

TANZANIA / JUDGMENT

kikim contractors co ltd vs ncba bank another 2023 tzhclandd 17153 23 november 2023

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23 November 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 268 OF 2023 KIKIM CONTRACTORS CO. LTD.... PLAINTIFF VERSUS
NCSA BANK DEFENDANT NUTMEG AUCTIONEERS & PROPERTY MANAGERS CO. LTD 2^
DEFENDANT Date of Last Order: 11/10/2023 Date of Ruling: 23/11/2023

RULING

I. ARUFANI, J This ruling is in respect of the points of preliminary objections raised by the counsel for the defendants which read as follows: -

1. That the plaint is incurably, defective for non joinder of necessary party to wit the bonafide purchaser of the suit property in the auction.
2. That the plaint is defective for want of pecuniary jurisdiction. With leave of the court the objections were argued by way of written submissions. In his submission Mr. Nimrod Msemwa, learned counsel for the defendants abandoned the second point of preliminary objection and submitted on the first point of preliminary objection only. He stated that non-joinder of a necessary party in a suit is provided for under Order 1 Rule 3 of the Civil Procedure Code CAP 33 RE 2019. He argued that, according to the book titled Civil Procedure with Limitation Act, 1963 by C. K. Takwani, 7th Edition, a necessary party is one whose presence in a suit is indispensable to the constitution of the suit against whom a relief is sought and without him no effective order can be passed. He also cited in his submission the case of 21st Century Food Packaging Ltd V, Tanzania Sugar Producers Association & Another, Civil Appeal No. 91 of 2003 CAT at Tanga (unreported) where the similar definition of a necessary party was given. He argued that, the suit was filed in the court after the auctioning of the suit property and therefore it is proper for the bona fide buyer of the suit land to be joined in the suit as a defendant. He went on saying that reading the plaint at paragraph 15, it shows the successful bidder has been pleaded by the plaintiff and therefore the plaintiff is fully aware that the said mortgaged house has been sold by way of public auction. It is his submission that the bonafide buyer ought to have been joined in the suit

and failure thereof is a violation of Order 1 Rule 3 of the CPC. He observed that the court has to look on whether the case is proper before entertaining it so as to avoid unnecessary delays in future.. He went on arguing that paragraph 15 of the plaint is dear that there is no dispute that the successful bidder is in possession of the suit property. He stated the only claim by the plaintiff is that the defendants 2 did not disclose the name of the said buyer to the plaintiff. He submitted that, since it is the plaintiff who instituted the suit in the court, he ought to know the parties to be joined in the suit. He stated the plaintiff is claiming for the sale of the suit house to be declared void ab initio while the buyer is not joined in the suit. : - He referred the court to the cases of Abdulatif Mohammed Hamis V. Mehboob Yusuf Osman & Another, Civil Revision No. 6 of 2017, CAT at Tanga (unreported) and Mwinyihatibii Jumaa Hatibu V. Ridhwani Jumaa Hatibu, Civil Appeal No. 70 of 2020 [2023], TZCA 17620 (18th September 2023) TANZLII to support his submission. He argued that, the principle laid in the above cited cases shows failure to join necessary party in the present case who is the purchaser of the mortgaged property is a mistake that goes to the root of the case and it is detrimental to the determination of the suit. He also cited in his submission the case of Mondorosi Village Council & 2 Others V. Tanzania Breweries Ltd & 4 Others, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported) where it was held that, overriding objective principle cannot be applied blindly against mandatory provisions of the procedural law which goes to the foundation of the case. In his conclusion he prayed the court to struck out the suit at hand with costs. ■ 3 Mr. Frank Ntuta, learned advocate for the plaintiff drew and filed in the court the submission in reply to the submission of the counsel for the plaintiff. He submitted the plaint is defective because the alleged purchaser is not a necessary party to the suit. He cited to the court the case of Juliana Francis Nkwabi V. Lawrent Chimwaga, Civil Appeal No. 531 of 2020 CAT at Dodoma (unreported) where the Court of Appeal held that: - "Determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances and facts of a particular case. Among other factors for such determination includes the particulars of the non-joined party, the nature of the reliefs claimed as well as whether or not, in the absence of the party an executable decree may be passed." The counsel for the plaintiff argued that, the purchaser of the suit property by public auction conducted on 18/08/2023 who is unknown to both the parties to the date of the submissions is an interested party in the suit and not a necessary party. He submitted that the plaintiff's cause of action is against the first defendant who entered into a loan agreement with the plaintiff, and further the plaintiff has a cause of action against the second defendant who conducted the public auction with instruction from the first defendant. He submitted that, the suit is all about challenging the sale of the suit property and went on arguing that, under the stated circumstances, the court is in a position to pass an executable decree. He consequently observed that, the purchaser of the suit property, if any, remain to be an interested party to the suit who may be joined by his or her wishes or otherwise who does not affect this court to pass effective decree. He further pointed out that, a suit may not be defeated because of misjoinder or non-joinder of parties and supported his argument with Order I Rule 9 of the CPC. He further argued that, even the necessary party as alleged by the defendants is incapable of making the suit to be defeated as the court may

