

TANZANIA / JUDGMENT

Ruling Taheri

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT DAR ES SALAAM LAND CASE NO. 33 OF 2010 TAHER
HUSSEIN.....PLAINTIFF VERSUS HARITH AMOUR KHALFAN
(The Administrator of the Estate of Late KHALFAM SAID SINANI)
.....1ST DEFENDANT KIMONGE
ORIYO.....2ND DEFENDANT INTER–TOURISM (T)
LIMITED.....3RD DEFENDANT

RULING

7th & 28th March 2025. KIREKIANO J: The plaintiff's claims against the defendants a declaratory order affirming that the plaintiff is the legal owner of all plots in Block 15A, Gezaulole, Temeke Municipality, L.O. No. 39038. The plaintiff also seeks an order restraining agents, employees, or any other individuals, bodies corporate, or institutions from interfering with the plaintiff's plot. Additional claims include damages and costs. The defendants dispute the claims. On the part of the 2nd and 3rd defendant, the stance is that they are the lawful owners of the suit property and wondered how the area could be resurveyed in favor of the plaintiff. As such it is claimed by these 1 defendants that they have evidence from the land commissioner to prove their ownership. Leaving the details of the parties contending pleadings, what is worth noting is that, upon perusal of the amended pleadings, it appears to this court that the Centre of controversy involved the Commissioner for Lands, and the Registrar of Title, thus making them necessary parties. The parties are in the same position that they ought to be joined. What is the contending position is the fate of this proceedings. To appreciate this concern, in this ruling, it is worth noting here that the plaintiff's suit was filed in 2010, and it was dismissed on June 2, 2014, for want of prosecution. Upon necessary applications, on 30 October 2018, this court made an order setting aside the dismissal order dated 6th February 2014. Despite the order dated 30 October 2018, this record was on in December 2023. Upon tracing the records, it was assigned to me for continuation of the trial. It followed another procedure to have the appointment of an administrator for the first defendant following the death of the earlier administrator. All these prolonged facts these proceedings, and the same are relevant in the party's submission on the fate of these proceedings in the event of a need to join the necessary party. 2 Mr Didas for the plaintiff submitted that he agrees that, considering the party's dispute, the Commissioner for Lands and the Registrar of Titles are necessary parties. Ordinarily, the remedy would be to withdraw the suit or strike out

the plaintiff to join the required necessary party. In this case, the aforementioned Commissioner for Lands is a government entity with a 90-day notice procedure needed to initiate legal action against them. He stated that, in this case, the plaintiff is concerned with the peculiar circumstances, as previously mentioned. That is to say, if the matter was to be withdrawn with a view of joining the necessary party after the lapse of 90 days' notice, the suit would suffer the hurdles of limitation. He urged this court to consider that the only safe way to ensure that hurdles of time limitation do not defeat justice is to allow the respondent to make amendments, including the registrar of title and the commissioner for land, after the lapse of 90 days' notice as required under section 6 (2) Government Proceedings Act. (GPA) Mr Didas reflected on the case in *MSP & International Ltd vs. Trustee of Tanzania* which gave guidance that facts may be pleaded under showing that the case was already being litigated to salvage a case from bar of limitation. In his opinion this may leave a court with discretion to accept or reject the facts of limitation. He emphasized a note that, this case was delayed in court for reasons beyond the plaintiff's control. Having posed a prayer of amendment, he was of the view that the suit is not incompetent Mr Woiso, for the second and third defendants, was of the view that the submission by the plaintiff's counsel is not covered by law. Regarding the prayer for amendment, Order XVII of the Civil Procedure Code states that there must be a reason for the adjournment. He said, since the parties agree that the commissioner in this case is a necessary part, without his presence, we cannot have an effective decree. He advised that the plaintiff may withdraw the suit under XXIII Rule (1) and (2), which provides room for withdrawal of the suit to avoid it from failing due to a defect. As such, the procedure under section 6 (2) GPA is to the effect that no suit against the Government shall be instituted, and heard unless ninety days' notice has been served. Now, without the necessary part, this suit becomes incompetent, and the order for adjournment will contravene Section 6 (2) of the GPA. 4 Regarding the remedy in the circumstances of this case, he said that the plaintiff may salvage his intended suit under Order VI, Rule 6, CPC, by pleading the facts to show why the suit is not time-barred. He said this provision protects the plaintiff. The facts to be pleaded are as provided under sections 21 and 22 of the Law of Limitation Act, he cited the case in *M/s. P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA)* (Civil Appeal No. 265 of 2020) [2021] TZCA 248 (9 June 2021) page 11, when the CAT was faced with akin situation on terms of Order VII rule 6 of the CPC held; In terms of Order VII rule 6 of the CPC, a party who seeks to rely on exemption from time limitation has an obligation to plead grounds for such exemption. The grounds which are permitted for the purpose of exemption are specified under sections 20, 21, 22 and 23 of the Act He submitted that this case is a fit for the application of that provision. He believes it is proper that the plaintiff be protected by law rather than by wisdom. Mr. Woiso thus submit that the prayer for adjournment be refused on the reason stated to avoid offending section 6 of the GPA. If the plaintiff does not wish to withdraw, then the remedy is to strike it out. He also argued that if the suit is withdrawn or struck out, the defendant should have the costs, as the defendant has been in court all along. 5 The first defendant had nothing to submit, understandably being a lay person. In rejoinder, Mr Didas noted that Order XVII CPC, an adjournment has to be for good cause. The circumstance here is a good ground for adjournment. He conceded that failure to join the necessary party in this case, the Government, renders the suit incompetent. But maintained the consideration of the peculiarity of this case.

