

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 288 OF 2017**

**REHEMA ALLY MDOE.....PLAINTIFF**

**VERSUS**

**THEONEST BYARUGABA RUGANISA.....DEFENDANT**

**JUDGMENT**

*09/9/2021 & 05/10/2021*

**A. MSAFIRI, J:**

The plaintiff above has instituted a suit against the defendant praying for the following orders: -

1. A declaration that the respondent (sic) is the trespasser of the disputed property.
2. An order for specific performance that compel respondent (sic) to vacate the disputed property.
3. A permanent injunction restraining the respondent (sic) his family, its(sic) agent, servant or any person claiming on his behalf from disturbing the plaintiff with regards to the above mentioned plot, to which was brought and owned lawfully.
4. An order for respondent (sic) to pay the plaintiff sum of Tshs. Fifty Million (Tshs. 50,000/=) being compensation by the Plaintiff due to Respondent's conduct, disturbances and non-use of the said property.

5. Payment of Tanzanian shillings 25,000,000/= being special damages on account of the cost incurred by the Plaintiff and its (sic) agent regarding to this claim.
6. An order for the respondent to pay general damage as assessed by the honourable court.
7. Cost of this suit and interest thereon at the court rate of 12%.
8. Interest on the amount stated in the judgment and the decree for the plaintiff based on the Bank of Tanzania interest rate of 22% from the date of filing of this case until the date of judgment.
9. Interest on the amount stated in the judgment and the decree at the court rate of 12% from the date of judgment until the date of final satisfaction of the decree.
10. Costs of this suit be provided for.
11. Any other reliefs that this honourable court deems fit and fair to grant.

The gist of this matter as can be grasped from the plaint is to the effect that, the matter originates from the dispute over the ownership of the house situated on the land measuring 40 meters length and 24 meters width at Kibaga, Tabata Kinyerezi at the street known as Muhanga Secondary School in Ilala District in Dar es Salaam. The plaintiff is averring to have bought the above in mentioned house from one Jonathan Ezekiel Barampanze and his wife Meda Kosem Kilemo who were the lawful owners at the consideration of Tshs. 65,000,000/= (Sixty-Five Million Shilings) on 11<sup>th</sup> November, 2016. The plaintiff complained to have failed to occupy the suit property because of the trespass done by the defendant. The plaintiff prayed for the court to grant her the relief(s) stated herein above.

On the other side the defendant stated in the written statement of defence to be the lawful purchaser of the suit property from Jonathan Ezekiel Barampanze and Meda Kosemu Kilemo who were the previous owners. The defendant stated further that he purchased the suit property from the said people on 31<sup>st</sup> December 2015. Therefore 11<sup>th</sup> November, 2016 the date which the plaintiff is claiming to have bought the suit property from Jonathan Ezekiel Barampanze and Meda Kosemu Kilemo, the said people had no any interest on the said suit premises that they would pass to the plaintiff since they had nothing to sell no any good title to pass to the plaintiff. The defendant prayed for the plaintiff's claims to be dismissed with costs and the defendant be declared the rightful owner of the suit property.

During the hearing of this dispute, the plaintiff was represented by Mr. Walter Goodluck, learned advocate, and the defendant was represented by Mr. Emmanuel Machibya, learned advocate. The plaintiff called five witnesses to prove the claims and the defendant called two witnesses to refute the same. The following issues were framed for determination as follows:

- A) As between the parties, who is the rightful owner of the disputed property?*
- B) Whether the defendant has trespassed onto the plaintiff's property?*
- C) To what reliefs are the parties entitled to.*

Rehema Ally Mdoe, the plaintiff, testified as PW1, and told the Court that she is a retired employee of Oryx Gas Tanzania Limited. That the suit before the court relates to trespass by the defendant on her property which she bought. She described the property to be the size of 40 x24

meters, a 3 room house with four frames for shops, a well and a fence. She said the house is located at Kinyerezi Kibaga, close to Muhanga Secondary School. She told the court that after retirement, she decided to buy a house which she could also invest so after locating a house through Dalali, she met with the owners of the house namely Jonathan Ezekiel Barampanze and his wife Meda Kosemu Kilemo.

