

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(LAND DIVISION)
AT ARUSHA**

LAND APPEAL NO. 3 OF 2020

(Originating from the District Land and Housing Tribunal for Manyara at Babati, Application No. 75 of 2018)

ALOYSE GWAE APPELLANT

Versus

THERESIA PHILLIPO 1ST RESPONDENT

EMMANUEL ALOYSE 2ND RESPONDENT

JUDGMENT

31st August & 12th October 2022

Masara, J.

The crux of the dispute leading to this appeal is over a farm land measuring 55 acres, located at Gailoli area, Laghanga village within Hanang' District, Manyara Region (hereinafter "the suit land"). The Appellant claimed to have acquired the suit land through purchase between 1985 and 1996. The dispute emerged in 2015, when the 2nd Respondent allegedly invaded the suit land and rented out part of it without the Appellant's consent. According to the Appellant, in mid-November 2017, the Appellant was evicted from the suit land by the Respondents with the intention to deprive him ownership of the same. The Appellant instituted a suit against the Respondents in the District Land and Housing Tribunal for Manyara ("the trial tribunal"), seeking to be

declared the lawful owner of the suit land. He further sought an order that the Respondents be permanently restrained from entering the suit land.

In their Written Statement of Defence, the Respondents disputed every claim, putting the Appellant into strict proof. They averred that the 1st Respondent is the lawful wife of the Appellant and that the 2nd Respondent was their son. They further averred that the suit land is a matrimonial property jointly acquired during the subsistence of their marriage.

On 13th November 2019, the date the case was fixed for hearing, the advocate for the Respondents raised a preliminary objection contending that the trial tribunal did not have jurisdiction to hear and determine the dispute since it was matrimonial in nature and that the same ought to be determined by normal courts of law. After hearing counsel for both sides, the trial tribunal sustained the preliminary objection. It was convinced that the dispute was a matrimonial one, therefore the trial tribunal lacked jurisdiction to entertain the same. Consequently, the application was dismissed. The Appellant was dissatisfied with that dismissal, he preferred this appeal on the following grounds:

- a) The Tribunal chairman erred in law and facts to accept and determine the respondents' counsel objection without affording the applicant notice so that he could prepare his defence in advance;*

- b) That the trial chairman erred in fact and law to treat the respondents' counsel preliminary objection as pure point of law while in his ruling grounded findings from the evidence in record; and*
- c) Generally and on the whole, trial chairman erred in fact and in law to accept and entertain respondents' counsel submission without satisfying himself whether the said advocate was legally engaged.*

Basing on the foregoing grounds of appeal, the Appellant urged the Court to allow the appeal with costs.

At the hearing of the appeal, the Appellant was represented by Mr Lobulu Osujaki, learned advocate while the Respondents were represented by Mr Raymond Joakim Kim, learned advocate. By consent of the Court, the appeal was heard through filing of written submissions.

In his written submissions, Mr Osujaki impliedly abandoned the third ground of appeal. Submitting on the first ground of appeal, Mr Osujaki stated that the case was fixed for hearing on 05/12/2019; however, on that day counsel for the Respondents raised the preliminary objection and the same was heard on that day. He accounted that, practically, a preliminary objection is raised through a notice as part of pleadings, therefore, the preliminary objection ought to have been raised in the written statement of defence that was filed by the Respondents on 17/12/2018. According to learned counsel, the course taken by the trial

tribunal chairman meant to take him by surprise, contrary to the settled principles of fair hearing.

Expounding the second ground of appeal, Mr Osujaki contended that the preliminary objection raised was not based on a pure point of law. It required evidence in order to ascertain when the suit land was acquired and whether the Appellant and the Respondent were husband and wife. It was his further submission that the ruling was in contravention of what was held in the case of **Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd [1969] E.A 696**, which propounded on what amounts to a preliminary objection in law. Mr. Osujaki prayed that the dismissal order be reversed so as to allow the application at the trial tribunal to proceed on merits. He also prayed for costs of the appeal.

On his part, Mr Kim, in response to the first ground, submitted that a point of law especially the one touching on jurisdiction can be raised at any stage of the proceedings, before the matter is determined on merits. To reinforce his argument, he relied on the decision in **R. S. A. Limited vs Hanspaul Automechs Limited Govinderajan Senthil Kumal, Civil Appeal No. 179 of 2016** (unreported). According to the referred case, a notice of preliminary objection is not mandatory in so far parties are afforded the right to argue on the raised preliminary objection. Mr. Kim

asserted that, in the appeal under consideration, all parties were heard in respect of the raised preliminary objection; thus, the issue of notice was immaterial.

According to counsel for the Respondents, the preliminary objection raised is a pure point of law because the Appellant is the husband of the 1st Respondent and father of the 2nd Respondent. He maintained that, according to paragraph 6 of the application, the Appellant claimed that the Respondents evicted him from the matrimonial home with an intention to inherit the same. On that account, he urged the Court to dismiss the appeal with costs.

I have thoroughly considered the grounds of appeal and submissions by both counsel for the parties. I have also subjected the record to a close scrutiny. The task before me is to determine the appeal based on the grounds of appeal as filed and submitted upon.

