

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

LAND APPEAL NO. 28578 OF 2023

(Originating from Land Application No. 98 of 2022 of the District Land and Housing
Tribunal for Moshi at Moshi)

ELIBARIKI KASANDA MTONI APPELLANT

VERSUS

AVELINE DOMINIC URIO RESPONDENT

JUDGMENT

25/04/2024 & 10/05/2024

SIMFUKWE, J.

This appeal emanates from the decision of the District Land and Housing Tribunal of Moshi (Trial Tribunal). The respondent herein sued the appellant before the trial tribunal, claiming a piece of land located at Kifula village in Makuyuni ward, within Moshi district in Kilimanjaro region. The respondent stated that he had acquired the suit land by purchasing it from one THERESIA MIRAJI NJARITA. The sale agreement was witnessed by

local government leaders. It was alleged by the respondent herein that on diverse dates in March 2022, the appellant and his agents without any colour of right trespassed the suit land by removing the pillars, demarcations, destroying boundaries, cutting down planted trees and burning dry grasses.

The appellant prayed before the trial tribunal that the seller of the suit land one Theresia Said (Theresia Miraji Njarita), be joined as the second respondent. The appellant sought refuge under **Order 1 Rule 9 and 10 (2) of the Civil Procedure Code**, Cap 33 R.E 2019. Advocate Thadei Minja resisted the prayer on two reasons. First, he said that the applicant (respondent herein) cannot be compelled to sue or not to sue a person. Second, the learned counsel informed the Trial Tribunal of their intention to call the said Theresia Saidi as their witness during the trial.

After considering arguments of both parties, the trial tribunal decided in favour of the respondent herein (who was the applicant). It supported its findings with the case of **Bunda Town Council & Others v. Elias Mwita Samo & Others**, Civil Appeal No. 309 of 2021 [2023] TZCA.

The appellant was dissatisfied with the decision of the trial tribunal on the ground that the trial tribunal erred in law and fact by its failure to join the

seller of the suit land as a necessary party. He appealed before this court on that sole ground of appeal.

The appellant prayed that the appeal should be heard by way of written submissions. His prayer was granted. He was unrepresented while the respondent herein continued to enjoy the service of Mr. Thadei Minja learned counsel.

Arguing in support of his ground of appeal, on the outset the appellant referred to **Order 1 rule 9 of the Civil Procedure Code** (supra) and the case of **Car Truck Distributors Limited v. MKB Security Company Limited and Another**, Land Case No. 169 of 2021 [2022] TZHC 198 Tanzlii at page 4-5.

Similarly, the appellant referred to **Order 1 rule 3 and rule 10(2) of the Civil Procedure Code** (supra) and the case of **Leonard Peter vs Joseph Mabao and 2 Others**, Land Case No. 4 of 2020 at page 5,6,7,8 and 9 which held that: *the court should make an order to join the necessary party in order to end litigation.*

On the basis of the cited authorities, the appellant was of settled opinion that the seller one Theresia Saidi (Theresia Miraji Njarita) should be joined as necessary party because she is the source of the land dispute which

was filed by the respondent herein as reflected under paragraph 6 (a) (ii) of the application. Thus, the said Theresia should not be brought as a witness as stated by the trial Tribunal at page 2 of the ruling. That, Theresia Said will elaborate how she acquired the suit land before she sold it to the respondent therein.

The appellant cemented his argument by citing the case of **Juliana Francis Nkwabi v. Lawrent Chimwaga**, Civil Appeal No. 531 of 2020 [2021] TZCA 564 [Tanzlii] at page 10 where the Court confirmed its decision in a similar case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported) in which it was 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 the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

In addition, the appellant referred to paragraph 5 of his Written Statement of Defence which elaborates how the appellant acquired the said land. That, initially, the said land was owned by her sister since 1980 who died

in 2005 and left oral will which directed the appellant what to do with her estate. It was the appellant's opinion that if the seller Theresia Miraji Njarita @ Theresia Saidi will not be joined as a necessary party, the decision will be a nullity. He emphasized by referring to the book of Mark Chapter 8 verse 32 of the Holy Bible which stated that: "*You will know the truth and that truth will set you free.*"

Another reference was made to the case of **Mussa Chande Jape v. Moza Mohammed Salim** (Civil Appeal No. 141 of 2018) CAT at Zanzibar at page 12 where it was held that:

"In Tang Gas Distributors Limited (supra) the Court, while considering the issue of a necessary party to be joined in a suit stated that:

"Settled law is to the effect 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[emphasis added]. Also, MULLA at page 1020 provides 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."

