

TANZANIA / JUDGMENT

RULING ISSA NDUMA ON NECESSARY PARTY

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
MWANZA AT MWANZA LAND CASE NO. 25 OF 2023 ISSA NDUMA AND 449
OTHERS..... PLAINTIFF VERSUS THE REGISTERED TRUSTEES OF
THAQIB ISLAMIC CENTRE.....1st DEFENDANT REGISTERED
TRUSTEES OF ISLAMIC PROPAGATION CENTRE (IPC).....NECESSARY
PARTY

RULING

16th Sep & 25th October, 2024 ITEMBA, J. The suit by the plaintiff has encountered a series of preliminary objection (PO) from the 1st defendant. Prior to the present PO the 1st respondent filed points of preliminary objections inter alia that there was miss-joinder of a necessary party. The outcome of that PO led to inclusion of the Necessary party into the suit by an order of this court dated 4th day of June 2024. Again the 1st defendant have raised a point of preliminary objection that; “Since the suit involves registered land described as Title No. 29139, 29177 and 4256, non-joinder of the Registrar of Titles and Commissioner for oaths (sic) renders the suit incompetent and liable to be strike out.” 1 To grasp the gist of this point of preliminary objection I will narrate albeit in short the background of this matter. Parties’ dispute is over the parcel of land described as Title No. 29139 designated at Plot No. 502 Block ‘A’ Nyasaka Mwanza City; Certificate of Title No. 29177 designated at Plot No. 569 Block LL and Certificate of Title No. 4256 styled as farm No. 1 Bock ‘LL’ Kiloleli Mwanza (hereinafter the suit premises). Both the plaintiff and the 1st defendants alleges to be lawful owners of the suit premises which according to both parties, it was acquired through contributions made by a number of Muslims who had formed unregistered union called Darsa Duara with the aim to establish and operate educational institutions. Another fact which is undisputed is that, members of Darsa Duara once entrusted the necessary party to manage the schools built over the suit premises and that the Certificate of Titles over the suit premises was registered under the name of the Necessary party herein. Prior to institution of this suit, the 1st defendant sued the necessary party in Land Case No. 23 of 2015 for recovery of the suit promises and management of the school. They inter alia secured a decree which ordered the ownership of the suit premises be transferred to the 1st defendant. 2 Now, in this suit, the plaintiff challenges the victory by the 1st defendant in the previous proceedings that

it was acquired by fraud because some of the members of Darsa Duara secretly registered themselves on a trustee (the 1st defendant) and claims ownership of the suit premises in isolation of other members of Darsa Duara. The reliefs sought by the plaintiffs are as follows;

- (a) For declarations that the plaintiffs are the legal owner of the suit properties the parcels of land described as Tittle No. 29139 designated at Plot No. 502 Block "A" Of Nyasaka Mwanza City. Certificate of Tittle No. 29177 designated at plot No. 569 Block LL and Certificate of Tittle No. 4256 styled as Farm No. 1 Block LL Kiloleli Mwanza City procedurally and illegally diverted from them by the Defendants.
- (b) A permanent injunction restraining the Defendant respectively, their servants, agents, employees or anybody claiming under or through them from taking possession entering into, evicting whoever is authorized by the plaintiffs, dealing with or in any way interfering with plaintiff quiet possession and/or tittle to the suit properties.
- (c) That the Defendant has committed fraud against the plaintiffs hence this Honourable Court is pleased to declare that the decree of the court dated 24th day of July, 2018. In land Case No. 23/2015 was obtained by fraud and illegally and therefore null and void.
- (d) For a declaration that the defendant is in breach of the fiduciary duty, it owes the plaintiffs. 3
- (e) For an order that the defendant pay the plaintiffs general damages of Tshs. 200,000,000 or such other sum as assessed by the Honourable Court; and
- (f) For an order that defendant, pay the plaintiff punitive damages to be assessed by the Honorable Court.
- (g) For an order that the defendant, be condemned to pay the costs of this suit, and
- (h) Any other relief(s) the honorable Court may deem fit and just to grant. As a matter of procedure, it behoves the court to hear the raised PO first. I ordered the point of PO be argued by way of written Submissions. the submission was drawn and filed by Messrs. Akram Adam and Godfrey Basasingohe for the plaintiff and 1st defendant respectively. Having taken the podium, the counsel for the 1st defendant submitted that, the said plots of land are registered in the names of the Registered Trustees of Islamic Propagation Centre (IPC) but through Land Case No. 23 of 2015 the Registered Trustees of Thaqib Islamic Centre was declared the lawful owner of the said landed properties. That, the Commissioner for Lands and the Registrar of Title are not included as Necessary Parties for the purpose of obtaining an effective decree in this subsequent suit. That, all three parties involved in this suit are claiming ownership over the same plots 4 of land. That, since this Court had already entertained the same kind of proceedings between the Defendant and the Necessary Party by rectifying the register of land in absence of land allocating authorities, this Court cannot again vary its orders basing on the allegation of fraud and on the facts already discussed and decided upon. The court was referred to the case of Ongujo Wakibara Nyamarwa vs Beatrice Gryson Mmbaga Civil Appeal No. 122 of 2021; Msafiri Makindi Mtigandi vs Mwanza City Council & 3 Others Land Case No. 4 of 2021 and Lydia Mwamiko & Another versus

