

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO DISTRICT SUBREGISTRY)
AT MOROGORO

LAND APPEAL NO. 15 OF 2021

1. ISDORY FRANCIS MALATA
2. HASSAN SALUM BOMBWE
3. SELEMANI SALUMU [Administrator of the Estate
of the Late SALUMU NASSORO BOMBWE]APPELLANTS

VERSUS

KASSIM MOHAMEDI HIMBAHIMBA [Administrator of the
Estate of the Late MOHAMEDI HIMBAHIMBA]RESPONDENT

(Being an appeal from the Judgment and Decree of District Land and Housing
Tribunal for Kilosa District at Kilosa)

(R.S. MNYUKWA, CM)

dated the 27th day of September, 2021

in

Land Application No. 51 of 2017

RULING

S.M. KALUNDE, J.:

On 11.11.2021, ISDORY FRANCIS MALATA, HASSAN SALUM BOMBWE and SELEMANI SALUMU (in his capacity as the administrator of the estate of the late SALUMU NASSORO BOMBWE) (hereafter "the appellants") filed the present appeal seeking to challenge the judgment and decree of District Land and Housing Tribunal for Kilosa District at Kilosa (hereafter "the trial tribunal") in **Land Application No. 51 of 2017** dated 27.09.2021.

Having been served with the memorandum of appeal and relevant documents on 07.12.2021 the respondent filed a reply to the memorandum of appeal together with a notice of preliminary objection as follows:

"(1). *That the appellants lack **locus standi** to claim over the suit land;*

(2). *That the appeal is incompetent for want of administrator of the estate of the late Mwajuma Kaniki as a necessary party in this suit.*

Before this Court the respondent was unrepresented, he thus appeared in person and argued his points of objection himself. The appellants on the other hand enjoyed the legal representation of **Mr. Asifiwe Alinanuswe** learned advocate.

The essence of the respondents' submissions was that before the trial tribunal the 1st, 2nd and 3rd appellants failed to establish the size of the suit property. She contended that the appellants were not aware of the size or geographical location of land they owned. In relation to the second limb, the respondent argued that the administrator of the estate of Mwajuma Kaniki (now deceased), who was the 3rd respondent at the trial tribunal, must be joined in the present appeal as a necessary party. To support his view, he cited the case of **Ibrahim Kusaga vs. Emmanuel Mweta** [1986] TLR

26. In conclusion, the respondents' view was that the appeal lacked merit and ought to be dismissed.

Reacting to the above Mr. Alinanuswe argued that the points of law argued by the respondent did not fit into the description of a preliminary objection as envisaged in the case of **Mukisa Biscuits Manufacturing Company Ltd. vs. West End Distributors Ltd.** (1969) EA 696. Alternatively, the counsel submitted that the applicants had interest in the suit at the trial tribunal as they would have been affected by eviction and vacant possession of the suit property. In addition to that, the counsel argued that being aware of their interests over the suit property the respondent was the one who sued them at the trial tribunal. His view therefore was that applicants had locus standi. As for the second limb, the counsel argued that an appeal is a right preferred by a party who is aggrieved by the decision of the trial tribunal or court. Thus, being parties to the suit at the trial tribunal, any person who was a party thereto may institute an appeal. In his view it was not important to join the administrator of the estate of the late Mwajuma Kaniki because they may be not interested in the appeal. The counsel prayed that the preliminary objections be dismissed, and the appeal be heard on merits.

In rejoining the respondent insisted that the appellants had no interest in the suit property having failed to identify their respective portion of land which they claimed to have purchased from the late Mwajuma Kaniki. The respondent insisted that for the appeal to

proceed the administrator of the estate of the late Mwajuma Kaniki must be joined.

On my part, having examined the oral submissions advanced by the parties for and against the preliminary objection, the main issue for my determination is whether the objection raised is meritorious. Before I proceed to the merits, I propose to restate the principles relating to preliminary objections as stated in the case of **Mukisa Biscuits** (supra) where at page 700 the defunct East Africa Court of Appeal, (Law J.A) observed as follows: -

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

As to what constitutes a preliminary objection and when it can be raised, **Sir Charles Newbold P**, at page 701 had this to say: -

*"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 what is the exercise of judicial discretion."*

[Emphasis is mine]

The above principles have been upheld and amplified in several decision including the case of **The Soitsambu Village Council vs. Tanzania Breweries Ltd and Tanzania Conservation Ltd**, Civil Appeal No.105 of 2011 (Unreported) where the Court of Appeal stated:

"A preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of proper procedure for entertaining application for preliminary objections. It will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits."

Through judicial interpretation examples of what may constitute preliminary objection includes; objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal has been lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc. See **Karata Ernest and others vs The Attorney General**, Civil Revision No. 10 of 2010 (unreported).

Having the above principles in mind the next question would then be whether the present preliminary objections fall within the description and requirements stated above. In my view, they definitely do not and illustrate. In relation to the first point, there is still dispute on some factual matters that require proof. Specifically, an investigation into the facts is required to respond to the question whether the appellants were able to identify and establish their portion and location of the suit property. There is therefore a need to investigate and determine the veracity of certain facts to decide on this point. Otherwise, the appellants were parties to the suit at the trial tribunal and that comes with the right to appeal against the decision of the trial tribunal.

Turning to the second point, I have considered the submissions collectively, I am convinced that the same was in fact made as an argument in support of the first point of objection that, it is important that the administrator of the estate of the late Mwajuma Kaniki be joined so that the rights of the parties may be properly determined. However, as I pointed out earlier, the determination of these points requires an investigation of the facts hence falling outside of what may constitute a preliminary objection within the principles cited in **Mukisa Biscuits** (supra). In both circumstances presented herein there are several facts which needs deliberation by both parties. This, I think, would be addressed in the hearing of an appeal.




In the end and for the above reasons, I am convinced that the two points to not qualify as points of preliminary objection within the meaning of authorities cited above.

That said, I dismiss the points of preliminary objection raised. Costs to be in cause.

It is so ordered.

DATED at MOROGORO this 23rd day of November, 2022.




S. M. Kalunde

JUDGE

ORIGINAL