit at the Trial Court which she was not a party. And that the suit ended on the 11<sup>th</sup> day of March 2022 in favour of the 1<sup>st</sup> respondent and against the 2<sup>nd</sup> respondent under which the Court declared the 1<sup>st</sup> respondent as the lawful owner of her landed property Plot No.94, Block H, Ipagala North - Dodoma City. And that she only became aware of the suit after she had received a Copy of judgment on the 04<sup>th</sup> of April 2022.

The applicant admitted that she was involved in some arrangements of selling the suit property to the 2<sup>nd</sup> respondent, but the 2<sup>nd</sup> respondent did not finalize the payments, thus she never handed her property to the 2<sup>nd</sup> respondent, and she remained in possession of her original letter of offer to date. She finally pressed the court to allow the application.

The application is strongly contested by the 1<sup>st</sup> respondent on the reasons that the applicant's name does not appear in the land offices as the owner, the respondents were business partners in a joint venture agreement operating a dispensary in the suit plot of which the 2<sup>nd</sup> respondent had agreed with the 1<sup>st</sup> respondent that suit property will be owned by the 1<sup>st</sup> respondent in case the 2<sup>nd</sup> respondent fails to pay back a loan of Tshs. 80,000,000/=, *That* the 1<sup>st</sup> respondent was assured by the 2<sup>nd</sup> respondent's managing director that the suit plot belongs to the 2<sup>nd</sup> respondent following the purchase of the same from the original owner, the applicant herein and that the original documents for the purchase of the house were handed over to the 1<sup>st</sup> respondent by the 2<sup>nd</sup>

respondent's Managing director and for the whole period the respondents occupied and used the house in issue and the applicant had never shown interest in the house.

When the application came for a hearing, both parties were represented. Mr. William Fungo learned advocate represented the applicant, Mr. Juma Nassoro, learned advocate appeared for the 1<sup>st</sup> respondent and Mr. Mlyambebele Ngweri, also learned advocate represented the 2<sup>nd</sup> respondent.

It was Mr. Fungo's, submission that, the applicant being the owner of the property with Plot No 94 Block H Ipagala Dodoma Municipality, was denied the right to be heard in Civil Case no 69 of 2021 between the respondents at the trial Court. According to him, during and after the proceedings at Kisutu, the applicant is the one who held the Title of the property in question and thus ought to have been joined as a party in that suit. He relied on the decisions of **Simoni Hamisi Sanga Vs Stephen Mafimbo Madwary And another**, Civil Application No 402/01/2017; **Jane Kimaro V Vicky Adili (administratrix of the estate of the late Adili Daniel Minde)**, Civil Appeal No 212 of 2016; **Constantine B Aseenga V Elizabeth Peter and 4 others**, Civil Appeal No 70 of 2019 (Unreported) and **MS Flycatcher Safaries Limited V The Minister for Lands and Human Settlement Development and another**, Civil Appeal No 142 of 2017 (CAT- unreported) insisting that before one's right is taken away, the owner should be heard contrary to which renders the entire proceedings and judgment a nullity. He finally urged the court to nullify the judgment and decree in Civil Case No. 69 of 2021 of the Kisutu RMs court with an order declaring the applicant lawful owner of the suit property.

On the other hand, Mr. Nassoro, advocate for the 1<sup>st</sup> respondent, admitted that there was a suit at Kisutu between the respondents in relation to the joint venture agreement through which the plot in issue came in. According to Mr. Nassoro, the Applicant admits that she had a sale agreement with the 2<sup>nd</sup> respondent, and therefore in the absence of evidence showing to the contrary, the trial court was right to give effect the joint venture agreement to transfer the disputed plot to the 1<sup>st</sup> respondent.

Mr. Nassoro contests the allegation that the applicant was not heard by the trial court. He maintained that the allegation that the applicant was a necessary party in the trial court lacks merit as during cross-examination, the applicant admitted having knowledge of the case in the years 2021 and 2022 but did not take any action if at all she had any interest on the disputed land. According to Nassoro, the applicant lost interest in the suit property immediately after agreeing on the sale of the plot.

