

TANZANIA / JUDGMENT

ABBAS HUSSEIN

COURT
TANZLII

DECIDED
3 December 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) ALARUSHA
LAND CASE NO. 9699 OF 2024 ABBAS HUSSEIN (The Administrator of the estate of the late TABU SHIFAO)..... 1st PLAINTIFF ABUBAKAR AHMED KASSA (The administrator of the estate 2 of the late TABU SHIFAO)..... nd PLAINTIFF Versus ALAMU ABDUL KASSA..... DEFENDANT

RULING

3rd December 2024 and 16th January, 2025 MWASEBA, J. The plaintiffs herein preferred the suit against the defendant seeking for the following declaratory reliefs:

- a) That Plot No. 40 Block "E" Area "F" Arusha Municipality measuring 4455 square feet with Certificate of Title No. 14581 belongs to the estate of the late Tabu Shifao;
- b) Mandatory injunction directing the defendant to restore the suit property to the position in which it was before demolition instigated by him; 1 | P a ge
- c) An order directing the defendant to yield possession of Plot No. 40 Block "E" Area "F" Arusha Municipality measuring 4455 square feet with Certificate of Title No. 14581 to the plaintiffs;
- d) Permanent injunction restraining the defendant, his agents, assigns, heirs or successors in title from interfering with possession of Plot No. 40 Block "E" Area "F" Arusha Municipality measuring 4455 square feet with Certificate of Title No. 14581 by the plaintiffs, their agents, assigns and successors in title;
- e) General damages as may be assessed by the court;
- f) Costs of the suit; and
- g) Any other relief that the court deem fit and just to grant. In the plaint, the plaintiffs alleged to be the administrators of the estate of the late Tabu Shifao, who died intestate on 17/06/1986. They alluded that the suit property was registered in the name of the late Tabu Shifao on 14/10/1967. The suit property, forms part of the estate of the deceased, which they are administering. According to the plaint, the suit property was entrusted to their brother Abdul Kassa, who was conducting business thereon on mutual agreement that he raise funds for erecting commercial storey building. In the process, all heirs to the estate of the

late Tabu Shifao were being given certain amount of money for their sustenance. 2 | Page

Abdul Kassa died in 2021 and the defendant was appointed as administrator of his estate. To the plaintiffs' surprise, the defendant included the suit property as part of the estate of the late Abdul Kassa, despite objections from them. When an official search was conducted by the plaintiffs in the land register, they discovered that suit property had been registered in the name of Abdul Kassa, way back in 1999. Being the administrator of the estate of the late Abdul Kassa, the defendant transferred ownership to himself. The plaintiffs allege that the transfer of ownership of the suit property to Abdul Kassa and the subsequent transfer of the same to the defendant were tainted with fraud and illegalities whose particulars are elaborated under paragraph 34 of the plaint. The plaintiffs sought redress by filing this suit claiming for the aforesaid reliefs. The defendant filed his written statement of defence on 24/05/2024, disputing the claims put forth by the plaintiffs, putting them into strict proof. The defendant contended that the heirs to the estate of the late Tabu Shifao in an agreement executed in 1999, mutually transferred ownership of the suit property to Abdul Kassa, who in turn, processed the certificate of occupancy on 03/08/1999. Subsequently, being the administrator and lawful heir of the estate of the late Abdul 3 | Page Kassa, the defendant transferred ownership of the suit property to himself in 2021. On 08/10/2024, when the matter was coming for a ruling whether the suit was filed within the time prescribed by law, counsel who appeared for the defendant prayed to address the court on the competency of the suit for non-joinder of the Registrar of Titles. I afforded the parties that opportunity on 03/12/2024. Both parties were represented. The plaintiffs were represented by Mr. Rogers Mlacha, learned counsel while the defendant had services of Messrs Evasion Maro and Peter Nyamwero, learned advocates. Hearing of the preliminary legal point was conducted orally. Submitting on the matter, Mr. Maro contended that the suit property is registered under Certificate of Title No. 14581, as per paragraph 3(a) of the plaint. He argued that among the reliefs sought by the plaintiffs is declaration of ownership of the said property as part of the estate of Tabu Shefao. It was alleged that the cause of action is based on fraud and illegalities relying on paragraphs 34 and 40 of the plaint. According to Mr. Maro, the plaintiffs allege that the registration of the title in the name of the late Abdul Kassa and subsequently to the defendant was perpetrated with fraud. He contended that the defendant disputed the allegation in the WSD. According to counsel for the defendant, the dispute is over a registered land whose registration was effected by the Registrar of Titles. He added that in disputes involving registered land, the Registrar of Titles must be made a party. To bolster his contention, he referred the following Court of Appeal decisions: Nestory Msoffe and 5 others v. The Registered Trustees of Catholic Arch Diocese of Arusha, Civil Appeal No. 254 of 2019, Ngerengere Estate Company Limited v. Edna William Sitta, Civil Appeal No. 209 of 2016, Double Diamond Holdings v. East African Spirits Tanzania Limited, Civil Appeal No. 63 of 2021 (all unreported). Counsel for the defendant argued that if the Registrar is impleaded as party to the case, the Attorney General must as a matter of law be impleaded as well. He was of the view that since there is allegation of fraud in the registration which is a serious allegation against the Registrar who made the registration, she must be featured as a party so as to avail her the right to be heard. Mr. Maro insisted that since the prayer made in relief

