

TANZANIA / JUDGMENT

20191028 TZHC Mbeya

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IN THE HIGH COURT OF TANZANIA DISTRICT REGISTRY OF MBEYA AT MBEYA LAND APPEAL
CASE NO 59 OF 2016 (From the District Land and Housing Tribunal for Mbeya at Mbeya Appellate
No 175 of 2015) 1S1 L AGNESS TWANGALE MKONDYA APPELLANT

2. MOSES EZEKIAH MWAKYOMA C2NDAPPELLANTS VERSUS DANIEL N'ONGOLE . c c
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JUDGMENT

30/7 & 25/10/2019. Utamwa, J. In this first appeal the appellants are Agness Twangale Mkondya and Moses Ezekiah Mwakyoma (first and second appellants respectively or the appellants cumulatively). The respondent is Daniel Nyongole (the respondent). The Appellants were aggrieved by the proceedings, judgment and decree dated 29th August, 2016 issued by the District Land and Housing Tribunal for Mbeya at Mbeya (the DLHT) in Land Application No. 175 of 2015.

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2015. The matter related to the dispute on a house in Plot No. MK/NG'S/154 at Mwakibete area in Mbeya city (the suit premises). In the original suit, the respondent (as the applicant) approached the DLHT seeking for among other things; the declaration of his exclusive entitlement and unimpeded right of possession and occupation of the house on the suit premises, vacant possession of the suit premises, a declaration that the first appellant, his servants, agents or whosoever, is wrongly in occupation of the suit premises, payment of general damage of Tanzanian shillings 300,000,000/= for trespass, costs of the suit and any other relief the DLHT would deem fit to grant to him. Shortly, the evidence adduced by the respondent was this: the suit premise belonged to his late father, one Severine Nyongole (the deceased) who passed away in 2000. The respondent was appointed as administrator of the deceased estates in 2014. He has never sold or caused any person to sale the suit premises to the appellants. The first appellant claimed to have purchased the suit premises from the second appellant in 2010. On his part, the second appellant claimed to have bought the same suit premises from one of the family members of the deceased known as Atu Kilongo. This was the widow of the deceased. The DLHT heard the matter on merits and pronounced the judgment in favour of the respondent. The appellants being dissatisfied by

that decision, appealed to this court on the following four grounds of appeal: (Page 2 of 8

That, the trial tribunal chairman erred in law and fact for entertaining a case while there was clear non-joinder of necessary parties. That, the trial tribunal erred in law and fact for entertaining a matter that was time barred. That, the trial tribunal erred in law and fact for declaring the respondent the owner of the disputed house without considering adverse possession which was clear. That, the tribunal chairman failed to evaluate the evidence properly which could prove the case in favour of the appellants. They therefore claim to this Court to allow the appeal with costs. Owing to the above grounds of appeal, the appellants urged this court to allow the appeal with costs. At the hearing of the appeal, the appellants were represented by Mrs. Joyce Kasebwa learned advocate and Ms. Lucy Kessy learned Counsel. The respondent had no any representation. Parties agreed, and the court ordered the appeal to be disposed of by way of written submissions. They accordingly submitted. In deciding this appeal, I will firstly consider the first ground of appeal. In case I will find it necessary, I will also test the rest of the grounds. This plan is based on the fact that, the first ground of appeal is strong enough to dispose of the entire appeal in case it will be upheld. This is because; it legally touches the competence of the proceedings. Regarding the first ground of appeal, the following two issues must be determined:

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- ----- Whether or not there was non-joinder of necessary parties in the matter before the DLHT. In case the answer in the first issue will be affirmative, then the other issue will be this; which is the legal effect of the non-joinder. Submitting for both issues, the appellant's counsel briefly argued that, the DLHT erred in law and fact for entertaining a case while there was a clear non-joinder of the necessary parties. This was because; the respondent failed to join the seller of the disputed land from his own family without assigning any reason. On his part, the respondent also shortly submitted that, this ground of appeal was weak since the appellants had an opportunity of applying before the DLHT for a third party notice and join the alleged necessary parties. Regarding the first issue, I am of the view that, according to the record, especially the judgment of the DLHT and the arguments by both sides, it is not disputed that, the suit property initially belonged to the deceased, It is also not disputed that, the respondent later became the administrator of the estate of the deceased. Furthermore, it is not disputed that, in their respective defences before the DLHT, the appellants maintained that, the second appellant had sold the suit premises to the first appellant. It was also the defence by the second appellant that, he had bought the suit premises from one Atu Kilongo, widow of the deceased and Ezebedayo Nyongole. The DLHT disbelieved the defences by the two appellants on the grounds, inter alia that, they had failed to produce any sale agreement between the second appellant on one hand, and the said Atu Kilongo and another on the other. It thus, held that, the second appellant had no title Page 4 of 8 to pass to the first appellant. It then entered judgment for the respondent as shown above. In my settled view, owing to the holding of the DLHT, it is clear that, it had actually,

