

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**LAND APPEAL NO. 25 OF 2023**

(Arising from the decision of the District Land and Housing Tribunal of Mbeya in  
Application No. 19 of 2022)

**FESTO DAUDI MWAKABUJE.....APPELLANT**

**VERSUS**

**KOTI BROTHERS COMPANY LTD AND ANOTHER.....RESPONDENTS**

**JUDGMENT**

Date of Last Order: 18.07.2023

Date of Judgment: 31.08.2023

**NDUNGURU, J.**

This is an appeal against the ruling of the District Land and Housing Tribunal for Mbeya (henceforth the trial tribunal) in Land Application No. 19 of 2022. Before the trial tribunal, the respondent herein (who was the respondent by then) raised the preliminary objection to the effect that the applicant's application (now is appellant herein) did not disclose the cause of action. Having heard the arguments adduced by the both parties, the trial tribunal gave the ruling in respect of the preliminary objection in favour of the respondent herein.

The appellant was unhappy with that decision and hence filed the present appeal seeking to assail the decision of the trial tribunal fronting the four grounds of complaint as follows: -

- 1. That, the trial tribunal gravely erred in law and fact to dismiss the matter while the preliminary objection was pre-empting the former application of making amendment of application.*
- 2. That, the trial tribunal gravely erred in law and fact for refusing to grant the applicant's prayer to amend the application without good caus.*
- 3. That, the trial tribunal gravely erred in law and fact to dismiss the application instead of struck out while the matter was not heard on merit.*
- 4. That, the trial tribunal seriously erred in law and fact to dismiss the matter while the preliminary objection had no notice to the other party.*

When the appeal was placed before this Court for hearing, the appellant enjoyed the service of Ms. Pamela Kalala, learned advocate whereas Mr. Siamini Ngwembe, learned advocate appeared for the respondent. Upon request of the parties the Court allowed this appeal be disposed orally.

Ms. Kalala, learned counsel for the appellant submitted the 1<sup>st</sup> and 2<sup>nd</sup> grounds in support of appeal together that, according to the trial tribunal's record on 23<sup>rd</sup> day of November 2022, she prayed to make amendment of the pleadings but the chairperson of the tribunal denied to grant the leave to amend the same without any reason. She also argued that, then the respondent raised the preliminary objection to the effect that there was no cause of action. She further argued that, the raising of the preliminary objection came after she had made application for amendment.

As regard to the 3<sup>rd</sup> ground of appeal, Ms. Kalala submitted that, the trial tribunal was not proper to dismiss the matter on the ground that the case was not determined on merit. She cemented her position by citing the case of **Cyprian Mamboleo Hizza v Eva Kioso & another**, Civil Application No. 3 of 2010, CAT at Tanga (unreported), to the effect that the Court has made distinction between striking out and dismissed of the case.

Explaining the 4<sup>th</sup> ground of appeal, Ms. Kalala submitted that, where there is preliminary objection there must be notice to that effect, but in the instant case, the preliminary objection was brought by surprise. She went

on to argue that, if an objection raised without notice to the other side, the Court/tribunal has to strike out the pleadings and allow for amendment.

She referred the Court to the case of **Registered Trustees of the Baptist Convention of Tanzania @ Jumuiya Kuu ya Wabatisti v James Kasomi & 4 others**, Misc. Civil Application No. 35 of 2021, HC at Mwanza (unreported), to the effect that where an objection raised in argument during submission without notice or leave of the Court is prejudicial to the Court and other party for being taken in surprise. Finally, she implored the Court to find merit in her submission and allow the appeal with costs, the proceedings and order of the trial tribunal be nullified.

Responding to the first ground of appeal, Mr. Ngwembe stated that, the appellant did not make any prayer to amend his pleadings in Land Application No. 19 of 2022. He also argued that, the prayer he prayed was following the concern that there was no cause of action. He further submitted that, what transpired on 23<sup>rd</sup> day of November 2022 the prayer made by the counsel for the appellant on that date was denied because she did not mention specifically what she intended to amend.

He continued to submit that, the trial tribunal was proper to deny her prayer to make amendment after the respondent had raised the concern on cause of action. To buttress his argument, she cited the case of **Meet**

**Singh Bhachu v Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018 (unreported) to the effect that, once a preliminary objection has been raised, it must be heard first and the other party is precluded from doing anything to pre-empt it.

