

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.192 OF 2023

(Arising from Land Case No.90 of 2023)

AGRO FRESH LIMITED APPLICANT

VERSUS

CRDB BANK PLC 1ST RESPONDENT

ADILI AUCTION MART LIMITED 2ND RESPONDENT

RULING

Date of the last order: 04.05.2023

Date of the Ruling: 10.05.2023

A.Z.MGEYEKWA, J

The applicants' application is brought under a certificate of urgency. The same is made under Order XXXVII Rule 2 (1) and sections 68 (e) of Civil Procedure Code Cap.33 [R.E 2019]. The application was accompanied by an affidavit sworn by Munawar Kassim Abduhazza, the Principal Office of the applicant. Opposing the application. The 1st respondent has demonstrated his resistance by filing a counter affidavit deponed by sworn by Mgisha Mboneko, Principal Officer of the 1st respondent.

The Application has encountered an impediment, the counsel for the respondent on 24th April 2023 raised three preliminary objections. The objections are to the effect that: -

1. *The applicant has no locus to sue on Plot No. 307 with CT No. DSMT 1000286 Mikocheni in Kinondodni Municipality Dar es Salaam.*
2. *The application is defective for non-joinder of necessary parties.*
3. *The affidavit in support of the application is defective for containing arguments, prayers, and conclusions.*

When the matter was called for hearing on 4th May 2023, the applicant enjoyed the legal service of Mr. Alex Balomi, learned counsel and the 1st respondent enlisted the legal service of Pascal Kamala, learned counsel.

Submitting on the first objection, Mr. Kamala was brief and focused, he submitted that the applicant has no *locus standi* to sue on Plot No 307 under CT DSMT1000286. He contended that looking at paragraphs 5 and 8 of of Kassim's affidavit, he stated that the mortgaged property belonged to a third party. He went on to state that the applicant is AGRO Fresh Ltd while the third party and mortgagor is Juma Mbarouk Ally. Mr. Kamala argued that the applicant in paragraph 10 disclosed that the notice was issued to Paul Meeda who is not the registered mortgagor and in paragraph 12 of the affidavit. He added that the applicant has disclosed

that Juma Ally is the mortgagor but he passed away in 2022 and no any administrator has been appointed to date.

Mr. Kamala continued to argue that on the premises, the applicant has not disclosed any interest in the suit property and had not disclosed how he is associated with the said property and they did not attach a death certificate. In his view, the correct person to sue and protect the interest of the deceased is the legal representative of the deceased. In the premises, he submitted that the applicant has no locus stand to sue on behalf of the mortgagor. Fortifying his submission, he cited the cases of **Petro Zabron Sinda & Another v Zabron Mwita**, Civil Case No. 176 of 2017 HC, and **Lujuna Shubi Balonzi v Registered Trustee of CCM** (1986) TLR 203. He insisted that the applicant failed to demonstrate the locus stand to bring the instant application hence the application be dismissed.

On the second objection, Mr. Kamala was very brief and straight to the point. He contended that Juma Mbarouk Ally is the registered owner of the suit property thus non-joinder makes the application incompetent before this court since the interested party.

As to the third objection; Mr. Kamala contended that paragraph 4 the last sentence of the affidavit contains a conclusion, whereas the applicant has established a *prima facie* case. He submitted that Order XIX Rule 1 of the

Civil Procedure Code Cap.33 [R.E 2019] requires the affidavit to be confined to the fact only and not contain arguments, conclusions, or prayers. The learned counsel for the respondents went on to submit that paragraph 6 of the affidavit contains prayers and paragraphs 8, 10,14, 21, and 22 of the affidavit contain arguments and conclusions.

Mr. Kamala did not end there, continued to pinpoint all offensives paragraphs; paragraph 11 of the applicant's affidavit starts with a conclusion, and paragraphs 12 and 16 of the applicant's affidavit contain hearsay since the applicant states that the 1st respondent was well informed by the applicant that the mortgagor passed away while there is no any death certificate to certify his allegation. He went on to submit that all these paragraphs should be expunged from the affidavit and the remaining paragraphs have no substance, thus, he invited this Court to dismiss the entire application for being defective with costs. To bolster his contention, Mr. Kamala cited the decisions of the Court of Appeal **Jacqueline N. Mengi & 3 others v Abdiel Reginard Mengi & 5 others**, Civil Application No.332/01 of 2021 whereas the Court of Appeal of Tanzania.

Weighing in for the applicant was Mr. Balomi who began combining the 1st and 2nd objections and argued them together. He contended that those are mere matter of facts they do not qualify to be an objection and instead

need proof during the course of trial. Referring to Order I of the Civil Procedure Code Cap.33, the learned counsel for the applicant argued that the consequence of misjoinder or non-joinder cannot defeat the suit but it renders the suit liable to striking out. He stressed that it is the Plaintiff who chooses whom to sue. Therefore, he maintained the concept of *locus standi* that this context is misconceived, the Plaintiff executed the third-party mortgage in favour of the first respondent and thus the Plaintiff has a direct interest in the subject matter.

The learned counsel for the applicant further contended that the issue whether the registered owner of the suit property passed away or not is a matter of fact, hence the same cannot be raised at this juncture. Mr. Balomi was confident that the instant application is proper before this Court. He added that at any rate, the only remedy is to strike out the matter and not to dismiss it.

With respect to the last limb, the contention is that the affidavit is not defective, hence the objection is misconceived. Mr. Balomi valiantly argued that paragraphs 4, 6, 8, and 10 are matters of facts and are in compliance with Order XIX Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019]. He went on to argue that the affidavit is demonstrating the ingredients in favour of granting an injunctive order, the facts do not contain arguments, prayers, or conclusions.

