

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)**

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 51 OF 2022

(C/F Land Application No. 150 of 2018 at the District Land and housing Tribunal of
Moshi at Moshi)

1. ELIZABETH NDIKE
2. M/S FHS ENGINEERING LTD. }**APPLICANTS**

VERSUS

1. FATUMA ALLY SHOO
2. ISSACK EMILY LYIMO
3. RENALDA A. SHAYO } **RESPONDENTS**

RULING

Last Order: 6th June, 2023

Ruling: 20th June, 2023

MASABO, J.: -

The ruling is in respect of a preliminary point of law raised by the 1st and 2nd respondents objecting the application for having been instituted against a deceased person. In brief, the applicants herein have moved this court under section 41(2) of the Land Disputes Courts Act, Cap 216 RE 2019 praying for a leave for extension of time within which to appeal from the decision of the District Land and Housing Tribunal of Moshi in Land Application No. 150 of 2018. Upon being served and filing their counter affidavits, the 1st and 2nd respondents subsequently raised a preliminary objection that the application is incompetent for suing a deceased person.

During the hearing which proceeded in writing all the parties were represented. The applicants were represented by Mr. Armando Swenya, learned counsel, the 1st respondent by Mr. Nicholas Mugarura and the 2nd respondent by Mr. Patrick Paul, all learned counsels.

Submitting in support of the preliminary objection, Mr. Nicholas Mugarura argued that the third respondent herein is demised. He passed away in March 2021 way before the present application was filed. When the applicant filed the present application on 3/10/2022, the 3rd respondent was already demised. Thus, he ought to have impleaded the administrator of estate, not the deceased. The anomaly is fatal as the administrator will be denied the right to be heard. Mr. Mugarura contended further that such act would render the application a nullity as held in **Exim bank (Tanzania) Limited vs Yahaya Hamisi** (civil Appeal No. 275 of 2019) 2022 TZCA 598 (Tanzlii) at page 5&6 where the case of **Babubhai Dhanji vs Zainab Mrekwe** [1964] 1E.A 24 was cited with approval and prayed that this court strike out the application as the applicants and their counsels were aware of the 3rd respondent's demise as evident in paragraph 9 and 12(b) of the affidavit supporting the application.

He further submitted and prayed that this court be pleased to award interest. He cited the decision of this court in **Mwanaisha Ally Mbalika vs Juma Ally Mbalika and 4 others** (Misc. Land Application No. 11 of 2021) 2022 TZHC (Tanzlii) where Mlyambina J, dealt with similar circumstances. He reiterated that, it is in the interest of justice that the costs be awarded because the applicants and their counsel had knowledge that the 3rd respondent had died.

Mr. Patrick Paul Counsel for the 2nd respondent, joined hand with Mr. Magarura. He submitted that the 3rd respondent is a deceased person having demised on 3/03/2021 while this application was lodged on

3/10/2022 before this court more than a year after his demise. Therefore, this application was void *ab initio*. To support his argument, he cited the case of **Exim Bank (Tanzania) Limited vs Yahaya Hamisi** (supra) and **Babudhai Dhanji vs Zainabu Mrekwe** (supra) which were all cited in **Zainab Mrisho and 2 others vs Elibariki Elisa Ngowi**, Misc. Land Application No. 409 of 2022 HC (Land Division) at Dar es Salaam. Based on this he prayed that, the application be struck out with costs.

In reply submissions, Mr. Swenya for the applicants submitted that the preliminary objection raised by the 1st and 2nd respondents does not qualify as point of objection since the same required proof which was annexed to the counter affidavit. He averred that it is trite law that a preliminary point of objection should be on a point of law and must be one that if argued, would be capable of disposing the suit. He supported his argument with **Mukisa Biscuits Manufacturing Company vs West End Distributors Ltd** [1969] E.A 696.

He further argued that the respondents have raised the preliminary objection without stating the provision of law that has been contravened and hence the same is incompetent for non-citation as held by the court of appeal in **Mathias Nduki and 15 Others vs Attorney General**, Civil Application No. 144 of 2015 (unreported).

Furthermore, he averred that the annexed photograph of the grave of the deceased in the respondent's counter affidavit did not suffice as proof of death of the 3rd respondent as the legal document which can prove the death of the deceased person is a certificate of death or letters of

administration of deceased's estate. He supported this stance with **NCBA Bank Tanzania Limited and Commercial Bank of Africa vs Patrick Edward Moshi**, HC, Misc. Land Case Application No. 701 of 2020 (unreported) and argued that, the objections are devoid of merit and should be dismissed with costs.

Alternatively, Mr. Swenya submitted that it is trite principle of law that the suit cannot abate for reason of death of the plaintiff or defendant if the right to sue survives as per Order XII rule 1, 2 and 4(2) of the Civil Procedure Code Cap 33 RE 2019. He averred that the applicants were unaware as to the death of the 3rd respondent who died after pronouncement of the judgment. However, the case is a continuation of the proceedings that originated from the District Land and Housing Tribunal in which the 3rd respondent was party.

