IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND CASE NO. 58 OF 2022

MATHAYO OROMBOI..... 1st PLAINTIFF

OROMBOI KINYASI.....2nd PLAINTIFF

SALOME MATHAYO.....3rd PLAINTIFF

NAITAPUAKI OROMBOI KINYASI..... 4th PLAINTIFF

VERSUS

HASSAN AHMED IBRAHIM..... 1st DEFENDANT

NOLERAH FARM LIMITED.....2nd DEFENDANT

ASSISTANT REGISTRAR OF TITLES MANYARA.....3rd DEFENDANT

THE ATTORNEY GENERAL..... 4th DEFENDANT

RULING

14th & 20th June 2024

MKWIZU, J:-

The dispute between the parties is over un-surveyed land measuring 1000 acres worth 380,000,000/= allegedly belonging to the plaintiffs, who are all residents of Namalulu village, former Lengijape Village within Naberera Ward within Simanjiro District in Manyara region. The 1st and the 2nd plaintiffs are brothers, while the 2nd and the 3rd plaintiffs are the wives of the 1st and 2nd plaintiffs respectively. According to the plaint, the land was allocated to the plaintiffs by the village council in 1990, where 1st and 2nd plaintiffs got 500 acres each.

It is further averred that in 2000, the 1st plaintiff was approached by the 1st defendant who needed land for farming. They agreed and leased all the suit land to the 1st defendant on the terms and conditions agreed in the lease agreement. The lease was executed until 2019 when the plaintiffs came to know of the existing Title deed of the suit land in the name of the 2nd defendant, the 1st defendant's company. They thus believe that the survey and registration of the land by the 1st defendant was done fraudulently without their consent and knowledge hence this suit where seeking the following orders:

i. *Declaratory orders that the 1st and 2nd defendants fraudulently obtained a certificate of Title CT. NO. 14940 in the land which does not belong to him*

ii. *An order for the rectification of the land register by adding the names of the plaintiffs as owners of 100- acres within CT No 14940*

iii. *An order that the 1stand 2nd defendant is invitee(lessee) to the suit land*

iv. *A declaration that the plaintiffs are legal owners of the suit land, measuring 1000 acres which was fraudulently included in and registered in a farm held under CT No 14940*

v. *A declaratory order that all actions and transactions made between the 1st and 2nddefendant, or any third party are null and void with no legal effect and that the first defendant be held responsible for such transactions*

vi. *An order that the plaintiffs be given vacant possession of the Suitland by the 1st and 2nd defendants or whoever was given possession of the Suitland by the 1st and 2nd defendant*

vii. *An order that the 1stand 2nd defendants be condemned to pay the plaintiff's costs of this suit*

viii. *Any other order(s) and /or reliefs(s) this Honourable court may deem just and equitable to grant.*

The defendant's defence is a denial of the claims. The first and second defendants assert that in 2000, the plaintiffs sold the land to the first defendant under a sale agreement. The first defendant then transferred it to the second defendant before it was registered in the name of the second defendant through the 3rd defendant.

During the trial, Mr Richard Lengitambi advocate represented the plaintiffs, Mr. Shadrack Mofulu also advocate was in court for the 1st and 2nd defendants, whereas Mr. Leyani Mbise served as the State Attorney for the 3rd and 4th defendants.

The plaintiff's case relied on the testimony of seven witnesses, including the plaintiffs and three other members of their community while the defence case had two witnesses, the 1st defendant (DW1) and the Assistant Registrar of Title(DW2)

The first plaintiff, Mathayo Oromboi, was the first to testify. He provided a detailed account of the land's origin, how they acquired the land, and the general relationship they had with the first defendant until when they realized the unfair dealings by the first and second defendants. According to his testimony, the disputed land, (1000 acres) belongs to him and his brother, Oromboi Kinyasi (2nd plaintiff). He explained that back in 1990, they applied for land in Namalulu Village, Olkiloriti Ward within Simajiro District. The approval was granted by the village council and the district council and he was allotted 500 acres adjacent to Siroineti Lande on the north, Ndahati Road on the south, Ndahat Hill on the east, and Oromboi Kinyasi on the west. His brother, Oromboi Kinyasi, also received 500 acres neighbouring Siroinet Landei on the north, Ndahat Road on the south, Mathayo Oromboi on the east, and KKKT Farm on the west. They were issued with allocation certificates in the year 2000. He presented these allocation certificates in court as evidence.

Subsequently, he found an investor, Hassan Ahmed Ibrahim, who needed land for farming. He leased his entire 500 acres to the first defendant for a monthly fee of 1,000,000/= and 50 bags of farm products starting from 4th February 2000. The lease agreement, dated 4th February, was tendered as an exhibit. Upon further demand, the first defendant leased the second plaintiff's 500 acres under similar terms and conditions through Mathayo Oromboi.