appreciated that the said Atu Kilongo and the other person who were claimed to have sold the suit premises to the second appellant, were necessary parties in the suit. This is because; the DLHT found the sale agreement between them and the second appellant as an important piece of evidence. It however, ignored theft non-joinder and concentrated on the lack of the written agreement between them and the second appellant. In my concerted view however, even if the said agreement was produced by the second appellant, that could not have been so useful in the case for purposes of an effective resolution of the dispute between the parties. It could still be vital for the said Atu Kilongo and another to be impleaded so that they could prove that they in fact, had title over the suit property to pass to the second appellant. In other words, the important issues before the DLHT were not only whether or not the second defendant had actually purchased the suit premises from Atu Kilongo and another, but also whether or not those two persons had title to pass to him (the second appellant). The DLHT thus, considered only the former issue and left the later un-attended. Owing to the above reasons, I find that, since the said Atu Kilongo and another were not impleaded before the tribunal though they were necessary parties, then there was a non-joinder of necessary parties in the matter before the tribunal. The first issue is therefore, affirmatively Page 5 of 8 (determined). This finding calls for testing the second issue posed herein above. The second issue of which is the legal effect of the non-joinder will not hold me for long. In fact, as hinted earlier, both sides did not argue lengthily on the legal effect of the non-joinder discussed above. However, the law is clear that, where there is a dispute on land ownership, and the parties claim to have acquired the land through an allocation by a mandated 'authority or through a sale by a third person, then such authority or third person is a necessary party that should be impleaded for the court to effectively, justly and fairly decide the controversy between the parties, unless the circumstances dictate otherwise. The law is also to the effect that, the omission to implead that necessary party where circumstances command so, renders the matter before the court incompetent. These legal requirements are based on the understanding that, without such necessary party being impleaded, no effective decree or order can be passed by the court. This position was underscored by the envisaging of the Court of Appeal of Tanzania (CAT) in the case of Farda Mbaraka and another v Domna Kagaruk, Civil Appeal No. 136 of 2006, CAT at Dar es Salaam (unreported). In deciding that case, the CAT took inspiration from a decision by the Supreme Court of India in the case of Raza Begum v Anwar Begum AIR 1958 SC 886. This court (Othman, J. as he then was) was also of the view just underscored herein above, in the case of Kennedy Kamwamba v Sopha Mwanguangu and Director of Mbeya Municipality, Misc. CM Appellate No. 31 of 2004, High Court of Tanzania (HCT) at Page 6 of 8 LI Mbeya (unreported). I also recently underscored the position in the cases of OH Corn Tanzania Ltd v Christopher Letson Mgafla, Land Case No. 29 of 2015, HCT, at Mbeya (unreported ruling) and Kawawa Saidy v. Tumaini Lugasi, Misc. Land Appeal No. 34 of 2018, HCT, at Mbeya (unreported judgment). Indeed, the precedents cited above (the Farda Case, the Kennedy Case and the OH Corn Case) considered registered lands that had been allocated to the respective parties of the cases through the undesirable style of double allocations by the respective mandated allocating authorities. However, in my settled view, the principle

underscored in those precedents squarely apply to land sold by a third person to a party to court proceedings like the one under consideration. This view is based on the understanding that, both an allocation of a registered land by a mandated authority on one hand, and the sale of land by an entitled person to another person on the other, confer proper ownership of land to the allocated person or the purchaser as long as the respective transactions were legally performed. It was therefore, the duty of the DLHT in the case under consideration, to ensure that, the law was followed for its effective adjudication of the dispute between the parties. It could do so by causing the necessary parties mentioned above to be impleaded in the suit. This is because; courts of law are enjoined to decide matters before them according to law even where parties to court proceedings take a passive approach. However, the tribunal did not perform that legal duty, hence a fatal omission. Paragraph 8 I therefore, answer the second issue posed above as follows: that, the non-joinder conversed above was fatal to the proceedings before the DLHT, it rendered the matter before it incompetent. The findings I have made herein above are forceful enough to dispose of the entire appeal without even testing the rest of the grounds of appeal. I will not thus, test them. Otherwise, doing so will amount to a superfluous or academic exercise which is not a core objective of the process of adjudication. I therefore make the following orders: That, the proceedings of the DLHT are hereby declared a nullity, and they are accordingly quashed. Its judgement is also hereby set aside. If parties still wish, they can follow up their rights through a proper procedure of the law. In case this matter will be filed before the DLHT afresh, it shall be tried by another chairman so as to test justice from fresh judicial mind. Each party shall bear his own costs since the tribunal also substantially contributed to the impugned omission that led to this appeal as shown above. It is so ordered. 24/10/2019. Page 8 of 8 4 - 4 Date: 28/10/2019 Coram: Hon. G.H. Herbert - DR AppeHant: Present For the Appellant: M/s Kasebwa - Advocate Respondent: Present B/C: Patrick MIS Kasebwa Advocate; I am ready for judgment Respondent: I am also ready. Court: Judgment delivered in presence of both parties. G.H. Herbert DEPUTY REGISTRAR 28/10/2019 Right of appeal explained. G.H. Herbert DEPUTY REGISTRAR 28/10/2019

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