Mr. Balomi emphasized that a court of justice must conform to the overriding objective for the best interest of justice. The applicant's counsel premised his submission on the provisions of section 34A of the Civil Procedure Code Cap.33 that the court is vested with the power to determine substantive issues contrary to what the respondent's counsel has stated. He distinguished the cited cases for the main reason that they have no similar facts; **Petro Sinda's** case (supra) is not binding and both cited cases **Petro Sinda** and **Jacquile Mengi's** (supra) are distinguishable from the facts at hand.

Submitting in rejoinder, Mr. Kamala reiterated his submission in chief. He insisted that the mortgaged deed was never executed by the applicant rather it was executed by the 1st respondent and Juma Mbarouk Ally, hence the applicant has no any connection with the respondents. To support his submission he referred this Court to annexure A2. He contended that parties are bound by their pleading, the applicant in his affidavit has pleaded that the mortgagor passed away, however, there is no proof such as a certificate of death. Ending, Mr. Kamala beckoned upon this Court to dismiss the instant application.

I have carefully considered the arguments advanced by both counsel for the respondents and the rebuttal from the applicant's advocate. I should state at the outset that the main issue for determination is *whether the*

Application is meritorious.

In determining the points of objection raised, I shall start to address the second objection, that the application is defective for non-joinder of necessary parties. The term necessary part is defined in the Black's Law Dictionary, 8th Edition to mean:

"a party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings."

This Court in the case of **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 9 Others**, Civil Application for Revision No. 68 of 2011 (unreported) when considering circumstances upon which a necessary party ought to be added in a suit stated that: -

"...an intervener, otherwise commonly referred to as a **NECESSARY PARTY**, would be added in a suit under this rule ...even though there is no distinct cause of action against him/ where: -

(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** [Emphasis added].

Applying the above authority in the matter at hand it is clear that a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court.

The question to ask is whether the owner of the suit landed property was a necessary party to be joined in the matter at hand. I have perused the applicant's affidavit and annexures thereto and found that Certificate of Occupancy in respect to Plot No. 307 with CT No. DSMT 1000286 is in the name of Juma Mbarouk Ally. However, as rightly pointed out by Mr. Kamla the owner Juma Mbarouk Ally is pleaded as the owner of the suit landed property in the Application, though, he is not impleaded as a party.

The documents shows that the Mortgaged Deed in question was executed by one Juma Mbarouk Ally and the 1st respondent and as shown in Annexure A2. The applicant's prayers are related to the mortgage deed and facility agreement in respect of the mortgaged property Plot No. 307 with CT No. 1000286 without including the owner of the suit landed property who is the necessary party to the application. Therefore the involvement of the owner is necessary and indispensable in the matter at hand.

Failure to involve the owner of the suit landed property is a contravention that may occasion a miscarriage of justice to the owner of the suit landed property. The discussion on the absence of the necessary party is

featured prominently in **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman & Another** (supra). The Court of Appeal laid the following specific emphasis:

"... There is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order 1 only holds good with respect to the misjoinder and nonjoinder 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.Unfortunately, that was not done and, indeed, the non-joinder of the legal representative in the suit under our consideration is a serious procedural in-exactitude which may, seemingly, breed injustice."

The Superior Court concluded, on page 6 of the judgment as follows:-

*"We, in turn, fully adopt the two tests and, thus, on a parity of reasoning, a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. Thus, **the determination as to who is a necessary party to a suit would vary from case to case** depending on the facts and circumstances of each particular case. **Among the relevant factors for such determination***

include the particulars of the non-joinder party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed." [Emphasis added].

The magnificent holdings by the Court of Appeal, as quoted above, persuade me to hold that the applicant's failure to implead the owner of the suit land to these proceedings constitutes a non-joinder of a party. It was an infraction of the law that rendered this application incompetent.

I am in accord with the submission made by Mr. Balomi that with respect to Order I, Rule 9 of the Civil Procedure Code, Cap. 33 [R. E. 2019], the interests of the parties in a suit shall not be subject to be defeated by reason of the non-joinder of parties. Therefore, the best this Court can do is to order that the owner of the suit's landed property be included in this application.

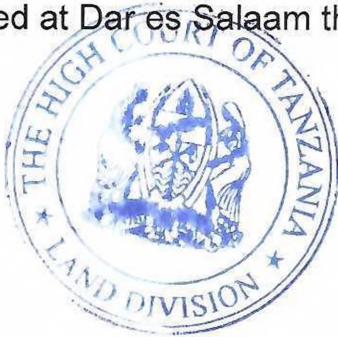
The overriding objective invoked by Mr. Balomi should not be applied as a gateway from the mandatory requirements of the procedural law. See the cases of **Puma Energy (T) Limited v. Diamond Trust Bank (T) Ltd**, CAT - Civil Appeal No. 54 of 2016, and **Mondorosi Village Council & Others v. TBL & Others**, CAT - Civil Appeal No. 66 of 2017 (both unreported). Therefore, the overriding principle is inapplicable in the instant application since the issue of the necessary party is a legal procedural requirement and the same cannot be overlooked.

To this end, I take the position that the owner of the suit landed property is a necessary party to the suit, therefore the second limb of preliminary objection has merit, the same suffice to dispose of the application and, needless to have to belabor on the other objections.

In the event, the second preliminary objection by counsel for the respondents is sustained. I direct that the applicant if he still wishes to pursue his claims, is advised to include all necessary parties. The suit is accordingly struck out with costs.

Order accordingly.

Dated at Dar es Salaam this date 10th May 2023.




A.Z.MGEYEKWA
JUDGE
10.05.2023

Ruling delivered on 10th May 2023 in the presence of Ms. Esther Msangi, learned counsel for the respondents.




A.Z.MGEYEKWA
JUDGE
10.05.2023