The first defendant did not pay the rental fee as agreed. In 2009, PW1 reported the matter to the village authority. Through a letter dated 20/8/2009 (exhibit P5), the first defendant was summoned. He acknowledged the debt of 15,000,000 Tsh accumulated rental fees and promised to pay. Instead of cash, he handed over a tractor make Ford 6600 worth 14000,000 and Tsh 1,000,000 cash in a transaction concluded before a Primary Court magistrate on 9/9/2009 through a written document signed by the parties and the magistrate (exhibit P3). From there, they resumed their terms and conditions, where the first defendant remained as a lessee paying rent as usual and the plaintiffs as landlords.

In 2019, PW1 stated, during a visit to Simanjiro, the minister for lands, Housing and human settlement development, William Lukuvi instructed the District Commissioner to have all big farms with the names of their

owners listed. Through a letter dated 17/4/2019 (exhibit P4), the first and second plaintiffs were required to give an account of their farms. Surprisingly, the first defendant produced a certificate of title No 14940 bearing the name of the second defendant as the owner. An official search with the Registrar of Title in Manyara regions confirmed that the survey and the ultimate registration of the land in the name of the first defendant's company was carried out by the first defendant. He asserted, that a survey and the ultimate registration of the suit land was fraudulently conducted by the 1st defendant knowing that he was just a lessee on the said land to whom he was continuing to pay rental charges without the plaintiffs' consent and knowledge, through forged documents with intent to deprive them of their rightful ownership.

To him, the third and fourth defendants were involved in the suit because they were necessary parties involved in registering the suit land. They had something to tell the court about what went on during registration. This evidence was supported by the testimony of PW2, PW3, PW5, PW6, and PW7.

The witness, PW4, is named Elia Seyae and is male. He is a resident of Namlulu Village in Simanjiro Village and served as the chairperson for Kiloroit Harmlet from 2000 to 2005. In addition to providing a proper

description of the farm in question, he stated that Hassan Ahmed, the 1st defendant, has been a lessee of the land in question since 2000. The dispute arose when the 1st defendant, as the lessee, registered the plaintiff's farm claiming ownership. In a way, he acknowledged the possibility of fraud by stating that he was not aware of any process undertaken by the village authority during his leadership term to register the farms in the village and that he had never witnessed any such transaction.

The defence case included testimony from two witnesses: the first defendant and the Assistant Registrar of Titles. The first witness, HASSAN AHMED IBRAHIM (DW1), claimed to be the director of Nolerah Farm Company Limited and therefore familiar with suit land located at Namalulu Village within Simanjiro district. He testified that he had moved to Namalulu village in October 1999 in search of land for agricultural purposes. He began farming activities by leasing land from Brown Olesuye. However, he used the land for only five years before he shifted to the suit land.

He stated that in 2000, the village chairperson by then, Mathayo Oromboi, approached him and informed him about a large land available for lease, measuring 500 acres. He agreed to lease the 1st plaintiff's land and signed

a lease agreement (exhibit P2) on 4/2/2000 for an annual fee of 1000,000 /= without a specific time limit. While clearing this land in the same year, he said, he was again approached by(PW1) Mathayo Oromboi, informing him about 500 acres belonging to his brother Oromboi Kinyasi available for lease, belonging to his brother, Oromboi Kinyasi, 500 acres for his son, and another 500 acres for his brother's son. They then proceeded to have a meeting with Oromboi Kinyasi and the two other young boys who gave their sales mandate to Mathayo Oromboi Kinyasi. They then went to advocate Mirambo in Arusha for a sale contract where they concluded a sale agreement signed by Mathayo Oromboi, Oromboi Kinyasi, Mandi Mathayo and Musa Kisota, (vendors), and himself, as a managing director to Mbalakai Farm (the purchaser) on 4th September 2000, exhibit D1.

After clearing the land, Naberera Village authority came in demanding the party of the land as theirs and that the original sellers did not have legal ownership of the land. A survey was initiated to establish the village boundaries and in that process, half of the purchased land was found to belong to Naberera Village owned by Sironet Landey at the time. Consequently, he reached an agreement with Sironet Landey to purchase the 950-acre land, which was acquired through two contracts dated 30/11/2002 and 4/11/2004, collectively referred to as exhibit D2.