With regards to costs he responded that the issues were raised by court, and the plaintiff. Conceded thus costs in event should be waived. He said the power to order an amendment is bestowed upon the court. In this case, the intended party has his procedure to be joined. As such under Order VII Rule 6 CPC, the matter stayed in court at no fault of the plaintiff. By the pleading of the facts to waive limitation, we do not see that it is safe on the part of the plaintiff. On my part, consideration of whether the commissioner for land is a necessary part has been taken from the reliefs sought in the pleading. This court consideration which is also consensus of the parties is fortified by the decision in *Abdulatif Mohamed Hamis vs Mehboob Yusuf 6 Othman & Another* (Civil Revision No. 6 of 2017) [2018] TZCA 25 (1 August 2018) "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 a determination include the particulars of the non-joined parties, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree maybe passed." [Emphasis provided] As indicated above, considering that the parties are litigating on a land which was allegedly resurveyed, and there they have pleaded facts and made prayers, making the Commissioner for Lands and Registrar of Titles at the center of the controversy, these entities become a necessary part in this case. While I note the submission by Mr Didas that, this court may order amendment of the pleadings to join said entities, it is apparent that procedure sue the government entity is of its kind as opposed to the ordinary parties. Section 6(2) of the Government Proceedings Act (Cap 5 R.E 2019). at issue provides; "No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer 7 concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General and the Solicitor General." (Emphasis supplied) From this section, it can be discerned that the institution of suits against the government and the jurisdiction of the court to hear the same depend on the submission of a ninety-day notice. I have taken into account the circumstances, much as I agree with the plaintiff's counsel that the plaintiff is not to blame for the lapse of time; this will be a matter of the other day upon in determination of limitation. Applying all wisdom necessary, I am unable to take the path suggested by Mr. Didas to adjourn the matter pending compliance with the law; whatever wisdom to be employed must observe the clear provision of the law, which is the perfection of reasoning. Now, whether the matter which ought to join the attorney general as a part could remain pending, as beseeched by Mr Didas, this court was faced with akin situation in which the plaintiff sought adjournment to accord his opportunity of joining of the Attorney General as necessary part. My brother Kamana J in *Kirotet Ole Siara vs. Ibrahim Charles 8 & Others* (Civil Case No. 4 of 2024) [2024] TZHC 7243 (27 June

2024) held, As regards the prayer that the Court should use its power to join the Attorney General or permit the plaintiff to amend the plaint to add the Attorney General as a necessary party, I hasten to state that since the Attorney General is a necessary party by operation of the law, his absence makes this suit incompetent before the Court. Given that, I hesitate to grant the prayers in the incompetent suit. I subscribe to this position that, in event the suit

is incompetent, the court is bereaved of its powers to make useful orders. The proper recourse is to strike it out if not withdrawn by a part. This position is also fortified by the CAT decision at in Hamisi Bushiri Pazi & Others vs Saul Henry Amon & Others (Civil Appeal No. 166 of 2019) [2022] TZCA 186 (13 April 2022).at page 20. Regarding costs, I have considered the prayer by Mr. Woiso; it is noted that the issue of joinder of necessary parties was raised by the court. This is the practice that I wish to keep. Thus, each part shall bear the cost. Before I pen off, I wish to indicate in my dictum that, reading from the proceedings and the correspondences made in respect of the suit, it is apparent as indicated above, the proceedings were protracted for a long 9 time not only for the reason of the parties but also the court. This will be a matter of another day if Order VII rule 6 CPC was to be at issue. In the event of an act of the court not in the parties' control, the judicial wisdom dictates to accede to the old Latin maxim, thus: "Actus curiae neminem gravabit", that is "an act of the court shall prejudice no one. In the end, the suit is struck out, for being incompetent. Each part shall bear its own const. A J KIREKIANO JUDGE 28.3.2025 COURT Ruling delivered in presence of Mr Boniface Woiso for the 2nd and 3rd defendant also holding brief of Mr Respicius Didas for the plaintiff and in absence of the 1st defendant. 10 A J KIREKIANO JUDGE 28.3.2025 11

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