Again, Mr. Nassoro contended that it was admitted during cross-examination, that the house has already been passed to different hands so far. The applicant was the original owner, and the landed property was transferred to the 2<sup>nd</sup> respondent, later transferred to the 1<sup>st</sup> respondent, and now to another third party not part of these proceedings. He referred the court to annexure A of the Counter Affidavit which is a letter from Halimashauri ya Jiji la Dodoma dated 23/3/2022 with reference No CCD/LD/24758/PPM and a letter from Halmashauri ya Jiji la Dodoma with reference No CCD/LD/24758 dated 21/4/2022 all showing that the applicant had already sold the suit plot to the 2<sup>nd</sup> respondent, and she had received the sum of 75,000,000/=.

He said, even if the trial court's decision is to be reversed, still this court would not be in a position to declare the applicant a lawful owner of the suit property because an unchallenged counter affidavit establishes that the suit property in this proceeding is not owned by the applicant as the name appearing in the land registry is Ahmed Jama who is not a party to this suit and who had no any private arrangement with either the applicant or 2<sup>nd</sup> respondent and secondly that this court lacks jurisdiction under the cited provisions to declare the applicant owner of the suit plot and lastly that Asha Ahmed Jama the current owner of the land in issue, is a bonafide purchaser who is protected by the law. To buttress the same, he cited the case of **John Thomas V KAM Commercial Services and two others**, Land Appeal No 261 of 2020, and prayed for the dismissal of the application with costs.

The 2<sup>nd</sup> respondent did not file a counter affidavit thus, Mr. Mlyambebele advocate had not much to say other than pointing out a point of law that a non-party to the trial court's proceedings, can only approach the court through revision and it is the duty of the court to make sure that that party is joined so as to be accorded the right to be heard. To support his proposition, he cited the decision of **Bunda Town Council and others V Elias Mwita Samo** Civil Appeal No 309 of 2021

In his rejoinder, the applicant's counsel persistently supplemented that it is not true that the applicant did not challenge the facts stipulated in the 1<sup>st</sup> respondent's Counter affidavit as she had filed a reply to the Counter affidavit on 22<sup>nd</sup> June 2022. She maintained that a bonafide purchase is a matter of qualification, it is not an automatic status acquired and thus Asha Ahmed Jama ought to have conducted due diligence, and

if done she would have realized that the property in dispute has never passed through any execution proceedings.

I have examined the court record, the cross-examination details, and the rival submissions by the parties, the central issue for determination is *whether the applicant has given sufficient ground to reverse the trial Court's Proceedings, judgment, and decree.*

Though the dispute between the respondents at the trial court was claimed to arise from the business transaction- the joint venture agreements, the plaintiff's ( 1<sup>st</sup> respondent) claim was centered on the ownership of the disputed property. From the amended plaint by the first respondent against the 2<sup>nd</sup> respondent, the applicant was referred to as the owner of the landed property at issue as reflected in paragraph 8 of the amended plaint that the house at issue was originally owned by the applicant herein AVODIA ANTIPAS SWAI who sold it to the 2<sup>nd</sup> respondent before it became part of the joint venture agreement. A specific prayer was made in the plaint requiring the court to declare the plaintiff (now 1<sup>st</sup> respondent) the lawful owner of the property at issue. The 2<sup>nd</sup> respondent (original defendant) not only denied ownership of the said property but also contested knowing the original owner of the disputed property AVODIA ANTHIPAS SWAI.

The trial court did not keep a blind eye on this contentious matter, it went ahead to frame issue No. 4 tasking the trial court with an investigation on *whether a landed property say plot no 94 Block H Ipagala North located in Dodoma City belongs to the defendant and was agreed to be a subject matter in the joint venture*



Examination of the trial court pleadings, proceedings, evidence of witnesses, facts disclosed to the court through cross-examination of the applicant, and submission of parties in this application position **AVODIA ANTIPAS SWAI( applicant)** as a party with an interest in the landed property at issue and thus a necessary party whose presence in the matter was necessary to conclusively determine the issue in dispute including the validity of the terms of the joint venture agreement entered between the 1<sup>st</sup> and 2<sup>nd</sup> respondent because *one*, neither the joint venture agreement nor the demand notice served on the 2<sup>nd</sup> respondent after the alleged breach mentioned the landed property in consideration. The entire clause 3 of the joint venture agreement for instance talks of the *building and its surroundings* without details.

