IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 107 OF 2016

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No. 149 of 2008 (Hon. Mbilinye, Chairman)

PAULO MUSHI.....APPELLANT

VERSUS

THE REGISTRED TRUSTEES OF

CONSOLATA FATHERS.....RESPONDENT

JUDGMENT

I. MAIGE, J

The appeal under discussion is against the decision of the District Land and Housing Tribunal for Kinondoni ("the trial tribunal") in Land Application No. 149/2008. The controversy involved is on the ownership of a piece of land at Plot No. 16 Bock "B" Ununio, Kinondoni within the City of Dar Es Salaam ("the suit property"). The factual allegations constituting the respondent's cause of action was pleaded at paragraph 5(a) (i)-(x) of the Application as follows;-

> *5.(a) Cause of action/ brief statement of facts constituting the claim*
>
> *(i). That the Applicant on 5th of April 2005 acquired through a sale transection with one Ambo Rajabu the parcel of land described as Plot*

No. 16 Block "B" situated at Ununio in Kinondoni Municipality within the City of Dar Es Salaam.

(*ii). That the title to the plot traces back in 1987 when the plot was granted by Letter of Offer with Ref No. LD/126766/1/PJC issued on 14/1/1987 to the Vendor who is now deceased after he has paid all necessary fees and other costs incidental thereto.*

(*iii). That the land rents to the plot were at all material time paid by the Applicant.*

(*iv). That sometime December 2007 the Applicant upon visiting the disputed plot found the Respondent invaded onto the Applicant plot and started building a servant quarter therein without any color of right and of now construction works are continuing.*

(*v). That following the above invasion reported the trespass to the Street Chairperson of Ununio who after hear the compliant on 31/03/2008 wrote a letter to the Kinondoni Municipal director requesting the Authority to assist in stopping construction which were illegally taken place there by some one know as Mushi.*

(*vi). That on 10/4/2008 the Kinondoni Municipal Engineer in response to that letter by Street Chairman summoned the Respondent with all documents concern ownership of that plot in vain hence the Engineer stop order but refused to comply. Therefore, the Applicant has no alterative other than resort to legal action.*

(v*ii). That the Applicant intention to develop the suit premises has not been realized due to continuous interference and unlawful encroachment of the plot by the Respondent.*

v*iii). That the continued occupancy of the Applicant's suit property by the Respondent is illegal and unlawful.*

ix). By reason of the aforesaid unlawful occupation and construction of a building on the said property, the Plaintiff has been deprived of and denied of quit and peaceful enjoyment of the said suit property as a result suffered financial loss as the Applicant's sponsor has cancelled from sponsoring the Applicant in developing the said plot, costs of construction is rising everyday; and the Applicant had therefore

suffered loss and damages for which he is entitled to general damages against the Respondent, to be assessed by the Tribunal.

x*). That despite the demand to stop trespassing and unlawful constructing the said building on the suit property Respondent refused and or neglected to do so orally.*

(b) List of relevant documents to be annexed, if any, the following documents are annexed with this application and leave is craved that they form part thereof

Cause of action/ brief statement of facts constituting the claim

(a). A copies of Sale Agreement and transfer deed are hereby annexed and collectively marked ***"FM-1".***

(b). A copies of a Letter of Offer dated 21/05/2007 and Site Plan are annexed Sale and collectively marked ***"FM-2".***

(c). Copies of Exchequer receipts for payment of Land Rents are hereto annexed and collectively marked ***"FM-3".***

(d). copies of Valuation Report prepared by the Government Valuer from Ministry of Land are hereby annexed and collectively marked ***"FM-4".***

(e). A letter from the Street Chainman to the Municipal Director dated 31/3/2008 is attached and marked ***"FM-5".***

(d). Copies of Call Notice and Photographs are hereby attached and collectively marked Valuation ***"FM-6".***

In his Written Statement of Defence, the respondent, aside from questioning the standing of the respondent to initiate the proceedings, rebutted the factual allegations in the Application as follows:-

2. IN THE ALTERNATIVE, but without prejudice to the foregoing the respondent has noted the contents of paragraphs 1,2,3 and 5 of the application.

