

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**LAND APPEAL NO. 02 OF 2021**

**(Arising from the Decision of the District Land and Housing Tribunal of  
Songea at Songea in Land Application No. 104 of 2018)**

**BAKARI SHABAN SIKA..... APPELLANT**

**Versus**

**NIKITA JOHN KIBOPILE..... RESPONDENT**

**RULING**

**Date of Last Order: 23/09/2021.**

**Date of Judgment: 19/10/2021.**

**BEFORE: S.C. MOSHI, J:**

The appellant was aggrieved by the whole decision of the District Land and Housing Tribunal (hereinafter referred to as the Tribunal), thus he lodged this appeal on the following grounds: -

- 1. That the learned trial Chairperson seriously erred in fact and law by not realizing that the application was improperly tabled before the Tribunal as the jurisdiction mentioned in the record had ceased to exist over decades.*

2. *That the learned trial chairperson grossly erred in not realizing the matter was so cumbersome in running the proceeding and making the judgement for noncompliance with rule 7 of order 1 of the Civil Procedure Code. Cap 33 R.E 2019.*
3. *That the learned trial chairperson gravely and seriously erred in fact and law in awarding the judgement and decree under the evidence adduced by PW1 and PW2 during the trial which lacks scintilla evidence be it orally or documentary in the purchase of the land owned by the appellant.*
4. *That the learned trial chairperson of the Tribunal gravely and seriously erred in fact and law for awarding the judgement and decree in the basis of non repayment of the loan in contrary to the issues raised of which were to that one of the suit premise and whether the respondent is a trespasser.*
5. *That the learned trial chairperson of the tribunal gravely and seriously erred in fact and law in concurring with his assessors opinion in that the*

*assessors' opinions was based on the end result while was to be done in substantive aspect.*

*6. That the learned trial Chairperson of the tribunal gravely and seriously erred in fact and law in blessing the action which was illegal by conducting an auction on a day of which was not a working day as prescribed under the law without adducing any reason of doing so or to have obtained leave of doing so from the authority above them.*

*7. That the learned trial Chairperson foul played in fact and law to bless the auction that which the purchaser paid the price hundred percent of the sale price at the auction the same at material time, an act which is illegal.*

*8. That, the learned trial chairperson of the tribunal grossly erred in law and fact to bless the eviction application while he knew that he had dismissed land application no. 80 of 2018 between the applicant versus CRDB PLC and the same at the stage of the court of Appeal as was evidenced in and during the*



*trial thus the trial tribunal had no jurisdiction to try the matter that had gone all that far. Thus is an abuse of court process.*

The respondent through his reply to the petition of appeal raised a preliminary objection on a point of law and prayed for this appeal to be struck out with costs on the point that: -

*1. The appeal is incompetent for not being accompanied with judgment.*

The appellant was represented by Mr. Mwamwenda, advocate whereas the respondent was represented by Mr. Elseus Ndunguru, advocate. As a practice of the court, before deliberation on the appeal I invited the counsel for the parties to address the court on the preliminary objection, whereby they agreed to argue it by way of written submissions.

Supporting his ground of preliminary objection Mr. Ndunguru submitted that the appeal by the appellant is incompetent for not being accompanied with the judgement. He said that, this comes from the mandatory requirement of order xxxix rule 1(1) of the Civil Procedure Code, Cap. 33 R.E 2019 which provides as follows: -

*"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate*

*and presented to the High Court (hereinafter in this order referred to as the court) or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the court dispenses therewith) of the judgement on which it is founded"*

He said that, since the appeal has not been accompanied with a copy of judgement as required by the law; then the appeal is incompetent. He prayed the court to strike out it with costs.

In reply, the counsel for the Appellant Mr. Mwamwenda vehemently opposed the submission by the respondent's counsel by submitting that the preliminary objection lacks merit. He argued that the preliminary objection is misplaced for being lodged in unknown High court such as High court of Songea while what is in existence is the High Court of The United Republic of Tanzania. To support his argument, he cited Rule 8(2) of the High court Rules, 2005.

