IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 167 OF 2019

1. **NABEEL ABDULHAKIM FUAD**
2. **NABEEL FUAD** ..... **PLAINTIFFS**

VERSUS

1. **TAUSI LUFUNGA NGOMA**
2. **JUMA BAU**
3. **AMSHA BAU**
4. **ATHUMANI MUSSA** ..... **DEFENDANTS**
5. **HAMISI MTINGE**
6. **SELEMANI MUSSA**

RULING

S.M. KALUNDE, J.:

This ruling is in respect of preliminary objections raised by the counsel for the 1st Defendant on the following points of law that: -

1. **The suit is bad in law as it offends the mandatory provisions of Order VII Rule 1(e) of the Civil Procedure Code Cap 33 R.E 2019;**
2. **The Plaintiff have no *locus standi*;**
3. **The suit is bad in law for non-joinder of Chalinze town council who are a necessary part; and**

4. **The suit is bad in law for offending the mandatory provisions of Order VII Rule 3 of the Civil Procedure Code Cap 33 R.E 2019.**

In the end, the counsel for 1st defendant prayed that the suit be dismissed with costs.

Hearing of the preliminary objections was done by way of written submissions. Submissions of the 1st defendant were drawn and filed by **Mr. Godwin Musa Mwapongo**, learned advocate whilst those of the plaintiff were drawn and filed by **Mr. Mashaka Ngole** learned advocate. I appreciate the counsels' industrious work which assisted the Court in composing the present ruling.

In support of the 1st ground of objection, Mr. Mwapongo referred the Court to the provisions of **Order VII Rule 1(e)** of **the Civil Procedure Code, Cap. 33 R.E 2019 (CPC)** which requires the plaint to contain facts constituting the cause of action and when it arose. He submitted that the plaint filed by the Plaintiff does not show cause of action and when it arose to enable the Court to know whether the suit is time barred. To support the contention, he cited the High Court case of **Materin M Muhumbila vs. Clarence M. Muhimbila & 2 Others,** Land Case No. 276 of 2010 (unreported), where a plaint was struck out for non-compliance with provisions of Order VII Rule 1 (e) of the CPC.

On the 2nd ground, it was argued that the Plaintiff has no ***locus standi*** since he surrendered, to the President, the Certificate of Occupancy in relation to the suit property and the property has not been allocated again to the plaintiff. To support the argument, the counsel cited the case of **the Registered Trustee of Masjid Mwinyi vs Daniel Zakaria and 2 Others**, Civil Case No. 200 of 1995 (unreported).

As for the 3rd point of objection, Mr. Mwapongo stated that Chalinze Town Council (herein referred to as **"the Council"**) was necessary party to the case as upon being surrendered, the land authorities at the council re-surveyed the land and new survey plan

was put in place and hence making the Council a necessary party to suit. He cited the case of **Oilcom Tanzania Limited vs Christopher Letson Mgalla,** Land Case No. 29 of 2015 (unreported) where this Court struck outbthe plaint for non-joinder of land authorities as necessary parties.

In the 4th point of objection, the counsel for the 1st defendant alleged that the suit is bad in law for offending the mandatory provisions of **Order VII Rule 3 of the CPC** which requires the plaint to contain description of the suit property sufficient to identify it. He submitted that the Plaintiffs attached a survey map, **Annexure MK3,** which had several plots with different plot numbers, but they have not been able to identify or specifically disclose which plot was trespassed by which defendant amongst six defendants.

In reply to the 1st point of objection, Mr. Ngole, the counsel for the plaintiff submitted that the allegations are devoid of merit as paragraph 17 of the plaint disclosed the cause of action to have arisen from acts and conducts of defendants to encroach part of the Farm No. 98 at Msolwa, where they introduced themselves to the Council as the owners of 400 acres farm which includes farm No. 98 and procured a resurvey of the 400 acres which includes Farm No. 98. Further to that, Mr. Ngole submitted that, paragraph 17 stipulated the acts and conducts of defendants arose in 2017. In view of that, the counsel concluded that, through paragraphs 8 to 21 the plaintiff has provided materials sufficient to disclose a cause of action against the defendants and when it arose.

Responding on the 2nd ground, the counsel cited **section 43(4) (b) (ii), 43 (4)(c) and 43(5) of the Land Act, Cap. 113 R.E 2019** and argued that, in accordance with the respective provisions, surrendering a title deed to the President does not take away the owner's title to the land until such surrender has led to cancellation of the title of the holder to the respective plot by the Commissioner for Lands is effected and registered. The counsel reasoned that, since the present surrender has not been accepted

and not entered into the register the same had not been effective in accordance with the Land Act, sufficient to deprive the plaintiff of his rights of the suit property.

The counsel went on to argue that surrendering was a matter of procedure, which has no effect of cancellation of the title to the holder nor take away interest of ownership. He submitted that unless there is evidence that the Plaintiff's title is cancelled by the Registrar of Title, the Plaintiffs are still the title holder and therefore have locus standi.