The DW1 explained that the original sale agreement used the farm's original name, Mbalaki Farm but later, during the company's formation, they discovered that the name Mbalaki Farm was already registered. Therefore, they had to change the name to Nolerah Company. DW1 emphasized they then effected changes on the Farm Name to Nolerah Farm leaving the terms of the sale agreement intact. He presented in court the amended sale agreement between Mandi Matayo, Musa Kisota, Mathayo Oromboi, Oromboi Kinyasi, and Nolerah Farm, dated September 4, 2000, as exhibit D3. Saying on all the two contracts, he signed on behalf of the purchaser.

He went further to state that, he carried out his farming activities smoothly until 2001 when they started facing challenges with the pastoralists. They enlisted Mr Mathayo Oromboi as their liaison officer because he was a local leader, an Indigenous individual, and a close friend, to help resolve the issues, at a consideration of 150,000 a month. Subsequently, the first plaintiff requested a tractor in lieu thereof and they decided to give him one as a token of appreciation for his work.

They worked smoothly until 2019 when he was asked to explain to the village authority how he acquired the farm. During this process, he

submitted all the required documents, including the registration papers, to the village authority, who kept the documents for some time before returning them to him. But before that, in 2007, he took a loan from CRDB. As a requirement for the loan, he submitted a copy of the title deed of the land along with other documents. However, later, the loan was acquired by NMB Bank. Due to a prolonged drought affecting his farming activities, he was unable to repay the loan. Consequently, the Nolerah Farm was taken over by the bank in 2021, leading to the sale of the property. And that the plaintiff's riot came after the Bank attempted to auction the Farm. He insisted that the land in question belongs to Nalerah Farm company and not to the plaintiffs.

DW2, Japhary Beatus Mpelembwa, assistant registrar of Titles in the Manyara Region, clarified how land allocation and registration processes work, emphasizing that the register of Titles is not responsible for any faults during the process as she is not involved in the allocation or approval of land.

He stated that the title deed in question was registered in 2004 and they had never received a complaint during the registration process, except for the caveat registered to their offices in 2022. He also confirmed to the court that the titled deed is registered as collateral in their office by Nolerah Farm. That concludes the party's evidence.

After the closure of the defence case, the parties' counsels were ordered to file closing submissions. Mr. Michael Lengitambi, counsel for the plaintiff managed to file one, the rest could not do as ordered. The following issues were framed for resolution by the court: -

1. Who is the lawful owner of the suit land
2. Whether the 1st defendant was a lessee to the suit land
3. Whether the 1st defendant obtained the suit land from the plaintiffs
4. Whether the title deed No 14940 was fraudulently obtained
5. To what reliefs are the parties entitled to

While composing judgment, I was alerted by the defence evidence that NMB Bank is currently in possession of the suit land by virtual of a mortgage deed executed by the 2nd defendant and that the said Bank had taken over the suit land since 2021 when the borrower failed to repay the loan the fact which was conformed by the Assistant Registrar of Title (DW2). At this juncture, parties were invited to address the court whether the NMB Bank was a necessary party in these proceedings and whether she should have been joined as a party in this suit.

Both parties admit that NMB Bank owns the suit land and therefore necessary, they only differ on the effect of the non-joinder. Mr

Lengitambi's advocate for the plaintiffs contends that the non-joinder of the NMB Bank is not fatal because firstly a clear position of the law under Order 1 Rule 9 of the CPC that insists that non-joinder of a party is not fatal. When probed to air his views on the interpretation of said rule given by The Court of Appeal in **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman and Another,** Civil Revision No.6 of 2017 (unreported), he said, the non-joinder could only have been fatal had the existence of the mortgage and the whereabout of the title disclosed in the pleadings. He thus implored the court to proceed with the preparation of the judgment as earlier intimated.

The defendants' counsels are of a different view. To them, the NMb Bank is a necessary party whose presence in the matter is indispensable. They both informed the court that the plaintiffs were well aware of the NMb's interest in the suit land even before the institution of the suit as exhibited by an official search report from the Registrar of Title made by the 2nd plaintiff way back in 2021 attached in the plaint by the plaintiffs showing that the Title was mortgaged to NMB and that based on the same information the plaintiffs have before this same court filed another case, Land Case No 39 of 2022 where NMB was impleaded as the defendant. They, based on **Abdullatif Mohamed Hamis (Supra),** urged the court to declare that NMB is a necessary party and therefore her non-joinder is fatal.

I have reflectively considered the parties' submissions on the point raised.

Order I of the Civil Procedure Code (Cap 33 R.E. 2019) deals with the parties to the suit including misjoinder, non-joinder and related matters. According to this Order, the issues on the joinder of parties whether plaintiffs or defendants. To be joined as plaintiff, the order says, there must be a right to relief alleged to exist in each plaintiff arising out of the same act of transaction; and the case is such of a character that, if such person brought separate suits, any common question of law or fact would arise. And parties can only be joined as a defendant where there exists a right to relief alleged against them arising out of the same act of transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise.

