IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

LAND APPEAL NO. 8/2021

(Originating from Land Application No. 97 of 2019 in the District Land and Housing Tribunal for Kigoma at Kigoma)

ANGELINA STAFORD (The administratrix of the estate of the late Staford Kaniugu) .....**APPELLANT**

VERSUS

1. SERIKALI YA KIJIJI CHA RUNGWE MPYA
2. ELIZABERA AHAMAD
3. KOTASON MBISA
4. MORIS ZEGERI
5. RAHEL KONRAD .....**RESPONDENTS**
6. STAHIMILI STEPHANO LUKOHOLA
7. ABU BAWILI SAIDI

JUDGMENT

01 & 01, September, 2021

A. MATUMA, J.

The appellant instituted a land dispute against the Respondents in the District Land and Housing Tribunal.

When the 1st Respondent filed her written statement of defence, raised preliminary objection to the effect that the suit against her was misconceived and unmaintainable in law for want of statutory notice to sue. That was on 25/3/2020.

But when it got on the 30/7/2020, Mr. Emmanuel Ladislaus learned solicitor for the 1st Respondent withdrew the PO and the trial chairperson marked such PO to have been withdrawn.

On 4/2/2021 when the matter came for hearing at the trial tribunal, the learned solicitor for the 1st respondent raised a preliminary issue that the trial tribunal lacked pecuniary jurisdiction because the dispute land is for irrigation scheme in which the Government has injected six hundred million Tanzania shillings **(Tshs 600,000,000/=)** and that the Attorney General ought to have been joined.

Mr. Sadiki Aliki leaned advocate for the 2nd to 7th respondents joined hands with the 1st respondent. Mr. Kivyiro learned advocate who represented the appellant at the tribunal disputed the raised concern by the respondents as being baseless because the dispute land is only part at the irrigation scheme within the pecuniary jurisdiction of the tribunal.

The tribunal after hearing the parties did struck out the suit stating that:-

"Baraza linakubaliana na wajibu maombi kwamba shauri hili liondolewe katika baraza hili kwa kuwa baraza halina mamlaka ya kithamani ya fedha kusikiliza shauri hili ikizingatiwa ukubwa wa mradi husika".

The appellant became aggrieved of the decision hence this appeal with four grounds the major complaint being that he trial chairperson erred in law to have relied on a mere statement by the counsel of the 1st respondent that the dispute land was valued Tshs 600,000,000/= without considering that the appellant's claim was not the whole area in the irrigation scheme but only 7 acres which is under individual ownership and not the Government.

At the hearing of this appeal the Appellant was present in person and she had the service of Mr. Eliuta Kivyiro learned advocate. The respondents were all absent without any notice. The Appellant effected service to them through the Court Process Server Mr. Job John Gwasa but they deliberately refused to acknowledge the services as exhibited by the affidavits of the said Process Server in respect of each Respondent. I thus ordered the hearing of this Appeal ex-parte.

Mr. Eliuta Kivyiro argued the grounds of appeal mainly reiterarting what he submitted at the trial tribunal against the Preliminary Objection. I will thus not reproduce his arguments but I will take them on board in the course of addressing the appellant's complaints in this appeal.

It is a settled law that preliminary objection should consist a point of law which has been pleaded or which arise as a clear implication out of pleadings see; ***Mukisa Biscuit Manufacturing Co. Versus West End Distributors Ltd (1969) E.A 696.***

In the circumstances, one should not raise a preliminary issue on a matter not pleaded by the adverse party nor it arises by necessary implication out of the pleadings.

In the instant matter, the Appellant's pleadings did not plead the value of **Tshs 600,000,000/=** nor that the dispute land was the Government irrigation scheme. Her pleadings are very clear that the dispute land is estimated at the value of Tshs 7,000,000/=- only and that the cause of action arose after the 1st respondent had allocated the dispute land to the 2nd, 3rd and 4th respondents which she claims to be her property by virtue of her administratrix capacity which was customarily owned by her late father since 1976.

The 5th respondent is accused to have purchased part of the dispute land from the 3rd respondent, the 6th and 7th respondents are merely alleged to have been invited by the 4th respondent to cultivate in the dispute land.

Issues of irrigation scheme and its value or that the government has injected Tanzania shillings six hundred million does not feature in the appellant's pleadings at the trial tribunal. They were bare facts raised by the 1st respondent in the course of hearing the suit as rightly argued by Mr. Eliuta Kivyiro learned advocate. It was a drama of one creating his own facts and raise objection on them to the detriment of the adverse party.

What Mr. Ladislaus did at the trial tribunal was not expected from him as a learned brother. It was a total misleading of the tribunal to the detriment of justice. If at all a party has some sort of facts necessary to be known in the suit, the right course is to raise such facts in the pleadings to avail opportunity to the other party to know them and prepare to counter them if need be.

I have gone through the 1st respondents written statement of defence and did not find the facts of the Government to have injected the alleged amount of Tshs 6000,000,000/= nor to own the alleged irrigation scheme. Her written statement of defence contains a general denial to have ever allocated the dispute land to the rest of the respondents.

Even the 2nd, 3rd and 4th respondents in their respective joint written statement of defence did not plead that the dispute land was allocated to them by the 1st respondent or that the government has injected the alleged amount of Tshs 600,000,000/=.

They merely contended that the dispute land is their own property acquired through clearing the bush.

In that respect it was wrong for the trial chairperson to rely on bare statements of the 1st respondent's counsel at the time of hearing, to struck out the appellant's suit as rightly submitted by the learned advocate for the Appellant Mr. Eliuta Kivyiro.

In fact, the allegations were facts to be proved and not a legal point. In the case of ***Morandi versus Petro (1980)*** *TLR 49* which I had also cited in the case of ***Joseph Juma versus Nasibu Hamisi***, *Misc. Civil Application No. 48 of 2018* High Court of Tanzania at Tabora, the Court refused to act on allegations arising by way of submission at the hearing stage. It held:-

> *"Submissions made by a party to an appeal in support of grounds of appeal, are not evidence but are arguments on the facts and law raised before the Court.* ***Such submissions are made without oath or affirmation, and a party***

making them is not subject to cross examination by his opponent".

In the like manner, the trial tribunal ought to have rejected the submissions of Mr. Emmanuel Ladislaus which raised new facts not impleaded in any pleading before the Tribunal and use the same facts to raise objection against the appellant's suit.

Allowing this trend, will definitely injure innocent plaintiffs or Applicants because Defendants or Respondents would always be raising facts against the plaints or Applications and use the same facts to suppress the claims against them. That is not accepted at all in the proper administration of justice.

Under section 110 of the Evidence Act, Cap. 6 R.E 2002, it is quite clear that he who alleges must prove existence of the facts so alleged. In that respect, the learned solicitor ought to have proved not only that the land in dispute is the government irrigation scheme but also that such Tshs 600,000,000/= has been really injected by the Government in it. In any case that ought to have come in evidence during trial and not by way of preliminary objections as it does not feature in the Appellant's pleadings.

With the herein observation, I agree with Mr. Kivyiro learned advocate and allow this appeal. The decision of the trial tribunal is hereby quashed and the drawn order thereof set aside. I order the Appellant's

Application (suit) at the trial tribunal to be restored and be heard on merit. Costs to follows the event. It is so ordered.

Right of appeal is explained to whoever aggrieved with this decision.

A. Matuma

Judge

01/09/2021

Court: This judgment is delivered in the presence of person and her advocate Mr. Eliuta Kivyiro and in th Respondents.

Sgd: A. Matuma

Judge

01/09/2021