

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

LAND CASE NO. 36 OF 2023

**THOMAS BRASH RWEBANGIRA.....1st PLAINTIFF
FLORA CHARLES KATULANGA.....2nd PLAINTIFF
BAKARI GHUMPI ISSA.....3rd PLAINTIFF**

VERSUS

**JULIAN SHAWN KADRI (the Legal Personal
Representative of OMARY KADRI BAKSH)1st DEFENDANT
ADILI AUCTION MART LTD.....2nd DEFENDANT
NASSOR SHABANI HASSANI.....3rd DEFENDANT**

RULING

Date of last Order:06/09/2023

Date of Judgment:04/12/2023

K. D. MHINA, J.

This ruling was triggered by the preliminary objections raised by the defendants in their Written Statements of Defence against the plaintiffs' suit. In the plaint, the plaintiffs seek reliefs from this Court as follows;

- i. A declaration that the execution of a decree of the Visiga Ward Tribunal No. 145 of 2008 through Kibaha District Land and Housing Tribunal Execution Order in Application for Execution No. 176 of 2022 did not extend to the Plaintiffs landed properties on Houses No. 5,7 and 44 located at Matuga Village Kawawa Ward Kibaha District.*

- ii. *A declaration that the said Execution Application No.176 of 2022 was wrongly executed against the plaintiffs who are not parties to the application and that the 2nd and 3^d defendants exceeded the powers of execution of the decree.*
- iii. *An order that the plaintiffs be restored to their occupation of their pieces of land and permanent injunction restraining the defendants and/or their agents from interfering with a peaceful occupation of the plaintiffs' respective pieces of land.*
- iv. *A permanent injunction restraining the 1st defendant and/or his agents from disposing of the said land and or carrying out any development on the said land.*
- v. *Payment of TZS. 850,000,000/= being special damages as pleaded in paragraph 14 above.*
- vi. *Payment of general damages.*
- vii. *Interest on the decretal sum.*
- viii. *Costs of the suit*
- ix. *Any other reliefs the court may deem to grant.*

In response, the defendants confronted the plaint with a notice of a preliminary objection.

In a separate WSD, the 1st defendant raised three grounds, namely;

- i. *That this suit is bad in law and incompetent for failure to implead the necessary parties in likes of Order 1 of the CPC.*
- ii. *That this suit is bad in law and incompetent for having carried the verification which is incurably defective in law contrary to Order VI Rule 15 of the CPC.*
- iii. *That the amended suit is bad in law for having varied the amendment orders of the court dated 15 June 2023 contrary to the law.*

On their side, the 2nd and 3rd defendants raised four grounds of preliminary objection, namely;

- i. The plaintiffs' amended plaint has incorporated new matters without a leave of the court contrary to the Court order dated 15 June 2023.*
- ii. The verification clause is bad in law as it contravenes Order VI Rule 15 (1), (2) and (3) of the CPC.*
- iii. The plaintiffs have no cause of action against both the 2nd and 3rd defendants.*
- iv. The suit is bad as it contravenes Section 6 of the Government Proceedings Act, for failure to implead the Chairman of Zegereni Village in Visiga Ward and failure to issue 90 days mandatory notice.*

From above, it is clear that the 1st, 2nd and 4th grounds of objection filed by the 2nd and 3rd defendants are similar to those raised by the 1st defendant.

As it is trite, this Court had to deal with preliminary objections first because once a court is seized with a preliminary objection, it is first required to determine the objection before going into the merits or the substance of the case or application.

The objections were argued by way of written submissions, which were duly filed by Mr. Ferdinand Makore, learned advocate for the 1st defendant, Mr. Dennis Maringo, learned advocate for the 2nd and 3rd defendants and Mr. Thomas Eustace Rwebangira, also a learned advocate for the plaintiffs.

In supporting the first limb of the objection raised by the 1st defendant, Mr. Makore, in paragraph 2 of the 1st defendant's written statement of

defence, it was clear that the suit property was registered with a certificate of title No. 32345 Land Office No 99749 located at Visiga, Kibaha Township within Coastal Region known as Farm No. 28 measuring 995.45 hectares.

He further submitted that it was necessary to implead the Kibaha Municipal Council and Commissioner for Land. These authorities allocated the suit land if the need arises for the Registrar of Title to clarify the validity of the title deed registered in the names of the 1st defendant.

