

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB – REGISTRY

AT MUSOMA

LAND APPEAL NO 43 OF 2021

*(Arising from the Ruling of the District Land and Housing Tribunal for Mara at
Musoma in Misc. Application No 305 of 2020)*

MAKUNJA JOHN APPELLANT

VERSUS

NYAMAGERE PAULO RESPONDENT

JUDGMENT

8th and 17st Sept, 2021

F. H. MAHIMBALI, J.:

The appellant Makunja John is aggrieved by the decision of the trial tribunal (DLHT – Musoma) in its ruling delivered on 7th May, 2021 in which it upheld the preliminary objection raised and consequently dismissed the Misc. Application No. 305 of 2020 instead of striking it out.

Following that dismissal order by the DLHT, the appellant lodged two grounds of appeal namely:

- 1. That, the trial Tribunal learned erred in law and fact in considering the preliminary objection and dismissed application instead of struck out.*
- 2. That, the trial Tribunal erred in law and fact in considering the preliminary objection while the preliminary objection is not pure point of law.*

During the hearing of the appeal, Mr. Philipo learned counsel appeared for the appellant whereas the Respondent enjoyed the legal services of Mr. Noah Mwakipesile learned counsel.

As far as the first ground of appeal is concerned, both counsels are at agreement that the learned trial chairperson erred in law in dismissing the application instead of striking it out after sustaining the preliminary objection. I am in agreement with the both learned counsel that the appropriate legal order of the trial tribunal upon sustaining of the preliminary objection was not a dismissal order but a strike out order (see **NGONI MATENGO COOPERATIVE MARKETING UNION LTD V. ALIMOHAMED OSMAN [1959]1 EA 577, HASHIM MADONGO & 2 OTHERS V. MINISTER FOR INDUSTRY AND TRADE & 2 OTHERS**, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 27 of 2003).

On the second ground of appeal which is in controversy, Mr Philip learned counsel is of the view that the said legal objection raised at the DLHT didn't qualify to be a legal objection as per case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. He thus prayed that this Court to rule that the objection didn't pass the legal test of preliminary legal objection as it is the fact that needed proof in the eyes of the law.

To appreciate the gist of the second limb of preliminary objection which is in controversy, it is better if I may state what transpired at the DLHT that led to the said Preliminary Objection and the resulting order/ruling which is the subject of this ruling.

On 28th August 2020, one Makunja John (the appellant herein) filed his application at the DLHT under section 14(1) of the law of Limitation Act Cap 89 R. E. 2019 and Reg. 11 (2) of GN 174 of 2003 (the Land Dispute Courts (the District Land and Housing Tribunal) Regulations, 2002 and section 95 of the CPC Cap 33 R. E. 2019 for the following orders:

a) This honourable tribunal be pleased to grant applicant to set aside Ex-parte judgment pronounced on 24th day of November, 2017 by this honourable Tribunal.

b) This tribunal be pleased to extend time to enable the Applicant to aside Ex-parte judgment.

In support of this application, there was a filed an affidavit of one Makunja John containing a total of nine paragraphs.

Having received the Appellant's application filed at the DLHT, the Respondent raised one preliminary objection on a point of law that

"The affidavit in support of the application is defective for containing lies and untrue statement.

In his ruling, the Honourable Chairperson ruled that:

"Considering the nature of the preliminary objection as depicted herein above, which has gone uncontroverted, I am inclined to agree with the Respondent's raised preliminary objection that the affidavit in support of the application is defective for containing lies and untrue statement."

The lie and untrue statement that led to the preliminary objection being sustained and eventually the application being dismissed with costs, the DLHT record has the following in reply:

" The lies and untrue statement in the affidavit is seen in paragraph 8 of the Applicant's affidavits in support of the Misc. Application No. 305 of 2020 that state "that on 20th day of October 2017, Application No. 100 of 2019 was scheduled for

defense hearing, on that day advocate Thomas Makongo was attending in the High Court sessions cases at TARIME BEFORE JUSTICE R. MAKARAMBA; Advocate Peter Adam appeared holding brief of Advocate Makongo, he also tendered cause list to that effect but chairman Kaare ignored it and proceeded ex-parte; to prove this cause list of Criminal Session held at Tarime is attached herewith and marked as "B" forming part of this affidavit"

The central issue of the respondent's counsel at the DLHT lies on what is deposed by under paragraph 8 of the affidavit. He submitted that it was untrue and open lies. That in his knowledge and recollection on the date scheduled for hearing, there was no any cause list tendered by the advocate who held brief of advocate Makongo.

