

**IN THE COURT OF APPEAL OF TANZANIA**

**AT BUKOBA**

**(CORAM: MWARIJA, J.A., MUGASHA, J.A., MKUYE, J.A.)**

**CIVIL APPEAL NO. 224 OF 2018**

**1. CHARLES CHAMA  
2. MUZOLA KAISHOLI  
3. KADUGU KAHINDI** } .....**APPELLANTS**

**VERSUS**

**1. THE REGIONAL MANAGER (TRA)  
2. DISTRICT COMMISSIONER  
KARAGWE DISTRICT  
3. DISTRICT IMMIGRATION OFFICER  
KARAGWE DISTRICT  
4. THE ATTORNEY GENERAL** } .....**RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania  
at Bukoba)**

**(Khaday, J.)**

**dated the 2<sup>nd</sup> day of May, 2014**

**in**

**Civil Case No. 2 of 2006**

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**RULING OF THE COURT**

**8<sup>th</sup> & 13<sup>th</sup> May, 2019**

**MWARIJA, J.A.:**

The appellants, Charles Chama, Muzola Kaisholi and Kadugu Kahindi (the 1<sup>st</sup> – 3<sup>rd</sup> appellants respectively) filed this appeal challenging the decision of the High Court of Tanzania (Khaday, J.) in Civil Case No. 2 of

2006 (the suit). The appellants who were the plaintiffs in the High Court, had instituted the suit against the respondents; the Regional Manager TRA, Kagera region, the District Commissioner, Karagwe district, District Immigration officer, Karagwe district and the Attorney General (the 1<sup>st</sup> – 4<sup>th</sup> respondents respectively). The suit arose from the acts of the respondents (the defendants in the High Court), of seizing and later selling a certain number of cattle claimed by the appellants to be their properties. In the suit, the appellants claimed for the following reliefs:

- "(i) A payment of Tshs. 450,000,000/= being the value of 1500 herds (sic) of cattle belonging to the plaintiffs, which were illegally seized and sold jointly by the first, second and third defendants.*
- (ii) A payment of Tshs. 100,000,000/= being the general damages expected from off-springs of milk (sic) of the illegally sold female cattle.*
- (iii) Costs of the suit.*
- (iv) Any other relief, which this court may deem fit to grant to meet the justice of this suit."*

The respondents denied the claim contending that the seized cattle did not belong to the appellants. The case was heard by Kibela, J., but later on, the judgment was composed and delivered by Khaday, J. In her judgment the learned judge found that the appellants had failed to prove their claims and proceeded to dismiss the suit. The appellants were dissatisfied by the decision hence this appeal.

At the hearing of the appeal on 8/5/2019, the appellants were represented by Mr. Aaron Kabunga, learned counsel while the respondents were represented by Mr. Abubakar Mrisha, learned Senior State Attorney who was being assisted by Ms. Grace Lupondo, learned State Attorney and Mr. Salvatory Switi, the Principal Legal counsel, Tanzania Revenue Authority.

Given the fact that the respondents had, by a notice filed on 2/5/2019, raised a preliminary objection and because, according to the rule of practice, determination of a preliminary point of law has to precede hearing of a main case, we proceeded to hear the learned counsel for the parties on the point of law raised by the respondents. The objection is to the following effect:

*"The appeal is incompetent for contravening the provision of Rule 97(1) of the Tanzania Court of Appeal Rules, 2009 as amended for failure to serve the Memorandum of Appeal and Record of Appeal within the prescribed time of the law."*

Submitting in support of the preliminary objection, Mr. Mrisha argued that the respondents were served with the record and memorandum of appeal (the documents) outside the period of seven days from the date of filing the same as required under Rule 97(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He contended that, whereas the documents were lodged on 15/1/2018, the respondents were served on 7/5/2018, the period of over three months thereafter. He argued that by so doing, the appellants contravened the provisions of Rule 97(1) of the Rules hence rendering the appeal incompetent. He cited the case of **National Housing Corporation v. Asgarali Habib Kassam Manji**, Civil Appeal No. 112 of 2006 (unreported) to support his argument. He stressed that since Rule 97(1) of the Rules is couched in mandatory terms, the appeal should be struck out with costs.

In reply, Mr. Kabunga submitted that the preliminary objection is misconceived. He argued that the respondents have not established that they were served with the documents outside the period of time prescribed under Rule 97(1) of the Rules. According to the learned counsel, the documents were served to the respondents on 17/1/2018 within the period of seven days from the date of lodgment of the same in Court. He contended that, since the point raised by the respondents' counsel requires proof of the date of service, the fact which had to be established through evidence, the objection by respondents is not based on a pure point of law. He submitted that, the onus of proving the date of service lies on the respondents who alleged that they were served out of time.

In rejoinder, Mr. Mrisha conceded that, the date of service of the documents is a matter which is in dispute and therefore, the application ought to have contained the evidence showing the date of receipt of the documents by the respondents. He prayed however, to be allowed to tender the relevant document to prove his assertion. We declined to grant that prayer because of the obvious reason, that to do so would amount to allowing a counsel to adduce evidence from the bar. Following that stance,

the learned Senior State Attorney concluded his rejoinder by leaving the matter for the Court's determination.

Having considered the arguments of the learned counsel for the parties, we find that the only issue for our determination is whether or not the documents were served on the respondents outside the prescribed time in contravention of Rule 97(1) of the Rules. Mr. Mrisha conceded that the notice of preliminary objection does not contain any attachment showing that the respondents were served with the documents belatedly on 7/5/2018. Since the contention was disputed by the appellant's counsel, there is no gainsaying that the fact as regards the date of service of the documents on the respondents is unascertained.

In the circumstances, we agree with Mr. Kabunga that the preliminary objection does not raise a pure point of law. In the case of **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 (unreported), the Court dealt with a similar preliminary objection. At the hearing, it became apparent that the date on which the memorandum and record of appeal were served to the respondent in that case, was not ascertained. Relying on the

principle stated in the famous case of **Mukisa Biscuit Manufacturers Ltd v. West End Distributors Ltd** [1969] EA 696, we held as follows:

*"In the present case, the parties were at issue as to whether or not the documents referred to in the 1<sup>st</sup> and 3<sup>d</sup> grounds of the preliminary objection were timely served to the respondent. Since therefore, determination of this issue requires evidence, the two grounds do not raise pure points of law."*

The principle was also underscored in the case of **Ms. Safia Ahmed Okash (As Administratrix of the Estate of the Late Ahmed Okash) v. Ms. Sikudhani Amiri & 82 others**, Civil Appeal No. 138 of 2016 (unreported). In that case, we emphasized that a preliminary objection may only be raised when a matter involves a pure point of law. The Court cited a passage from the decision in the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported) which states as follows:

*"... Where a preliminary objection raised contains more than a point of law, say law and facts it must fail (see **OTTU and Another v. Iddi Simba, Minister for Industries and Trade and Others***

*[200] TLR 88). For, factual issues will require proof, be it by affidavit or oral evidence."*

Having found therefore, that the preliminary objection raised by the respondents does not raise a pure point of law, the same must, for that reason, fail. In the event, the objection is hereby overruled with costs.

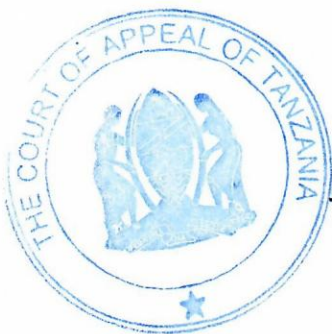
**DATED** at **BUKOB**A this 10<sup>th</sup> day of May, 2019.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**