

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 271 OF 2022

CHINESE- TANZANIA JOINT SHIPPING COMPANY PLAINTIFF

VERSUS

RICHARD GORDON MUSIKA (As an administrator

of the estates of the late

Edna Nsambe Thom Mwakabumbe) **1ST DEFENDANT**

ANGELA MWAIPIANA

(As an administratrix of the estates of the late

Anna Asajile Mwaipiana) **2ND DEFENDANT**

Moses Maganga **3RD DEFENDANT**

RULING

Date of Last Order: 01.03.2023

Date of Ruling: 16.03.2023

A. MSAFIRI, J.

The Plaintiff in this suit is a partnership whose shareholders are the Governments of Peoples' Republic of China and the United Republic of Tanzania with equal shares registered under the Business Names (Registration) Cap 213 R.E. 2002. *Alle-*

The plaintiff is jointly and severally claiming against the defendants for the declaration that the plaintiff is a lawful owner of a parcel of land measuring 1.512 hectares which is registered as farm 1736 located at Mbezi Juu area at Kinondoni Municipality Dar es salaam City, permanent injunction against the defendants from trespassing and or interfering with ownership, possession and occupation of the said land owned by the plaintiff, demolition of all structures erected by the defendants in the plaintiff's parcel of land, damages and costs of the suit.

On 14.11.2022 when the 1st defendant was filing his WSD, he raised a point of preliminary objection to the effect that;

That the suit is bad in law for failure to join the necessary party.

On the same date when the 2nd defendant filed her WSD also raised a preliminary point of objection that;

That the suit is hopeless bad in law as the plaintiff has no cause of action against the respondent.

The preliminary objections were disposed of orally whereas the plaintiff was represented by Mr George Sang'udi, learned Advocate, the 1st and 3rd defendants were represented by Mr. Francis Munuo, learned Advocate, whereas the 2nd defendant appeared in person. *Adls -*

Mr Francis Munuo the learned Advocate contended that the plaintiff did not join the Commissioner for Land as a necessary party, that for that reason this suit is incompetent before this Court, hence that the same be struck out with costs.

To bolster his argument, he cited the case of **Jued Homes Ltd vs Samuel Zabdiel Tarimo & Another**, Land Case No. 210 of 2020 HC DSM at page 4. He contended that the cited case established an exception to the general rule set under Order 1 rule 9 of the Civil Procedure Code, Cap 33 [R.E. 2019] (the CPC) that the suit shall not be defeated by reason of non-joinder or misjoinder of parties.

He further argued that the plaintiff's claim under paragraph 9(d) of the plaint, are directed to the Commissioner for Land, who is responsible in planning of the suit property and registration of the same. According to Mr Munuo, the plaintiff claims the existence of fraud in the planning of suit property and that there are documents which were issued fraudulently.

He averred that, if the documents were fraudulently issued, the responsible authority to answer on the authenticity of the alleged fraudulently issued documents is the Commissioner for Land who has to be joined as a necessary party.

Adls -

He urged this Court to strike out this suit with costs because the failure to join the Commissioner for Land is the gross mistake which renders this case being premature.

On the part of the 2nd defendant, she appeared unrepresented. Submitting to her raised preliminary objection, she contended that she is not Administratrix of the estate of the late Anna Asajile Mwaipiana as she was sued, but the Administratrix of the aforesaid estate is Erica Mwaipiana.

To bolster the above statement, she attached a copy of letter of appointment of Erica Mwaipiana as the Administratrix of Estates of the late Anna Asajile Mwaipiana which is part of the pleadings in Court record as **Annexure AM -1**. She asserted that for that reason, the plaintiff has no cause of action against the 2nd defendant, hence this suit be struck out.

Mr Sang'udi learned Advocate for the plaintiff, responding to the preliminary objection, contended that the law is very clear under Order 1 Rule 9 of the CPC that the case cannot be defeated because of an error or non-joinder of the party.

He further submitted that the plaintiff has no any valid claim against the Commissioner for Land but, against the current defendants. He cited *Atle*.

the case of **Abdulatif Mohamed Hamis vs Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017 CAT DSM at page 15, whereas the Court of Appeal defined the necessary party to a suit and tests to consider. First; that the plaintiff must have a valid claim against the non-joinder party and Second; the Court must not be in a position of an effective decree in absence of such a party.

He further stated that the claims of fraud against the 1st defendant at paragraph 9(d) of the Plaint, are directed to the 1st defendant and not the Commissioner for Land. He argued that, it is upon the plaintiff to prove the case against the sued defendants, and that the plaintiff is ready to prove that in absence of the Commissioner for Land.

The Counsel for the plaintiff argued that the Commissioner for Land is not necessary to this case, and that if this Court finds that the Commissioner for Land is necessary to this suit, the proper remedy is for the same to be added and not to struck out the case. He referred the case of **Juliana Francis Mkwabi vs Laurent Chimwaga**, Civil Appeal No. 531 of 2020 CAT at Dodoma at page 9 and 11.

He prayed that the Court to order for joinder of a party and not striking out the case. He urged the Court to overrule the preliminary objection. *Aelle*

Regarding to the preliminary objection raised by the 2nd defendant, the plaintiff concedes and requested for alteration of the Plaint as per Order VI Rule 17 of the CPC.

He also cited the case of **Peter Wegesa vs North Mara Mine Ltd**, Civil Appeal No. 49 of 2020 CAT at page 11, 12.

In rejoinder, Mr Munuo and the 2nd defendant reiterated what was submitted in their submission in chief.

After a careful consideration of the parties' submissions, it appears that the plaintiff claims ownership over the suit land, which according to him, is the farm No. 1737, which was illegally subdivided to other three defendants by creating other registration as per paragraphs 5 and 9 of the plaint.

In that regard, the presence in the present suit, of the parties responsible in subdividing the said farm No. 1737 to the other three defendants is of fundamental importance, failure of which the decree of this Court would not be effected as it was ruled in the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuf Osman & Another, (supra)** which was referred to this Court by the counsel for the plaintiff. *Alle*.

In the Case of **Ilala Municipal Council vs Sylvester J. Mwambije**, Civil Appeal No. 155 of 2015, the Court of Appeal made a distinction between *misjoinder* and *non-joinder* of parties covered under Order 1 Rule 9 of the CPC. It was among other things held that;

*"...we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the **absence of necessary parties**, the court may **fail to deal with the suit**, as it **shall**, eventually, **not be able to pass an effective decree**. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff".*
(Emphasis added)

The Court of Appeal further cited with approval the decision in the case of **Tang Gas Distributors Ltd vs Mohamed Salim Said and Two Others**, Revision No. 6 of 2011 where it was held that;


"...it is now an accepted principle of law (see MULLA'S treatise (supra at p 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore, is fatal (MULLA at p.1020)"

In the instant case, the planning, subdivision and registration of the suit land was done by authority/authorities that are not joined in the case with the three defendants herein, hence their absence would render the decree ineffectual. *Adelle*

For that reason, I find that the preliminary objection raised by the 1st defendant have merit and I sustain it.

Regarding to the preliminary objection raised by the 2nd defendant, the plaintiff has conceded to the same. I think there is no need to waste much time and energy to discuss the same. Again, I find this preliminary objection to have merit and I sustain it.

In the upshot, I am convinced that both preliminary objections have merit. I hereby struck out this suit with no order for costs.

 *Allleaf*
A. MSAFIRI
JUDGE
16/03/2023