IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 200 OF 2016

AZIMKHAN AKBER AZMIKHAN .....APPELLANT

VERSUS

JOSEPH JOHN NGOWA .....1ST RESPONDENT

RETURNING OFFICER , ILALA MUNICIPALITY ...2ND RESPONDENT

ASSISTANTS RETURNING OFFICER OF

MCHIKICHINI WARD.....3RD RESPONDENT

THE HON ATTORNEY GENERAL .....4TH RESPONDENT

29/11/2017 & 26/2/2018

JUDGMENT

I.P.KITUSI,J.

Before Hon Mashauri PRM, at the Resident Magistrates' Court of Dar es Salaam at Kisutu, Azimkhan Akber Azimkhan, now the appellant, had petitioned to contest the Councilors electoral results for Mchikichini Ward in Dar es Salaam following the last general Elections held on 25th October, 2015. Joseph John Ngowa, the first respondent, won the election and was declared so by the Returning Officer, Ilala Municipality, the second respondent. The Assistant Returning Officer of Mchikichini Ward the 3rd respondent was the supervisor of the elections at Mchikichini Ward.

The fourth respondent, the Hon the Attorney General, was impleaded in his capacity as Government Chief legal advicer.

The second, third and fourth respondents raised two points of preliminary objection, one or both of which the trial court sustained and struck out the petition for being improperly before it. This appeal seeks to challenge that decision by a four ground Memorandum of Appeal. The reason I am saying that the court sustained one or both of the points of preliminary objections is manifest in the grounds of appeal themselves, which are;

1. " *That the trial Magistrate, Mashauri RM erred in law and fat to allow the preliminary objection that was raised by Notice outside the pleadings this in violation of Order VIII Rule 2 of the Civil Procedure Code Cap 33 R.E. 2002."*

2. *That the trial Magistrate erred in law and fact for the failure to record the fact that the appellant conceded to the two preliminary objections raised by the 4th respondent in the written statement of Defence.*

3. That the trial Magistrate erred in law and fact for recording the fact, and holding that the appellant conceded to only one preliminary objection raised by the 4th respondent in the written statement of Defence.

4. That the trial Magistrate erred in law and fact for the failure to record the order in respect of the conceded first objection on the conceded first objection on the petition being vague, ambiguous and frivolous this leaving the said objection appearing hanging and thereby undecided while it was decided"

From these grounds of appeal it can be said that the complaints are two sided. On one side the court is being faulted for entertaining points of objection raised outside the written statement of defence. Yet on the other side it is contended that the appellant conceded to both points of preliminary objection but the court did not record that, instead it recorded that only one point had been conceded to.

The essence of the appeal is that, had the trial court recorded the concession on both points, it would have proceeded to order the appellant to amend the substance of the petition that had been alleged to be vague ambiguous and frivolous.

The appellant is being represented by Mr Francis Stolla, learned advocate, as Mr. Kerario stands for the first respondent. The second, third and fourth respondents are being represented by Ms. Irene Lusilie, learned Senior State Attorney with the assistance of Mr. Kambi, the Municipal Solicator.

By an order of this court dated 29th November,2017 the parties presented written submissions which I shall now refer to and consider.

On the first point it has been submitted that both statutory and case law require that a point of preliminary objection be raised by pleading, and the latter means along with the written statement of defence. Order VIII Rule 2 of the Civil Procedure Code, hereafter the CPC has been cited, as well as decisions of this court on the interpretation of the said provision. The case is of **CRDB Bank Limited V. Noordlly K.J Dhanani & Another** Commericial Case No. 102 of 2001, Hc, Commercial Division (unreported) by Nsekela J (as he then was). This decision was subsequently followed by Massati, J (As he then was) in **Kenya Commercial Bank (T) Ltd V. Deata Ltd & 6 other**, Commercial case No. 65 of 2006, HC Commercial Division (unreported)

The first respondent submitted in reply that the point of preliminary objection came about when the appellant had filed his petition and the respondents had filed their respective WSD. When the appellant obtained leave to file an amended Petition and indeed filed

one, the second and fourth respondents prayed for extension of time to file a Reply to the Amended Petition within which it had been intended to include the points of preliminary objection. However the trial court did not grant the prayer for extension of time thereby denying them the opportunity to raise the points in the ordinary way. It is submitted that the practice in Tanzania is to raise an objection by a Notice, which they argue, was done by them.

