

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 169 OF 2021

CAR TRUCK DISTRIBUTORS LIMITED.....APPLICANT

VERSUS

MKB SECURITY COMPANY LIMITED.....1ST RESPONDENT

M/S GSM.....2ND RESPONDENT

R U L I N G

Date of Last Order: 09.05.2022

Date of Ruling: 25.05.2022

T. N. MWENEGOHA J.

The instant case met with two preliminary objections on point of law from the 1st and 2nd defendants jointly to the effect that; -

- 1. The suit is incompetent for failure to join a necessary party.**
- 2. The plaintiff has sued a non-existing person.**

The objections were heard by way of written submissions. Advocate Marcel Constantine Kanoni appeared for the plaintiff, while the defendants enjoyed the legal services of Advocate Jovin M. Ndugi.

Submitting in favour of the 1st objection, Mr. Jovin Ndugi for the defendants, was of the view that, in their joint written statements of defense, the two defendants have expressed clearly that their presence in the suit land is due to the instructions given to them by the owner of the said property, who is M/s GALCO Limited. That, since the cause of

action in the case at hand is trespass to land, the same cannot be fully determined in absence of the actual occupier of the land in question.

Therefore, M/s GALCO Limited, being the occupier and the actual owner of the suit land after purchasing the same from Azania Bank Limited, is a necessary party in this case as she has the proprietary attached to the subject matter of the case. That, because M/s GALCO Limited is directed affected by the proceedings and decision of in this case, it is necessary to join her as a party. Failure to do so, the court cannot pass an effective decree capable of being executed.

He argued that, this has been the position always found in number of cases in our jurisdiction. These include the case of **Tanga Gas Distributors Ltd vs. Mohamed Salim Said and 2 Others, Civil Revision No. 68 of 2011, Court of Appeal of Tanzania(unreported)**. Also, the famous case of **Abdullatif Mohamed Hamis vs. Mehboob Yusufu Osman and Another, Civil Revision No. 6 of 2017, Court of Appeal of Tanzania, (unreported)**.

On the 2nd objection it was argued that, M/s GSM is not a legal entity, it has never been registered anywhere hence it cannot be sued or sue in its own name. That being the case, the plaintiff has sued a wrong party. As observed by Mruma, J. in the case of **Singida Sisal Products & General Supply vs. Rofal General Trading Ltd & 4 others, Commercial Review No. 17 of 2017, High Court of Tanzania Commercial Division, (unreported)**, that, a non-juristic person has no leg to stand, no hands to prosecute, no eyes to see and no mouth to speak on her own or on behalf of any person before any court of law.

Replying for the plaintiff on the 1st objection, Advocate Kanoni relied on **Order I Rule 9 of the Civil Procedure Code Cap 33 R. E. 2019**, which says; -

"A suit shall not be defeated by reason of the misjoinder or non-joinder of 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."

He insisted that, the fact of non-joinder of a necessary party should not prevent the course of justice to prevail. He also cited the case of **Leonard Peter vs. Joseph Mabao and 2 Others, Land Case No. 4 of 2020, High Court of Tanzania at Mwanza**, where Hon. Judge Ismail cited in approval the case of **Benares Bank Limited versus Bhagwandas, AIR (1947) ALL 18.**

In the said case, two tests were set for a person to be a necessary party that; first, there must be right to some relief against such party in respect of the matter involved in the proceedings in question. Secondly, it should not be possible to pass an effective decree in the absence of such party. In the opinion of the plaintiff's counsel, M/s GALCO has not met these conditions for her to be a necessary party in the case at hand. He insisted that, the two defendants are the ones who trespassed into the disputed land.

As for the 2nd objection, it was simply argued by the counsel for the plaintiff that, the same is not on point of law as per the requirements given in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A.** Also, the case of **Gasper Peter vs. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017, Court of Appeal of Tanzania at Mtwara.**

I have given the submissions by the counsels for the parties here in above the consideration they deserve. The issue that needs my attention to determine is whether the two objections have merits or not.

My discussion will start with the 2nd objection, that, the plaintiff has sued a wrong party (the 2nd defendant). The arguments were that, M/s GSM, the 2nd defendant here in above is a not a legal entity and it has never been. The plaintiff's counsel on the other hand has insisted that, this is a factual issue hence it doesn't qualify to be a preliminary objection. It is well settled that, what generates an objection is a point of law and not otherwise, see **Mukisa Biscuits (supra)**. If it is a fact, then it can be ascertained in the cause of deciding the matter at hand, see **Gasper Peter (supra)**, citing in approval the case of **Karata Ernest and Others versus Attorney General, Civil Revision No. 10 of 2010, Court of Appeal of Tanzania, (unreported)**. On this point, I agree with Mr. Kanoni that, this objection has to fail owing to the reasons that it is on factual issue. The same is overruled.

Back to the 1st objection of non-joinder of a necessary party. I agree with the plaintiff's counsel on the reliance of **Order I rule 9 of the Civil Procedure Code (supra)**, that non-joinder of mis-joinder of parties in a case is not fatal. However, under Rule 10(2) of Order I of the Civil Procedure Code, Cap 33 R. E. 2019, the court has powers to order an amendment of pleadings to add or remove a party be a plaintiff or defendant as the case may be if it sees necessary to do so. I will reproduce the said provisions as here under; -

(2) "The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the

name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

In the case at hand, based on the joint Written Statement of Defense by the 1st and 2nd defendants, on paragraphs 3 & 4 respectively, I'm of the view that, M/s GALCO Limited is a necessary party to this case. The two defendants here in above have just been contracted to secure the area, they are not occupiers or owners. Since the matter at hand involves the question of ownership of the disputed property, then it is important for the purported to be part of the suit. Without her, no effective decree can be passed by this court.

It seems to me that the plaintiff is unwilling to add the said person for reasons only known to her. However, I find it is necessary to add him as a necessary party to this case instead of deciding otherwise. I refer to the case of **Tanga Gas Distributors Ltd versus Mohamed Salim Said and 2 Others**. The 1st objection is here by sustained.

In the event, I proceed to struck out this suit with costs.




T. N. MWENEGOHA
JUDGE
25/05/2022