In respect to the 3rd ground of objection, Mr. Ngole argued that the title, the subject of the present suit, is still in the name of plaintiff and that the property was unlawfully resurveyed by defendants upon instruction of Council after defendants trespassed into the disputed land. He reasoned that, in that context, the Council was not a necessary party since cause of action is a result of defendant's trespass to land and instruct the Council which acted based on wrong information presented by the defendants on pretext that they were owners of the suit land. Thus, determination of the issue of trespass to suit land will dispose the dispute between the parties and this does not necessitate joining the Council. He referred to the Court of Appeal decision in the case of **Abdi M. Kipoto vs Chief Arthur Mtoi** (Civil Appeal No.75 of 2017) [2020] TZCA 26; (28 February 2020 TANZLII) where at page 12 the Court (**Mwambegele, J.A**) stated:-

> *"What we can discern from the above is that, non-joinder of a party does not defeat the proceedings of a suit as long as the dispute between the parties to the suit can be resolved without that party and without affecting that party's interest"*

He distinguished the case of **OILCOM TANZANIA LIMITED** (supra) by stating that, that case dealt with double allocation, and the plaintiff in that case had no intention of joining the Authority, while in the present case the plaintiff had issued a notice of joining

the Council as deposed in the plaintiff's affidavit in support of the Application for injunction which is incidental to this suit.

In addition, Mr. Ngole argued that, even if the Council was necessary party, which is not the case, the remedy is not to strike out the suit but rather to join the necessary party. To bolster his position he cited the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Fatma Mohamed,** Civil Revision No. 6 of 2017 (Unreported) which Court of Appeal stated that;

> *".....Since as we have just remarked, the legal representative of the deceased was a necessary party, her non-joinder was fatal and the trial court, either on its own accord, or upon a direction to the 1st Respondent, was enjoined to strike out the name of the 1st Respondent and substitute to it the name with the caption: as the legal representative of the deceased", during the initial stages of the trial"*

On the 4th ground of objection, Mr. Ngole was brief, he argued that the averments of paragraphs 8(a), 8(b), 9 and 17 of the Plaint were clear that, the suit property is a portion of Farm No. 98 at Msolwa, Chalinze, which is a registered land, hence the details were sufficient for identification of the suit property. He, thus, prayed the objection be dismissed with costs.

In re-joining on the 1st ground, the counsel for 1st defendant, submitted that, upon surrendering the disputed land the plaintiff was not re-allocated the said land and therefore there could be no trespass. As for the 2nd ground, he referred to **Section 43 (1) of Cap 113** which provides that **"... *surrender should be in prescribed form, signed and accompanied by certificate of occupancy*...."** He added that, in the present case the Plaintiffs have pleaded they surrendered the title and President accepted the surrender of Farm No. 98.

On the 3rd ground, Mr. Mwapongo re-joined that the re-survey of the suit land was sanctioned by the Council, imploring that the Council was necessary party to the suit. Winding on 4th

ground, submitted Annexures are part of the pleadings, hence their failure to describe the property makes the plaint incompetent.

Having examined the pleadings, specifically the plaint, and the submissions for and against the preliminary objections, the main issue for my determination is whether the preliminary objections raised are meritorious. For the reasons which shall become apparent later in this ruling, I propose to start with the 3rd ground of the objections.

Gleaning from the records, it is apparent that, the plaintiffs claim to be lawful owners of 400 acres part of the land comprised the then Farm No. 98 located at Msolwa, Chalinze District. It is also on record that, around 2015 the plaintiff instructed Ardhi Plan Limited to initiate the cancellation of Farm No. 98 by making an application for re-survey to the Council. As a result of the process sometimes on the 07th October, 2016, the Director of Survey and Mapping accepted the request for cancellation of Farm No. 98 made by the Regional Land Surveyor and Mapping Department. In a bid to facilitate the process, in the same year, that is 2016, the plaintiffs, through the office of the Assistant Commissioner for Land Morogoro Zone, started the process to surrender **Certificate of Title No. 33418** to the President. The plaintiff was notified that the surrender was accepted. The plaintiff kept waiting for the communication from the Regional Land Surveyor and Mapping Department.

Unbeknown to the plaintiffs, around 2017 the defendants took advantage of the cancellation of Farm No. 98 and introduced themselves to the Council as the owners of the 400 acres thereafter procuring a re-survey of the farm hence a new survey plan. The new plan was approved by Director of Survey and Mapping at the Ministry of Land and registered as **Registered Plan No. 91828** and **91829.** The plaintiff complain that new registered plans were illegal and unlawful. They thus brought the present suit seeking for *inter alia* declaratory orders that:

(a) The land covering 400 acres with Registered Plan No. 91828 and 91829 at Msolwa Chalinze (suit property) is lawfully owned by the plaintiffs;

(b) Acts and conducts of the defendants to introduce themselves to the Council as lawful owners of the suit property, procuring a re-survey and preparation of new registered plans amounted to trespass;

(c) Eviction of the defendants from the suit property;

(d) Perpetual injunction against the defendants from further trespassing into the suit property; and

(e) Payment of general damages and costs.