He averred that the golden rule is that statutes must prima facie be given their ordinary meaning. According to Order XII rule 1 and 2 of the CPC since the 3rd respondent was party to Land Application No. 150 of 2018 and this is not a fresh suit and should not be treated as such as would be contrary to the wording of the statute. He supported this stance with **Pan African Energy Tanzania Ltd vs Commissioner General Tanzania Revenue Authority** Civil Appeal No, 172 of 2020 (unreported) CAT at Dar es Salaam. Mr. Swenya contended that the law allowed the suit to proceed provided the right to sue is not exhausted by the death of a party as was stated in **Shabir F. A. Jessa and Another vs Raj Kumar Deogra** Civil Appeal No. 59 of 1996) [1997] TZCA 56 CAT at Zanzibar.

In further alternative, he argued that, if this court finds the objection with merit, the remedy would be to invoke the provision of Order XXII Rule 4(1) of the Civil Procedure Code.

I have dispassionately considered arguments in support and in opposition of the preliminary objection. The respondents have argued that this application is a nullity and ought to be struck out as the same has been preferred against a deceased person without proper procedures being followed. The applicants on the other hand are maintaining that the objection raised is not on a point of law and that even if the same is sustained the remedy is not striking out of this application but the one provided under for Order XXII Rule 4(1) of the Civil Procedure Code. From these arguments, two questions need be answered. The first is whether the preliminary objection raised by the 1st and 2nd respondents is competent and if so, whether the present application is competent.

On the first issue, the law on preliminary objections is very well settled that, preliminary objections need be on pure point of law apparent on pleadings, as opposed to fact. There is a plenty of authorities in support, among them the land mark case of **Mukisa Biscuit Manufacturing Co. Ltd vs West Distributors Ltd** [1969] EA 696. Also relevant are; **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasar**, Civil Application No. 33 of 2012, CAT (unreported); **Britam Insurance Tanzania Limited vs Ezekiel Kingongogo and another** (Civil Appeal 125 of 2021) [2021] TZCA 579 (Tanzlii) and **Gideon Wasonga & Others vs The Attorney General & Others** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 (Tanzlii). In **Mukisa Biscuit Manufacturing Co. Ltd**

vs West Distributors Ltd (supra) which propounded this principle, the parameters of preliminary objection were set. It stated thus, 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.”

“A preliminary objection is in 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”.

Since the main argument in the present case is that the 3rd respondent is dead and for that reason, the application is a nullity, I will stand guided by the principle in **PRESTIGE FINANCE P LTD VS BALWANT SINGH AND ANOTHER**, 1978 48 compaCas 459 Delhi which was cited with approval by the Court of Appeal in **Exim Bank (Tanzania) Limited vs Yahaya Hamisi** (supra) where it was stated that:

"If a suit is filed against a dead person, then it is a nullity and you cannot join any legal representatives; you cannot even join any other party because it is just as if no suit had been filed. On the other hand, if a suit is Hied against several persons, one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void, but the Court has to strike out the name of the party who has been wrongly joined. Such a person would be deemed to be wrongly joined, because he was

dead on the date of the institution of the suit and, therefore, incapable of being joined."

Having cited this authority, the Court of Appeal concluded that, such suit should be struck out. In the foregoing, there can be no doubt that, a suit or application filed against a dead person, is a point of law and falls within the realm of preliminary objection.

In the present case, I note however that, this point is not as straight forward as it requires this court to investigate it. The death of the 3rd respondent was raised by the 1st respondent in paragraph 5 of her counter-affidavit in which she attached a copy of photographs of the grave where the 3rd respondent was purportedly buried. Hence, the question whether the 3rd respondent is indeed dead, a question which need be unveiled before invoking the consequences for filling of the application against a dead person. In other words, for the objection to successful, this court must first investigate the appended photographs to ascertain the death of the 3rd respondent. This has landed me into a decision of the Court Appeal in **Shose Sinare vs Stanbic Bank Tanzania Limited & Another** (Civil Appeal No. 89 of 2020) [2021] TZCA 476 [Tanzlii] where it was stated thus;

"What we can add is that for a preliminary objection to be successful, generally it should not need support from evidence. In **The Soitsambu Village Council v. Tanzania Breweries Ltd and Another**, Civil Appeal No. 105 OF 2011 (unreported), this Court stated:

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a

preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a 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 the affidavits or other documents accompanying the pleadings to support the objection such as exhibits." (emphasis mine)

On the strength of this authority, I am of the firm view that as the death of the 3rd respondent needs to be ascertained from the photographs appended to the counter affidavit or any further evidence, the objection raised do not qualify as a preliminary objection. I may also add here that, even if such ascertainment was welcome, the point would still fail as the primary proof of death of a person is a certificate of death or an affidavit by a trustworthy person who was present at the burial of the deceased or other credible evidence, not a photograph of an individual's grave.

In the foregoing, the preliminary objection raised by the 1st and 2nd respondents fails and is overruled with costs for being stained with facts that require evidence to ascertain.

DATED and DELIVERED on this 20th day of June 2023.



A handwritten signature in black ink, appearing to read "J.L. MASABO".

J.L. MASABO
JUDGE