3. The Respondent disputes the contents of paragraphs 5(a) (i)-(x) (inclusive) of the application and states that the said facts are false. The respondent states that he is the lawful occupier of the said plot and has been there developing the plot even before the said December, 2007, without interruption whatsoever from any person including the applicant. The applicant will be subjected to strictest proof of the allegation thereof.

3. The Respondent disputes the contents of paragraphs 5(a) (i)-(x) (inclusive) of the application and states that the said facts are false. The respondent states that he is the lawful occupier of the said plot and has been there developing the plot even before the said December, 2007, without interruption whatsoever from any person including the applicant. The applicant will be subjected to strictest proof of the allegation thereof.

4. The Respondent states that the contents of paragraphs 5(b) of the application are incapable of being replied to as the alleged annexure FM1, FM2, FM3,FM4,FM5 and FM6 are not annexed to the Application. In any case they are denied and the applicant is subjected to strictest proof.

5. The reliefs claimed in paragraph XI will be strictly resisted.

6. Save for what might have been expressly stated to have been admitted herein, the respondent denies each and every allegation in the application as if each had been specifically stated and seriatim traversed.

In view of the factual contentions reflected in the pleadings, the **trial tribuna**l framed the following issues for determination;-

1. *Who is the lawful owner of Plot No. 16 Block "B" Ununio Kinondoni Area.*
2. *What relief are the parties entitled to.*

In support of her case, the respondent produced two witnesses. Father Mario Beseggio, a priest residing at Sadan in Iringa testified as **PW1**. He is among the trustees of the respondent. He told the **trial tribunal** that, the **suit property** was purchased by the respondent way back in 2005 from Ambo Rajabu, who was in possession of a letter of offer dated 1987, in consideration of **TZS 5,000,000/=**. He produced the sale agreement, letter of offer and the relevant receipts (Exhibit **P1**). The respondent could not develop the **suit property**, he testified further, because of the trespass by the appellant and construction of a structure thereunto sometime in 2007. The photos of the structure was received into evidence as exhibit **P2** collectively. On cross examination by the defense counsel, PW1 told the tribunal that because he was staying in Iringa, the purchase process was largely done by pastor Angelo.

Pastor Angelo Parola testified as PW2. He was, at the material time, a priest of Catholic Church, Kigamboni Parish. He said that, he knew the **suit property** since 2004 upon being shown by the vendor in collaboration of the *Serikali ya Mtaa*. The latter confirmed that the vendor was the lawful owner of the **suit property**. He said, while they were in the process of procuring a title deed, they established that the appellant had trespassed unto the **suit property**. He was claiming ownership thereon. However,

when he was challenged by the *Serikali ya Mitaa* in 2008 to produce any document of title on the **suit property**, he could not.

On cross examination by the defense counsel, **PW2** informed the Court that, the vendor had already demised. He claimed further that, the acquisition of the **suit property** by the respondent had all the blessings from the Administrator General. On examination by Mafulu, gentleman assessor, PW2 told the **trial tribunal** that, there was an old house on the **suit property** when it was being purchased.

The appellant on his part was the only witness. He told the **trial tribunal** that he purchased the **suit property** from Ambo Rajabu (exhibit **D1**). This was after conducting a due diligence search and verified his title thereon through a letter of offer. He produced, which were admitted collectively as **D2**, the letter of offer, a letter from *serikali ya mtaa* purporting to be a search report and exchequer receipts. After execution of exhibit **D1**, says the appellant, the vendor wrote to the Commissioner for Lands to have the same recognized (exhibit **D3**). He thereafter surveyed the **suit property** and procured a certificate of title. He tendered the survey report as exhibit **D4** and the certificate of title as exhibit **D5**. He constructed on the **suit property** a two rooms house and a toilet, he further attested.