3(a) may end up nullifying the registration, the Registrar must be impleaded as a necessary party in the case. He referred the case of Godfrey Nzowa v. Selemani Kova, Civil Appeal No. 183 of 2019 (unreported) On his part, Mr. Nyamwero submitted on the way forward, insisted that as a legal requirement under Section 6(2) of the Government 5 | Page Proceedings Act, Cap 5 of [R.E 2019] (GPA) no suit against the Government without 90 days' notice. He insisted on joining the Attorney General as a matter of legal requirement. He also relied on the book of Mulla, the Code of Civil Procedure at page 1509 paragraph 2 arguing that the position in India is that failure to join the necessary party leads to dismissal of a suit. He however opined that in our jurisdiction, the omission rendered the suit incompetent deserving to be struck out. Resisting the objection, Mr. Mlacha in the first place distinguished all cases relied on by the defendant's counsel arguing that they are distinguishable in all material facts. On the substantive part, he accounted that in order for a party to be held necessary party in a matter, two tests established in Godfrey Nzowa v. Seleman Kova (supra) must be met. The tests are (a) there has to be a right or relief on that party in respect of the matters involved in the suit and (b) the court cannot be in the position to pass an effective decree in the absence of such a party. Applying the tests in the instant case, Mr. Mlacha argued that the Registrar of Titles and the Attorney General do not fit as necessary parties because the plaintiffs have no right or reliefs against them. Second, the cause of action and relief sought by the plaintiffs is against the defendant alone. j 6 | Page He admitted that the matter Is based on fraud, forgery and illegality but was concise that the fraud was perpetrated by the late Abdul Kassa from whom the defendant traces his title. In his firm view, such allegations do not touch the Registrar or the Attorney General. According to counsel for the plaintiffs, the fact that the dispute is over a registered land, does not necessarily mean that the court cannot pass an effective decree in the absence of the Registrar. He relied on Section 99 of the Land Registration Act, which in his view does not require any dispute in respect of a registered land to feature the Registrar as a party to the case. Mr. Mlacha was of the view that in the event the court subscribes to the submission by counsel for the defendant holding that the Registrar of Titles is necessary party, the court adopts the position of the Court of Appeal in the cited decisions. In those decisions, the Court of Appeal ordered amendment of the pleadings to join the necessary party. The essence of his submission is that there is no adherence to the mandatory requirement of 90 days notice in the event the court orders amendment of the pleadings to join the Registrar. He also relied on Order 1 Rule 10(2) of the Civil Procedure Code, Cap. 33 [R.E 2019] (the CPC), in support of his proposition. 7 | Page In rejoinder submission, Mr. Maro refuted that Section 99(1) of the Land Registration Act does not apply in this matter as it deals with the decision of the Registrar that has been challenged through appeal to the High Court. He insisted that in any dispute involving a registered land, the Registrar of Titles must be made a party. He urged the court to be bound by the decisions cited as they are relevant to the principle in this matter. Mr. Nyamwero in addition insisted on striking out the case so as the plaintiff complies with the mandatory legal requirements. I have considered the objection raised and the well-researched submissions by counsel for the parties. The main issue for determination at this juncture is whether the Registrar of Titles is a necessary party in this