After discussion, she asked the owners about the ownership documents. They said that the documents are with Akiba Commercial Bank (ACB) Banana Branch where it was set as a guarantee to secure a loan. The remaining amount due to the Bank was Tshs. 10,000,000/=. PW1 said that she had agreed with the sellers that the purchasing price is Tshs. 65,000,000/= and they agreed that the title of the property should be recovered from ACB by discharging the mortgage. On that agreement, PW1 and the sellers went to ACB and met the manager who said that the amount due was Tshs. 10,800,000/=. The said amount was paid by PW1 and the title was released.

After that the payment slip for the pay of amount due was issued. PW1 tendered the said payment slip as Exhibit P1. PW1 also tendered the document which had been in bank custody as a security which was released after payment of amount due. The same was tendered as Exhibit **P2 (Titled Hati ya Kuuziana Shamba/Kiwanja – Nyumba).**

PW1 stated further that she added another amount of money to the couple totalling Tshs. 13,000,000/=. Then they drafted and signed an agreement witnessing payment of Tshs. 13,00,000/= being part of the purchase price, the tendered document was agreed and filed in this court as Exhibit P3. PW1 told the court that later she paid Meda Kosemu Tshs.

27,000,000/=, she tendered a cash withdrawal slip from NMB Bank dated 11/11/2016 as Exhibit P.4. Then on 12/11/2016, she paid to the NMB account of Meda Kosemu Tshs. 22,000,000/= and also withdrew Tshs. 3,500,000/= from her account and gave Meda Kosemu Tshs. 3,000,000/=. She tendered a cash withdrawal slip from NMB and a fund transfer request from NMB collectively as Exhibit P5.

After the payment, Jonathan Barampanze, the seller, prepared an agreement to handover the property to PW1 through a ten-cell leader. PW1 tendered an agreement titled "**HATI YA KUUZIANA SHAMBA/KIWANJA/NYUMBA**" dated 11/11/2016 as Exhibit P.6.

PW1 stated further that after that, the legal contract was prepared between PW1 and the seller. She tendered the said contract – sale agreement dated 11/11/2016 as Exhibit P.7. PW1 told the court that, after conclusion of the sale, it was agreed that the house will be handed over to her on 10/12/2016. However, on 29/11/2016 she got information that there was a dispute over the house. She went at the said house and found a Notice written that the house was not for sale and whoever has a claim should go to the office of local government (Serikali ya Mtaa). When she went at the said office, she was informed by the Chairman that the notice at the disputed house was issued by the defendant. PW1 stated that she decided to file a suit at the Ward Tribunal against the defendant, and suit was decided in her favour. She tendered the decision of the Ward Tribunal as Exhibit P.8.

On cross examination, she said the payments was made to Meda Kosemu because she was a wife of Jonathan Barampanze and had an account at

the Bank which PW1 had an account, and that all payments were made in the presence of Jonathan Barampanze and his wife Meda Kosemu.

Greyson Celestine Siwilwa was PW2. He said that he is a local government street chairman from 2014 to 2019. He said that he know the present dispute whereas the area in dispute belonged to Barampanze who was the resident of the area. That the dispute over the area was initially reported by the defendant around 2016. The defendant wanted to be introduced to survey the area, however there was no records of the defendant's residence because the previous owner of the house they know was Barampanze.

PW2 said that, later, the defendant and Jonathan's wife came to his office. The defendant wanted the house not to be sold or mortgaged until the dispute was resolved over their loan. We advised Jonathan's wife to settle the dispute. PW2 stated that, another dispute was reported at their office by the plaintiff claiming that the defendant has hired security guards who are preventing her from accessing the house she had lawfully purchased. Since the defendant and plaintiff were both nonresidents, PW2 said that he invited Jonathan Barampanze to inform the office on the truth of the matter. PW2 told the court that Jonathan recorded his statement that he sold the house to Rehema (the plaintiff). PW2 tendered the statements of Jonathan Barampanze which he prepared which was admitted collectively as Exhibit P.9. He stated that the defendant did not show any ownership documents. On cross – examination, PW2 stated that the dispute that came first was between Ruganisa (defendant) and Jonathan's wife relating to a loan.