On cross examination, he told the **trial tribunal** that he purchased the **suit property** in 2004 at purchase price of TZS 4,000,000/=. He said, he did not

transfer the same because its initial survey was not approved. He therefore caused another survey.

In its judgment, the **trial tribunal** was impressed by the oral testimony of **PW1** and **PW2** that the respondent purchased the **suit property** from Ambo Rajabu on 5/04/2005. It entirely believed exhibits **P1** and **P2** to be authentic documents of title on the **suit property**. It also considered the evidence by **PW2** on the death of the vender in 2007 to be probable and trustworthy.

The **trial tribunal** considered the probative value of the defense evidence to be highly questionable for four main reasons. First, it was improbable for the vendor to write a letter to the Commissioner in exhibit **D3** in 2008 while in accordance with the established evidence by **PW2** the said person had passed away in 2007. Two, although the appellant claimed in evidence that the vendor was alive, for undisclosed reason he never produced him as a witness to testify on the validity of the agreement in exhibit **D1**. Three, at the time he was filing his written statement of defense, the appellant did not plead any evidence of title. Four, the certificate of title in exhibit **D5** was issued in 2012 while the suit at the **trial tribunal** was filed in 2008. In the circumstance, the **trial tribunal** dismissed the defense evidence and granted the application.

Being aggrieved, the appellant instituted the above appeal faulting the decision of the **trial tribunal** on the following grounds;-

1. *That the trial District Land and Housing Tribunal erred in law and facts as it failed to recognize the discrepancy between the Applicant's pleadings and testimonies hence reached an erroneous decision.*

2. *That the trial District Land and Housing Tribunal erred in law and facts when it failed to doubt the authenticity of the Applicant's letter of offer and other Applicant's evidence.*

3. *That the trial District Land and Housing Tribunal erred in law and facts for lack of reasons for its judgment.*

4. *That the trial District Land and Housing Tribunal erred in law and facts for failure to order to join the vendor of the disputed property to the suit.*

Subsequent to the filing the instant appeal, the appellant lodged Miscellaneous Land Application No. 717 of 2018. That was an application under section 42 of the Land Disputes Courts Act, Cap. 216 RE, 2002 for an order compelling the **trial tribunal** to certify additional evidence. The application, it would appear to me, was prompted by a letter from the Ministry of Lands, Housing and Human Settlements which the appellant claims to have received on 20th April 2017. The application was successful. In his ruling dated 22nd May 2019, my learned brother Judge Mashauri who adjudicated upon the matter made the following order:-

I proceed to order that, to make justice trump in this matter, the original record of Kinondoni District Land and Housing Tribunal be remitted to the Tribunal for recording additional evidence from an officer from the Ministry for Lands pursuant to the contents of its letter to Paulo E. Mushi with reference No. LD/284445/11 (PM1).

In compliance with the order as afore stated, the record of the **trial tribunal** was remitted and in the process **Adelfrida Camillus Lekule** who introduced herself as a land officer, testified as **DW2**. In her testimony in chief, she produced a letter dated 20th April 2017 with reference number LD/284445/11 from the Commissioner for Lands to the appellant which was admitted as **D6**. In effect, exhibit **D6** suggested that the **suit property** was allocated to the appellant and that, it had no relation with LD/126766/1/PJC. She also produced a letter of offer on plot number 10 and 24 Block "B" Ununio with LD/ 126766/1/PJC (exhibit **D7**) signifying that the said plot belonged to B.M. Kapela. She said, in accordance with an investigation conducted by her offices, exhibit **P1** was not a genuine document. She did not however say when the said inquiry was done and by whom. She admitted however in the course of cross examination that, exhibit **D6** was in response to a letter dated 22/03/2017 from the appellant. She was, in the course of cross examination, caused to produce the letter which was admitted as exhibit **D8**. No doubt it was by mistake. For, evidence produced in the course of cross examination is deemed to be the evidence of the adverse party. On that account therefore, though the documentary evidence is marked **D8**, it shall, for the purpose of this Judgment, be treated as the prosecution evidence. She conceded further that, in exhibit **D8**, the appellant did not make any disclosure of there being a pending appeal in

relation to the same subject matter. She also admitted that if her offices were aware of the pending appeal, it would not acted on the letter.

