IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 143 OF 2022

WILHELM S. ERIO.. ..PLAINTIFF

VERSUS

GODFREY BALTHAZAR CHUA...DEFENDANT

RULING

Date of last Order:08/12/2022
Date of Ruling:08/02/2023

K. D. MHINA, J.

In this suit, the Plaintiff, Wilhelm S. Erio, sues the respondent, Godfrey Balthazar Chua, for trespassing into his land measuring 12 acres located at Kunguru Street in Goba Ward within Ubungo Municipality.

The plaintiff alleges that he purchased the suit land on 1 June 1984 from Mohamed Kikobogo for TZS 80,000/=Therefore, he prayed to be declared a lawful owner of the suit land, i.e., 12 acres of land.

In response, the defendant countered the plaint by filing a written statement of defence in which he alleges that the land was previously owned by his late father, who bought 10 acres in 1970 from Mohamed Kikobogo. After the demise of his father, the land was surveyed in 2015,

owns only one plot, i.e., plot no 2626. According to the attached survey plan, the plot measure 3178 square meters.

Further defendant, confronted the plaint with a notice of preliminary objection predicated on the following ground;

> *The suit is bad in law for non-joinder of parties, thus contravening Order 1 Rule 3 of the Civil Procedure Code [Cap 33 R: E 2019]*

The preliminary objection was argued by way of oral submissions. The plaintiff was represented by Mr. Ng'weli Mlyambelele, learned advocate, while the defendant by Mr. Jerry Msamanga, also a learned advocate.

In essence, Mr. Msamanga's submission was based on paragraphs 4 and 9 of the amended plaint and paragraph 5 (i) of the written statement of defence.

In his submission, he argued that initially, on 28 June 2022, the plaintiff filed the suit against one Paschal Chua. Later, after summons by affixation in the defendant's property, the court ordered the amendment of the plaint to include the current defendant.

He further submitted that Order 1 Rule 10 (2) of the CPC gives power to the Court to join the necessary parties to the suit.

Therefore, he argued that based on the pleadings, necessary parties ought to have been sued but have not been sued. He referred to paragraph 4 of the amended plaint, where the plaintiff alleged that he is the owner of 12 acres of land which he purchased on 1 June 1984, and paragraph 9, where the plaintiff alleged that the defendant trespassed into the said 12 acres of land. Therefore, the plaintiff prayed to be declared the lawful owner of the 12 acres of land.

On the other hand, in the WSD under paragraph 5 (i), the defendant alleged that his late father owned 10 acres of land, and out of 10 acres, he owns one plot titled plot no 2626 with the size of approximately 0.78 acres.

Further, Mr. Msamanga submitted that for the court to avoid issuing a declaration in favour of the plaintiff if succeeds, it will be an injustice to other persons who are the owners of the remaining 9.3 acres of land. To bolster his argument, he cited **Christina Johnson Mwamlima and another vs. Jalison Mwamlima and six others,**

Land Case No. 19 of 2017 (HC-Mbeya) on pages 8 and 9 where two tests in respect to the non-joinder of a party were pointed out. **One**, there has to be a right or relief against such a party, and **two**, the court must not be in a position to pass an effective decree in the absence of such a party.

Mr. Msamanga related the two tests with the case at hand and submitted that one, while the plaintiff stated that he is the owner of the 12 acres, the defendant stated that he owns only 0.78 acres of land, therefore; the relief sought will affect other owners and two the court will not be in a position to pass an effective decree in the absence of the owners of the remained piece of land.

He concluded by submitting that, though Order 1 Rule 9 of the CPC provides, a suit cannot be defeated by a non-joinder or misjoinder of parties. Still, in the cited case of **Christina Johnson Mwamlima** (Supra), on page 14, it was held that a non-joinder of a necessary party renders a suit incompetent. The available remedy is to strike out the suit.

In response, Mr. Mlyambelele began by informing the court that, as from the record, the preliminary objection raised did not include Order 1 Rule 10 (2) of the CPC.

He further submitted that initially, the defendant was introduced by the name of Paschal Chua by the masons who were constructing the house. After the affixation, the defendant came out and introduced himself as Godfrey Balthazar Chua.

He further submitted that the plaintiff could only have a cause of action against a person who violates his interests. Therefore, it was only the defendant who trespassed into the land and began construction while the other alleged defendants were unknown; therefore, there was no cause of action against them.

In his further submission, he argued that if the alleged persons became interested parties, they have an avenue under Order 1 Rule 10 (2) of the CPC by filing a chamber application to be joined as the parties, as they can assist the court to know the extent of their interest by demonstrating the evidence. To substantiate his submission, he cited **George Ndege Gwandu and 20 others vs. Kastuli Safari Tekko**

and another, Civil Appeal No. 255 of 2018 (Tanzlii) and **21st Century Food and Packaging Ltd vs. Tanzania Sugar Producers Association and two others**, Civil Appeal No. 91 of 2003 (CAT-Unreported).