In the first ground of appeal, counsel for the Appellant faulted the trial tribunal for entertaining the preliminary objection which was raised without giving notice to the other side. Mr Kim resisted the argument, portraying that the preliminary objection was properly raised and entertained due to the fact that both parties were accorded the right to

submit on the same. Perusal of the trial tribunal records reveals that the case was fixed for hearing on 13/11/2019. On that date, counsel for the Respondents herein raised the said preliminary objection which touched on jurisdiction of the trial tribunal. The records further show that both counsel for the parties submitted on the preliminary objection, and a ruling in that respect was delivered on 05/12/2019. Concomitant with the cited case of **R. S. A. Limited vs Hanspaul** (supra), it is settled position of the law that a preliminary objection challenging jurisdiction of the court can be raised at any stage of the proceeding. In the cited case the Court stressed that:

"Thus, since the jurisdiction to adjudicate any matter is a creature of statute, an objection in that regard is a point of law and it can be raised at any stage. In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the close of the hearing." (Emphasis added)

From the above position of the law, it is undisputed fact that preliminary objection challenging jurisdiction of the court/tribunal can be raised at any stage, provided both parties to the dispute are accorded the right to submit on the same. It is not a mandatory requirement that such objection be raised by a notice. The contention by Mr Osujaki that the preliminary objection ought to be raised in the written statement of defence is

unfounded. I hold this view because the records show that the written statement of defence was filed by the Respondents in person, presumably without the assistance of counsel. They engaged an advocate who, on the first day he entered appearance, discovered the preliminary objection and raised it. Since the Appellant's counsel in the instant appeal was accorded the right to respond to the raised preliminary objection which challenged jurisdiction of the tribunal in entertaining the case, his argument cannot be sustained. That said, the first ground of appeal lacks merits.

The second ground worth determination is whether the preliminary objection raised and sustained by the trial tribunal was a pure point of law. In order to properly address this ground, one needs to know what amounts to a preliminary objection. The answer to this question may be found in the Court of Appeal decision in **NIC Bank Tanzania Limited vs Hirji Abdallah Kapikulila, Civil Application No. 561/16 of 2018** (unreported), where the Court observed:

*"As our take off, we shall restate the principle in the case of **Mukisa Biscuits Manufacturing Company Ltd vs West end Distributors Ltd**, [1969] EA 696 which, in our view, not only defines what a preliminary objection is, but also prescribes when it can be raised and when it should not be raised. The relevant excerpt goes thus;*

*"A preliminary objection is in the nature of what used to be a **demurrer**. It raises a pure point of law which if 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".**
[Emphasis ours]*

*From the above statement, a preliminary objection is like a demurrer.
The latter word comes from the word "demur" which is defined in
Black's Law Dictionary, 8th Edn at pg 465, as;*

*"To object to the legal sufficiency of a claim alleged in a pleading **while
admitting the truth of the facts stated.**" [Emphasis ours]."*

Simply put, a preliminary objection must be pure point of law. It should not be an assertion that requires ascertainment through evidence. The question before me is whether the raised preliminary objection in the appeal under consideration qualifies the parameters set in the above Court of Appeal decision.

Having considered the pleadings filed in the trial tribunal, the dispute was over ownership of the disputed land. According to paragraph 6 of the application, the Appellant claimed to have bought the suit land in 1985 and 1996. He added that at the time he bought the suit land he had not married the 1st Respondent. Regarding the orders sought in the trial tribunal, one is a declaratory order that he is the lawful owner of the suit land. The fact that the parties were husband and wife, was raised by the Respondents in the written statement of defence.

In my view, in order to ascertain whether at the time of acquiring the suit land the Appellant was married to the 1st Respondent, the trial tribunal was mandated to hear evidence on it. Similarly, to ascertain that the Appellant and the 1st Respondent were husband and wife as at the time of the dispute, that is also subject of evidence. That goes hand in hand in resolving whether the suit land was matrimonial property or was the sole property of the Appellant, which can also be ascertained after hearing evidence from both parties. Furthermore, the relationship between the Appellant and the 2nd Respondent could not be assumed as proved.

From the record availed to me, I see no cogent proof that the Appellant and the 1st Respondent were duly married. Annulment of the marriage was not part of the reliefs sought before the trial tribunal. Similarly, division of matrimonial property was not one of the reliefs sought. From the records, it is apparent that the cause of action in that matter was determination of ownership of the suit land and not determination of matrimonial properties. Therefore, determination of the said preliminary objection was contingent upon receiving of evidence to prove the same. This renders the raised preliminary objection deficient of the parameters stated in **NIC Bank Tanzania Limited** case. In other words, the raised preliminary objection did not qualify to be a pure point of law. I should

also add that mere existence of marriage does not deprive parties to the marriage to personal property. It is possible for married couples to litigate on personal properties which dispute need not be with regard to the existence of marriage.

That said, it is my decision that the trial tribunal improperly handed the matter before it. The second ground has merits.

Consequently, the appeal herein is found to have merits. It is hereby allowed. The decision of the trial tribunal dismissing the case is hereby quashed and set aside. I direct the case file to be remitted back to the trial tribunal so that the case can proceed to be heard on merits. This should be expedited considering that this case has been pending in courts since 2019. Considering the nature of the parties, I make no order as to costs.




Y. B. Masara

JUDGE

12th October, 2022.