PW3 was Jonathan Ezekiel Barampanze. He told the court that he sold his house to the plaintiff and not anybody else. That he has never sold his house to the defendant. That the Tshs. 9,000,000/= stated by Ruganisa as deposited to him originated from a loan advanced to him by the defendant, of Tshs. 10,000,000/= whose the security was a car hiace which Ruganisa took into his possession. The interest over the loan was Tshs. 3,000,000/= and that they paid the whole amount.

PW3 said that later, they requested a loan amounting to Tshs. 15,000,000/= from the defendant. They gave a car as security to the defendant. PW3 and his wife were able to pay 7 Million but they were told that the defendant has sold a car. That the defendant came asking them for the original car registration card. PW3 told him that the car card was at Access Bank Karitakoo. So, the defendant paid Tshs. 9,000,000/= to recover the said card and told them he sold the car to recover the unpaid amount. PW3 stated that when they were asking for a loan from the defendant, he told them to bring a letter from "*Serikali ya Mtaa*" that is the genesis of the letter in the hands of the defendant, they relate to the loan secured by a car.

PW3 told the court that during the time of selling the disputed house, the ownership documents were with ACB Ukonga, but they were recovered after the plaintiff paid Tshs. 13,000,000/= and subsequently other amounts by instalments totaling 65 million shillings as a purchase price.

He tendered the affidavit which he said he made to attest that he sold and handed the disputed house to the plaintiff as Exhibit P.10, and that the affidavit was made during the dispute settlement which was called by the Dar es Salaam Region Commissioner.

In cross – examination, PW3 said that according to Exhibit P3, the seller of the house was Meda Kosemu. That he knows the defendant because they were involved in money lending business. That, currently the house is occupied by the defendant as a trespasser.

Meda Kosemu Kilemo was PW4. She said that she is married to Jonathan Ezekiel Barampanze and that they sold the house to plaintiff not the defendant. That they only loaned an amount of money from him and pledge their car as security. PW4 stated that she did not hand over the house to Ruganisa (defendant) but she had left the house to her sister in law while she was in Morogoro to attend some business. Her husband was in Mozambique. It was at this time when the defendant invaded and occupied the house in dispute. PW4 told the court that the defendant threatened her that he was married to the then President Magufuli's sister so she could not go anywhere to report. So she left him in the house and went to stay in Marangu. She said that when her husband (PW3) returned from Mozambique, he was put under police custody and then testified that he has sold the house to the plaintiff. That they later went to the office of *Serikali ya Mtaa* to make clarifications. The defendant stated that he gave a loan to her husband (PW3). Pw4 stated that they never signed a contract to sell a house with the defendant and never received any amount in relation to the purchase of the house from defendant. The only agreement signed with the defendant was for a loan amounting to 10 million and interest of 5 million hence the total of 15 million shillings.

On cross examination, PW4 said that they did not inform the plaintiff about their dispute with the defendant because the dispute related to a car not a house.



PW5 Hamidu Salehe Ngibweni, told the court that he is a driver. That PW3 and PW4 were his neighbours and they told him they were selling the house so he took Rehema (Plaintiff). He said that, Barampanze's wife said she had a loan with ACB. So he witnessed the recovery of the title from the Bank which was made by the plaintiff. That throughout the process of selling the house he was a Dalali and that the sale was conducted through an agreement drafted by a lawyer. On cross examination, PW5 stated that he was informed that the house was being sold in 2016 and that he has never heard of the dispute over the area. After that the plaintiff closed her case.

The defendant has two witnesses, himself and another one witness namely Joanita Florence Mutayoba who testified as DW1. She stated that she is an Advocate and that she has come before the Court to testify on the sale agreement which she has prepared and attested. DW1 said that the dispute is on the house which was the property of Jonathan Barampanze and his wife Meda Kosemu which they sold to Theonest Ruganisa (defendant), the house was sold at Tshs. 36,000,000/=. DW1 identified the sale agreement and stated that Mr. Jonathan and his wife Meda and Mr. Ruganisa came at her office and asked her to prepare a sale agreement on the sale of the house. The purchaser had with him the papers from Serikali ya Mtaa which shows that Jonathan Barampanze and his wife were the legal owners of the purchased house. DW1 said that, she sat with the purchaser and seller and prepared a sale agreement in accordance with law.