It is a strong argument of Mr. Mwapongo that, in the circumstances of this case, the Council ought to be joined as a necessary party. Mr. Ngole had other ideas, his view was that the council was not a necessary party as the rights of the parties would be determined in the absence of the Council. The question now is whether the Council is a necessary party.

The circumstances under which a necessary party may be joined were discussed in the Case of **Fang Gas Distributors Limited v. Mohamed Salim Said and 2 Others**, Civil Revision No. 68 of 2011 (unreported) which was cited with approval in **Abdi M. Kipoto** (supra). In that case the Court of Appeal held that:

> *"... an intervener, otherwise commonly referred to as a **NECESSARY PARTY**, would be added in a suit under this rule [Order 1, rule 10 (2) of the Civil Procedure Code, Cap. 33 RE 2002] even though there is no distinct cause of action against him, where: -*
>
> *(a) in a representative suit, he wants to challenge the asserted authority of a plaintiff to represent him; or*

(b) ***his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit;*** *or*

(c) in actions for specific performance of contracts, third parties have an interest in the question of the manner in which the contracts should be performed; and/or

(d) on the application of the defendant, it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is called as a co-defendant. [Emphasis added]"

In his plaint the plaintiff alleges that the defendants introduced themselves as lawful owners of the suit property to the Council prompting the Council to resurvey the property and issue a new survey plan with separate Registered Plan Numbers. Those registered plan numbers were issued to new owners, that is, the defendants. The resurvey was thus conducted by the Chalinze District Council, approved by the Director of Survey and Mapping at the Ministry of Land leading to the issuance of new registered plan numbers. Considering the above scenario, Mr. Ngole wanted to work me into the park into believing that the determination that the defendants were trespassers would be possible without joining the Council. With respect, I do not agree with him.

One, the determination that the plaintiffs are lawful owners of the suit property would not be possible without, initially, establishing that the alleged re-survey of the suit land by the Council; and the subsequent issuance and registration of new Registered Plan Numbers was unlawful and of no effect. The determination of this issues goes to the root of the matter. Its determination is thus essential in the disposition of the suit. I say so because the new registered plan numbers are now the new identifiers of the suit land having been re-surveyed whether by the

council under the instruction of the defendants or otherwise. The validity or invalidity thereof, of the resurvey and registered plan, is necessary for the determination of the rights of the parties; and that can be adequately dealt with after the Council and Director of Survey are joined.

Two, looking at the prayers, the plaintiff had a prayer that this Court declares the acts and conducts of the defendants to introduce themselves to the Council as lawful owners of the suit property, procuring a re-survey and preparation of new registered plans amounted to trespass; in similar vein this would not be properly determined if the Council is out of the equation. For that matter the council becomes a necessary party.

Three, although defendants did not apply or raised it, the reasoning of the decision in **Fang Gas Distributors** (supra) is to the effect that a person may be joined as necessary party if it can be established that the defendant cannot effectually set up a defence he desires to set up unless that person is called as a co-defendant. I am aware that, the argument would be that an officer of the Council may be called in as a witness, but the cumulative circumstances in the present case necessitates the joining of the Council so that the Court may effective and effectually determine the right of the parties.

In light of the above analysis, the Council is, therefore, a necessary party whose decision or actions are being challenged or called into question; and hence was entitled to defend based on the principle of **audi alteram partem** so the that the rights of the parties may be conclusively determined. Also see the provisions of Order I rule 9 of Cap. 33.

As for the way forward, Mr. Ngole argued, and correctly so, that, in view of the authority in **Abdullatif Mohamed Hamis** (supra), even if the Council was necessary party, the remedy is not to strike out the suit but rather to join the necessary party. But that would not be possible in the present case since prior to the institution of the suit, the plaintiff is required to join the Attorney

General. Further to that, the law requires issuance of a 90 days' statutory notice of intention to sue the Attorney General and the Council. That requirement to serve a notice is not a cosmetic one. Thus, one cannot file a case and then serve a notice later. Until such notice is filed, and the Council and any other necessary party is joined, the suit in its present form is incompetent for failure to join a necessary party.

In the circumstances I sustain the 3rd ground of the preliminary objection raised by the counsel for the 1st defendant. I find the suit incompetent hence liable to be struck out. Considering the position taken above, I do not see the need to consider the remaining points of preliminary objection raised by the 1st defendant in the first set of the preliminary objections.

The incompetent suit is hereby struck out with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **25th** day of **JUNE, 2021**.

S. M. KALUNDE
JUDGE