Kinondoni Municipal Council & 14 Others Land Case No. 126 of (all unreported). Basing on his submission, the counsel for the 1st defendant prayed for the suit to be struck out with costs for non-joinder of the necessary party. In reply it was submitted that, the submissions for the 1st defendant were filed on 28/10/2024 contrary to the order of this court which required submission in chief to be filed on 27/8/2024. That, failure to file written submission as scheduled amount to failure to prosecute one's case. I was referred to the case of Jassie and Company Ltd vs Cement Distributors (EA) Ltd, Misc. Civil Application No. 113 of 2022. (unreported). 5 On the merit of PO Mr. Adam submitted that, for the Registrar of Titles and Commissioner for Oaths to be involved in this suit there is condition to be met as set out in the case of Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another, CAT-Civil Revision No. 6 of 2017 (unreported) that is to say; first, there has to be a right of relief against such a party in respect of the matters involved in the suit and; second, the court must not be in a position to pass an effective decree in the absence of such a party. That, nowhere in the pleadings it has been shown that there are any reliefs thought against the Registrar of Titles, Commissioner for oaths or there is a question raised against the Registrar of titles and Commissioner for oaths. That, a Commissioner for Oaths is a person who is authorized to witness the signing of important legal documents, including affidavits and statutory declarations, he has nothing to do with issues of title rather his function is to administer oaths. That, in absence of commissioner for oaths in this suit the court cannot be rendered incapable of resolving the dispute between the parties herein. That, not every suit involving a registered Land need the joining of Registrar of titles, but only where there is a question raised by implication of the pleading on the legalities and propriety of allocation and registration of the Land in dispute. I was referred to the case 6 of Nestory Msoffe & others vs The Registered Trustees of Catholic Archdiocese of Arusha Civil Appeal No. 254 of 2019 (unreported) Ongujo Wakibara Nyamarwa v. Beatrice Greyson Mmbaga, (supra) in. He went further submitting that, in the present suit the presented Amended Complaint and Amended Written Statement of Defence (WSD) the defendant does not question the legality over allocation and registration of the disputed lands in the name of the necessary party. That, the cases cited by the counsel for the 1st defendant are distinguishable. In rejoinder it was submitted that, the submission in chief was filed online timely on 27/8/2024 that the name Commissioner for Oath was a clerical error they meant Commissioner for Land. That, the cited case of Abdulatif Mohamed Hamis (supra) supports the point of objection raised by the 1st defendant. That, there is a right of relief against the Commissioner for Lands and Registrar of Titles who are land allocating authorities. I have considered the submissions of both parties. The contention that the submission in chief was filed out of time raised by Mr. Adam will not detain me. I have checked the Court Online filing system and I have confirmed that, the submission was timely filed on 27/8/2024. 7 Regarding the merit of the PO I will determine whether the Commissioner for Land, Registrar of Titles and Attorney General as a chief advisor of the Government are necessary in this suit. I will ignore the name Commissioner for Oath because I consider it to be a mere slip of pen as the substance of his presence did not feature in the defendant's submission. For a party to be necessary in a suit Order I Rule 1, 3 and 10(2) of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) are

relevant. They provides;