I agree that according to Order 1 Rule 9 of the CPC, non-joinder and misjoinder of parties are not fatal to the extent of defeating the suit. However, the interpretation of this rule by the Court of Appeal, is that these provisions do not extend to where the non-joined party is necessary. This is the position by the Court of Appeal in the case of **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman and Another,** Civil Revision No.6 of 2017 (unreported) where it was held:

> "...***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. *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 relief claimed*** *as well as* ***whether or not, in the absence of the party, an executable decree may be passed***."

And went further to say:

"*Despite being couched in mandatory language, we should think, there is an exception to the foregoing general rule. In this regard, it is noteworthy that by an amendment to Act No. 104 of 1976, the Indian Code of Civil Procedure, Act V of 1908 added a rider through a proviso to Rule 9 of Order 1 which is, incidentally, word to word with our Rule 9. In the proviso, the Indian Rule excludes its applicability to cases of non-joinder of necessary parties.*

Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts

to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good concerning the misjoinder and non-joinder of non-necessary parties. On the contrary, 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. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff"(emphasis added)

So, the test of whether a party is necessary or not is assessed through the nature of the relief claimed and whether an enforceable decree can be issued in the party's absence. If the court is satisfied that a third party is likely to suffer grievances due to the outcome of the suit, the court can allow the party to be added to ensure that the real matter in controversy is conclusively resolved. For the court to allow this, it must be satisfied that (1) there is a right to relief against such a party regarding the controversies involved in the proceedings and (2) no effective decree can be issued in the absence of such party. See also **Juliana Francis Mkwabi V Lawrent Chimwaga**, Civil Appeal NO. 531 OF 2020(Unreported)

There is no dispute here that the land at issue is currently in possession of the NMb Bank through a mortgage transaction by the 2nd defendant whose ownership of the suit property is in question.DW1 has categorically informed the court that the land in dispute was taken over by the Banks through a settlement he entered with the Bank in the year 2021 and that the plaintiffs were alerted by the auctioning of the suit land by the Bank. This fact was also affirmed by DW2, the Assistant Registrar of Title that they have on their records a valid registered Mortgage over the Title at issue and the Plaintiff's pleading, through the Registrar of Titles report dated 12/7/2021 attachment to the plant.

More obvious is the plaintiffs' prayer for rectification of the Title Deed to have their names as owners of the 1000 acres be added to the Title Deed plus an order for vacant possession which, to me cannot be effected without affecting the Bank's subsisting and decipherable substantive interests in the suit. It is for these reasons I find the Bank's involvement in the matter indispensable.

The appropriate procedure would have been to order for the joining of the NMB Bank as a defendant before the commencement of the trial under Order 1 Rule (10) (2) had the parties disclosed the fact to the court as

emphasised by the Court of Appeal in **Tanzania Railways Corporation (TRC) vs GBP. T. Ltd,** Civil Appeal 218 of 2020 (Unreported) that:

> *"... **if a trial court notes that some issues raised in the pleadings call for the addition of a party whose absence will lead to such issues of importance to remain unresolved**, then the **court cannot fold its arms and assume the 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 must take an active role by taking matters upon itself and adding such a party or parties to the proceedings 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."*

Regrettably, neither the plaintiffs who were all aware of the situation nor the defendants alerted the court of such a necessary party in this case, until during the defence evidence when DW1 and DW2 unveiled the facts precisely and explicitly.

I have thought a lot about the best way to proceed, and I believe it is fair to ensure that all parties involved have their interests represented in the case. Failing to do so would prolong the dispute and lead to unnecessary

legal proceedings, which is not in the best interest of anyone. Therefore, I believe that the lack of involvement of the Bank as a necessary party makes the claim defective. My conclusion finds support from the decision of this court in **Leonard Peter V Joseph Mabao and Two Others,** Land case No. 4 of 2020 (unreported) where in a similar situation the court held:

> *"...the plaintiff's failure to implead the Registrar of Titles to these proceedings constitutes a non-joinder of a party. It was an infraction of the law that rendered the suit incompetent."*

As a result, the suit is struck out for being incompetent. The plaintiffs may, if they so wish, institute a fresh suit joining all necessary parties, subject to the law of limitation. As usual, defendants to have their costs.

DATED at **Dar es Salaam** this **20th June** 2024

HIGH COURT OF TANZANIA

E.Y. Mkwizu

JUDGE

20/6/2024

COURT: Right of Appeal explained

E.Y. Mkwizu

JUDGE