

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 2 OF 2023

(Arising from decision of the District Land and Housing Tribunal for Moshi at Moshi dated 19/12/2022 in Land Case No 70 of 2018)

SHANEL ANDREW MOSHY..... APPELLANT
(Suing as administrator of the estate of Andrew Salewa)

VERSUS

ALFRED ELIAKIM NDOWO.....1ST RESPONDENT
OMARY HASHIM2ND RESPONDENT
AZIZ MFINANGA3RD RESPONDENT
IDDI JUMA4TH RESPONDENT
ROBERT MOSHA5TH RESPONDENT
ALEXANDER PAUL6TH RESPONDENT
MARY JOSEPHAT TARIMO7TH RESPONDENT
GIFT HERMAN MUURU8TH RESPONDENT
SAMWEL MSAKI9TH RESPONDENT
RODE MREMA10TH RESPONDENT
VICTOR MASSAWE11TH RESPONDENT
BURIANI ISSA MFINANGA12TH RESPONDENT
JOHN MAPATO MEELA13TH RESPONDENT
EDWARD MERO14TH RESPONDENT

RULING

23rd Aug.& 20th Sept. 2023.

A.P.KILIMI, J.:

This is in respect the preliminary objections on point of law raised by the Respondents when replying memorandum of appeal filed by the

appellant. The respondents collectively replied that the appeal against them is misconceived and bad in law to the effect that, first; the appellant is the stranger to the application no. 70 of 2018 and second; that the appeal is time barred.

When these objections came for hearing, the appellant was represented by Mr. Philip Njau learned counsel, while the respondents were represented by Mr. Kipoko assisted by Lilian Moshi both learned counsels. Then they both prayed the hearing of the same be by way of written submission. I acknowledge that they have filed them as per schedule of this court and I will allude them in due course as the need arises.

Submitting in support of objections Mr. Kipoko argued that the appellant in this appeal is one SHANIEL ANDREW MOSHY (Suing as administrator of the estate of Andrew Salema), while in the attached copy of the decision the name is SHANIEL MOSHI (Msimamizi wa mirathi ya Andrew Salema). Therefore, SHANIEL ANDREW MOSHY and SHANIEL MOSHI are apparently distinct names, in this regard Mr. Kipoko said SHANIEL ANDREW MOSHY (Suing as administrator of the estate of Andrew Salema) is not a party appearing in the attached copy of the decision. He also insisted that this defect is not minor since it goes to the root of the case, thus can't

be cured by overriding objective hence renders the appeal to be fatally defective. To buttress his stance the counsel has referred the cases of **Kalinzi Organic Coffee Growers vs Tanganyika Coffee Curing Company Limited and Another** [2022] TZHC 10792 (TANZLII); **Chairperson Patanumbe Village Council vs Enock Kitoi** [2021] TZHC 7135 (TANZLII) and **Inter Consult Ltd vs Mrs. Nora Kassanga & Another** [2019] TZCA 164 (TANZLII).

Responding to the above, Mr. Philip Njau contended by praying this court to revisit the records of the Tribunal and find that the appellant is not a stranger to this suit as alleged. This is for the reasons, records of the amended land Application no. 70/2018 which was filed in the District Tribunal for Moshi on 15/08/2022 the name of the Applicant appearing therein reads SHANEL ANDREW MOSHY. The Tribunal records further shows that the Written statement of defense filed by Respondents on 28/09/2022, the name of Applicant is changed to read SHANIEL MOSHI. Respondents added i between n and e, on the first name and the surname was changed to MOSHI instead of MOSHY. In that purported WSD Respondents also registered their Preliminary Objection. Following the

hearing of the PO and when the chairman composed his ruling resulting from the purported preliminary objection, he fell in the trap of spelling the name of the Applicant and wrote SHANIEL MOSHI instead of SHANEL ANDREW MOSHY.

Mr. Phillip Njau further contended, in the filed memorandum of appeal in this Court, Appellant has continued to state his name as SHANEL ANDREW MOSHY and again in the reply to the memorandum of appeal filed by Respondents on 16/02/2023 the same mistake of misspelling is vivid. Therefore, filing reply to memorandum of appeal which is the source of this Preliminary objection is equally defective as Respondents have continued to introduced a stranger to the suit. Thus, he urged this court that, since the raised Preliminary objection is hinged on a defective reply to memorandum of appeal, this court should ignore and refrain from entertaining the preliminary objection in its entirety. The counsel relied to the principle of no one shall profit from his own wrong and added one wrong does not make the other wrong right.

In respect to the cited cases, Mr. Njau contended that are distinguishable because in the said cases the name of the Respondent was substituted by the parties to the suit during hearing while in the case at hand the name of the Applicant who is also the Appellant was spelt correctly but the Respondents and the Tribunal Chairman invented a new name that was not in the pleadings and purported to proceed to determine the matter. Thus, the counsel prays to this court to invoke Article 107 A (2) of the Constitution of the United Republic of Tanzania 1977 which provides for the court to dispense justice without being tied with too much of technicalities. The learned counsel also invited this court to consider the provision of 3(A)(1) and 3(8) of The Civil procedure Code R.E. 2019 and the case **Erasto Kamala Mwambuye vs. Jubilee Insurance and other** [2020] TZHC 4408 (TANZLII).