1. All persons may join in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.
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 the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise. 10 (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 improperly joined, whether as plaintiff or 8 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. Therefore, for a person to be considered necessary there must be a right of relief against such part or he will be added for the purpose of enabling the court to effectually and completely adjudicate and settle all the questions involved in the suit. In other words, to enable the court to pass effective and executable decree as stated in the case of Abdulatif Mohamed Osman vs. Mehboob Yusuf Osman (supra) present suit. I have gone through the cited case by the defendants in Ongujo Wakibara Nyamarwa in that case, in the plaint, there were complaints specifically made against the registrar of title. Contrary to the present suit. In fact, at page 6 of the said decision the Court of Appeal quoted Mulla's Code of Civil Procedure that;- 'As regard non-joinder of parties, distinction has been drawn between non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because 0.1 r 9 is a rule of 9 procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed' (Emphasis supplied). In this matter at hand, there is no dispute concerning allocation of land by allocating authorities or validity of a certificate of title over the suit premises. The issue pending for determination is who between the plaintiff and the 1st defendant is entitled to the suit premises. I am aware of the previous judgement of this court which ordered ownership of the suit premises be transferred to the 1st defendant, However, the reliefs sought by the plaintiff on the amended plaint does not indicate if they want to rectify the land Register. Further, in their WSD, both defendants do not state whether the Certificates of Title has already been transferred from the name of Necessary Party to the name of the 1st defendant. The law is settled that; the plaintiff is a dominus litis. He has the domain to choose who to sue. In other words, the plaintiff cannot be forced to sue the defendant she is not willing to sue. See the case of Claude Roman Shikonyi vs. Estomy A. Baraka & Others, Civil Revision No. 4 of 2012 (unreported). Nevertheless, under Order I Rule 10 (2) of the CPC, this court has power to order necessary party to be joined in a suit for effective determination of the matter in

controversy. In the case of 10 Tanzania Railways Corporation (TRC) V GBP T. Ltd (Civil Appeal 218 of 2020 (unreported), the court of appeal said; 'We must stress as we wind up, that if a trial court notes that some issues raised in the pleadings call for addition of a party whose absence will lead to such issues of importance to remain unresolved, then the court cannot fold its arms and assume a role of an onlooker, a bystander or a passer-by only because parties are resistant or unwilling to apply to join a necessary party or parties. The court has a duty to take an active role by taking matters on itself and add such a party or parties to the proceedings in order to facilitate effective and complete adjudication and resolution of all issues of controversy presented before it. That is what we hold to be the position of law.' It is our holding further that, had the trial court been keen enough as it should have, it would have required the respondent to amend its plaint and join the authority that granted land to it, or else, as stated above the court would have taken matters in its own hands and joined either the Commissioner for Lands or the Kigoma Ujiji Municipal Council to the proceedings. In this matter at hand, having gone through the pleadings, I see no need to implead the Commissioner for Land, the Registrar of Title or the Attorney General because both parties agree that the members of Darsa Duara consented the suit premise be registered in the name of Necessary 11 Party herein. The plaintiff does not seek relief to remove the name of the necessary party in the land register. And, the defendants neither in theirs WSD nor submissions tell this court if the transfer has already been effected in the names of the 1st defendant. In the upshot, the point of Preliminary Objection lacks merit. I dismiss it accordingly with costs. It is so ordered. Right of Appeal full explained to the parties. Dated at Mwanza this 25th day of October 2024. L.K.J. ITEMBA JUDGE 12

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