Upon satisfaction of the Respondent's submission during the hearing of the said application, the DLHT sustained the objection as argued and the application was consequently dismissed with costs.

In essence I agree that *"an affidavit which is tainted with untruth is no affidavit at all and cannot be relied to support an application. The false evidence cannot be acted upon to resolve any issue"* (see **Uganda VS Commissioner of Prisons ex-parte Matovu (1996)** E. A. 514 and **Ignazio Messina VS Willson Investment SPRL Civil Application No 21 of 2001** Court of Appeal of Tanzania (unreported).

However, the central issue is whether in the circumstances of this case, that ground qualified to be the point of preliminary objection as per law. To answer this issue, it is better to know what is the preliminary objection as per law. The best answer is as provided in the famous case of **Mukisa Biscuit Co Ltd vs WEST END TZ Ltd** (supra) where the following criteria were set for a legal objection to qualify as preliminary point.

" a preliminary objection consists of point of law which has been pleaded or which arise by clear implication out of the 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".

And at page 701, Sir Charles Newbold, P. stated as follows: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. I cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

So, example of what can be raised as a preliminary objection are an objection to the jurisdiction of the court, or a plea of limitation or when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law, where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required etc. All these are clear pure points of law as stated in the case of **Shahida Abdul Hassanali v. Mahed M.G. Karji**, Civil Application No. 42 of 1999 (CAT).

In digest to the criteria set by Mukisa Case and putting the same into the case at hand, I am of the firm view that, the learned chairperson of DLHT was swayed away by the submission of the learned counsel of the Respondent (Mr. Noah). In essence what he submitted though might be very right, it didn't qualify to be a point of law arguable as preliminary objection. It was a matter of evidence which needed to be proved during the hearing of the said application at the DLHT and upon its full digest, the DLHT would have made its final ruling. This is because the parties were at contention with the issue of court's attendance and tendering of the said cause list as evidence of the non-attendance of Mr. Makongo learned counsel. The fact that there was no

such cause list tendered at the trial is purely a matter of fact which needs proof by inspecting court records for satisfaction and thus not a matter of law.

With due respect, Mr. Noah might be mixed up by the cited case's decision (**Robert S. Lova and Mahamed Maryole Vs Ministry of Natural Resources and Trouirism and AG**, Revision No 742 of 2018) in which being a High Court decision. Though persuasive as submitted, in the circumstances of the present matter, the same has neither inspired me. It is totally out of context reading squarely in line with the Mukisa's case (*supra*).

Having said so, whereas I agree that the appropriate cause when the matter is incompetent before the court is not dismissal but rather striking out, in the present matter the appeal is allowed in both grounds. However, considering the latter ground as I agree that the cited objection didn't qualify to be preliminary objection, I hereby set aside the ruling by the DLHT which sustained it. Further, I step into its shoes and overrule the objection. In its place, I hereby order that let the application be heard and determined in its full merits in disregard to the ruling of the trial tribunal. The appeal is thus allowed. Considering the

manner the said matter was handled, I order that each party bear own costs.

It is so ordered.

Dated of MUSOMA this 17th day of September, 2021



F. H. Mahimbali

JUDGE

17/09/2021

Court: Judgment delivered this 17th day of September, 2021 in the presence of Mr. Philipo Advocate learned for the Applicant, Mr. Noah Advocate learned for the Respondent and Miss Neema P. Likuga – RMA.

F. H. Mahimbali

JUDGE

17/09/2021

Court: Right to appeal explained.

F. H. Mahimbali

JUDGE

07/06/2021