On this, Mr. Makore concluded by submitting that the remedy for the failure to join the necessary party is to strike out the suit. He substantiated his submission by citing ***CRDB Bank Limited vs. UAP Insurance Company Limited***, Civil Appeal No. 32 of 2020 (Tanzlii)

On his side, Mr. Maringo, for the 2nd and 3rd defendants, in the third ground of his objections regarding the issue of failure to join necessary parties, submitted that the proceedings involved challenges to the decision by the Ward Tribunal as well as the District Land and Housing Tribunal in which the Chairman of Zengereni Village was a party. Therefore, it was imperative for the provisions relating to 90 days statutory notice to be complied with, as well as joining the Attorney General in the suit.

In response to the submission by the counsel for the 1st defendant, Mr. Rwebangira submitted that the plaintiff has a right to know the person against whom the suit should be filed, and the parties to the suit are not suggested by the defendant.

He further cited Order 1 Rule 9 of the CPC, which reads that;

"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”.

And submitted that in the instant case, the parties before the Court were as pleaded in the plaint, and this Court has no option but to determine the matter in controversy so far with regard to the rights and interests of the parties.

Furthermore, he submitted that the plaintiff had not raised any issue over farm no. 28 held under the certificate of title No. 32345, and there was nowhere the powers of the Registrar of Title or Commissioner for Lands had been questioned. The plaintiffs only claim damages against the defendants over their actions towards the plaintiffs' properties, and the facts were very clear.

On the cited case of **CRDB Bank Limited (Supra)**, Mr. Rwebangira stated that the same is distinguishable because the issue involved would not be determined without joining other parties whose Court orders would be proximate while in the instant suit, the order may not extend to other persons other than the defendants.

He concluded by submitting that if the Court find it necessary for some persons to be joined as parties, the most convenient procedure is to invoke Order 1 Rule 10 (2) of the CPC by ordering the joinder of necessary parties as it was held in ***Tanzania Railway Corporation vs. GBP (T) Limited***, Civil Appeal No. 218 of 2020 (Tanzlii)

Therefore, the remedy of non-joinder is not striking out a suit; instead, the Court may order the necessary parties to be joined.

Responding on the same ground against the submission by the 2nd and 3rd defendant advocate, Mr. Rwebangira briefly submitted that the plaintiffs have no cause of action against the Chairman of Zengereni Street or the Attorney General. The suit is against the 1st defendant, who was executing a decree on the plaintiffs' land under the assistance of the 2nd and 3rd defendants. Therefore, the issue is whether the defendant had the legal right to demolish the plaintiffs' properties while they were not parties to the suit.

Regarding the second limb of objection raised by the 1st defendant, Mr. Makore submitted that Order VI Rule 15 of the CPC requires the plaintiff to verify all paragraphs contained in the plaint. The plaintiff must specify by reference number what he/she verifies of his own knowledge and what information received and believed to be true.

He further argued that paragraph 11 of the plaint was not verified, which renders the verification clause defective as per the decision of the Court of Appeal in the ***DPP vs. Dodoli Kapufi and another***, Criminal Application No. 11 of 2018.

On his side, Mr. Maringo, for the 2nd and 3rd defendants, though, raised the same ground as ground no.4, but he did not submit anything to substantiate the ground.

In response, Mr. Rwebangira submitted that by a slip of the pen, paragraph 11 of the plaint was not listed in the verification clause. That defect is curable and cannot lead to considering the plaint is incurable defective.

He cited ***Kiganga and Associated Gold Mining Company Limited vs. Universal Gold N.L.***, Commercial Case No.24 of 2000 (unreported),

where it was held that the defect of signature or verification is a mere irregularity and curable by amendment.

Further, in ***Diamond Motors Limited vs. K. Group (T) Limited***, Civil Appeal No. 50 of 2019 (Tanzlii), it was held that the omission is not fatal and is curable in the spirit of the overriding objective.

Responding to what was written by the counsel for the 2nd and 3rd defendants, Mr. Rwebangira pointed out that there were no submissions on this limb of preliminary objection. In addition, he submitted the same as when responding to the 1st defendant's counsel.