Both parties have been represented in this appeal. The appellant enjoyed the service of **Mr. Lusajo Willy,** learned advocate whereas the respondent **Mr. Rajab Mrindoko**, also learned advocate. The counsel debated for and against the appeal by way of written submissions. The submissions have been very impressive, if I can say. They have been given due consideration in this my judgment.

With the above exposition of the nature of the contention, I find it appropriate to consider the merit or otherwise of the appeal. I propose to start with the fourth ground which seeks to question the legality of the judgment and proceedings of the **trial tribunal**. Mr. Lusajo thinks that the vendor, Amboni Rajabu was a necessary party in the proceedings. He was supposed to be impleaded as a necessary party, says the counsel. He submits that, failure to join him as a party vitiates the proceedings. The counsel substantiates his contention with the authority in **Juma B. Kadala vs. Laurent Mnkande, 1983 TLR 103**. On the basis of that submission, he prays that the appeal be allowed.

Mr. Mrindoko has used four propositions to rebut the contention. First, the vendor was not a necessary party in the circumstance because the determination of this matter could in no way affect his right. He places

reliance on the authority in **Abdi M. Kipoto vs. Chief Arthur Mtoi, Civil Appeal No. 75 of 2017**. Two, non-joinder of a party is not a fatal irregularity. He relies on order 1 rule 9 of the Civil Procedure Code, CAP. 33, R.E, 2002 ("the CPC"). Three, the issue of misjoinder being preliminary to the proceedings, it ought to have been raised at the earliest possible opportunity. His contention is based on order 1 rule 13 of the **CPC**. He submits therefore that, in not raising the objection at the **trial tribunal**, the appellant waived his right to raise the same. He further cements his view with the authority in **Ramadhani Kisunda and Ndilu Ujamaa Village vs. Adam Nyalandu and others** (1998) TLR 68. **Four**, as both parties trace the root of their titles on the **suit property** from the same person, the appellant was at liberty to pray for joinder of the vendor to the proceedings if he wished. He thus invites the Court to dismiss the submission.

I have heard the counsel's submissions and familiarized myself with the principles stated in the cited authorities. Much as it is true that the right to raise an objection as to non- joinder of a party would be deemed to have been waived if not raised at the earliest opportunity as directed by order 1 rule 13 of the **CPC**; it is my understanding of the law that, the rule in the respective provision does not apply where the non- joinder is of a necessary party. For, in the absence of a necessary party in a suit, no decree capable of being executed can be enforced. Therefore, it sounds to me to be the law that; non- joinder of a necessary party vitiates the proceeding if it is not rectified before pronouncement of the judgment. There are many authorities in support of this view.

For instance, in **Dishon John Mtaita vs. the DPP, Civil Application No. 44 of 2012,** the Court of Appeal held that non joinder of a necessary party vitiates the proceedings. A similar position was stated in **Mbeya-Rukwa Autosparts and Transport Ltd. Vs. Jestina George Mwakyoma (2003) TLR 251**. In accordance with the authority in **Dishon Case *supra*** , a necessary party is he whose joinder in a suit is absolutely imperative such that if he is not joined, determination of the controversy between the parties cannot be made and a decree capable of being enforced cannot be issued. A more or less similar definition was made in **Abdi M. Kipoto vs. Chief Arthur Mtoi, Civil Appeal No. 75 of 2017** where His Lordship Mwabegele, JA considered a necessary party as he whose "proprietary right are directly affected by the pending proceedings".

