

TANZANIA / JUDGMENT

ongujo wakibara nyamarwa vs beatrice gryson mmbaga 2024 tzca 74 20 february 2024

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: KOROSSO. J.A.. KITUSI. J.A. And KHAMIS, J.A.^ CIVIL APPEAL NO. 122 OF 2021 ONGUJO WAKIBARA NYAMARWA APPELLANT VERSUS BEATRICE GREYSON MMBAGA..... RESPONDENT (Appeal from the judgment of the High Court of Tanzania, Land Division at Dar es salaam) (Rumanvika, J.) dated the 11th day of December, 2020 in Land Case No. 43 of 2016 RULING OF THE COURT 13th & 20th February, 2024 KITUSI, J.A.: The parties to this land dispute have competing claims of title over a parcel of land described as Plot No. 93, Block 2 with Certificate of Title No. 117257, situated at Mtoni Kijichi within Temeke Municipality. The appellant was the plaintiff at the trial High Court alleging that the piece of land was allocated to him by the government while the respondent was the defendant alleging that she purchased the suit land in 2004 and questioned the allocation of that land to the plaintiff/appellant. The essence of the suit was an alleged trespass by the respondent. The High Court entered judgment for the respondent, declaring her the rightful owner of the suit land, which prompted the appellant to prefer this instant appeal. This ruling is in respect of an issue that was raised by the Court inviting the parties to address the propriety of the proceeding at the trial court that proceeded without joining parties who appear to be necessary for the determination of the dispute. Mr. Samson Edward Mbamba, learned advocate, appeared for the appellant assisted by Mr. Kung'e Nyamhanga Wabeya, learned advocate. Mr. Nickson Ludovick, also learned advocate, represented the respondent. The essence of our concern is traced from the pleadings. In the amended plaint, the appellant had averred as follows under paragraphs 5, 7 and 8:- "5. That sometimes in the year 2004 the plaintiff was allocated plots no. 204 and 205 Block 3 Mtoni Kijichi for residential purposes. When time was due for payment o f the said plots he was told to wait for re-allocation o f another plot as the said plots were located on steep slope. Copy o f the letter dated 17th December 2009 is annexed herewith and marked OWN 1. The plaintiff craves for leave o f the court to refer to the same as part o f this plaint.

7. That on 14th day of July 2010 the plaintiff was issued with a letter of offer from the Ministry of Lands, Housing and Human Settlement Copy of the Letter of Offer is annexed herewith and marked OWN 3. The plaintiff craves for leave of the court to refer to the same as part of this plaint.
8. That the plaintiff upon paying all land fees on 1st of August 2010 was issued with certificate of occupancy over the disputed land. Copies of certificate of Occupancy and a letter from the Ministry of Lands, Housing and Human Settlement addressed to the plaintiff is attached herewith and marked annexures OWN 4 and OWN 5 respectively. The plaintiff craves for leave of the court to refer to the same as part of this plaint." In the written statement of defence, the respondent not only disputed the allegations contained in the above paragraphs but also put to question whether the alleged allocation was valid. She stated the following under paragraphs 5, 7 and 8 of the amended written statement of defence "5. That the contents of paragraph 5 of the amended plaint are denied in their entirety as no proof is adduced to substantiate the fact that plaintiff was allocated Plot No. 204 and 205 Block 3 for residential purposes. Also, no scintilla of proof is given to show that plaintiff was told to wait for re-allocation of another plot as the said plots were located on steep slopes. Letter dated 17/12/2009 marked as OWN 1 is objected on the following reasons. Firstly, signature appended to it that purports to be of the plaintiff is quite different from plaintiff's signatures appended to the plaint, amended plaint and certificate of title. Secondly one would wonder if plaintiff had applied for a plot under 20,000- plots- " project" without filing Land Form No. 19 as he rightly did on 15/06/2010 in the instant plot, thirdly the address (physical or postal) of addressee of that letter is unknown and no proof that it was sent and received and fourthly means of genesis of follow up is broken. The letter is nothing but a forgery.
7. That the contents of paragraph 7 of the amended plaint are noted to the extent that plaintiff was issued with a letter of offer on 14/07/2010. Is it disputed to the extent issuance of letter of offer was invalid and unlawful as defendant who was lawful owner and occupier of the land at that material time was not compensated as the law mandatory requires. It was neither Ministry of Lands, nor Temeke Municipality nor the plaintiff who paid compensation to the defendant prior to allotment of the suit land.
8. That the contents of paragraph 8 of the amended plaint are noted to the extent that plaintiff was issued with a certificate of right of occupancy on 10/08/2010 over the disputed land. Is it disputed to the extent that issuance of a certificate of right of occupancy over the disputed land was irregular, invalid and unlawful as defendant who was lawful owner and occupier of the land at that material time (prior to its issuance was not compensated as the law mandatorily requires). It was neither Ministry of Lands nor Temeke Municipality nor the plaintiff who paid compensation to the defendant prior to allotment of the suit land. It was for this reason land case no. 124/2016 was instituted in this Court by defendant suing plaintiff, Temeke Municipality, Registrar of Titles, Commissioner for Land and Hon. Attorney General for compensation over the disputed land is pending before Hon. Mgonya, J." Plain from those pleadings is the fact that some of the issues would not be resolved

without impleading the land allocating authorities. Even the judgment of the High Court appears, in our respectful view, to be inconclusive because it orders for instance, compensation without specifying the person to carry it out, and/or allocation of an alternative plot to the appellant which order is not directed to any party. We are aware of the provisions of Order 1 rule 9 of the Civil Procedure Code (the CPC) that non-joinder of parties may not defeat a suit. We are also aware of rule 13 of Order 1 of the CPC that a party who does not object to a non-joinder at an earliest time possible shall be deemed to have waived the right to object. However, we are similarly aware of a settled position of the law that non-joinder of a necessary party is bound to defeat a suit. In *Stanslaus Kalokola v. Tanzania Building Agency & Mwanza City Council*, Civil Appeal No. 45 of 2018 (unreported) we pointed out the 5 exception to rule 9 of Order 1 of the CPC relying on the Commentary to Mulla's Code of Civil Procedure, 13th Edition, Volume I page 320 and we reproduce it hereunder. "As regards 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 Order 1 r. 9 is a rule of 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 the above case, we cited our earlier decision in the case of *Tan Gas Distributors Limited v. Mohamed Salim Said & 2 Others*, Civil Application for Revision No. 68 of 2011 (unreported) which offers guidance as to what the trial court should do in the prevailing circumstances. The learned counsel for the parties were in agreement that the non-joining of the Commissioner for Lands, the Registrar of Titles, the Temeke Municipal Council and the Attorney General rendered the suit unmaintainable. We agree with them. They differed on the way forward, but we see one as we shall soon order. 6 Since the suit was unmaintainable, we quash the proceedings before the High Court as well as the judgment, and set aside the resultant orders. We order a retrial before a competent court during which the presiding judge may make appropriate orders according to law, including the joining of necessary parties. Each party to bear their own costs. Order accordingly. DATED at DAR ES SALAAM this 19th day of February, 2024. W. B. KOROSSO JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL A. S. KHAMIS JUSTICE OF APPEAL The Ruling delivered this 20th day of February, 2024 in the presence of Mr. Fabian Sefu, learned counsel holding briefs for Mr. Samson Mbamba, learned Counsel for the Appellant and also for Mr. Nickson Ludovick, learned Counsel for the Respondent is hereby certified as a true copy of the original.

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