case. On who is necessary party in a suit, Order I Rule 3 of the Civil Procedure Code, Cap. 33 [R.E 2019] responds to this question. It provides: "3. AH persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly severally or in the alternative where, if separate suits were brought 8 | P a g e against such persons, any common question of law or fact would arise." A necessary party in a suit is a person whose presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit. In establishing such necessity, it has to be shown that reliefs which the plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. The position on who is a necessary party, was discussed in extenso by the Court of Appeal in the case of Tang Gas Distributors Limited v. Mohamed Salim Said and 2 Others, Civil Application Revision No. 68 of 2011 (unreported), where it was held inter alia that: "It is in this way that one would appreciate the force of the reasoning of Muienga, JSC (supra), to the effect that a person is a necessary party in a suit if the order, which the plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable for the avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit." 9 I Page Similar position has been restated in the cited decisions of Godfrey Nzowa v. Selemani Kova (supra), Ngerengere Estate Company Limited v. Edna William Sitta (supra), Double Diamond Holdings Limited v. East African Spirits (T) Limited and Another (supra) and Nestory Msoffe and 5 Others v. The Registered Trustees of Catholic Archdiocese of Arusha (supra). The question is whether the Registrar of Titles is a necessary party in the case under consideration. Mr. Maro vehemently submitted that since the dispute is over a registered land, and owing to the relief 3(a) in the plaint, warrants joining of the Registrar of Titles as necessary party. He further contended that since the plaintiffs under paragraphs 34 and 40 of the plaint alleged fraud and illegality in registration of the suit property in the name of the defendant, the registrar who is bestowed with legal duty as custodian of the land register needs to be joined as necessary party. Mr. Mlacha resisted the submission on the account that the reliefs sought do not touch the Registrar. He further accounted that the purported fraud and forgery were committed by the late Abdul Kassa, and not the Registrar. I entirely agree with Mr. Maro that the suit property is a registered land. Under paragraph 34 of the plaint, the plaintiffs narrated particulars of fraud and illegality in registering the suit property in the name of the 10 | P a g e defendant. The same appears Mer pmgraph pf fraud featured as the basis of transferring ownership of the suit property from the late Tabu Shifao to the late Abdul Kassa. As correctly pointed out by Mr. Maro, despite the fact that there is no relief claimed against the Registrar of Titles, in the event the court adjudicates in favour of the plaintiffs, it will make an order to rectify the land register. That order will directly affect the Registrar of Titles. More so, the fact that the cause of action in this matter hinges on fraud in effecting registration of the suit property in the name of the defendant, the registrar who is tasked to effect registration in the land register must be made a party so as to explain how the registration was effected. Without featuring the Registrar as a party, she will be condemned unheard, which is contrary to the

fundamental principles of natural justice enshrined under Article 13(6)(a) of the URT Constitution. It is true as contended by Mr. Mlacha that there is no relief sought against the Registrar. But as I have pointed out earlier, looking on relief 3(a) and (c) in the plaint, the plaintiffs prayed that the suit property be declared the lawful property of the estate of the late Tabu Shifao. Critically looking, that has the effect of affecting the land register, which is the solemn domain of the Registrar of Titles. That warrants her being pleaded as party to the case. p ' 11 | P a g e It has also been held by the Court of Appeal that In cases involving registered land whose end result may affect registration, the Registrar of Titles must be joined as party. In the case of Nestory Msoffe and 5 Others (supra), the Court of Appeal made the following observation: "In the premises, in view of the state of the pleadings and the stated position of the law, it was incumbent on the High Court to be keen enough and require the parties to amend the pleadings and join the Registrar of Titles who is alleged to have registered the respondent's property in question held under Certificate of Title. Since it is dear that the Registrar of Titles had a rote in the registration of the land in question, the non-joinder of her in the suit before the High Court it means that the Registrar was not heard which occasioned a miscarriage of justice which cannot be condoned by the Court by hearing and determining the present appeal. "(Emphasis added) Since registration of the suit property in the name of the defendant features as the basis of the plaintiffs' claim in the plaint, non- joinder of the Registrar of Titles renders decision and resultant decree ineffectual. I therefore subscribe to the submission by the learned counsel for the defendant to find and hold that non-joinder of the Registrar of Titles in this matter was fatal. The Registrar of Titles was necessary party in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in⁴ this suit. The objection has merits, it is hereby sustained. 12 | P a g e Next is the way forward. Mr Nyamwero urged the court to strike oUt the suit in order for the plaintiffs to comply with the mandatory requirement of 90 days notice under Section 6(2) of the GPA. Mr. Mlacha on the other hand pressed that the court takes the course emphasised by the Court of Appeal in all four decisions relied on by the defendant's counsel, by ordering amendment of the pleadings to allow joinder of the Registrar of Titles. Order I Rule 10(2) of the CPC confers upon the court discretion to order amendment of the pleadings so as to accommodate joinder of necessary party to the suit. The provision provides: "(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 improperlyjoined, 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. "(Emphasis added) Similar position has been reiterated by the Court of Appeal in its numerous decisions including the cited case of Nestory Msoffe and 5 Others (supra), where it held: 13 | P a g e In the premises, in view of the state of the pleadings and the stated position of the law, it was incumbent on the High Court to be keen enough and require the parties to amend the pieadings and join the Registrar of Titles who is alleged to have registered the respondent's

property in question held under Certificate of Title. "(Emphasis added) Guided by the above position of the law and the authoritative decisions of the Court of Appeal, and considering the facts of the case, I order amendment of the pleadings to join the Registrar of Titles as necessary party to the case. That being the position, in terms of Section 6(2) of the GPA, the Attorney General naturally becomes party to the case as well. To avoid unnecessary complications, the plaintiffs are availed 90 days within which to amend the plaint to join the Registrar of Titles as party to the case after complying with the mandatory legal requirements. In the event, the objection is sustained to the extent above explained. Costs shall be in the cause. DATED at ARUSHA this 16th day of January, 2024. 14 | P a g e

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