In this matter, the respondent was suing the appellant on the ownership of the **suit property**. He was not in any way faulting the said Rajabu for selling a property unto which he had no title. Nor was he claiming any relief against the said Rajabu. In the defense by the appellant, there was no claim whatsoever that the said Rajabu had any suable interest on the **suit property**. Just as the respondent, the appellant claimed in evidence to have purchased the **suit property** from the same person. In the circumstance therefore, if the presence of the said Rajabu was necessary, it would be in the capacity as a witness and not necessarily a party. In the circumstance therefore, I find the fourth ground of appeal devoid of any merit and it is accordingly overruled.

This now takes me to the second ground wherein the **trial tribunal** is faulted in not doubting the authenticity of the prosecution evidence. In his submissions, Mr. Lusajo in the first place relied on the testimony by DW2 that exhibit **P1** was not authentic. He has also placed reliance on the testimony in exhibit **D7.** Mr. Mrindoko has advised me not to rely on the evidence in exhibit **D7** because **DW2** admitted in evidence that, the same was issued pursuant to a letter in exhibit **D8** which was written when this appeal was still pending. With respect, I agree with him. In the pendency of this appeal and with a judgment of the **trial tribunal** against him in the hand of the respondent, it was improper for the appellant to initiate efforts at the office of the Commissioner for Lands to have a new document relating to the pending dispute and more so in a situation wherein such pertinent information was concealed. I will not also accept the testimony by **DW2** of there being an investigation unto the legality of the offer in exhibit **P1.** The reason being that, there was not adduced any evidence as to how such investigation was conducted and at whose instance. More to the point, the investigation report was not exhibited. Neither did **DW2** claim in evidence to have taken part in the said investigation. On that account therefore, I will not give any weight to the evidence in exhibit **D6** and **D7.** The second ground of appeal is therefore overruled.

I now turn to the first ground as to discrepancy between pleadings and evidence. In support of the ground Mr. Lusajo submits that while in accordance with pleadings, the respondent was allocated the **suit property** vide a letter of offer in exhibit **P1,** in his evidence through **PW2,** the

respondent told the Court that the vendor inherited the same from his parents. With respect, the claim is baseless. Acquisition of a property by inheritance does not mean that the same cannot be surveyed and officially allocated by the land authority. Yet another complaint is that, while in pleadings the **suit property** is described to include a house, in his evidence through **PW2** it is suggestive that the house was constructed by the appellant. There is no merit on this submission. I have read the evidence of **PW2** in between line and established that, there is no where he is saying that the house which is referred in exhibit **P1** and the one constructed by the appellant as shown in exhibit **P4** is the same house. Quite differently, in his testimony on examination by one of the assessors, Mr. Mafuru, **PW2** told the **trial tribunal** that, there were remnants of an old house when they were purchasing the **suit property**. Besides, exhibits **P4** suggests that the construction was made subsequent to execution of exhibit **P1**. The first ground is also dismissed.

In the third ground, the decision of the **trial tribunal** is doubted for not being reasoned. In his submissions, Mr. Lusajo criticized the judgment of the trial tribunal for not containing a concise statement of the case, the points for determination and the reasons for such decision. Relying on the authority in **Tanga Cement Company Ltd vs. Christopher Company Ltd, Civil Appeal No. 77 of 2002**, the counsel invited the Court to nullify the said judgment. In his rebuttal submissions on that point, Mr. Mrindoko while in agreement with his learned counsel for the appellant on the elements of a judgment on trial set out in Order XX rule 4 of the **CPC** as judicially

considered in the authority just referred, he is of humble opinion that the judgment under discussion was reasoned and duly complied with the said elements of a judgment on trial.