Mr. Mlyambelele also submitted that this Court does not know who are the interested parties because even the names of alleged persons were not described. Therefore, in such circumstances, the proper remedy is not to strike out the suit but to order the interested party to file the chamber summons.

He concluded by submitting that the cited case of **Christina Johnson Mwamlima (Supra)** is distinguishable because the parties who were not joined were known.

Therefore, he prayed for the preliminary objection to be dismissed with costs as non-joinder does not affect the suit under Order 1 Rule 9 of the CPC, and since the interested parties are unknown, the court should give an order for those interested to be joined in the suit.

In a brief rejoinder, Mr. Msamanga stated that citing a provision of law in a notice of preliminary objection is not mandatory.

Further, he submitted that it was not the duty of the defendant to describe the interested parties as it was the duty of the plaintiff.

In relation to the cited case of **George Ndege Gwandu (Supra),** he submitted that it is distinguishable because it was a public interest litigation, therefore, irrelevant to this case.

He insisted that the cited case of **Christina Johnson Mwamlima (Supra)** is relevant because the parties supposed to be joined in this matter are known.

Having considered the oral submission made by both learned counsel for the parties and their pleadings, the issue that has to be resolved is whether there was a non-joinder of the necessary parties and if the issue will be in the affirmative, then what is the remedy?

Starting with the issue first, the entry point is the definition of the term "necessary party" as 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. It 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 matter at hand, as I indicated earlier, the plaintiff is claiming a declaration that he is the lawful owner of 12 acres of land against the defendant. On the other hand, the defendant responded that he only owned 0.78 acres of the land he inherited from his late father. He annexes to the WSD the survey plan and the request for the certificate of Title, which indicates that he owned plot no 2626 only and other plots are owned by his brothers.

Further, as I indicated earlier, the counsel for the plaintiff submitted that only the defendant trespassed into the land and began construction while the other alleged defendants were unknown; therefore, there was no cause of action against them.

From above, my observation is, if that is the case, why did the plaintiff not sue the defendant for the actual size of the land he trespassed on? As long as he sued for 12 acres of land, finding other occupiers of the land was essential. This is very important because in case this Court passes the decree in favour of the plaintiff, then the rights of the occupiers of the remaining piece of land will be affected.

Therefore, in the determination of whether the remaining occupier(s) of the 12 acres of land is or are necessary party(s), the elaboration above on the nature of the relief claimed as well as the executability of decree if passed in favour of the plaintiff in the absence of the persons who were not joined lead me to hold that there is non-joinder of the necessary party (s) whose rights may be directly affected by the outcome of this suit.

As to the issue, those persons were unknown, and the defendant was the one who started construction, with respect I differ with Mr. Mlyambelele because;

One, it is common knowledge that the plaintiff is expected, prior to instituting a suit in Court, he was required to make inquiries or search to determine the correct parties to sue. See **Coseke (T) Ltd vs. Public Service Social Security Fund (Formally known as LAPF)**, Commercial Case No.143 of 2019 (HC DSM-Unreported).

Two, in cases of trespassing into the land, the cause of action does not depend on whether the person starts to construct the house or not; it starts when the plaintiff discovers that his land has encroached. By the way, the land was already surveyed; therefore, it was not difficult to find the other occupiers.

As to the remedy, 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 **Christina Johnson Mwamlima (Supra),** this Court (Utamwa, J) held that non-joinder of the necessary party to the suit renders the suit incompetent. That

position was reached while citing the **Abdullatif Mohamed Hamis** case **(Supra)**, in which the Court of Appeal held that although Order 1 Rule 9 of the CPC being couched in mandatory terms but there are exceptions. That provision of law applies to non-joinder of non-necessary parties. Therefore, the non-joinder of a necessary party is exempted from the applicability of Order 1 Rule 9 of the CPC.

Therefore, as I held earlier, there is a non-joinder of the necessary party (s) who are the occupier (s) of the 12 acres minus 0.78 acres occupied by the defendant.

In the circumstances of this matter, I fully adopted the two tests pointed out in **Abdulatif** (Supra) and hold that the presence of remaining occupiers of the suit land is indispensable and no effective decree or order can be passed in their absence as it will cause injustice to them.

Flowing from above and for the reasons advanced, the point of the preliminary objection raised the counsel for the different has merits and is, therefore, sustained. The plaintiff can institute a suit against all

alleged trespassers into the 12 acres of the suit land, or he can sue the defendant for the actual size of land occupied by him.

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

I order accordingly.

DATED at **DAR ES SALAAM** this 08/02/2023.

K. D. MHINA

JUDGE