order any party to be joined in a suit for the Interest of justice. He stated the requirement of joining a necessary party In a suit does not apply to a suit where the purchaser. If any is not a necessary party to be joined in a suit as argued by the counsel for the defendants. The counsel for the plaintiff conceded to the definition of the term necessary party supplied by the counsel for the defendants but denied the fact that there is another necessary party apart from the first and second defendants required to be joined in the Instant suit. He stated Order 1 Rule 3 of the CPC is not applicable in the present suit as it is clearly stated that the suit property was sold to an unknown bidder as such, he cannot be a necessary party. He submitted that the reliefs prayed by the plaintiff are against the defendants whom the plaintiff has cause of action against them. The stated reliefs include declaratory, order that the purported sale of the house of the Managing Director of the plaintiff (suit property) by way of public auction on 18/08/2023 is null and void and the other reliefs sought would not affect the purchaser of the suit property, if any. He submitted that is because the stated party is not a necessary party to the suit contrary to what has been submitted by the counsel for the defendants. He went on arguing that, the reliefs claimed by the plaintiff against the defendants arises from the same transaction and no question of law or fact will arise for not joining the purported purchaser in the suit because he is not a necessary party to the suit.. He concluded his submission by arguing that, the preliminary objection, raised and argued by the counsel for the defendant is baseless and it ought to be overruled with costs. In his rejoinder, the counsel for the defendants reiterated his submission in chief the fact that the purchaser of the suit house is a necessary party, and posed a question -'who is the current owner of the said suit property?' He said If there was an auction and there was a successful bidder then the plaintiff was duty bound before filing the suit in the court to do a search and know who is currently the new owner of the suit property. He argued the plaintiff mortgaged the suit property to the first defendant who instructed the second defendant to sell the suit property and it was sold to the third party who is, now the actual owner who ought to be joined in the suit as a necessary party. He stated any order which will be made by the court will affect the stated purchaser of the suit property directly or indirectly. He insisted that the successful bidder is a necessary party to the suit and non-joinder of a necessary party is fatal because it affects the adjudication of the matter between the parties. He relied on the case of Oilcom Tanzania Limited V. Christopher Letson Mgila, Land Case No. 29 of 2015. HC at Mbeya (unreported) to support his submission.. He also submitted that, the case of Juliana Francis Nkwabi (supra) cited in the submission of the counsel for the plaintiff is distinguishable to the instant suit because the nature of the dispute and the reliefs prayed in the said case are different from the present case. At the end he prayed the suit to be struck out with costs for non-joinder of necessary party. Having painstakingly considered the rival submissions from the counsel for the parties in the matter at hand, the court has found the main issue for determination here is whether the point of preliminary objection raised and argued by the counsel for the defendants that the plaint is incurably defective for non-joinder of necessary party to wit the bona fide purchaser of the suit property deserves to be sustained. ■ ∴ Counsel for the parties have no dispute regarding the concept of who is a necessary party. But for clarity purposes the said concept was well elucidated In the case of