The appellant reiterated that the seller should be joined as a necessary party and not a witness so that she can be in a good position to defend herself and help the tribunal to reach at the wise and just decision in order to save time.

In his final remarks, the appellant implored this court to set aside the decision of the trial tribunal, allow the seller to be joined as a necessary party and allow the appeal with costs.

In reply, Mr. Minja supported the findings of the Trial Tribunal. He submitted that the appellant was misleading the Court as the cited provisions and cases do not support what has been said by the appellant. That, the cited provisions have used the word "**may**" and not "**shall**."

It was further submitted that the issue of adding necessary party in a suit is a discretion of the court and not mandatory contrary to what has been contended by the appellant. The learned counsel quoted the provision of **Order 1 rule 10 (2) of the Civil Procedure Code** (supra) and argued that the provision does not mandatorily require the Chairman of the tribunal to add the said Theresia Saidi/Theresia Njarita as a Necessary Party. Mr. Minja was of the view that the appellant was very wrong and the cited law is not applicable to the instant case.

The learned counsel cited **Order 1 rule 9 of the Civil Procedure Code** (supra) which provides that no suit shall be defeated by reason of misjoinder or non – joinder of parties. He argued that, failure to join a party as prayed by the appellant is not fatal as it is within the discretion of the court to add or not to add a necessary party depending on the facts and circumstances of that particular case. Thus, the appellant misconceived the provisions of the law and the cited cases are distinguishable to the present matter.

On the alleged necessary party, Mr. Minja informed this court that initially there was application No. 56 of 2016 before the District Land and Housing Tribunal for Moshi at Moshi between the appellant as applicant and Theresia Said as respondent. The said case was dismissed with costs by the District Land and Housing Tribunal on the reason that the Applicant failed to prove his case. An appeal before this court, was allowed due to irregularities and the court ordered the matter to be retried de novo. Thereafter, the appellant never instituted a fresh suit and Theresia Said (Theresia Miraji Njarita) continued to enjoy possession of the suit land until when she passed it over to the respondent herein on 30th November, 2021. That, the said sale was blessed by local government leaders who witnessed that she was the owner of the suit land.

In that regard, Mr. Minja was of the view that there was no need of joining Theresia Njarita/Theresia Said as a necessary Party as prayed by the appellant, rather to bring her as a witness to testify. The learned counsel contended that, if at all the appellant wanted that necessary party to be part of the case, he could have acted immediately after the said appeal was allowed. Mr. Minja condemned the appellant for employing delaying tactics. He insisted that, it is within the discretion of the court to join a necessary party. He prayed that the appeal should be dismissed with costs.

In rejoinder, the appellant reiterated his submission in chief. He insisted that the said Theresia Said ought to be joined as a necessary party.

Having examined the trial tribunal's record and the parties' submissions, there are two issues for determination:

a) Whether Theresia Said (Theresia Miraji Njarita) was a necessary party to be joined in the application which was filed before the Trial Tribunal.

b) Whether it was proper for the appellant as a respondent, to pray that the seller be joined as a second respondent (necessary party).

Before determining the first issue whether the seller in this case was a necessary party, it is pertinent to note that while determining the prayer of the appellant, it seems that the whole issue of necessary party and who should apply for such an order to join a necessary party was a riddle to the trial tribunal. I say so as it is on record that the trial tribunal was satisfied that the seller could only be called as a witness. Moreover, it was stated explicitly that the applicant was not supposed to be compelled who to sue. In the premises, I find it of utmost importance to restate albeit briefly who is a necessary party.