Regarding the 3<sup>rd</sup> ground of appeal, Mr. Ngwembe contended that, the trial tribunal was proper to strike out the application No. 19 of 2022. He continued to submit that, the trial tribunal did not dismiss but did strike out. He went on to submit that, the appellant was required to file a fresh case before the trial tribunal and not to file an appeal before this Court.

On the 4<sup>th</sup> ground of appeal, Mr. Ngwembe argued that, the respondent raised a concern when the case came for the first time. He also argued that, it is not true that she was surprised as submitted. He further submitted that, the trial tribunal availed the parties the time to discuss it then the counsel for the appellant conceded with the concern as shown in the trial tribunal's proceedings of 13<sup>th</sup> day of March 2023. From the submissions above he prays this Court to dismiss this appeal with costs.

In rejoinder, Ms. Kalala reiterated her submission in chief. She also added that, the preliminary objection being raised on 23<sup>rd</sup> day of November 2022 in the circumstances the same pre-empted the application for amendment. She continued to submit that, regarding cause of action that

was not a concern as the counsel for the respondent is trying to tell the Court, it was an objection. In conclusion, she reiterated her prayer in chief.

Having carefully considered the entire record of the trial tribunal and the rival submissions made by the parties in this matter, the issue calling for determination is whether this appeal has merit or not.

Starting with the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, the main complaint here advanced by the counsel for the appellant is that, the preliminary objection raised by the respondent was pre-empting their application for amendment of the pleadings which was refused by the trial tribunal. On the other hand, counsel for the respondent opposed the same. This Court has taken the pain to navigate through the handwritten proceedings of the trial tribunal and found that it is true that on 23<sup>rd</sup> day of November 2022 the counsel for the appellant made application for amendment of the pleading in terms of the amount claimed.

And it is true that, the trial tribunal did not say anything about such prayer of amendment made by the counsel for the appellant on that date. In the premises, it is my considered view that, the preliminary objection raised by the counsel for the respondent was pre-empted the prayer of amendment made by the appellant because the preliminary objection

raised on 13<sup>th</sup> day of March 2023 that means came after the prayer of amendment made. In the premises, these grounds of appeal have merits.

In relation to the 3<sup>rd</sup> ground of appeal, it must be noted that, it is well settled law as to the scenario where the Court has to dismiss or strike out a matter before it. In the case of **Ngoni Matengo Cooperative Marketing Union Ltd v Alimahomed Osman** (1959) EA 577 where the defunct Court of Appeal for Eastern African made the following statement of principle:

*"... This Court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive and not a properly constituted appeal at all. What this Court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

The question here is whether the phrase "*maombi yametupiliwa mbali*" amount to dismissal or not. It is my considered view that, the phrase "*maombi yametupiliwa mbali kwa gharama*" speak itself that the application was dismissed with costs. On that regard, I disagree with Mr.

Ngwembe that the trial tribunal did strike out the Land Application No. 19 of 2022 and not dismissed the same. Again, I agree with Ms. Kalala that the trial tribunal was not supposed to dismiss the said application because the matter was not heard on merit.

In the light of the above cited authority, the proper approach to have been taken by the learned trial chairman was for him to strike out the application and allows the appellant to file a fresh application instead of dismissing it or alternatively making an order as to an amendment of the pleadings. I therefore find this ground of appeal has merit.

Turning to the 4<sup>th</sup> ground of appeal, after gone through the trial tribunal's record I have noted that, the respondent raised the preliminary objection and not the concern as submitted by the counsel for the respondent. Indeed, the said preliminary objection was raised without notice to the other side. In my considered view, the appellant was prejudice for being taken into surprise thus leading to unfair hearing, such practice has to be discouraged. See the case of **Registered Trustees of the Baptist Convention of Tanzania @ Jumuiya Kuu ya Wabatisti v James Kasomi & 4 others** (supra) which was as well cited by the counsel for the appellant when submitting. In the premise, I find merit in this ground of appeal.



From the observation and authorities cited, it is therefore not safe to rule out that justice was done. Under the circumstances of the instant case, the proceedings from 23<sup>rd</sup> day of November 2022 to the date of delivering ruling, drawn order, and ruling of the trial tribunal in Land Application No. 19 of 2022 are hereby nullified. The case file is remitted back to the trial tribunal for retrial from the proceedings of 23<sup>rd</sup> day of November 2022, presided over by another chairman with the new set of the assessors. In the result, I find out this appeal has merit. Considering the nature of this case, I make no order as to costs.

It is so ordered.



  
**D.B. NDUNGURU**  
**JUDGE**  
**31/08/2023**