

TANZANIA / JUDGMENT

dustan r njeme vs norbert gwebe

2021 tzhc 7644 7 december 2021

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TZHCDECIDED
7 December 2021

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IN THE HIGH COURT OF TANZANIA (IN THE DISTRICT REGISTRY) AT MWANZA LAND APPEAL NO. 24 OF 2021 (Arising from the Decision of the District Land and Housing Tribunal for Mwanza at Mwanza before Hon. Masao, E (Chairman) dated P6" April 2021, in Land APPLICATION No. 355 of 2021) DUNSTAN R. NJEME..... APPELLANT VERSUS NORBET GWEBE..... RESPONDENT

JUDGMENT

Last Order: 10.11.2021 Judgement Date: 7.12.2021 M. MNYUKWA, J. This is an Appeal arising from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza (herein will be referred as the trial tribunal) in Land Application No. 355/2020. The trial tribunal upheld the preliminary objection raised by the respondent for a reason that the applicant failed to join a necessary party in his application. The background to this appeal is as follows; i The appellant here in instituted land application No. 355 of 2020 before the District Land and Housing trial tribunal against the Respondent for encroaching the suit land which is his lawful property. In a trial tribunal the Appellant prayed for the declaration to be the lawful owner of the suit property, the declaration that the Respondent has encroached and built some structures illegally on the suit property, demolition of the encroached property, general damages to the tune of Tsh 2,000,000/=, the Respondent and his agent be evicted from the suit property, cost of the suit and any other relief deem fit to grant. At the time of filing reply to the application, the Respondent raised a preliminary objection containing two points of objection and ended up arguing one point of objection that; the application was defectively incompetent for non-joinder of the necessary party. After hearing both parties, the trial tribunal sustained the preliminary objection by the respondent. Dissatisfied with the trial tribunal's decision the Appellant has appealed to this court raising 3 grounds of appeal as follows;

1. That, the Honourable Chairman erred in law and fact by holding that the Mwanza City Council was a primary owner of the suit property. 2
2. That the Honourable Chairman erred in law and fact by dismissing the application for failure to join the Mwanza City Council as a necessary party.

3. That, the Honourable Chairman erred in law and fact by dismissing the application for failure to join the necessary party while failure to join necessary party does not lead to dismissal of the application. The Appellant prays for his appeal to be allowed with costs. By order of the court dated 28/09/2021, the appeal was heard by way of written submissions were both parties adhered to the court's order of filing their written submission. In this appeal, the Appellant was represented by the learned sister Judith Nyaki while the Respondent enjoyed the service of Mwita Emmanuel, learned counsel. The Appellant's counsel started his submission by giving the background of this appeal from the trial tribunal. He then opted to submit on the grounds of appeal by submitting ground 1 and 2 together and then ground 3 independently. She submitted that they are faulting the decision of the Honourable Chairman for holding that the Mwanza City Council was a primary owner of the suit plot hence necessary party to the suit. The counsel felt the importance of giving the meaning of the necessary party as it was provided in the case of Abdullatif Mohamed Hamisi Versus Mehboob Yusuph Osman and Another, Civil revision No. 6 of 2017 (unreported) where the court at page 25 defined the term Necessary party to mean "... one whose presence is indispensable to the constitution of a suit and whose absence no effective decree or order can be passed". He further submitted that in the case of Abdullatif Mohamed Hamis (supra) the court quoted the case of Benares Bank Ltd Versus Bhagwandas, AIR (1947) ALL 18, where the two tests of determining whether a particular party is necessary party to a proceeding were laid down as follows: /. There has to be right of relief against such a party in respect of matters involved in the suit; ii. The court must not be in a position to pass an effective decree in the absence of such party. The counsel went on that, taking into consideration the above tests of who is a necessary party, it is obvious that, Mwanza City Council does not fall in the category of necessary party. That, it is because the issue at hand is not about ownership of land, and there is no any relief sought against Mwanza City Council and without their presence, the court can still pass an effective decree or order. He then prayed for this appeal to be allowed and order the Application No. 355/2020 to continue with hearing from where it ended. The counsel went on to submit that, Mwanza City Council was not a necessary party as the court can still pass an effective decree without him being a necessary part, and therefore the Honorable Chairman erred in law by dismissing the Application. In regard to the 3rd ground, the Appellant's counsel submitted that, even if Mwanza City Council was a necessary party, the Honourable Chairman was supposed to strike out the application and not to dismiss it as dismissal orders goes to the merit of an application. The counsel cited Order 1 Rule 9 of the Civil Procedure Code, Cap. 33 RE 2019, that no suit shall be defeated on the reason of non-joinder or mis joinder of parties. The counsel went on to refer the decision in the case of Abdullatif Mohamed Hamis (supra) where the Court of Appeal struck out the plaint and allow the party to institute the suit. The counsel cited another decision of Ngoni Matengo Cooperative Marketing Union Versus Alimohamed Osman (1959) EA 577 where the court gave out the different outcome of strike out and dismissal of the suit. That it was not right to dismiss the application as the parties were not heard on merit and that would infringe parties to be heard again on the same matter. To finalize his submission, the counsel kept cementing that the dispute was not on