Arguing the 3rd limb of objection raised by the 1st defendant, Mr. Makore submitted that the order to amend the plaint was in respect to the names of the parties. But the plaintiff inserted a new paragraph 13 and amended paragraphs 14, 15 (a) and (b) of the amended plaint without leave of the Court.

This also was submitted by Mr. Maringo when supporting the first limb of the 2nd and 3rd defendant objection. On his side, the amendment was done contrary to the order of the Court, but he did not point out what was amended.

On the remedy, he submitted that the plaint should be struck out as it was held in ***Rasia Harub Salim (As Administratrix of the estate of Harubu Salum Msamala) vs. Halima Mshindo & 12 others***, Land Case No. 131 of 2018 (HC-Land Division).

Responding to this ground of preliminary objection in respect of what was submitted by the counsel for the 1st defendant, Mr. Rwebangira submitted that after impleading Julian Shawn Kadri as a legal personal

representative of Omary Kadri, that change alone would not suffice without the same be pleaded to show who was Julian Shawn Kadri. Therefore, paragraph 13 was necessary in the proximity and ambit of the court order to show how Julian Shawn Kadri was connected to the case.

Regarding paragraphs 14, 15 (a), and (b) of the amended plaint, Mr. Rwegangira argued that the same was not amended/ varied.

Responding to what was submitted by the counsel for the 2nd and 3rd defendants, Mr. Rwebangira submitted that the counsel failed to point out the areas that introduced new contents in the amended plaint, contrary to what constitutes a preliminary point of law.

The remaining ground of preliminary objection is ground number 3, raised by the 2nd and 3rd defendants. Unfortunately, as in ground No. 3, Mr. Maringo did not substantiate the ground, rather than mentioning two cases without elaboration.

Having considered the written submission made by both learned counsel for the parties and their pleadings, I will start with the issue of non-joinder of necessary parties as pointed and argued in the first limb of the 1st defendant grounds of preliminary objection and the third limb of the 2nd and 3rd defendants' grounds of preliminary objection.

But before disposing of the issue, quite briefly, I have to deal with the issue Mr. Rwebangira raised in his submission.

He argued that the 1st defendant's written submission in chief was filed out of time, i.e., on 9 July 2023, instead of 7 July 2023, without leave of the Court. And that amounts to non-appearance; therefore, the preliminary objection should be dismissed.

This should not detain me long because of the following;

One, as per the exchequer receipt with no. 24557231 for the payment of the submission in chief; the same was paid on 7 July 2023.

Two, the issue was already overtaken by events because he was duly served and filed his reply.

Three, since the issue was already overtaken by event, then is not fatal and is curable in the spirit of overriding objective.

Reverting to the issue of non-joinder of the necessary party, the entry point is the definition of the term "*necessary party*". The term is well defined by the Court of Appeal in *Ilala Municipal Council vs. Sylvester Mwambije*, Civil Appeal No. 155 of 2015 (Tanzlii) as;

"...one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed".

In **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman and another**, Civil Revision No. 6 of 2017 (Tanzlii), the Court of Appeal set a criterion for determining who is a necessary party. The Court vividly held that;

*"The determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such a determination include the **particulars of the non-joined parties, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed.**"*[Emphasis provided]

In the instant suit, in paragraph 6 of the amended plaint, the plaintiffs stated that I quote;

"The plaintiffs are owners and occupiers of the land in the Village of Matuluga, Kawawa Ward, Kibaha District on their individual capacities".

Further, the 1st and 2nd plaintiffs, as husband and wife, owned 10 acres of that land with houses No. 5 and 7. The 3rd plaintiff is the legal owner of house No. 44 within the land measuring 20 acres, which he owns.

The first and second plaintiffs annexed the deed of gift that they were given that land as a gift by Domina Mnanginga. While the plaintiff was allocated the farm by ***"Uongozi wa Kikundi cha Wakulima na Wafugaji makazi mapya"***.

On the other hand, in the 1st defendant amended WSD, the 1st defendant in paragraphs 2, 3 (a), and (b) stated that his late father owned the suit land since 6 March 1987, but now under his administration. It was registered with a certificate of title No. 32345 Land Office No 99749, located at Visiga, Kibaha Township, within the Coastal Region known as Farm No. 28, measuring 995.45 hectares. He annexed the title deed No. 32342.