I faced a similar scenario in the case of **Gisela Godfrey Mosha v. M/S Sidai Select Safari and 2 Others**, Land Appeal No. 38 of 2021 [9 August 2022], HC at Moshi. I cited with approval decisions of the Supreme Court of India which elaborate the meaning of the doctrine of necessary party as follows:

In the case of **Vidur Impex and Traders (P) Ltd v. Tosh Apartments (P) Ltd, (2012) 8 SCC 384**; it was stated that:

*"...A necessary party is one whose presence is a sine qua non to the constitution of the suit and **without whom, no effective order can be passed with respect to the questions arising before the court.**" Emphasis added*

In another case of **Kasturi v. Iyyamperumal (2005) 6 SCC 733, 738**, the Supreme Court of Indian outlined two tests for determining whether or not a particular party is a necessary party to a proceeding, that:

"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.** (Emphasis added)*

The two tests were also observed by the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed Hamis** (supra) to be among the factors for determining whether a non - joined party is necessary. That is, *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.***

In our case, I have examined the application which was filed before the trial tribunal. Under paragraph 6(a)(i) (ii) of his application, the applicant (respondent herein) was claiming a piece of land (suit land) which he acknowledged under sub paragraph (ii) that it was purchased from Theresia Miraji Njarita. I am of strong opinion that a seller of the suit land to the respondent herein, was a necessary party for two reasons: First, so that the said seller may be able to defend her interests in the suit, if any.

Second, for assisting the court to *effectually and completely adjudicate and settle all the questions involved in the suit.*

In the cited case of **Abdullatif Mohamed Hamis** (supra) at page 27 the Court stressed that:

*"... in the absence of necessary parties, the court may fail to deal with the suit, as it shall eventually not be able to pass an effective decree."*Emphasis added

Therefore, respectfully, I do not agree with the learned counsel for the respondent that joining a necessary party is not mandatory.

The second issue to be determined, is whether it was proper for the appellant as a respondent, to pray that the seller be joined as a second respondent (necessary party).

While resolving the above noted issue the trial tribunal at page 1, last paragraph of its ruling had this to say:

"Baada ya kusikiliza hoja za pande zote mbili, na kama alivyosema Wakili Minja, Mleta maombi ndiye mwenye Wajibu wa kuchagua amshtaki mtu gani. Katika shauri hili Mleta maombi aliona mtu sahihi kwake na ambaye ana madai naye ni Elibariki Kasanda Mtoni (Mjibu maombi). Hivyo Mjibu maombi hana mamlaka ya kumlazimisha Mleta

*maombi kumunganisha Theresia Saidi kama mdaiwa
kwenye shauri hili*

*Hata hivyo kwa upande mwingine na kama alivyosema
Wakili Minja wanakusudia kumleta mtu hivyo (sic) ambaye
ni Theresia Said kama shahidi wao.”*

The appellant faulted the above quoted findings of the trial tribunal and was of the view that, the said Theresia Said should be joined as the necessary party, as the source of the dispute which was instituted before the trial Tribunal. On the other hand, the respondent's counsel supported the findings of the trial Tribunal on the ground that the applicant cannot be compelled who to sue.

Order I rule 10(2) of the Civil Procedure Code (supra) provides that:

*"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 mine).

According to the wording of the above quoted provision, joinder of a necessary party may be applied by either party to the suit or ordered by the court *suo moto*. The provision is crystal clear and free of ambivalence. Therefore, there is no gainsaying that the grievances of the appellant against the decision of the trial tribunal are merited.

That said, I hereby quash the ruling and order of the trial tribunal and nullify the proceedings of the trial tribunal. Consequently, I order retrial of the matter on merit after joining the seller of the suit land as a necessary party, before another Chairman sitting with a different set of assessors. Considering the circumstances of this case, I make no order as to costs. Appeal allowed.

It is so ordered.

Dated and delivered at Moshi this 10th day of May 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

10/05/2024

