

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO 61 OF 2020

BETWEEN

WAISLAM WA KIJJI CHA BUTIAMA _____ APPELLANT

VERSUS

**THE REGISTERED TRUSTEES OF BARAZA KUU LA WAISLAM TANZANIA
(BAKWATA) _____ RESPONDENT**

(Arising from the decision and orders of the District Land and Housing Tribunal for Mara at Musoma Hon. Kitungulu, Chairman, in Land Application no 44 of 2020 dated 30.07.2020)

JUDGEMENT

1st December 2020 & 22nd January 2021

GALEBA, J.

The subject matter of this appeal is an unregistered land located at Butiama village within Butiama district in Mara region. The hotly contentious issue between the parties to this appeal, is who between them, owns a Holy Mosque and other developments including a hostel on that land, each of them maintaining the position that the Mosque is its lawful property. The party which sued in the **DLHT** was the appellant, seeking for three basic orders, **first** that they be declared as lawful owners of the land in dispute, **secondly** that the respondents be evicted from the land and **thirdly**, that the respondents be ordered to pay Tshs 50,200,000/= as general damages and costs.

That application attracted two preliminary objections; *one*, that the appellants had no *locus standi* and *two* that the suit did not disclose a cause of action against **BAKWATA**. The **DLHT** heard the parties on the preliminary objection and dismissed the application for reasons that all properties owned by religious institutions can only exist in the name of the registered trustees of that institution. This decision aggrieved the appellant who lodged the present appeal raising 6 substantive grounds to challenge it.

Before this court, the appellant and the respondents were represented by Mr. Emmanuel Gervas and Mr. Thomas Makongo both learned advocates respectively. Submitting in support of the appeal Mr. Gervas argued only the 1st, 2nd, 4th and 5th grounds of appeal and abandoned the 3rd and the 6th grounds. In respect of the 1st, 2nd, 4th and 5th grounds which were argued together, Mr. Gervas was faulting the decision of the **DLHT** for holding that the appellants were not an incorporated body. The learned advocate's point being that the appellant was an entity registered with the 'Registrar of Social Groups' at the District Commissioner's office. He submitted that the appellant was registered as an institution in 2010 and it was given a certificate.

In reply, Mr. Makongo submitted that the **DLHT** was right to dismiss the appellants' action because, they were not registered and the word **WAISLAM** means that the appellants were many in which case, they were supposed to file an application under **Order VIII Rule 1 of the Civil Procedure Code [Cap 33 RE 2019] (the CPC)** in order to bring a representative suit, which they did not do. In supporting his point Mr. Makongo cited the case of **Pius Msigwa and 2 others v the Secretary, Kijiji cha Ujamaa Marocha [1979] LRT 13.**

I have considered the contending arguments of parties and I will dwell more on those of Mr. Gervas. In Tanzania all registrars after registering any process or institution they issue certificates or some form of evidence to that effect. When Mr. Gervas told this court that the appellants were registered in 2010 I asked him, if he raised that point with the **DLHT**, but he stated that he would not have raised it because then he would have to rely on a document while they were arguing a preliminary objection, which would not call for use of documents. On his argument, there are two points I must make clear.

First, an appellate court has no mandate to undo a judgment of the lower court or tribunal by basing on a point that was not raised before

that tribunal, litigated upon and resolved. This is the position of the law in Tanzania for a long time as per the decisions in **Hassan Bundala Swaga v Republic**, Criminal Appeal no 416 of 2014, **Diha Matofali v Republic**, Criminal Appeal no 245 of 2015 and **Martine Masara v Republic**, Criminal Appeal no 428 of 2016, all decided by the Court of Appeal but yet to be reported. *Secondly*, Mr. Gervas is not right in submitting that he was not able to present the document of registration of his clients because the matter had not gone to substantive hearing. That is so because, the issue whether the appellants were a registered entity or not was raised as a preliminary objection in the written statement of defense so had the appellants any credible document to counter that attack they would have either filed a list of additional documents to be relied upon attaching with it a certificate before commencement of the hearing. Mr. Gervas should be reminded that some preliminary objections can be established or defeated by relying on documents. One of such instances is where existence of a legal entity is at issue. Even at the level of appeal when I demanded to see a copy of the certificate of registration of the appellants into a legal entity, Mr. Gervas informed the court that the document was at the home of one of his clients. The learned advocate did not even have the registration number of the legal entity he was referring to. In any event, Mr. Gervas did

not ascertain to the court whether his client was a company, a Non-Governmental Organization, a Board of Trustees or any other legal personality known to Tanzanian law.

In this matter, the arguments of the appellants, failed to cast any blame on the judgment of the **DLHT** even without any reply from Mr. Makongo. In the circumstances the appellants had no *locus standi* to bring a legal action in the **DLHT** as they did. The appellants had either to be registered in an artificial legal person or they were to disclose their names as natural persons, but neither of the two was the case. Finally, the 1st, 2nd, 4th and 5th grounds of appeal are hereby dismissed for want of merit.

Based on the above reasons this court upholds the decision of the District Land and Housing Tribunal for Mara in land application no 44 of 2020 and dismisses this appeal in its entirety with costs.

DATED at MUSOMA this 22nd January 2021



Z. N. Galeba
JUDGE
22.01.2021