

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB REGISTRY)

AT MWANZA

LAND APPEAL NO. 28 OF 2022

(Arising from the District Land and Housing Tribunal of Mwanza in Land Application No. 250 of 2021)

ZAMARADI AHMAD SIMBA.....APPELLANT

VERSUS

1. HELENA MAGOHE.....1ST RESPONDENT

2. CHACHA RUSAKA.....2ND RESPONDENT

3. ROBERTY GUDEBA.....3RD RESPONDENT

JUDGMENT

2nd Aug. & 19th Sept., 2022

DYANSOBERA, J.:

In this appeal, the appellant is, by way of a memorandum of appeal drawn by learned Counsel Mr. Silas John and filed on 25th day of May, seeking to impugn the decision of the District Land and Housing Tribunal for Mwanza in Land Application No. 250 of 2021 on the following grounds:-

1. That the Mwanza District Land and Housing Tribunal erred on points of law by raising a legal issue *suo moto* and disposing it without affording parties with an opportunity to address on the same in violation of the law.
2. That the Mwanza District Land and Housing Tribunal erred on points of law by dismissing the land application No. 250 of 2021 with costs based on misjoinder or non-joinder of parties.

Briefly, the background of the matter is the following. The appellant herein filed Land Application No. 250 of 2021 before the District Land and Housing Tribunal, suing the three respondents above over trespass of the landed property which is a squatter located at Kaseke, within Ilemela District whose estimated value is Tshs. 16, 000, 000/=. It was alleged under paragraph 6 (A) (iv) of the Application Form that on 10th day of August, 2021, the applicant visited the suit land only to witness the respondents having illegally entered that suit land and busy cutting all the trees down, clearing it for local survey claiming that the suit land belonged to them.

The suit was not determined on its merits as the respondents raised preliminary objections. The 2nd and 3rd respondents, in their written statement of defence, *inter alia*, raised a preliminary objection on the ground that: -

1. The application is bad in law as the applicant sued the wrong party.

While the 1st respondent's preliminary objection in her written statement of defence was the following:-

1. That the applicant has not *locus standi* to institute the matter against the 1st respondent.

Parties submitted in writing in support and in opposition of the preliminary objections.

The Chairman considered not only the parties' submissions but also the document, (pleadings) together with annexures that had been filed by the parties. At the end of the day, he, in the extract award titled 'TUZO YA UAMUZI' dated 13th May, 2022, made the following findings: -

- i. Pingamizi za awali zote mbili zimekubaliwa kwa kuwa mleta maombi hana miguu kisheria kufungua shauri dhidi ya mjibu maombi wa kwanza.
- ii. Maombi haya ni mabaya kisheria kwa kuwafungulia kesi wajibu maombi wa pili na wa tatu ambao ni viongozi walioshuhudia mkataba badala ya kuwafungulia kesi wauzaji wa ardhi hiyo.
- iii. Maombi yamefutwa kwa gharama.

The above findings of the District Land and Housing Tribunal aggrieved the appellant hence this appeal. According to the petition of appeal filed by the appellant, the following complaints have been raised: -

1. That, the Mwanza District Land and Housing Tribunal erred on points of law by raising a legal issue *suo moto* and disposing it without affording parties an opportunity to address on the same in violation of the law.

2. That, the Mwanza District Land and Housing Tribunal erred on points of law by dismissing the land Application No. 250 of 2021 with costs based on misjoinder or non-joinder of the parties.

On 2nd August, 2022 when this appeal came for hearing, Mr. Melchizedek Gunda, learned Advocate, represented the appellant while the respondents enjoyed the legal services of the Ms. Scholastica Teffe, learned counsel.

Arguing in support of the 1st ground of appeal, Counsel for the appellant submitted that the lower Tribunal erred in law by raising a legal point *suo moto* and decided it without giving an opportunity to the parties to address on it contrary to legal requirements. He explained that it is the law that a cause of action is determined by looking at facts which will give judgment in the plaintiff's favour. Counsel for the appellant cited the case of **Mussa Ng'ang'andwa v. Chief Wanzagi and 8 others** [2006] TLR 382. He asserted that the issue of cause of action was neither pleaded nor raised in the preliminary objections but was raised *suo moto* without affording parties to address on it before deciding it. According to him, the appellant was condemned unheard. In support of his argument, Counsel for the applicant cited the cases of **Scholastica Missana v. Wilson Doto and 3 others**, Land Appeal No. 13 of 2019 and **Abbas Sherali and**

another v. Abdul Fazalboy, Civil Application No. 33 of 2002 (unreported).