*Two*, apart from the allegation that the original owner had sold the property to the 2<sup>nd</sup> respondent, no ownership documents were presented to the 1<sup>st</sup> respondent to establish the 2<sup>nd</sup> respondent's title over the same as pleaded in paragraph 10 of the amended plaint that :

*"10. That the defendant's failure to contribute to the joint venture and repay the costs pleaded herein above, together with the failure to hand over ownership documents of the house to the plaintiff, the defendant breached the joint venture agreement".*

Mr Nassoro argues that since the applicant doesn't dispute the existence of the sale agreement and since that agreement was never rescinded, then the trial court was justified in giving effect to the joint venture agreement. With due respect to the learned advocate, it is not the sale agreement that gives one title over the registered landed property.

Section 2 of the Land Registration Act makes it express that proof of ownership of a registered land is by one whose name is registered. See **Salum Mateyo vs. Mohamed Mateyo** (1987) TLR 111 and **Jane Kimaro V Vicky Adili ( administratrix of the estate of the late Adili Daniel Minde)( supra)**.

In this case, there is no dispute that the Applicant remained the registered owner of the disputed property until the end of the respondent's suit before Kisumu Resident Magistrates Court. Under the circumstances, the sale agreement alone would not have assisted the trial court in ascertaining the legal owner of the property at issue. To rule out in the 1<sup>st</sup> respondent's favour, the court was required to first establish the 2<sup>nd</sup> respondent's title over the disputed landed property by going beyond the sale agreement and this would have been cleared by involving the alleged vendor, and the original owner AVODIA ANTHIPAS SWAI, the applicant herein.

The applicant's complaint in this revision proceedings is on the infringement of the rule of natural justice as she was never summoned to appear and defend her property which the 1<sup>st</sup> Respondent (Plaintiff) was declared a lawful owner. I agree with the applicant's contention and Mr. Mlyambebele's submissions that the applicant was a necessary party in the trial court proceedings and therefore ought to have been joined as a party under Order I Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC). The rules provide: -

*"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."*

On how to ascertain if a party is necessary to the proceedings or not, the Court of Appeal decision in **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), while discussing the imports of Order I Rule 10(2) of the CPC said :

*"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as plaintiff or defendant and is not joined so; or (ii) when without his presence, the questions in the suit cannot be completely decided".*

It is now a settled law that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, the Court has a separate and independent duty from the parties to have him added. Order I Rule 10(2) of the CPC, reads:

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*"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 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)

See also **Tang Gas Distributors Ltd v. Mohamed Salim Said and Two Others**, Civil Revision No. 6 of 2011 (unreported)

Emphasizing this express duty of the court, the Court of Appeal in **Tanzania Railway Corporation ( TRC) V GBP (T) Limited**, Civil Appeal No 218 of 2020, Observed:

*"We must stress as we wind up, that if a trial court notes that some issues raised in the pleadings call for addition of a party whose absence will lead to such issues of importance to remain unresolved, 16 then the court cannot fold its arms and assume a role of an onlooker, a bystander or a passer-by only because parties are resistant or unwilling to apply to join a necessary party or parties. The court has a duty to take an active role by taking matters on itself and add such a party or parties to the proceedings in order to facilitate effective and complete adjudication and resolution of all issues of controversy presented before it. That is what we hold to be the position of law.*

Apparently, the applicant was neither joined as a party or summoned as a witness in the impugned proceedings. Guided by the above Court of Appeal decisions, I think it would be in the interest of

justice that the applicant is allowed to be heard in a manner that will resolve the issues raised by the 1st respondent in the original suit as well as the applicant's interest in the suit property if any. And that can only be achieved by invoking the provisions of Order 1 Rule 10 (2) of the Civil Procedure Code.

Consequently, the revisions application is allowed, and the proceedings, judgment, and decree of the trial court are quashed and set aside with an order remitting the original filed in respect of the Civil Case No 69 of 2021 back to Resident Magistrate Court of Kisumu for a retrial after joining the applicant as a necessary party under Order 1 rule 10 (2) of the CPC. Costs to follow the events. Order accordingly

**DATED at DARE ES SALAAM this 22<sup>nd</sup> day of SEPTEMBER 2023.**



**E.Y. MKWIZU**  
**JUDGE**  
22/9/2023