On cross-examination, DW1 said that in order for the sale agreement to be complete, it involves the property, money and transfer of ownership. When she was shown the sale agreement, DW1 read it

that the money agreed is Tshs 36,000,000/=, and they will be paid by the buyer on 31/12/2015.

She stated that after drafting a sale agreement, the parties told her they are going at CRDB Bank, and they came back and show her the proof, they had cash money, and they signed the sale agreement after they came back from the bank. She said further that she have never seen the house which was being sold but knew it from the documents from Serikali ya Mtaa. That in the sale agreement she attached a letter from a ten cell leader confirming the owner of the house, identification letter from Mwenyekiti wa Mtaa to Ward Executive Officer and a letter form Ward Executive Officer to Kinondoni Municipal. She said that these documents and the cash money she saw satisfied her that the money was paid. DW1 stated further that there are other agreements which she has prepared for Ruganisa (defendant) as he was her client. She said that she saw the original sale agreement and she don't know if the original one was at the bank.

The defendant Theonest Byarugaba Ruganisa testified as DW2. He said that in this dispute, Bi, Rehema (the plaintiff) has been sold a house which was already sold to him. The house in dispute is at Ilala District, Kinyerezi Ward, Kibaga Street. DW2 stated that he bought the disputed house from Jonathan Ezekiel Barampanze and his wife Meda Kosemu Kilemo. That he bought it on 31/12/2015 at a purchase price of Tshs. 36,700,000/=. He identified the sale agreement which he proceed to tender it as Exhibit D1. He said that he received also a letter of original sale between Ezekiel Barampanze buying the house from Salum Mohamed Simbe in 2010. DW2 said that before the house purchase transactions, he never knew Ezekiel Barampanze except for his wife. He vehemently denied to be involved

into any loan transactions with Jonathan Ezekiel Barampanze. He said he knew the plaintiff after they were called at the Police in November 2016 about this dispute.

DW2 stated that after buying the house in dispute on 31/12/2015, the same was handed over to him. Jonathan Barampanze was not around but his wife Meda Kosemu was and continue to live in the house until 29/11/2016 when the house was completely handed over to DW2 after Meda Kosemu has vacated. DW2 said that he was not in a hurry to move in to the house as Meda Kosemu was still living there, while processing for the transfer of ownership. DW2 told the Court that before buying the house in dispute he conducted a due diligence to satisfy himself on the ownership of the house. That he went to a ten cell leader of the area where the disputed house was located. He was given a letter to take to the street local government – Serikali ya Mtaa, there he was again given an identification letter which he took to the advocate. The letter from Serikali ya Mtaa was received for identification purpose as exhibit. ID-1.

DW2 said further that, on 04/1/2016, he went to Serikali ya Mtaa with Meda Kosemu. There he got informed that the house was secured for a loan at Access Bank, so he went to Access Bank Kariakoo Branch with Meda Kosemu. There, the Loan Manager confirmed that the house was secured for a loan (guaranteed for a loan) and that the sale agreement was in the Bank's custody. The loan at Access Bank as per the Bank statement was Tshs. 9,821,000/= So, he went to his Bank where he withdrew Tshs. 10,000,000/= and deposited the amount to Access Bank.

He produced the deposit form to Access Bank for identification purpose as Exhibit "ID2". DW2 said that after that, he demanded to be refunded with the money he paid to Access Bank for release of sale agreement, but he was not refunded. That after receiving the sale agreement, he started to process for transfer of ownership of the house. That he went at Serikali ya Mtaa to make that process. When he arrived there, he was told by the Chairman that, Meda Kosemu has come at the office and requested time (one month) to refund the money which the defendant paid to settle their loan at the Bank and also that she has communicated with her husband and they have agreed to refund the money the defendant has used to purchase the disputed house. Therefore, the local government street Chairman refused to sign the sale documents until the parties have settled the dispute. DW2 tendered the minutes of a meeting of 01/10/2016 of settling dispute as Exhibit. D2.