Submitting on the second ground, Counsel for the appellant contended that the cause of action of the appellant was trespass and destruction of trees after the same appellant eye witnessed the incident when she visited the *locus in quo*. Mr. Melchizedek stressed that the appellant had no cause of action against the wife of the deceased's vendor of the suit land one Gertrude Emmanuel and, therefore, the finding by the Tribunal Chairman that the appellant sued wrong parties was misplaced.

Lastly, it was argued on part of the appellant that the preliminary objections raised by the respondents did not meet the tests propounded in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696 and endorsed by the Court of Appeal in the case of **Mussa Ng'ang'andwa v. Chief Wanzagi and 8 others** (supra). He emphasized that there was a dispute of who was the rightful owner of the suit land and this was a matter of evidence.

Replying to the submission by Counsel for the appellant, Ms. Scholastica Teffe, the respondents' advocate, argued that the 1st ground of appeal has no merit. She elaborated that the Tribunal was correct in analyzing and evaluating the facts on both sides whereby the respondents'

preliminary objections were legal. She argued that both parties were heard by way of written submissions and that the record is clear how the deliberations were conducted.

With respect to the second ground, Counsel for the respondents reiterated that the parties were given opportunity and were heard. She urged the court to find the grounds of appeal devoid of merit and dismiss the appeal with costs and other reliefs.

In a brief rejoinder, Mr. Melchizedek reiterated what he had submitted in chief.

From the petition of appeal and the rival arguments of learned Advocates for the parties, there is no dispute that the District Land and Housing Tribunal, in dismissing the appellant's suit, first upheld the two preliminary objections on account that the appellant had no *locus standi* to sue the 1st respondent.

Second, it found that the suit was bad in law in that the appellant sued the 2nd and 3rd respondents who were leaders and had witnessed the contract.

As the record shows, the appellant's suit was dismissed at a preliminary stage on two grounds. One, that the appellant had no *locus standi* to sue the first respondent.

There is no dispute that, according to the record, the 1st respondent's raised preliminary objection was that the appellant had no *locus standi* to institute this matter against her. According to the 'TUZO YA UAMUZI' dated 13th May, 2022, nowhere is the issue of cause of action reflected, only in the ruling at p 4, where the Chairman wrongly stated that the cause of action was a sale of the suit land. This argument, however, did not form the basis of the decision of the lower Tribunal and that is why it was not reflected in the; 'TUZO YA UAMUZI'. The 1st ground of appeal lacks any merit.

In relation to the second ground of appeal, I agree that the Mwanza District Land and Housing Tribunal erred on points of law by dismissing the land Application No. 250 of 2021 with costs based on misjoinder or non-joinder of the parties. Here, the learned Chairman missed the point. As rightly argued by Counsel for the appellant, the 2nd and 3rd respondents were sued for two reasons, first they had trespassed the suit land and second, they had unlawfully destroyed the crops of the appellant. Those were indeed causes of action against the respondents. The appellant believed that only the trespassers and the persons she had witnessed destroying her crops deserved to be taken before the justice and not the persons who executed the sale of the suit land.

It is the accepted position of law that the decision as to who to sue was essentially that of the appellant. The paramount consideration being whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. This position was echoed by the Court of Appeal in the case **Ami Mpungwe v. Abbas Sykes**, Civil Appeal No. 67 of 2000.

In the case under consideration, the 2nd and 3rd respondents were, according to the appellant, trespassers and had destroyed crops in the suit land. They were, therefore, according to the pleadings, necessary parties before the District Land and Housing Tribunal. In other words, there was neither misjoinder nor non-joinder of parties; only that the 2nd and 3rd respondents were made parties to the case. The Hon. Chairman is reminded of the difference between joining or not joining a party to the case and making a party to the case.

As Sir Ralph Windham, CJ observed in the case of **Daphne Parry v. Murray Alexander Carson** (1962) EA 515 at p. 517: -

"...The rule is thus concerned with parties who have been wrongly joined, or who ought to be joined or added. To "join or "add" a party is not synonymous with making a person a party."

The 2nd and 3rd respondents were made parties to the case and not joined. The argument by the 2nd and 3rd respondents that they were wrongly sued was misplaced and their preliminary objection was wrongly upheld by the trial Tribunal.

For the reasons expressed in ground No. 2, I am satisfied that the trial Tribunal unlawfully dismissed the appellant's suit. This appeal is meritorious.

In the end result, the decision of the lower Tribunal dated 13th May, 2022 is quashed and set aside and the dismissed suit is restored. It is ordered that the record be remitted back to the District Land and Housing Tribunal for it to hear and determine the appellant's suit on merit.

Costs to be borne by the respondents.


W.P. Dyansobera

Judge

19.9.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 19th day of September, 2022 in the presence of the 1st and 3rd respondents but in the absence of the appellant and 2nd respondent.




W.P. Dyansobera

Judge