He also argued that, the presentation for filing date and month is not filled and signed by the Registry officer and there is no reason assigned thereto for not doing so. He cited the case of **The Registrar of Trade and Service Marks vs. Godrej Consumer Products Limited and**



**HB Worldwide Limited**, Civil Application No. 295/16 of 2020, Court of Appeal sitting at Dar es salaam, where it was held thus: -

*"It is also in the record that the notice of the motion before me is not signed and dated and there is also evidence as to whether the said notice was lodged in this court sit does not stamp of the court, signature Registrar and even the date when it was lodged. It is even not clear whether the said notice was indeed lodged in this court to give it authenticity and credence to be placed before the court. This is as good as the same does not exist in this court. So, by all means this is an incompetent matter and there is nothing to be amended. In the circumstances, I argue with Mr. Kamuzora that the prayer for amendment of the notice of motion made by Mr. Mta, in the circumstances, is not practible. In my view, his point alone suffices to dispose of the matter."*

In regard to the reply to respondent's counsel written submission in support of the preliminary objection he said that, it is an abuse of the court process in all its four corners. He argued that, in the case of **National Insurance Corporation of (T) Ltd & Parastatal Sector Reform Commissioner vs. Shengena Limited**, Civil Application No. 20 of 2007, Court of Appeal sitting at Dar es salaam reiterated the principles to be followed in dealing with a preliminary objection which

were set in the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West Ends Distributors Ltd**, (1969) EA 696 where it was held thus:-

*"So far as I am aware, preliminary objection consists of appoint which has been pleaded or which arises by clear implication out of the pleadings and which, if argued as a preliminary objection may dispose the suit. Example are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.....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. If cannot be raised if any fact has to be. Ascertained or what is the exercise of judicial discretion."*

He also cited the case of **The Secretary General of the East Africa Community and RT. Hon. Margaretzziwa**, East African Court

of Justice, Appellate Division at Arusha, Appeal No.7 of 2015, where it was held that: -

*"The improper raising of points by way of preliminary objection does nothing unnecessarily increase costs and on occasion, confuse the issue. This improper practice must stop."*

He argued that, the law and the provision that respondent's advocate applied is no longer applicable, especially in respect of section 38(2) of the Land Disputes Court Act Cap. 216 R.E 2019 which requires every appeal to the High court to be by way of a Petition of Appeal. He said that the preliminary objection is a fallacy in that the word Memorandum of Appeal is no longer applicable at the stage of the High court. He cited the Land Disputes Courts (District Land and Housing Tribunal (Amendment) Regulations, 2012 read together with the Land Disputes Courts (District Land and Housing Tribunal Regulations, 2002) first schedule item 8 and 9 which reads thus: -

*"Item 8 on filling Memorandum of appeals arising from the Ward Tribunal*

*Item 9 on filling Petition to the Land Division of the High court."*



On the issue that the appellant failed to attach the copy of the judgement, he said that, has no merit taking into account that section 38(2) of the Land Courts Disputes Act (supra) requires only filing of petition of appeal in absence of copy of judgement and decree. In support of his submission, he cited the case of **Edward Otesoi vs. Maigwa**, Miscellaneous Land Appeal No. 36 of 2019 Arusha District Registry (Unreported).

He therefore prayed that the preliminary objection be over ruled with costs.

In rejoinder the respondent submitted that, the appellant's counsel instead of replying to the point of law raised, he raised another point of law to the effect that the name of the court, filing date and month was not indicated, and that there was no signature of the registry officer in the notice. He prayed that appellants preliminary objection be disregarded by this court since his (respondent's) preliminary objection has not been determined. He said that, the rule against pre-emption of raised preliminary objection requires that once a party raises a preliminary point of objection it must be heard first and the other party may not pre-empt it. He cited the case of **Meet Sigh Bhachu vs.**

**Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018, Court of Appeal sitting at Arusha (unreported).

On the issue of whether the said notice of preliminary objection was presented for filing before the court, he said that this assertion is baseless as it does not get support of the proceedings before the court, since it was properly filed as it is dated, signed and evidenced by exchequer receipt No. 2746077 dated 23/08/2021. He further reiterated his submission in chief that the appeal is incompetent for contravening mandatory requirement of the law for not being accompanied with a judgment, stating that the case cited by the appellant's counsel of **Dina Cosmas vs. Rajabu Shanai Kiwamba** (supra) is distinguishable for the reason that the appeal in the cited case originated from a Ward Tribunal whereas the instant appeal originated from a District Tribunal in exercise of its original jurisdiction. Responding to the argument that the preliminary objection was filed in non-existing court, he said that the error is purely a slip of the pen which can be ignored by this court as the same didn't prejudice any party, and that is why the appellant filed a reply.