DW2 said that on 22/6/2016, Jonathan Barampanze and his wife wrote a letter to him requesting to be given one month to refund the money he owe them and vacate the disputed house.

On 30/11/2016, DW2 went to Police Post Stakishari where the plaintiff has filed a suit against Ezekiel Barampanze. He gave his statement that he bought the house from Jonathan Barampanze and his wife. On cross examination, DW2 said that the disputed house is at Mhanga, CCM Street near Mhanga Secondary. That he has proof of having bought the said house by Sale Agreement. The proof is the Title which was at Access Bank. That the disputed house was bought on 31/12/2015 and DW2 introduced himself at Serikali ya Mtaa on 12/7/2016. Later on DW2 said he went to identify himself at Serikali ya Mtaa on 04/1/2016 as the purchaser of the house.

He said that there is no any written document which shows that he exchanged/paid money Tshs. 36 Million to Barampanze. He stated further that he had received certificate of ownership (Hati ya Mauziano) on 05/1/2016 after the sale agreement was signed on 31/12/2015. That on 04/1/2016 he went for a search and found that the house was guaranteed for a loan, Tshs.9,821,000/= . DW2 said that there is no any evidence that he was the one who paid Tshs. 9,821,000/= at the Access Bank. That when they went to the loan manager at Access Bank, DW2 has already paid Tshs.36, 700,000/= for the house. The defendant closed his case.

The parties through their counsels filed their final submissions. Mr.Walter Godluck, after narrating the brief background of the plaintiff's case, answering on the first issue as to who is the rightful owner of the disputed property, he stated that each party claim to have a good title to the property but one with supporting evidence and the other with none. He said that the plaintiff have been able to show this Court that she had a good title to the property with the transfer deeds, proof of payments, supporting witness from the owners of the property to the local government authority.

Mr. Godluck submitted that, as the matter stands, the crucial issue is whether there is admissible evidence of a sale agreement relating to the property in dispute between the parties. He said that the defendant failed to show proof of payment. Hence the valid contract before this court with regards to the ownership of property in dispute remained with the plaintiff. He relied on the case **of Hashim Omari Likingwa vs Mohamed Mtondo, Shaha Said Mamwambe**, Land Appeal No. 16 of 2018, High Court Mtwara(unreported).

He also cited the case of **Millan Richard vs Ayub Bakari Hoza** (1992) TLR 385 where Court of Appeal emphasized that having the sale agreement itself, even for five years is not enough prove that the title of ownership has been transferred from the seller to the buyer. He avers that the defendant had a duty as plaintiff did, to prove that his contract existed before that of the plaintiff and that there was a valid contract, and that the contract price was paid in full, hence the title was passed from Mr. & Mrs Barampanze to him. He thus concluded that the plaintiff is the rightful owner of the disputed property and the defendant has trespassed the same.

The final submissions on behalf of the defendant was by Mr. Emmanuel Machibya. He narrated briefly the evidence from both sides. He said further that, in his observation, PW3 and PW4 have sold the house in dispute to the defendant first then later sold to the plaintiff herein. He said that it seems that the plaintiff forced PW3 to swear affidavit when he was arrested by the Police to renounce the sale agreement signed between the defendant, PW3 and PW4. He submitted that the plaintiff's testimonies are based on the hearsay evidence which is not admissible under section 62(1) of the Evidence Act.

Mr. Godluck argued that the plaintiff ought to have sued PW3 and PW4 as a necessary party in this suit due to the facts that, at the time when this suit was instituted, the defendant in his amended WSD stated that PW3 and PW4 were the ones who sold him the house. He pointed that failure to join a person is fatal and such a failure vitiates the propriety of a suit before any court. If the plaintiff had no information about the necessity of joining PW3 and PW4, it could have been different but she had information that there is a necessary in dispute and she chose not to

pjoin them. The counsel for defendant cited the case of **Onesphory R. Mfuri and 5 others vs. Hamida Ramadhani Marara** Civil Appeal No. 136 of 2014 High Court (Unreported). He submitted further the plaintiff has never been in occupation of the disputed house while the defendant has been in occupation until to date, hence the defendant is not the trespasser, but the lawful owner of the house in dispute. He concluded by praying that the defendant be declared the lawful owner of the disputed house and the suit be dismissed with costs.