the ownership of the plot but boundaries and there were no any relief sought against the Mwanza City Counsel and therefore he cannot be a necessary party. He prayed for his appeal to be allowed with costs and order application No. 355/2020 to be heard from where it was dismissed. On reply to the Appellant's submission, Respondent started by saying that the Appellant arguments are baseless and non meritorious. He then went on to make remarks that the Appellant misinterpreted the Swahili word "kuyatupilia mbali" which he submit that it meant to strike out and therefore the Appellant was supposed to bring a new application and not file this appeal. On the 1st and 2nd ground, Respondent counsel submitted that, the disputed land is the surveyed one and since Mwanza City Council is responsible for allocating land and since the dispute is centered on boundaries thus Mwanza City Council was the necessary party. Respondent counsel referred to the letter written by Mwanza City Council dated 08/09/2020 with reference No. MCC/L/61103/10 addressed to the 6 Street chairman saying it is the one formed cause of action and without Mwanza City Council no effective decree can be passed as Mwanza City Council is responsible to show boundaries which is the subject of this dispute. The Respondent's Counsel submitted that non joinder of parties is fatal and went on to cite a case of Peter Richard Versus Masau Mujungu, Land Appeal No. 10 of 2020 (unreported) where the court quoted another case of Abdullatif Mohamed Hamisi Versus Mehboob Yusuph Osman and Another, Civil revision No. 6 of 2017 (unreported) pointing out the holding of the court that Rule 9 Order 1 is in respect of nonjoinder and misjoinder of necessary parties and in the absence of necessary parties, court may fail to deal with suit as it shall not be able to pass effective decree. The counsel also pointed out that non joinder of parties is fatal by citing two cases of Juma B Kadala Vs Laurent Mnkande [1983] TZ HC 42, and Stunsus Kakola Vs Tanzania Building Agency Mwanza City, Civil Appeal No. 45 of 2018 (Unreported). The Respondent's counsel went on to say that, the absence of the authority which surveyed and allocated and which wrote the above mentioned letter, it is legally 7 impracticable to pass an executable decree. That on land ownership the Chairman intended to highlight the modes of land ownership in Tanzania. On the third ground of appeal the Respondent counsel repeated what he had reiterated at the beginning of this submission that the Appellant misunderstood the word "natupilia mbali shauli hili" to mean he strike out the application and he did not dismiss the application as the Appellant's alleged. Therefore, the Appellant's Counsel was supposed to file a fresh application by joining Mwanza City Council as a necessary party of the case. The Respondent's counsel also kept insisting on the effect of non-joinder of parties and the outcome as it was discussed in the case of Abdullatif Mohamed Hamis (supra) and Ngoni Matengo (supra). The Respondent's counsel winded up his submission by submitting that after the application was strike out, the applicant was adviced to comply with the court order and if he was still interested, to correct the errors and file a proper and competent application before proper forum. He prays this appeal to be dismissed with costs and the trial tribunals decision be upheld. In rejoining his submission, the Appellant's counsel submitted that the Respondent is misleading this court as the letter did not create any dispute. The counsel went on to question that if Mwanza City Council is 8 responsible for ascertaining the boundaries, then how it becomes a necessary party instead of a witness. He

opined the Mwanza City Council qualified to be called as witness and not to be joined as a respondent. Appellant's counsel submitted further that the Respondent is misconceiving the meaning and test of necessary parties as it was provided in the case of Abdullatif Mohamed Hamis (supra). He insisted that the chairman erred to hold that Mwanza City Council is a necessary party as Appellant and Respondent plots are adjacent to each other and the dispute did not arise during allocation or survey and therefore the Appellant has no any cause of action against Mwanza City Council. He went on that Mwanza City Council is not a necessary party because the trial tribunal could pass a decree by examining the title deeds and visiting the disputed boundaries to see who encroached into another's plot and make decision. He cemented that; the respondent cited the case which is distinguished from the case at hand as this case does not involve ownership but boundaries of surveyed plots with title deeds. Therefore, he prayed this court to disregard them. The Appellant's counsel contested to have misunderstood the phrase "kuyatupilia mbali" and instead the respondent is the one who misunderstood it and misled the court. And that, if the Chairman 9 intended to strike out then he ought to have said "kuyafukuza/kuyatupa nje maombi haya" and instruct the Appellant to institute the fresh application. She also added that even if Mwanza City Council was a necessary party (which is not the case) the dismissal was improper. The Appellant's counsel winded up rejoinder praying this appeal to be allowed with costs and order Application No. 355/2020 to continue with hearing from where it was before the dismissal order to attain parties' justice. Now this court remain with one task of determining whether this appeal has merit. I will take the parties' choice of determining the 1st and 2nd ground of appeal together and discuss the 3rd ground separately. Starting with the 1st and 2nd grounds of appeal, the Appellant's main contention is that Mwanza City Council is not a necessary party to this matter as the trial tribunal could still pass an effective decree with absence of Mwanza City Council. The Appellant's counsel pointed out two tests to determine whether Mwanza City was a necessary party. First, the right to relief against such a party in respect of matters involved in the suit. Second, the court must not be in position to pass an effective decree in the absence of such party. In relation to the matter at hand, the Appellant's counsel submitted that Mwanza City Council does not fall to io the category of a necessary party as the disputed plots are surveyed and have titles. While the Respondent counsel contested such averment by saying that Mwanza City Council being the authority that surveyed and allocated the plots then it is a necessary party. The Respondent blamed the Mwanza City Council to have cause the dispute via its letter dated 8/9/2020 and caused the cause of action. From this rival contention I find it necessary to refer to the Civil Procedure Code Cap 33 R.E 2019, Particularly Order I Rule 3, where the Code provides as to who can be joined as defendants; Order I Rule 3. All 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 alternative where, if separate suits were brought against such persons, any common question of law or facts would arise. From the provision above it is clear that for the persons to be joined as defendants then the plaintiff must have a right to relief against both of them and in its absence will render the delivered decree not executable. Now, coming to our case at hand,

