

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 344 OF 2022

MBARALA A. MAHARAGANDE 1ST APPLICANT
MADARAKA A. MAHARAGANDE 2ND APPLICANT
IBARIKI A. MAHARAGANDE 3RD APPLICANT
MTEGAME A. MAHARAGANDE 4TH APPLICANT
SALEHE A. MAHARAGANDE 5TH APPLICANT

VERSUS

MAHIKU A. MAHARAGANDE RESPONDENT
(Arising from the decision of this Court in PC Civil Appeal No. 7 of 2009)

RULING

2nd and 13th September, 2022

KISANYA, J.:

The above named applicants have moved this Court to be pleased to grant extension of time within which to file an application for certificate on point of law against the judgment and decree of this Court (Wambura, J, (as she then was) dated 28th June, 2012 in PC Civil Appeal No. 7 of 2019. The application is made under section 11(1) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002 (now R.E. 2019) and supported by a joint affidavit which set out the historical background of the matter and the reasons for extension of time.

Upon being served with the application, the respondent filed a counter-affidavit to contest the same. He further lodged a notice of preliminary objection on the following points of law:

- 1. That the Applicants have no locus standi.*
- 2. That the application before the Court is res-judicata.*

At the hearing of the preliminary objection, the applicants appeared in person, whereas the respondent enjoyed the legal services of Mr. Richard Kinawari, learned advocate.

Kicking off the discussion was Mr. Kinawari for the respondent. On the first limb of objection, the learned counsel argued that the applicant has no locus standi to institute this application. His argument was based on the ground that the applicants were not a party to PC Civil Appeal No. 7 of 2009 which is the basis of the present application. He contended that such fact is reflected in Annex G to the counter affidavit.

As regards the second limb of objection, the learned counsel submitted that this matter was determined by this Court (Feleshi, J., as he then was) in Misc. Civil Application No. 484 of 2015. It was therefore, his argument that the application is res-judicata and that it contravenes section 9 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) on the contention that the applicants were granted leave to file an application for

certificate on points of law. The learned counsel further submitted that the matter is res-judicata because they were made aware of the said decision. He fortified his argument by referring this Court to the case of **Lotta vs Tanki and Others** [2003] EA 557. In conclusion, Mr. Kinawari prayed that this application be struck out with costs.

Both limbs of objections were vehemently disputed by the 1st respondent whose submission was adopted by other respondents. With regard to the first limb of objection, the 1st applicant submitted that the applicants have locus standi. He also contended that the applicants were a party to the appeal which is subject to this application. He urged me to consider in Annex A2 appended to the supporting affidavit in which the judgment subject to this application was corrected and their names added. On that account, the 1st applicant invited this Court to find the first limb of objection devoid of merit.

With regard to the second limb of objection, the 1st applicant submitted that this matter is not res-judicata. Making reference to rule 46 (1) of the Court of Appeal Rules, 2009, the 1st appellant argued that, an application for certificate on a point of law is made after lodging the notice of appeal. That being the position, he submitted that the application to which the certificate on point of law was granted was incompetent on the

reasons that their notice of appeal was defective. He also urged me to consider that this Court (Hon. Demelo, J, as she then was) had already granted them leave to file the notice of appeal out of time. In the light of the foregoing submission, the 1st applicant submitted that this application is not res-judicata. He added that the parties to the application referred to by the respondent's counsel are different. As indicated earlier, the remaining respondents prayed to adopt the submission made by the 1st applicant.

When Mr. Kinawari rose to rejoin, he submitted that the memorandum of appeal in respect of the appeal subject to this application shows that the applicants were not a party to the said appeal. He reiterated that the applicants have no *locus standi* and went on contending that no evidence to prove that the applicants were added as a party to the appeal in which decision is subject to this application. On the issue of res-judicata, the learned counsel urged me to consider that the applicants have admitted that the application was determined by this Court.

Having considered the contending submissions, it is clear that the point to be determined by this Court is whether the preliminary objection are meritorious.

Before dwelling into determining the merits of the objection raised by the respondent, I find it appropriate to restate the legal position on a

preliminary objection. It is settled law in this jurisdiction that; *one*, a preliminary objection should be on matters of law; *two*, a preliminary objection which requires evidence or factual proof to probe cannot stand; and *three*, a preliminary objection is raised on the proposition that the facts raised by the adverse party are true. There is a plethora of authorities on that position. It is worth noting that most of the authorities draw inspiration from the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 in which Justice JA had this to say on what amounts to a preliminary objection: -

"So far I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by a clear implication out of the pleadings and which if argued as a preliminary point dispose of the suit. Examples are an objection to the jurisdiction of the Court, 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.

On his part, Sir Newbold, underlined as follows, on the issue under consideration: -

*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. It cannot be raised if***

any fact has to be ascertained or if what is sought is the exercise of judicial discretion. *The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop.*" (Emphasis added).

As hinted earlier on, the above stated position has been adopted in a number of cases. One of them is being the case of **Karata Ernest & Others vs. Attorney General**, Civil Revision No.10 of 2010 (CAT) (unreported), where the Court of Appeal held as follows:-

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

Being guided by the above position, I have considered that, in terms of the trite law in this jurisdiction, the issues whether the applicants have no *locus standi* and whether the application is *res-judicata* are capable of disposing of this matter. This implies that the points raised in the notice of preliminary objection are of law. In that regard, I am satisfied that one of the principles on a preliminary objection has been met.

However, both points of objection are not based on the facts deposed by the applicant. They are based on the facts deposed in the counter-affidavit and documents thereto. Further to this, in arguing for and against the objections, both parties relied on the contents of documents appended to the affidavit and counter-affidavit. The issue whether the documents referred by the parties support the preliminary objection is not a matter of law. It is a matter of fact to be ascertained by evidence. In view of the position stated in the cases of **Mukisa Biscuits** (supra) and **Karata Ernest** case (supra), both limbs of objection are disqualified to be termed as the preliminary objections. For that reason, I find it not necessary to determine the merit of the objection raised by the respondent's counsel.

In the event, the preliminary objections are hereby overruled and struck for being premature. This being a probate matter, I make no order as to costs.

DATED at DAR ES SALAAM this 13th day of September, 2022.



S.E. Kisanya
JUDGE
13/09/2022