I have given deserving consideration to the submissions by the learned counsels. The question for determination is whether the preliminary objection has merits.

Firstly, as agreed by both parties the Notice of Preliminary Objection was wrongly lodged. It was contrary to Rule 8(2) of the High Court Rules, 2005 which provides thus: -

*"When any cause or matter, whether original or appellate, has been entered in a District Registry, it shall be entered;*

*IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA*

*IN THE DISTRICT REGISTRY AT.....*

*Criminal appeal, Civil appeal, Civil case miscellaneous civil cause, Bankruptcy Case, matrimonial case cause as the cause may be."*

Back to the case at hand the respondent filed preliminary objection is hereby quoted thus: -

*IN THE UNITED REPUBLIC OF TANZANIA*

*IN THE HIGH COURT OF SONGEA*

*AT SONGEA*

*LAND APPEAL NO. 02 OF 2021*

*(Originating from the Land Application No. 104 of 2018, in the District Land and Housing Tribunal for Ruvuma at Songea)*

*BETWEEN*



*BAKARI SHABAN SIKA.....APPELLANT*  
*NIKITA JOHN KIBOPILE .....RESPONDENT*

*NOTICE OF PRELIMINARY OBJECTION*

*TAKE NOTICE THAT, On the first day of fixed for hearing the respondent herein his counsel will raise preliminary objection on points of law.*

- 1. That appeal is incompetence for not being accompanied with judgement.*

*WHEREFORE: the counsel for the respondent shall pray pray that the appeal be struced out with cost for being incompetent.*

.....  
*ADVOCATE FOR APPELLANT*

*PRESENTED FOR FILING THIS 09<sup>TH</sup> day of September 2021*

.....  
*REGISTRY OFFICER.*

*Drawn and filed by*  
*Zuberi Maulidi (Advocate)*  
*JOBEL Attorneys Law Chamber*  
*New Kauru Building*  
*Room No. 11 first floor*  
*P.O.BOX 620*  
*SONGEA.*

*Copy to be served upon:*

*Appellant*

*C/A*

*MAUSA ATTORNEY'S AT LAW*

*MADABA OFFICE*

*OLD DED MAIN OFFICE ROOM NO. 13 &14*

*SONGEA MUNICIPALITY*

Although Mr. Ndunguru conceded to the error, he argued that it was just a slip of the pen and it does not prejudice the parties and that is why even the appellant was able to file a reply.

However, I have refrained from discussing it because the appellant's preliminary objection was raised after the respondent has filed a notice of preliminary objection. First, the point of law does not meet the test set in **Mukisa Biscuit's case** as it does not finalise the matter. In the same vein, the cited case of the **Registrar of Trade and service marks** (supra) is distinguishable for the reason that it related to a Notice of Motion which initiated the matter before the Court of Appeal and it had an effect of disposing of the matter. Again, raising this point of law during hearing a preliminary objection on point of law which was raised by the respondent is unprocedural and is tantamount to pre-empting the point of law which was raised by the respondent. The court of Appeal in the case of **Meet Singh Bhachu** reiterated the already laid down principle that once a preliminary objection has been raised, it must be heard first and the other party is precluded from doing anything to pre-empt it.

Now, coming to respondent's preliminary objection. The respondent's counsel cited order xxxix, rule 1(1) of the Civil Procedure Code, Cap. 33 R.E 2019, which requires a memorandum of appeal to be accompanied with a copy of judgment and decree.

The Civil Procedure Code applies in the High Court for appeals originating from the District Land and Housing Tribunal where there is a lacuna in the Regulations, see section 51(1) and 51(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. As submitted by Mr. Eliseus Ndunguru, in this regard, order xxxix rule (1) (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 applies. Considering the appeal at hand, it is true that the petition of appeal was not accompanied by the judgment. The requirement to attach judgment to a petition of appeal may only be dispensed with where the court makes orders or decision to that effect.

With due respect to Mr. Mwamwenda, his argument is misconceived as section 38 (3) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 relates to appeals of matters originating from Ward Tribunals. Therefore, it is not applicable in the present case.

All in all, that being said, I find Mr. Eliseus Ndunguru's argument is at the upper hand, the appeal is improperly filed and the preliminary



objection is sustained. Consequently, the appeal is struck out with costs accordingly.

Right of appeal explained.



  
**S. C. MOSHI**

**JUDGE**

**19/10/2021**