That houses No. 5, 7 and 44 or pieces of land located at Matuga Street from part of the land lawfully owned by the 1st defendant. Therefore, the 2nd defendant was executing lawful orders of the DLHT for Kibaha in Execution Application No. 176 of 2022, requiring the 2nd defendant to demolish all encroachments extending or existing in the land lawfully owned by the 1st defendant.

From the above facts, Mr. Makore argued that there was a non-joinder of necessary parties, the authorities that allocated the land to the 1st defendant. At the same time, Mr. Rwebangira stated that there was no issue over farm no. 28 held under the certificate of title No. 32345. There was

nowhere the powers of the Registrar of Title or Commissioner for Lands had been questioned. But they only claim damages against the defendants over their actions towards the plaintiffs' properties.

Though Mr. Rwebangira argued as above, but from the facts of the case from the pleadings, there is a controversy between the parties regarding the ownership of the land. Both the plaintiffs and the 1st defendant claimed to own the same land.

Further, while there is a dispute over the ownership as indicated in the third relief sought by the plaintiffs, which prays for an order that the plaintiffs be restored to their occupation of their pieces of land and a permanent injunction restraining the defendants and/or their agents from interfering with a peaceful occupation of the plaintiffs' respective pieces of land.

Apart from that, in land disputes, compensation follows the declaration of ownership in case of a dispute. Thus, based on the facts of the instant suit, it is clear that ownership of the disputed land must be determined first before deciding on the issue of compensation.

In addition, if we agree with Mr. Rwebangira that the plaintiffs are only claiming damages and there is no land dispute, then this court would have no jurisdiction to determine the suit because claims for damages per se do not fall within the jurisdiction of this Court.

Further, since the 1st defendant annexed the title deed, in which he claimed that the land allegedly owned by the plaintiffs was part of the land owned by his late father in joining the authorities that allocate the land issued, that title deed is inescapable. They must be given a right to be heard because of the title deed.

Those authorities, i.e. the Commissioner for Land and or Registrar of Titles, are necessary parties since there is a title deed. Further, by nature of the suit and the relief claimed, the authorities above are the necessary parties. The executability of the decree, if passed in the absence of the relevant authorities above, leads me to hold that there is a non-joinder of the necessary party (s) whose rights may be directly affected by the outcome of this suit. Their presence would enable the court to effectively determine the pertinent issue of the ownership of the land in dispute so that an effective decree can be passed.

Therefore, as I alluded to earlier, there is a non-joinder of necessary parties, and in ***Oilcom Tanzania Ltd vs. Christopher Letson Mgalla***, Land Case No. 29 of 2015, High Court of Tanzania at Mbeya (unreported), it was held that;

"In land suits, a person who is alleged in pleadings to have conferred land title to the parties or any of them by one means or another (such as by allocation or sale) and the person to whom the title was so conferred are necessary parties to the suit whose presence is indispensable. In the absence of such parties, no effective decree or order can be passed".

As to the remedy, I have two views, but both lead to the same position.

One, I am aware that Order 1 Rule 9 of the CPC provides that a suit shall not be defeated by reason of misjoinder or non-joinder of parties. But in the cited case of ***Abdullatif Mohamed Hamis*** case (**Supra**), the Court of Appeal held that the non-joinder of the necessary party to the suit renders the suit incompetent. The Court further held that although Order 1 Rule 9 of the CPC is couched in mandatory terms, there are exceptions. That provision of law applies to non-joinder of non-necessary parties.

Two, even if we order an amendment of the plaint by joining the necessary parties, there is a requirement of 90 days' notice since the necessary parties are the government authorities, including the Attorney General. The proceedings against the government are regulated by the Government Proceedings Act, Cap. 5 of the Laws. Therefore, in the absence of proof of service of the 90 days' notice, I decline to order the joinder of the necessary parties.

Flowing from above and for the reasons advanced, the point of the preliminary objection raised regarding the non-joinder of necessary parties has merits and is, therefore, sustained. By sustaining the limb of preliminary objection affects the whole suit by disposing of it; consequently, I don't see to dispose of the remaining grounds of preliminary objections.

In the upshot, the suit is hereby struck out with costs.

I order accordingly.



A handwritten signature in black ink, consisting of several vertical, overlapping loops and a diagonal stroke extending from the top left towards the bottom right.

K. D. MHINA

JUDGE

04/12/2023