

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
LAND APPEAL NO 19 OF 2018

*(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land
Case Application No. 29 of 2017)*

ALFRED SUKARI.....APPELLANT

VERSUS

JANE MWAMWINDI.....1ST RESPONDENT

UTT MICROFINANCE PLC.....2ND RESPONDENT

MASHANGO COURT BROKERS.....3RD RESPONDENT

BATON SWILA.....4TH RESPONDENT

JUDGEMENT

Date of Last Order : 24/07/2019

Date of Judgement: 02/10/2019

MONGELLA, J.

In the District Land and Housing Tribunal for Mbeya (DLHT) the Appellant filed an application seeking to be declared the legal owner of the suit premises which was sold to the 4th Respondent by the 3rd Respondent. The said sale followed an order to execute the decree issued by Mwanjelwa Primary Court in a suit between the 2nd Respondent and the 1st Respondent. It happened that the 1st Respondent who is the wife of the Appellant obtained a loan from the 2nd Respondent worth T.shs. 2,900,000/- which she failed to repay. In the DLHT a preliminary objection



was raised by the 3rd and 4th Respondents to the effect that the Tribunal had no jurisdiction to entertain the matter. The Tribunal sustained the preliminary objection and dismissed the application with costs. Dissatisfied with the said ruling the Appellant under the representation of Mr. Shitambala, learned Advocate has appealed to this Court on three grounds being:

1. *That the trial Chairman erred in law and facts when he relied on annexures attached to written statement of defence of the 3rd and 4th Respondents in upholding preliminary objection hence dismissing Application No. 29 of 2017.*
2. *That the trial Chairman erred in law and facts when he pre maturely dismissed the application on preliminary objection which was not purely on point of law.*
3. *That the trial Chairman erred in law when he held that the Tribunal had no jurisdiction basing on the submission of the Counsel for 3rd and 4th Respondents while the submission was not in respect of jurisdiction.*

The appeal was argued by written submissions and all parties adhered to the scheduled orders except the 1st Respondent who never filed her written submissions. Thus the determination of this appeal shall proceed ex-parte against her.

Mr. Shitambala started his arguments on the 1st ground by providing the definition of preliminary objection. He cited thereof the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) E.A. 696 in which it was held that:

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

He also cited the case of **COTWO (T) OTU Union and Another v. Honourable Iddi Simba, Minister of Industries and Trade and Others** (2002) TLR 88 in which the Court held that:

"A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing the case."

Mr. Shitambala argued that the Hon. Chairman in reaching his decision perused different annexures attached to the written statement of defence of the 3rd and 4th Respondents which were also referred to by their Counsel in their written submissions. The Hon. Chairman did not consider the protests by the Counsel for the Appellant made in his written submissions and the copies of judgments he supplied. He argued that by doing that the Hon. Chairman erred as submission on preliminary objection is not supposed to base on annexures to pleadings. To this effect Mr. Shitambala cited the case of **The Soitsambu Village Council v.**

Tanzania Breweries Ltd and Tanzania Conservation Ltd, Civil Appeal No. 105 of 2011 (Unreported) in which the CAT held that:

“A preliminary objection should be free from facts calling for proof or requiring evidences to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of proper procedure for entertaining application for preliminary objections. It will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits.

He concluded on this ground by arguing that by referring to annexures attached to pleadings in deciding the preliminary objection, the Hon. Chairman decided the rights of parties in merits.

Responding to this ground, Mr. Mulamuzi Patrick Byabusha, learned Advocate for the 2nd, 3rd and 4th Respondents argued that the points of objection raised in the lower Tribunal falls squarely within the parameters envisaged in the case of **Mukisa Biscuit** (supra). The preliminary objections were raised out of pleadings and other court records including the records of this Court. He concluded by arguing that the Appellant's Counsel is attempting to circumvent the law in a day light.

I agree with the position argued by both counsels in relation to the principle set in the case of **Mukisa Biscuit** (supra) that for a preliminary objection to stand it must be on a purely point of law ascertained from the pleadings. The preliminary objection raised by the Respondents in the

DLHT concerns jurisdiction which is in fact a matter of law. However, the determination of such point of law must not be based on evidence of facts adduced by parties. I have gone through the record of the DLHT particularly the Ruling and the written submissions of parties on the preliminary objection and found that in arguing the preliminary objection the counsel for the 3rd and 4th Respondent referred to the annexures in the written statement of defence in proving his point. These were copies of the various orders issued by the mainstream courts. The Hon. Chairman also relied on the same documents in reaching his decision. As guided by the CAT in the case of **The Soitsambu Village Council** (supra) cited by Mr. Shitambala, the determination on the preliminary objection should not be based on documentary evidence provided by the objector. The CAT specifically stated:

"The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits"

Taking into account the above CAT decision, I agree with Mr. Shitambala that it was erroneous for the Hon. Chairman to rely on the documentary proof attached on the Respondents' written statement of defence in reaching his decision. Upon seeing that the determination thereof needed perusal of attachments to the pleadings, the Hon. Chairman ought to have ordered the matter to proceed to hearing and such issues would have been argued and determined on merits. The preliminary objection as a point of law must be capable of being disposed on its own without resorting to annexures in pleadings.

On the 2nd ground, Mr. Shitambala argued that the order of the Hon. Chairman to dismiss the application was not proper because a case cannot be dismissed on preliminary objection. It rather ought to be struck out. In support thereof he cited the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Organisation of Tanzania Workers Union**, Civil Appeal No. 79 of 2001 in which the CAT held that a dismissal order can be made on preliminary objection only if the same is based on limitation of time, the suit has to be struck out in respect of other preliminary objections.