On my part, I have read the judgment between lines and I am in agreement with Mr. Mrindoko, learned advocate that, the same was reasoned and satisfied the requirement of a judgment on trial set out in the provision of law just referred. Before I proceed further, it may be necessary to state right from the beginning that, the provision of order XX rule 4 of the **CPC** much as it provides for the elements of a judgment, does not provide for any special format of a judgment. Consequently, how should a judgment be written to ensure that the said elements are incorporated is a matter of style. Therefore, in **Caritas Tanzania and another vs. Stuward Mkwawa, (1996) TLR 239** relied upon by Mr. Mrindoko, it was held;-

> *Although rule 4 and 5 of Order 20 of the Civil Procedure Code require judgment to contain a concise statement of the case, the points for determination, the decision arrived at and the reason for such decision, the content of each judgment depend upon the particular case and there is thus no specific format as to how a judgment should be presented. It is sufficient if it is formulated to contain the element stated under Order 20 Rule 4 & 5 of the CPC*

As I said else where in this judgment, the trial chairperson justified why she believed the prosecution evidence and disbelieved the defense evidence. One of such reasons is that, while the respondent's documents of title were pleaded and annexed in the pleadings, the existence of the documentary

evidence relied upon by the appellant were not pleaded at all. She was quite correct in my view. The passages from the parties pleadings reproduced elsewhere in this judgment speak for themselves.

The respondent clearly pleaded and attached her documents of titles. She clearly and specifically pleaded to have acquired the **suit property** by way of abrupt purchase from Rajabu. It was also in her pleadings that the said Rajab was holding a letter of offer. In his defense, the appellant generally denied the claim. He just asserted possession and use of the **suit property**. He did not in anyway claim to have purchased the **suit property** from Rajabu. He did not claim too that the said Rajabu had a letter of offer. Neither did he claim to have procured a certificate of title thereon. With these facts, it cannot be said that, the appellant intended to use exhibits **D1**, **D2** and **D5** as basis of his defense. His defense testimony therefore substantially departed from the pleading a to create a new different case. Obviously, this offended the rule against departure from pleadings set out in Order Vi rule 7 of the **CPC**.

The Court of Appeal of Tanzania, in THE NATIONAL INSURANCE CORPORATION VS. SEKULU CONSTRUCTION COMPANY, 1986, TLR 157 had an opportunity to judicially consider the rule against departure under the respective provision. It was the binding opinion of the Court of Appeal that; parties to dispute are not, during trial, allowed to depart from pleadings by adducing evidence which is extraneous to the pleadings.

MOGHA'S in his **LAW OF PLEADINGS IN INDIA**, 15TH EDITION, 1998, NEW DELH, EASTERN LAW HOUSE, commenting on the provision of Order 6 Rule 7 of the INDIAN CODE OF CIVIL PROCEDURE CODE, which is in *pari materia* with Order 6 Rule 7 of our Civil Procedure Code Act, has the following to say at page 113, thus;-

> *It is laid down that no pleading shall raise any new "ground of claim", but the word "claim" seems to have been used in a much wider sense here so as to include the claim of the defendant also, though it would have been better to have said "ground of claim or defense". Therefore, this rule prohibits the raising of a new plea in defense as well as a new ground of claim, as there is no justification for making any distinction between the pleading of a plaintiff and that of a defendant in this respect."*

From the above commentary, it would seem, the rule against departure applies to the plaintiff's pleadings in the same way as it applies to the defendant's pleadings. I am in total agreement with the afore said commentary and I am unable to do without applying it as a correct interpretation of the rule. Therefore, as the appellant in his defense at the **trial tribunal** did not plead that his title on the **suit property** was by way of purchase from Rajabu who was holding the suit property by a letter of offer, the adduction of such evidence during trial offended the mandatory requirement of the said provision. It ought not to have been relied upon. The **trial tribunal** was thus right in doubting the said documentary evidence since the appellant did not show in his pleadings that he was in possession of the same or he was basing his title on the suit property from those documents.

It is for the foregoing reasons that, I find this appeal without merit. It is accordingly dismissed with costs

It is so ordered.

I. Maige

JUDGE

08/05/20120

COURT:

Judgment delivered this 8th day of May, 2020 in the presence of Lusajo advocate for appellant and Mrindoko for respondent.

I. Maige

JUDGE

08/05/20120

THE HIGH COURT OF TANZANIA
LAND DIVISION