

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 35 OF 2021

*(C/f Misc. Application No. 135 of 2021, Application No. 127 of 2015
and Bill of Cost No. 44 of 2018 District Land and Housing Tribunal of
Moshi)*

ZENO JAMES MBUYA APPELLANT

VERSUS

LILIAN MMARI RESPONDENT

JUDGMENT

MUTUNGI .J.

The genesis of the matter is well gathered from the record that, it all started in the District Land and Housing Tribunal of Moshi. The respondent herein had filed a suit (Application No. 124 of 2015) on trespass alleging Christina James Mbuya (1st respondent) and Zeno James Mbuya (2nd respondent) had jointly and severally unlawfully trespassed on her landed property. The same was one acre of land located at Mabungo area, Uchira Ward, within Moshi District. She alleged to have purchased the said land from one James Joseph Mbuya incidentally the first respondent's husband in 1998. During the sale

transaction the first respondent had duly witnessed and signed the Sale Agreement (tendered as Exhibit). She thereafter enjoyed the peaceful ownership and use of the suit land to the year 2015 when the respondents (which included the second respondent and appellant herein) allegedly trespassed onto the suit land and cultivated the same. Since that time they claimed it was their lawful property.

On the other side of the coin, Christina Joseph Mbuya (the then first respondent) countered, she had been given the suit land way back in 1962 by the then chief (Mangi) Mashingia of Kirua Vunjo. The then second respondent (Zeno James Mbuya) had no defence. After deliberations the trial tribunal entered judgment in favour of the then applicant (Lilian Mmari) and consequently declared her the lawful owner. The respondent herein then filed an application for bill of costs (Miscellaneous Application No. 44 of 2018) which was henceforth granted to a tune of Tshs. 2,693,800/= on 4/7/2018.

The story did not end here as the respondent herein through the window of Misc. Application No. 135 of 2021 prayed for execution of the decretal sum of Tshs. 2,693,800/=. During the hearing the appellant (then

second respondent) objected, he had no liability to pay the first respondent's debts as the said respondent had passed on. Further, he was not availed an opportunity to respond and neither was he furnished with bill of costs documents, nor where they attached to the application. In response thereto the respondent's advocate herein informed the court, according to the law, execution can proceed despite the passing away of one of the judgment debtors. It was then settled by the trial tribunal that, execution can proceed even where one of the decree debtors has died and ordered the appellant's house situate at Kilema village be attached and sold in a public auction to satisfy the decretal amount. The trial tribunal in due thereof appointed Independent Court Brokers to carry out the execution on 31/08/2021.

Dissatisfied with the decision, the appellant has filed this appeal on the following ground: -

That, the trial chairman erred in law and fact in deciding that, the Preliminary objections submitted by the appellant did not hold water.

During hearing of this appeal, the appellant appeared in person whereas the respondent was represented by Mr.

Philip Njau, learned advocate. It was further ordered the appeal be argued by way of written submission.

Supporting the appeal, the appellant submitted, he raised the following points of preliminary objection at the trial tribunal: -

1. The Application is improper before the Tribunal as it has been filed against a deceased person.
2. The application is incompetent as it was not accompanied with Bill of Costs documents.
3. No. provision of the law had been quoted to support the Application.

He then argued, Application No. 135 of 2021 before the trial tribunal was improper and thus untenable because, it was filed against the deceased person (the then first respondent). It was the appellant's further submission that, the late Christina James Mbuya died on 26th November, 2019 hence cannot be a party in the execution process. He further argued, the Bill of Costs referred to in the application emanated from Taxation Cause No. 44 of 2018 arising from Land Case Application No. 124 of 2015 which was finally determined on 29th September, 2017. However, the said application was filed in 2018 which was out of 60 days limitation period. He prayed the respondent's

application should have been dismissed with costs by the trial tribunal.

In reply, Mr. Njau submitted, the appellant has not submitted on the grounds of appeal in the current appeal but rather on preliminary objections raised during the hearing by the trial tribunal. The Learned counsel urged, the Court to disregard the filed submission in its entirety since the trial chairman had already determined and overruled the raised points of objection.

Mr. Njau went on submitting, it is established by law and practice that, parties must be confined to their pleadings and whenever a party argues or raises different issues from the ones in the court record, the same should not be given due weight. To cement his argument, he cited the case of **Astepro Investment Co. Ltd Vs. Jawinga, Civil Appeal No. 8 of 2015 (CAT-Unreported)** as cited in **Leonard Nyanguye Vs. The Republic, Misc. Criminal Appeal No. 30 of 2016** which underscored the importance of sticking to the pleadings.