Abdulatif Mohammed.Hamis (supra) where the Court of Appeal , laid down two tests for determine the questions of whether a party is a necessary party to a proceeding, The Court of Appeal observed that:- "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. The foregoing benchmarks were described as true tests by Supreme Court of India in the case of Deputy comr., Hardoi V. Rama Krishna, A.I.R. (1953)5.0.521." . The Court of Appeal of Tanzania held that: - "I've, in turn, fully adopt the two tests and, thus, on a parity of reasoning, a necessary party is one whose presence is indispensable to the institution of a suit and in whose absence no effective decree or order can be passed. Thus, 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 determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not. In the absence, of the party, an executable decree may be passed." When the court was dealing with the similar issue in the case of Money Bridge Properties(EA) Limited V. Meru District Council, Land Case No. 24 of 2019. HC at Arusha (unreported) it borrowed a leaf from the Supreme Court of Uganda in the case of Departed Asians Property Custodian Board V. Jaffer Brothers Limited,[1999]1 EA 55 and the position of the law stated by the Court of Appeal of Tanzania in the case of Tang Gas Distributors Limited V. Mohamed Salim Said & 2 Others,(CAT) Civil Revision No. 68 of 2011 (unreported), It was stated: in the Ugandan case as follows:- "\.,For a person to be joined on that ground that his presence is necessary for effectual and complete settlement of all questions involved in the suit, one of the two things has to be shown; Either it has to be shown that the orders which the plaintiff seeks in the suit would negatively affect the interests of that person, and it is desirable, for avoidance of multiplicity of suits, to have such persons joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application of defendant) to be joined as a co-defendant where it is shown that the defendant cannot effectively set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person." In the latter case of Tang Gas Distributors Limited (supra) it was observed that:- "...it is now an accepted principle of law (see MULLA's treatise (supra) at p.810) that it is a material irregularity for a court to decide a case in the absence of a necessary party, Failure to join a necessary party, therefore is fatal (MULLA at p.2010)"/ Although the plaintiff in the present suit states there is no cause of action against the purchaser, but it is clear from the plaint that she is aware that there was a public auction conducted on 18/08/2023, and the suit property was sold to the person he referred in the plaint as in , ■ ■ unknown successful bidder (see paragraph 15 of the plaint). One of the reliefs sought by the plaintiff is for a declaratory order that the sale of the suit property by public auction was null and void ab initio. The stated facts show clearly that there was a sale and consequently there was a purchaser of the suit property, in that regard, any order which will be made by the court will in a way affect the rights of the stated purchaser. In other words, the purchaser is a necessary party because in case any decree is passed it will affect his interest or rights in the suit property. As rightly argued by the counsel for the defendants to avoid multiplicity

of.suits his presence in the matter is indispensable for effectual execution of the decree. In view thereof, as pointed out by the counsel for the: defendants the purchaser is a necessary party and ought to have been impleaded in the suit and failure to do so is fatal to the proceedings. . : • Now the question is what is the remedy for non-joinder of necessary parties in a suit? When the Court of Appeal was dealing with the issue of non-joinder of necessary party in the case of Abdullatif Mohamed Hamis (supra) it ordered;the matter to be returned to the trial court for amendment of the plaint to,include the necessary party. The similar order was made in the case of Money Bridge Properties ■11 . ■ EA Limited (supra). The stance taken in the above cited cases;is in line with what is provided under Order I Rule 10(2)of the GPC which allows the court to order amendment of a plaint to implead the name of a necessary party In a suit. Since the plaintiff has averred the purchaser: is unknown to them and the suit property was sold by the second defendant under the instruction of the first defendant, the court has found;the mentioned defendants are required to disclose the name'of the purchaser of the suit property to the plaintiff to enable the plaintiff to join the purchaser in the suit. The court has found the submission by the counsel for the defendants that the plaintiff is required to do a search to get the name of the purchaser it may be a tricky situation because if. there is no transfer then the search,result would not reflect, the name of the purchaser. . In the premises, the objection raised, by the counsel for the defendants is sustained to the extent that there is .non-joinder of the necessary party in the plaint. However, the court has, found It is appropriate to order the plaint be amended so as to join the purchaser of the suit property as a necessary party by Virtue of Order I Rules 9 and 10(2)of the CPC. The amended plaint to be filed in the court within 12 '■ 30 days from the date of this ruling. Costs to be within the suit. It is so ordered. Dated at Dar es Salaam this 23rd November, 2023. -/• N i ■> s U I. Arufani. JUDGE k// 23/11/2023 Court: Ruling delivered today 23 day of November, 2023 in the presence of Mr. Nimrod Msemwa, learned advocate for the defendants and also holding brief for Mr. Frank Ntuta, learned advocate for the plaintiff. Right of appeal to the Court of Appeal is fully explained. RT O r\j <5 I. Arufani. K JUDGE s S: 23/11/2023 13

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