

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MUGASHA, J.A., KEREFU, J.A and MWAMPASHI, J.A.)

CIVIL APPEAL NO. 219 OF 2020

DEONESIA ONESMO MUYOGA1ST APPELLANT
MICHAEL ONESMO.....2ND APPELLANT
EDSON ONESMO.....3RD APPELLANT
JACKSON ONESMO.....4TH APPELLANT
JUSTINE ONESMO.....5TH APPELLANT

VERSUS

EMMANUEL JUMANNE LUHAHULA..... RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania, at Tabora)
(Wambali, J.)**

dated the 19th day of April, 2013

in

DC Civil Appeal No. 34 of 2011

RULING OF THE COURT

17th & 20th March, 2023

MUGASHA, J.A.:

This is an appeal against the judgment and decree of the High Court of Tanzania at Tabora in Civil Appeal No. 34 of 2011 pronounced on 19/04/2013. In that suit, the respondent, Emmanuel Jumanne Luhahula sued jointly and severally, Dionesia Onesmo Muyoga, Michael Onesmo, Edson Onesmo, Jackson Onesmo and Justine Onesmo, the 1st,

2nd, 3rd, 4th, and 5th appellants respectively. The respondent was seeking specific performance of a three years' agreement to hire a fuel filling station situated at Ushirombo which was executed on 6/12/2007 by the respondent and the 1st appellant as witnessed by the 2nd, 3rd, 4th and 5th appellants and the respondent's wife.

The Respondent's case was predicated on the said hire agreement; in which it was agreed that the respondent hire the fuel filling station at Ushirombo for three years on payment of a sum of TZS. 21,600,000.00 for the whole period of hire whereas the respondent had paid advance payment of sum of TZS. 20,000,000.00 and it was agreed the remaining balance will be paid at the commencement of the business operations. However, it was alleged by the respondent that the petrol station was never handed over to him by the appellants. Thus, the respondent prayed for judgment and decree on the following reliefs: **One**, an order compelling the appellants to handover the fuel filling station; **two**, in the alternative, the appellants be ordered to reimburse him the sum of TZS. 20,000,000.00 together with accrued interest at commercial rate; and **three**, costs of the suit and any other relief which the court deemed fit.

In the written statement of defence, the 1st appellant did not dispute the hire agreement. However, she averred that pursuant to the signing of the agreement, it was incumbent on the respondent to commence business operations and if he failed to do so, that is for reasons known to him because no notice was given as to what made him not to commence the operations. Thus, the 1st appellant sought to be paid the remaining sum of TZS. 1,600.000.00 plus interest at the commercial rate. The 1st appellant as well, in the respective written statement of defence, raised a preliminary point of objection on ground that:

"... at the first hearing of this matter, the 1st defendant shall raise a PRELIMINARY OBJECTION That the matter is bad in law for misjoinder of parties to the suit."

The record does not show if the preliminary objection was argued by the parties and determined by the Court. Subsequently, the trial ensued and on 8/9/2011, judgment was entered against the appellants who were ordered to refund the principal sum of TZS. 20,000,000.00 to

the respondent and pay TZS. 2,000,000.00 as damages for breach of the agreement.

Dissatisfied with the decision of the subordinate court, the appellants preferred an appeal to the High Court which was opposed by the respondent. He raised a preliminary point of objection challenging the propriety of the appeal which joined the 2nd to 5th appellants who before the trial court, having not authorized the first appellant to act on their behalf as Attorney, neither did they enter appearance nor file any written statement of defence. The first appellate Court Wambali, J. (as he then was) sustained the preliminary objection having concluded that, though the 2nd- to 5th appellants were listed in the plaint, and they did not participate in the trial up to the time when the judgment was delivered and therefore, they could not participate at the appellate stage by being joined by the first appellant. Consequently, the appeal was struck out with costs. The High Court directed that the intended appellants were at liberty to take appropriate steps to enable them to be heard in court.

Unamused, the appellants have thus preferred the present appeal on the following grounds:

1. *The learned Judge of the High Court erred in law and fact to hold that there was no valid appeal that could properly be heard and determined by the High Court.*
2. *That, on the strength of the preliminary objection, not founded on law, the learned Judge erred in law to dismiss the appellants' appeal.*
3. *While the first appellant was heard by the trial court and the second to fifth appellants were not afforded the right to be heard by the trial Court, yet judgment delivered "not expert" against the 2^d to 5th appellants, the learned trial Judge erred in law and fact to dismiss it.*
4. *That, the learned Judge of the High Court erred in law and fact to dismiss the whole appeal while the first appellant, though appealed together with the second to 5th appellants, appealed in time after being aggrieved by the judgment to which she was involved in hearing at the trial court.*
5. *That, while practically it is impossible for the first appellant to prefer an appeal alone, in the High Court and the 2^d to 5th*

appellants applied to set aside the judgment in the same suit, DC Civil Case No. 6 of 2011 at Bukombe District Court the learned Judge of the High Court erred in law and fact to dismiss the appeal.