After hearing of the testimonies and final submissions from both sides of the suit, the court has to determine this matter basing on the issues framed which I have already quoted herein above. However, before focusing on the framed issues, I will have first to determine on the issue of non-joinder of the necessary parties which was raised suo motu by this court during the proceedings of the suit and later it has been raised in final submissions by the counsel for the defendant.

On 05/6/2020, the Court directed the parties through their advocates to address the same on whether the failure to join the sellers of the disputed house Mr. Jonathan E. Barampanze and his wife Meda Kosemu amounted to non-joinder of a necessary party and the consequences thereof.

Mr. Godluck for the plaintiff addressed the Court that, according to Order 1 Rule 3 of the Civil Procedure Code Cap 33 R.E 2019, a person may be joined as a defendant. The test is that there must be a right to the same relief against such party in respect of the matter involved in the proceedings in question and it should be possible to pass an effective decree in absence of such party.

Mr. Godluck told the Court that non-joinder or misjoinder is not fatal to the suit (Citing Order 1 Rule 9 of the Civil Procedure Code) and that the plaintiff can not be compelled to sue a person against whom he does not claim any relief. He stated that the plaintiff believe that they have sued the relevant party in accordance with the reliefs sought.

On his side, Mr. Machibya for the defendant replied that, it is very important to join Jonathan Barampanze so that he can prove before the Court whether he had a good title over the same property and to whom did the title pass to, whether to the plaintiff or defendant, so Jonathan is a necessary party. He stated further that by joining Jonathan, the Court will be able to address the question of ownership over the property which is at the center of this suit. Failure to join Jonathan Barampanze amounts to a non-joinder of a necessary party which renders the pleadings defective. The defective pleading is fatal since the Court will issue a decree which is also defective. He cited the case of **Farida Mbaraka & Another vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006, CAT at Dar es Salaam (Unreported) at pg10.

After hearing both parties, my predecessor Hon.Kalunde, J, decided that upon going through the pleadings and submissions of the Court, this Court finds that the non-joinder is not fatal as it does not affect the determination of the rights of the parties. He ruled that the suit will proceed to full hearing and further reasons for the decision to be given during the judgment. Following on the footsteps of my predecessor, as he has already made a finding that the non-joinder is not fatal as it does not affect the determination of the rights of the parties; Order 1, Rule 10(2) of the Civil Procedure Code provides thus;



*“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 questions involved in the suit, be added.”*

By this Rule, it is the discretion of the Court to order rejoiner of the necessary party or struck out the name of the party improperly joined and that will be on terms which may appear to the Court to be just.

The principle set by Order 1 of the Civil Procedure Code has been reiterated in the numerous land mark cases among them the case of **Tang Gas Distributors Ltd vs. Mohamed Salim Said & 2 Others**, Civil Application for Revision No.68 of 2011 CAT DSM (Unreported).

In the cited case the Rules of joining a NECESSARY PARTY were laid down as follows;

- a) In a representative suit, he wants to challenge the assented authority of a plaintiff to represent him; or*
- b) His proprietary rights are directly affected by the proceedings and to avoid 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 action for specific performance of contracts, third parties have an interest in the question of the manner in which the contracts should be performed, and*

*d) On 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.*

In the same referred case, the Court of Appeal went on to refer the case of **DEPARTED ASIANS PROPERTY CUSTODIAN BOARD VS. JAFFER BROTHERS LTD** (1999) EA 55 (SCU), where among others it was observed that;

*".....Either it has to be shown that orders, which the plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the Court in that suit....."*

Having gone through the statutory law and the authority referred regarding the issue in my hand, I am convinced that the present case does not fall within circumstances herein above provided. In our case both the plaintiff and the defendant claim ownership of the suit property which they both allege to have been purchased from Jonathan E.Barampanze and his wife Meda Kosemu. In the proceedings, Jonathan and Meda Kosemu has testified as PW3 and PW4 respectively claiming to have sold the suit property to the plaintiff.