Mr. Shitambala further argued that the dismissal order on the entire application given by the Hon. Chairman was improperly made as it has the effect of deciding rights of the parties to its finality. In support thereof he cited the case of **The Registered Trustees of NBC Club v. NBC Holding Corporation**, Civil Application No. 59 of 2001 (unreported) in which the CAT held:

"We have noted with some concern that, instead of confining himself to the preliminary objection raised, the learned trial judge went further and made some findings on the merit of the case, presumably by perusing the pleadings and written submissions by learned counsel of both parties. Thus, although on the face of it the order appears to be a dismissal of the plaint, yet in actual fact the learned trial judge conclusively determined the rights of the parties."

Responding to this ground Mr. Byabusha argued that whether the application was dismissed or struck out is a question of illegalities, correctness or otherwise a matter subject to revision in terms of section 79(1) of the Civil Procedure Code, Cap 33 R.E. 2002 and not an appeal.

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I in fact agree with Mr. Shitambala's argument that the Hon. Chairman erred in dismissing the application on a preliminary objection not based on time limitation. This argument basically has not been challenged by Mr. Byabusha, only that he argues that the remedy would have been under revision and not appeal as in terms of section 79(1) of the Civil Procedure Code. I however, differ with his argument because section 79(1) as much it deals with issues of illegalities, it empowers the High Court to intervene through revision where there is no appeal lying before it. Therefore even in an appeal the court can still deal with issues of illegalities committed in the lower courts/tribunals. The Hon. Chairman therefore was supposed to struck out the application and not to dismiss the same.

On the 3rd ground Mr. Shitambala argued that the Land Tribunal and court have various jurisdictions such as territorial, pecuniary and subject matter jurisdiction. However, the Counsel for the 3rd and 4th Respondents did not make submissions as to which respect the Tribunal lacked jurisdiction. He was of the view that the 3rd and 4th Respondents did not defend this limb of preliminary objection. The Hon. Chairman ignored this fact despite it being raised by the Counsel for the Appellant in his written submission and never accorded any reasons for not considering it. He argued that the Hon. Chairman ruled that the Tribunal had no jurisdiction, but the ruling was a departure from the written submissions filed by both counsels and thus the ruling was based on a matter not before him. Mr. Shitambala on the other hand concluded by arguing that the Tribunal had jurisdiction as the suit was in respect of land located at Plot 860 Block 'Q' Mwanjelwa area within Mbeya City and valued at T.shs. 50,000,000/- which is within its

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jurisdiction. He was of the view that the ruling that the Tribunal lacked jurisdiction was based on misconception of facts placed before him.

Mr. Byabusha responded to this ground by arguing that their line of argument was to the effect that the fate of the suit premise of Plot No. 860, Block "Q" Mwanjelwa area was finally decided by his lordship Mambi, J. in respect of PC Appeal No. 13 of 2015. The Appellant is attempting to sue the 1st Respondent in this appeal who was the then Appellant in Civil Appeal No. 13 of 2015. The 1st Respondent has not shown any indication of opposing the appeal. Mr. Byabusha was of the view that this is an abuse of the court process.

Mr. Byabusha argued further that the Appellant and his agent, the 1st Respondent in this appeal, have been filing unmerited numerous applications, suits or otherwise of similar nature, including this appeal, in this Court and in subordinate courts/Tribunal for purposes of delaying execution. She invited this Court to invoke provisions of Order VI Rule 16 by striking out the pleadings for being unnecessary and scandalous. With regard to jurisdiction, she cited the case of **John Agricola v. Juma Rashid** (1990) TLR 1 in which it was held that *"lack of jurisdiction in the presiding magistrate is a fundamental defect that is not curable at all. A trial by a District Magistrate who lacked jurisdiction in a court he was presiding was a complete nullity."*

In my view, what I ruled on the first ground is also applicable on this ground. The question of jurisdiction is fundamental but since the Respondents raised it in a manner that led the Hon. Chairman to consult



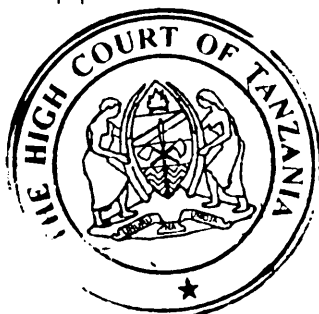
the annexed documents to the pleadings in proving or determining the preliminary objection, I am of the considered view that the preliminary objection was wrongly handled by the Hon. Chairman. If the same was pegged in the kinds of jurisdiction such as territorial, pecuniary and subject matter as argued by Mr. Shitambala or sufficing limited to the pleadings only, the DLHT would have easily dealt with it without resorting to the documents annexed to the pleadings. Since the determination of such point of law required proof of documentary evidence, the same should have been determined in the course of determining the rights of the parties in the main application. By resorting to documentary evidence attached to pleadings the same seized to be a preliminary objection.

My conclusion after the observations I have made above is that the preliminary objection was erroneously determined by the DLHT. I therefore quash the ruling and proceedings of the DLHT and order that the matter be tried in the DLHT on merits. Costs awarded to the Appellant.

Dated at Mbeya on this 2nd day of October 2019


L. M. MONGELLA
JUDGE
02/10/2019

Right of appeal to the Court of Appeal has been duly explained.




L. M. MONGELLA
JUDGE
02/10/2019

Court: Judgement delivered in Mbeya in Chambers on this 2nd day of October 2019 in the presence of Mr. Sambwee Mwalyego Shitambala, learned Advocate for the Appellant and the 1st, 3rd and 4th Respondents.



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L. M. MONGELLA
JUDGE
02/10/2019