The foregoing notwithstanding it was Mr. Njau's further submission that, at the trial tribunal, the appellant had raised his objection to the effect that he was never served with Bill of Costs documents and that he was not ready to settle the matter as the other respondent had died. The

learned counsel averred, these points do not fall in line with what a point of law entails as held in the case of **Mukisa Biscuits Manufacturing Co. Ltd. Vs. West End Distributors Ltd** **[1969] EA 696**. In the circumstances, the trial tribunal did not error in overruling the objection raised.

Mr. Njau further submitted, during the Bill of costs proceedings in 2018, neither the appellant nor the deceased (who was still alive by then) were present hence the matter was heard *ex-parte*. However, when the appellant was summoned for the execution, he claimed that he was denied the right to be heard on the said Bill of Cost and he cannot pay the deceased costs. It was the learned advocate's submission, the appellant was to first pray for the Bill of Cost order be set aside so that he can also be heard. The Learned counsel added that, **Regulation 23 of the Land Disputes (The District land and Housing Tribunal) Regulations, 2002** and **Order XXI Rule 20 (1) of the Civil Procedure Code Cap 33. RE 2019** provide for the prerequisite execution conditions and these were all adhered to during the execution proceedings.

Mr. Njau also asserted, **Order XXII Rule (1)(2) of the Civil Procedure Code (supra)** provides, with the death of the plaintiff or defendant the matter does not abate. The right

to sue survives and the matter is to proceed with the surviving party. In that regard, since the order for cost was issued to the appellant and the late Christina jointly and not separately thus the appellant had to comply with the trial tribunal's order. He finally prayed this Court finds the appeal meritless and is to be dismissed with cost.

In his rejoinder, the appellant reiterated his earlier submission and insisted this Court allows the appeal with cost.

Having gone through the parties' submission and the trial tribunal's records, it is undisputed that the respondent was declared the legal owner of the suit land with cost. The record also shows that, she filed a Bill of Cost where neither the appellant nor the late Christina James Mbuya appeared hence the same was decided *ex-parte*. As rightly argued by Mr. Njau, the proper remedy for the appellant was to pray for the Bill of Cost Order to be set aside so that the matter is heard *inter parties* instead of objecting the execution proceedings.

More so, **Order XXII Rule (1)(2)** provides and for the sake of reference is quoted as hereunder: -

“(i)The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

(ii) Where there are more plaintiffs or defendants than one and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

In the light of the above provision, the first preliminary objection raised at the trial tribunal that the case was against the deceased person cannot hold water since the appellant and the late Christina Mbuya were jointly sued and collectively held liable. More so, during the main application and the Bill of Costs the deceased was still alive and they neither appealed nor objected the Bill of Cost proceedings. In that regard, the appellant cannot hide under the pretext that, he is not obliged to settle the execution order as the bill of cost order did not state the cost had to be paid jointly but separately.

Regarding the 2nd objection that he was not served with a copy of Bill of cost or rather the application was not accompanied with the Bill of Costs documents. The same

is not purely a point of law. In the case of **Mukisa biscuits (supra)** a preliminary objection has been defined as;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection of the Court or a plea of limitation, or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

Be as it may, this issue cannot be resolved at the appeal stage, it would otherwise need factual proof.

As to the 3rd objection raised at the tribunal that, no provision of the Law was quoted to support the application. Regulation 3(1) of The Regulations provides that;

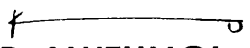
"Any proceeding before the tribunal shall commence by an application filed by an applicant or his representative or payment made of appropriate fees prescribed in the first schedule to these Regulations."

Going through the 1st schedule of the Regulation, there is no requirement of citing the law in the applications filed at the trial tribunal. In that regard, I do not see how the trial tribunal erred in overruling this objection.


In the upshot, I dismiss the appeal, and uphold the trial tribunal's decision that the execution should continue as ordered with costs.

It is so ordered.





B. R. MUTUNGI
JUDGE
23/02/2022

Judgment read this day of 23/02/2022 in presence of the appellant, respondent and Mr. Philip Njau learned advocate representing the respondent.


B. R. MUTUNGI
JUDGE
23/02/2022

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
23/02/2022