Therefore, since PW3 and PW4 gave their testimony by which the defendant had a chance of cross -examination, I am of the view that it was not necessary to join them as the party to the suit and in addition, the plaintiff chose not to join them. Furthermore, Order 1 Rule 9 of the Civil Procedure Code (Supra) provides that a suit shall not be defeated by a reason of the misjoinder or non -joinder of the parties, and the Court

may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

Therefore, as correctly put by my predecessor, the non-joinder of PW3 and PW4 is not fatal and does not vitiate the proceedings and eventually judgment on this matter.

Having decided that, I will now focus on the determination of the framed issues during the trial as follows;

**i) As between the parties, who is the rightful owner of the disputed property?**

In this suit, the plaintiff has sued the defendant over the disputed property claiming ownership over the same after having bought the property from Jonathan Ezekiel Barampanze – PW3 and his wife Meda Kosemu – PW4. On the other hand, the defendant also claims ownership over the same property, claiming to have bought it from the same persons ie. PW3 and his wife, PW4.

According to the available evidence, plaintiff who testified as PW4, claimed to have purchased the house from PW3 and PW4 on 10/11/2016 whereas the process of payment was concluded on 11/11/2016. That the sale agreement to effect the purchase was attested by the ten cell leader on 10/11/2016.

The plaintiff produced Exhibit P2 which is a certified copy of the certificate of Sale Agreement between the original owner of the suit land one Hanssy A.Mbuguni, and the then buyer Jonathan E. Barampanze which was conducted on 20/08/2010. Exhibit P2 was the document which

was issued to the plaintiff by PW3 and PW4 after completion of the sale of suit property.

The plaintiff then produced Exhibit P6 which is a sale agreement of the suit property between her and PW3 and witnessed by PW4. The agreement was conducted before a ten cell leader No. 6 of Kinyerezi Ward. It was conducted on 11/11/2016. The plaintiff, also produced Exhibit P1, a sale agreement (certified copy) conducted on 11/11/2016, with the pictures of the sellers and purchaser attached. This agreement was entered before the advocate (Commissioner for Oaths) and it was on the same date as the one before the ten cell leader i.e. 11/11/2016.

On his side, the defendant produced also a sale agreement as exhibit D1 purported to be entered on 31/12/2015 between the sellers, PW3 and PW4 and the purchaser, the defendant. The agreement is the original one and is stamped.

By these documentary evidence from the plaintiff and defendant, it shows that the defendant was the first to occupy the disputed property. Despite the fact that this sale agreement Exhibit D1, is the only document which shows and support the claims of the defendant that he bought the suit property, it is the original one and was not objected by the plaintiff as to its authenticity or legality.

Following both parties tendering the documents proving the purchase of the suit property, the issue shifts on the sale agreements and who has a good title between the plaintiff and the defendant.

The defendant's case is that the principle of first in last out should be applied since the defendant claims to by the disputed property on 31/12/2015 while the plaintiff claims to buy the same on 11/11/2016. I

have gathered that the dispute house was on unsurveyed area so there is no letter of offer or certificate of ownership. The available proof of ownership from the original owner is exhibit P2, a certified copy titled HATI YA KUUZIANA SHAMBA/NYUMBA from the original owner to Barampanze PW3 which he later pass on to the plaintiff.

Although the defendant in his evidence stated before the court stated that after payment of the purchase price and payment of the amount by which the house was mortgaged at the Access Bank, he was handed the original, handwritten Sale Agreement between Ezekie Barampanze (PW3) and Salum Mohamed Simbe in 2010, he could not tender the same document before the court.

As previously stated, in the circumstances where there are two sale agreements, the important question is who has the good title of ownership. Despite the oral and documentary evidence produced by the plaintiff, the defendant also has produced exhibit D2 the sale agreement which was attested by an advocate and the same advocate testified as DW1, stating that the defendant, PW3 and PW4 came before her on 31/12/2015 where she drafted the sale agreement for the purchase of the house in dispute. She witnessed the payment of money on the same date and the parties signed before her. There was evidence from the plaintiff that, PW3 and PW4 have never sold the house to the defendant and the only relationship they had was the one of money lending where the defendant has lent Tshs 15,000,000/= to the defendant, the claims which were vehemently denied by the defendant. As PW3 and PW4 could not produce evidence to prove that they had money lending relationship with the defendant, the claim of the defendant stands unchallenged.