I think I may address the first ground of appeal which I have no doubt must fail, for two reason. The first reason is that the points of preliminary objection were, both of them, conceded to by the appellant. This, in my view, makes the issue whether or not they were properly in the end the appellant conceded to the defects in the Petition. However I shall discuss the propriety of the points of preliminary objection, as my second ground.

As regards the issue whether or not the preliminary objection raised otherwise than in the pleadings were properly before the court, I think the position in the case of **Noorally** (supra)states the general rule. It is common knowledge that some points of preliminary objection such as jurisdiction may be raised at any time before judgment as such it cannot be expected that a party will seek to amend his pleadings at such late hour. I am satisfied therefore that there are exceptions to the rule in **Noorally.**

Faced with a somewhat similar situation my brother Mwambegele,J(As he then was, now Justice of Appeal) in the case of

Gaufff Ingenieure Gmbh & CO.- JBG Vs.The Director Kinondoni Municipal Council, Commercial Case No. 164 of 2014 at Dar es Salaam (unreported) considered several; decisions of the Court of Appeal that state that a point of law can be raised at any time. These decision are **Fanuel Montin Ng'unda V. Herman M. Ng'unda & others**, Civil Appeal No. 8 of 1995(unreported); **Amani Malewa V. Diocese of Mbeya** (R.C) Civil Appeal No. 22 of 2013 (unreported); **Richard Julius Rukambura V. Issack N. Mwakajila & Another** Civil Appeal No. 51 of 1997(unreported), to name some. Then the learned judge proceeded to pronounce himself as this;

> *"The hallmark of foregoing authorities of the Court of Appeal is that a PO should be raised in time. They do not state that a Po must be raised in the written statement of Defence, it being a point of law, can be raised at any time."*

I associate myself with that position because I think all that Rule 2 of order VIII of the CPC was intended was to avoid one party taking the other by surprised by raising new facts in the written statement of defence. In this case reasonable notice was given and the appellant readily conceded. For those two reasons, the first ground of appeal is not granted.

The appellant argued the second, third and fourth grounds simultaneously and I shall follow suit. In effect these grounds impugne the decision of Yongolo - SRM not recording the fact that the appellant had conceded to both points of preliminary objection. The appellant's complaint is that after conceding to both $P.O_S$ the Court ordered an amendment to the Petition and refused the respondents leave to file a reply. Thereafter the Petition ought to have proceeded for hearing but this did not happen and this makes the petition remain undetermined or that the second Po remains undetermined.

In response the 2nd, 3rd and 4th respondents submitted that the appeal is against the decision of Mashauri – PRM but the appellant's submissions fault the failure by Yongolo – SRM to record the concession on the second Po. The respondents also submitted that once a party is ordered to amend pleadings he should amend only those areas that he has been directed to. The case of **Chesmo Nangole V. Dr. Steven Lemono Kiruswa and Another.** (unreported) has been cited.

My reading of the ruling by Hon. Mashari- PRM shows that he struck out the petition because it had introduced in the pleadings new matters which had not been there before. The learned PRM went on to observe that;

> *" This is impossible and it also connotes uncertainty of the petitioner and his advocate on the matters to*

be brought to court for adjudication

....."

He cited the case of **David Zacharia Kafulila V. Hasna Sudi Mwilima and two other**, Misc. Civil Cause No.2 of 2013 HC, (unreported) where Hon. Wambali J(as he then was, now Jk) stated inter alia

" It is not sufficient for electoral petitioner to make vague allegations and wait for a request for particulars in order to expand on the petition"

I see the learned trial Magistrate's point and I can hardly see the appellant's. In this case the appellant presented an amended petition which the trial magistrate found to be a total departure from the original.He referred to paragraph 8, 9,11 and 15 of the petition and their corresponding paragraphs in the amended petition and concluded that they introduced new facts to the pleading, and struck it out.

This appeal does not seek to challenge the trial court for that conclusion but moves the court to find fault in the previous magistrate's failure [Hon Yongolo - SRM) to record the concession on the second Po. I do not think that the position taken by Mashauri PRM would have been different, had Hon Yongolo – SRM recorded the fact that both Po_s had been conceded to.

For those grounds and since the order of Mashauri PRM- is not being challenged, this appeal lacks merits. It is dismissed with costs.

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I.P.KITUSI
JUDGE
26/2/2018