the most important question that need li to be answered is whether the appellant have a right to relief against Mwanza City Council. I am inclined to agree with the Appellant's submission on the two tests of necessary party provided in the case of Benares Bank Ltd Vs Bhagwandas, AIR (1947) ALL 18 that, in order to term the Mwanza City Council as the necessary party the Appellant has to have a right of relief against Mwanza City Council and the court must not be in position to pass an effective decree in the absence of such party. Also, in the case of Abdi M. Kipoto v Chief Arthur Mtoi, Civil Appeal No. 75 of 2017(unreported) the Court of Appeal said that; "A party becomes necessary to the suit if its determination cannot be made without affecting the interests of that necessary party". The parties' submission revealed that both the appellant and the respondent own a separate surveyed plot. Meaning that there is no dispute of ownership of land as the appellant submitted, the dispute between the Appellant and the Respondent is on the boundaries. As reflected on the Appellant's Application in the trial tribunal. The Appellant stated that the Respondent has encroached into his disputed land which is adjacent to Respondent's plot. f/\ i 12 This is to say the appellant cannot sue the Mwanza City Council as to the boundaries because the plots are surveyed lands with known boundaries and if that is the case then the Appellant has no right to relief against Mwanza City Council. Furthermore, I don't agree with the argument of the Chairman of the trial tribunal that Mwanza City Council is the original owner of the disputed land. As it is reflected from the submissions of the Appellant, Mwanza City Council was not the original owner as he was involved in surveying and allocating Plots to the parties and the dispute arose after allocation and not before or during allocation since the appellant was owning the disputed land before it was surveyed. Since the dispute is not about the ownership of the disputed land, and it was undisputed that the appellant owned the disputed land before it was surveyed, and that the exercise of surveying found the appellant as the owner of the land in which finally he was granted a right of occupancy, in those circumstances, I don't think if there was need even joining the original owner who sold the land to the appellant. The seller might became the necessary party if there was dispute on ownership of the land in which it is not our case here as the dispute centered on boundaries and more importantly after being surveyed. 13 Thus, I am settled that the Mwanza City Council might be a key witness to the determination of the controversy on boundaries between the parties. This is due to the fact that no interests of the Mwanza City Council is at stake if the suit will be decided in favour of either party. In the circumstances of our case at hand, as I have earlier indicated, if need arise, the Mwanza City Council suffices to be called as a witness of which the land surveyor might be an ideal person to help the trial tribunal to reach its decision on determining as to whether there is encroachment or not if the dispute will not be resolved by visiting the locus quo. From the above discussion, I find the first and second grounds of appeal has merit, and thereby I allow them. As to the third ground of appeal, whether the words "nayatupilia mbali" amount to strike out or dismissal of the suit. The Appellant's counsel contended that the words amount to dismissal while the Respondent's counsel averes that the words amount to strike out. I think this issue should not detain me much, looking at the decision of the trial tribunal in its totality, it is clear that the Chairman of the trial tribunal did not decide the matter on merit

for a reason that the appellant failed to join a necessary party. That being the position, the remedy was to struck out the matter. 14 In the final analysis, I allow the appeal, I remit back the file to the trial tribunal of Mwanza so as Application No 355 of 2020 to continue where it ended. Costs to follow events. It is so ordered. M.MNYUKWA JUDGE 07/12/2021 Right of appeal explained to the ies. M.M KWA JUDGE 07/12/2021 Judgement delivered on 07th day of December, 2021 via audio teleconference whereby all parties were repiotely present. JUDGE 07/12/2021 15

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Prepared on 14 October 2026 · Esheria