The plaintiff did not challenge the authenticity and signatures of the exhibit D2 which shows the pictures and signatures of PW3 and PW4 along side with the one of the defendant. Furthermore, there was issue of the access of the defendant to the disputed house. It is on the evidence that the defendant has accessed the house in 2016 after conclusion of the payment where he left one room for Meda Kosemu (PW4). When testifying, PW4 stated that she did not know how the defendant got an access to the disputed house. I find that the defendant has accessed the land after the agreement between him, PW3 and PW4.

In his final submission, the counsel for the plaintiff has argued that each party claim to have a good title to the property but one with supporting evidence and the other none. That plaintiff have been able to show this court that she had a good title with transfer deeds, proof of payments, and supporting witness. From this I agree with the counsel, however, there is also evidence from the defendant of the sale agreement purported to be signed by PW3 and PW4 whose authenticity was not refuted. This shows that the defendant was the first to acquire the disputed property before it was sold to the plaintiff.

On the admissibility of a sale agreement, the counsel for the plaintiff pointed that for the same to stand, i.e. the proof that there was a valid contract between the parties, it is more than showing that the contract was signed but it should reflect that there existed a valid and binding contract. The counsel argued that, for the defendant failure to show proof of payment, he failed to prove that he met with the minds of seller and mutually agreed on whether the seller was ready to sell the property.

Second, the counsel pointed that, the defendant had a duty to the Court to prove that he performed his obligations or had legitimate reasons not to perform them. He said that the evidence on record shows that the defendant has failed to prove that he performed his obligations hence the valid contract before this court with regards to the ownership of the property in dispute remained with the plaintiff. To emphasize this the counsel for plaintiff cited the case of **Millan Richard vs. Ayub Bakari Hoza** (1992) TLR 385, where the Court of Appeal held that failure to pay the balance of the price within the two months stipulated in the agreement constituted breach.

In due respect to the counsel for the plaintiff, I differ with him on the contractual obligations or non-performance of them by the defendant. The evidence on record does not show how the defendant performed or failed to perform the contractual obligations. There is a sale agreement between the defendant and PW3 and PW4 which was tendered without objection from the plaintiff as Exhibit D1. The agreement which was entered on 31/12/2015 shows that the agreed sum was Tshs. 36,700,000/= as purchasing price. That by putting their signatures, it will be the proof that the seller has sold the house to the purchaser. Furthermore, there was no evidence from PW3 and PW4 that the defendant has failed to fulfil his contractual obligations or failed to pay the agreed sum. PW3 and PW4 denied to have ever sold the disputed house to the defendant. Therefore, the issue of contractual obligations is misplaced here. I could have understood if the learned counsel could have raised the issue of authenticity of the sale agreement (Exhibit D1) or the signatures of the sellers PW3 and PW4. However, that was not raised and the document was admitted in court as defendant's evidence.

By this analysis, I find that the defendant has a good title over the disputed property proved by the sale agreement (exhibit D1) which shows that he was the first to purchase and acquire the disputed house on 31/12/2015 whereas the plaintiff claims to have bought the same on 11/11/2016. From that, this issue is answered in affirmative that this court finds that the defendant is the lawful owner of the disputed property.

***ii) Whether the defendant has trespassed onto the plaintiff's property?***

Having found that the defendant has a good title, then, I also find that the sellers PW3 and PW4 had no good title to pass to the plaintiff as the house was already sold to the defendant. By that, the issue on whether the defendant has trespassed the suit property is answered in negative.

***iii) To what reliefs are the parties entitled to?***

And as to this final issue, for the reasons analysed hereinabove, the plaintiff is not entitled to the reliefs prayed in the suit.

Therefore, the judgment is entered for the defendant that he is the rightful owner of the suit property. Subsequently the suit is hereby dismissed with costs. Right of Appeal explained.

It is so ordered.



**A.MSAFIRI  
JUDGE  
05.10.2021**