6. That, the learned Judge of the High Court erred in law to decline to invoke revisionary powers to the appeal before it, which involved the 1st appellant who had the right to appeal 2nd to 5th appellants who had to apply to set aside the District Court Judgment out of the proceedings which are silent as to no-summoning the 2nd to 5th appellants and yet delivering a judgment which is not ex parte judgment against the 2nd to 5th appellants.

At the hearing, in appearance were advocates Mugaya Kaitila Mtaki and Kamaliza Kamoga Kayaga, representing the appellants and the respondent, respectively.

Before the commencement of the hearing, we invited parties to address the Court on the propriety or otherwise of the proceedings of the trial court on account of the unresolved preliminary point of

objection raised by the 1st appellant on ground of misjoinder of the parties before embarking on a full trial and handing down the judgment.

Upon invitation, Mr. Kayaga submitted that, the trial court wrongly embarked on conducting the trial and handing down judgment without initially resolving the preliminary objection. On this, referring us to pages 15 to 16 of the record of appeal, he pointed out that, there is no indication or reference to the preliminary point of objection raised and which cannot be traced in the judgment of the trial court. He thus urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2022] (the AJA) to nullify the proceedings of both the High Court and the trial court and return the case file to the trial court for a retrial.

On the other hand, like his counterpart, Mr. Mtaki submitted that, failure to resolve the preliminary objection vitiated the subsequent proceedings before both the trial and first appellate courts. In that regard, besides urging us to nullify the proceedings and judgments of both the trial and first appellate court, he implored on the court to spare the pleadings, and remit the case file to the trial court for it to

determine the preliminary objection first before proceeding to conduct a retrial. He as well prayed that, each party bear its own costs.

After a careful consideration of the submissions of the learned counsel for the parties and the record before us, the issue for our determination is the propriety of the proceedings of both the trial and first appellate court in the wake of the unresolved preliminary objection raised before the trial court.

It is settled law that, once a preliminary objection is raised, it must be determined first before the substantive case is heard and determined. This is pertinent because the whole purpose of a preliminary objection is to make the court consider the first stage much earlier, save the time of the court and the parties by not going into the merits of the case because there is a point of law that would dispose of the matter summarily. See: the cases of **Thabit Ramadhan Maziku and Kisuku Salum Kaptula vs. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar**, Civil Appeal No. 98 of 2011, **The Bank of Tanzania Ltd v. Devram P. Valambhia**, Civil Application No. 15 of 2002, **Khaji Abubakar Athumani vs Daud Lyakugile t/a DC Aluminium and Mwanza City Council**, Civil Appeal No. 86 of 2018

and **Modest Joseph Temba vs. Bakari Selemani Simba and two others**, Civil Revision No. 223/17 of 2019 (all unreported).

Given that, the preliminary point of objection raised by the 1st appellant, attacked the competence of the suit which was before the trial court, on account of the misjoinder of parties which is so basic, it was fundamental for the trial Magistrate to determine the preliminary objection first before proceeding with the trial of the suit in order to conclusively ascertain as to who was a proper and or necessary party to be sued in the matter. The omission was a serious procedural irregularity which vitiated the subsequent proceedings and judgments of both the trial and first appellate courts.

On the way forward, we agree with the learned counsel for the parties that a remedial measure is for us to invoke our revisional jurisdiction under the provisions of section 4 (2) of the AJA. We thus, nullify and quash all the trial proceedings subsequent to the filing of the preliminary objection and the related submissions as filed by the parties. The pleadings are spared and we direct the case file to be remitted to the trial court for it to conduct an expedited trial after first determining the preliminary objection. Accordingly, the judgments of

both the trial and first appellate courts are quashed and set aside. We direct that, the case file be remitted to the trial court for it to conduct an expedited retrial after determining the preliminary objection.

We make no order as to costs.

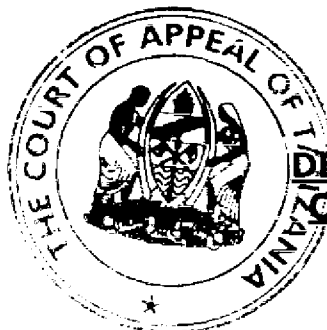
DATED at TABORA this 20th day of March, 2023.


S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 20th day of March, 2023 in the presence of Ms. Stella Thomas Nyakyi, holding brief for Mr. Mugaya Kaitila Mtaki, learned counsel for the appellants and Mr. Kelvin Kayaga, holding brief for Mr. Kamaliza Kayaga, learned counsel for the respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL