

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

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**LAND APPEAL NO 91 OF 2021**

(Originating from Land Application No 63 of 2021 of the District Land and Housing  
Tribunal for Mara at Musoma)

**MSAMBA KIGINGA (Administrator of the Estate of the**

**Late Kigingira Mang'era Chirare) ..... APPELLANT**

***VERSUS***

**MANG'ERA MGESI ..... RESPONDENT**

**JUDGMENT**

14<sup>th</sup> September & 07<sup>th</sup> October, 2022

**F. H. Mahimbali, J.**

This appeal arises from the findings of the DLHT (trial tribunal) in its ruling that the appellant has no cause of action against respondent. The reason for that ruling/finding of the trial tribunal which is the subject of this appeal was arrived basing on the administration letters that the trial chairman came into his knowledge and ruled against the appellant that the respondent was wrongly sued in his personal capacity instead of

being sued as administrator of the estate of the deceased. It also appears that the trial chairman amongst other issues, formulated his own preliminary objection against the appellant's case at the DLHT and on that basis dismissed the suit.

Aggrieved by that decision the appellant filed this appeal based on four grounds, namely:

- 1. That the tribunal chairman erred in law to hold that the appellant has no cause of action against the respondent relying on the facts that what was pleaded by the appellant. In is application. A copy of the judgment is hereby attached and marked as Annexure A-I to form part of this appeal.*
- 2. That the tribunal chairman erred in law to dismiss the application instead of rejecting it.*
- 3. That the trial chairman erred in law to rule out that the appellant's application basing on the court's record without inviting the to address him on the same court's record.*
- 4. That the trial chairman erred in law to rule out that the respondent was administrator while the administrator of the estate was already closed and he is the one occupying the land in dispute.*

In arguing the first ground of appeal, Mr. Wambura Kisika learned advocate submitted that for preliminary objection to stand it must be

self-proof. In this case, he submitted that the preliminary objection that the appellant had no cause of action, it needed proof. It must be established so by evidence. He added that for it to be lawful Preliminary objection, must base its facts on pleadings. He relied his position in the case of **George Ndege Gwandu and 19 others vs Kastuli Safari Tekko and Another**, Civil Appeal No 255 of 2018 at page 10, which insisted that cause of action must originate from the pleadings. In this case he faulted the chairman by out sourcing the facts out of the pleadings but not brought by the respondent and further relying on the provisions of law (section 71 and 100 of the probate and Administration Act) which provisions are not applied before primary courts in their exercise of probate and administration powers but the 5<sup>th</sup> schedule of MCA.

On the second ground of appeal, he faulted the chairman in dismissing the suit instead of striking it or rejecting it. By dismissing it, he erred as that is not the legal remedy provided under Order VII, Rule

11 of the CPC. He insisted so relying to the decision in the case of **B. M. Mbassa vs The Attorney General and 2 others**, Civil Appeal NO 40 of 2003, CAT at Mwanza while quoting the case of **John M. Byambalilwa vs Agency Maritime International (Tanzania Ltd,** (1983) TLR 1.

In the third ground of appeal, he faulted the Hon chairperson by introducing new grounds of preliminary objection in which parties were not given the chance to argue and used it to arrive at his finding when he considered that the respondent was not properly sued at his personal capacity while he was an administrator of the estate of the late Msesi Mang'era Shirare the fact that was not pleaded. On this Mr. Wambura sought reliance to the decision of my brother Kisanya, J in **Charles Okong'o vs Angisa Obongo**, PC Civil Appeal No 36 of 2020 page 3 in which he quoted the case of **EX. D8656 CPL Senga S/O Iddi Nyembo and 7 others vs Republic**, Criminal Appeal No 16 of 2018 where the case of **Abbas Sherally and Another vs Abdul Sultan**

**Haji Mohamed Fazalboy**, Civil Application No 33 of 2022 was referred.

Lastly, he faulted the trial chairperson when he dismissed the case on the finding that the respondent was not sued at his capacity as administrator of the estate of the late Msesi Mang'era Shirare while the probate case was already closed and that he was neither heir nor administrator by that time of the said estate.

On these submissions, he faulted the ruling by the trial chairman and prayed this court to intervene as the suit filed at the DLHT has been dismissed.

The respondent who was unrepresented, prayed that this court to adopt his reply to the grounds of appeal filed in court to form part of his submission and that he had nothing more to add.

As per his reply to the grounds of appeal, the first ground of appeal, he stated: the contents in ground no 1 of the petition of appeal

are self-contradictory, therefore the trial chairman rightly ruled that the appellant had no cause of action against him (the respondent).

This is because the application does not state the exact land owned, boundaries of it and that the respondent is the administrator of the estate of his late father.

In the second ground of appeal, he submitted that the trial tribunal chairman was justified in law to dismiss the application instead of rejecting it as it contains no any cause of action.

In the third ground, he denied the appeal as both parties were invited to address the learned chairperson on preliminary objection as per law. He added that since annexures are part of the pleadings it was right for the trial chairman to apply the annexures and raised the said legal issue.

On reply to the fourth ground of appeal, the respondent admitted that he had already discharged his duties as administrator of the said estate and that all the land has been accordingly distributed to the

lawful heirs of the said deceased and that himself is now neither heir nor beneficiary in anyhow of the said estate. He has no longer interest with the said estate.

I have critically digested the records of appeal and the parties' submission, I am of the view that this appeal is meritorious. I find it that way because it is undisputed that the trial chairperson first dismissed the suit on failure to disclose cause of action. As submitted above, failure to disclose cause of action attracts to rejection of the plaint or it be struck out but dismissal order as done. (See **John M. Byombalirwa vs Agency Maritime Internationale (Tanzania) Ltd**, (1983) TLR1) and Order VII, rule 11 (a) of the CPC. In the current case, it was therefore improper for the honourable trial chairperson to dismiss the said application. The appropriate cause was either to reject it or order an amendment of the plaint.

I also agree that the Honourable trial chairperson erred when he formulated his own legal issue and used it to determine the fate of the

application. This is clear when he raised the issue of the respondent being sued at his personal capacity. The best legal approach was for him to invite parties to address him on that legal issue and which weigh the parties' arguments before he makes his findings. (See **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed**, Civil Application no 33 of 2022 (unreported))

However, I differ with Mr. Wambura Kisika learned advocate for the appellant that where a plaint does not disclose cause of action does not constitute preliminary objection. I say so because, the law is clear that where the plaint does not disclose cause of action it is bound to be rejected or struck out or amended. The cause of action is traced from the parties' pleadings (plaint). If by itself it does not spell out the rights and obligations of the parties to the said filed case, then the plaint is said to constitute no cause of action. That is normally done at very initial stage of the case. It can be raised by the court either *suo motto* or by a



party to the suit. Therefore, the trial chairperson was justified to deliberate it as raised because it is an issue of law.

That said, the appeal is allowed to the extent explained above. In the resultant effect, I substitute the dismissal order of the suit with rejection or strike out order. The appellant is at liberty to refile his suit as per law.

Parties shall bear their own costs as far as this appeal is concerned.

DATED at MUSOMA this 07<sup>th</sup> day of October, 2022.



F. H. Mahimbali

**JUDGE**

**Court:** Judgment delivered 07<sup>th</sup> day of October, 2022 in the presence of both parties.

Right of appeal is explained.

F. H. Mahimbali

**JUDGE**