Mr. Njau further argued that appellant is not to be blamed since the error was occasioned by Respondents and the Tribunal chairman. Also, there is no properly filed reply to memorandum of appeal by Respondents, thus PO therein has no legs to stand as it is hinged on nonexistent Reply to memorandum of appeal. He therefore urged this court to invoke its inherent powers of Revision and examine the records of the District Tribunal and

make a finding that there has never been a properly filed Written statement of defense by the Respondents at the District Tribunal and that the purported preliminary objection was raised on a nonexistent WSD by Respondents, whereas the subsequent ruling by the Tribunal was a nullity.

In the alternative, the counsel for appellant has prayed this court to invoke Section 96 of The Civil Procedure Code R.E. 2019 which provides for clerical errors to be amended on the judgments, decree or orders by Court of its own or application, and order for rectification of the error on the records.

In brief rejoinder, Mr. Kipoko contended that, it is apparent that the name of the current appellant is different from the name in the attached decision, this inclusion of a different name as an appellant who is not in the appealed decision is a fatal defect which goes to the root of the appeal and this court can only strike out the appeal. He has bolstered this assertion by referring the case of **Inter Consult Ltd vs Mrs. Nora Kassanga & Another** [2019] TZCA 164 (TANZLII) and **Salim Amour Diwani vs. The Vice Chancellor Nelson Mandela African Institution of Science and**

Technology & The Attorney General, Application No. 116/01 of 2021, CAT at Dar es salaam (Unreported).

I have dispassionately considered the submissions by both learned counsels; it seems Mr. Kipoko did not proceed to argue on the second objection, be it as it may, the point to be considered is whether the objection raised has merit. I have entirely scanned the trial court record. The following are which I observed. The first application by the applicant at the trial court was on 7/5/2018 wherein named SHANIEL MOSHI as applicant. On the day he did file chamber application praying for temporary injunction also applicant was named SHANIEL MOSHI. Next the Written Statement of Defence filed by respondent was filed on 6/6/2018 also bears the same name SHANIEL MOSHI. Later it was on 9/7/2020 the appellant filed amended application which also bears the same name above, and the amended WSD filed 24/8/2020 bears the same name.

New name of the appellant came in on 15/8/2022 which bears the name of SHANEL ANDREW MOSHY when the appellant filed amended application at the trial tribunal upon secured a leave, but the WSD on

28/9/2022 and that filed 13/10/2022 which belong to 12th and 14th respondents continued to bear the name of SHANIEL MOSHI.

Moreover, I wanted to know whether the said name changed by the order of the court or otherwise, the record reveals that on 2/8/2022, which is the last date parties appeared before the tribunal and before the name of the applicant (appellant) changed, Mr. Njau prayed amendment to the tribunal to join other two persons to be respondents since they also trespassed the suit land. The tribunal granted the prayer and ordered the amendment be filed within 14 days. In view thereof the changes of the applicant's name was not communicated. In conclusion thereof the Judgment delivered by the District Land and Housing Tribunal delivered on 19/12/2022 bears the name of SHANIEL MOSHI.

Having revealed the above, it is therefore true that the current appeal bears the different name of SHANEL ANDREW MOSHY, that is why the respondents are alleging is a stranger. Now, what will be the effect of this name if the appeal proceeds as, it is, in my view any decision of this court will not affect the said decision of tribunal because of that name, and second will be inexecutable since the said case.

Back home to the arguments of the learned counsels, briefly I don't agree with Mr. Njau contention above when distinguished cases cited by Mr. Kopoko, as highlighted the record of the trial tribunal the said name changed through amendment of the application on the different prayer of adding respondents, therefore originally bears the name which appears on the tribunal Judgment. However, unfortunately no party alerted on this change of name, and the trial tribunal seems did not notice it.

Mr. Njau has prayed this court has prayed this court to invoke the constitution and overriding objectives, in my view as I have highlighted the effect of continue with this new name which is different to one used in the judgment of the tribunal all proceeds to this appeal will be futile. Therefore, I subscribe to the argument by Mr. Kipoko that this defect is fatally defective which goes to the root of the case. See the case of **Salim Amour Diwani vs. The Vice Chancellor Nelson Mandela African Institution of Science and Technology & The Attorney General** (supra).

Moreover, as argued in the alternative by Mr. Njau that this court to invoke Section 96 of The Civil Procedure Code R.E. 2019 and order rectification of the same. I have considered this prayer, and I have taken regard to the circumstances stated in the case at the tribunal, order for rectification at this stage of hearing a preliminary objection is not suitable since the defects commenced during trial at the tribunal which has finalized its duty. I think it was for the appellant to use the avenue available in law to move the same at the tribunal itself before the matter is at appellate stage at this court. In view thereof, I am of considered opinion the said defect does caused this court to fall within the ambit of the provisions of section 96 of the CPC and make order thereto.

On the whole, on account of what I have endeavored to discuss hereinabove, I find this objection with merit and is hereby sustained. Consequently, I find this appeal fatally defective and I hereby struck out with costs.

It is so ordered.

DATED at **MOSHI** this 20th day of September, 2023



X

JUDGE

Signed by: A. P. KILIMI

Court: Ruling delivered today on 20th day of September 2023 in the presence of advocate Philip Njau for appellant and Mr. Kipoko assisted by Lilian Mushi both learned counsels, also in the presence of second, third and fourth respondents only others absent.

Sgd: A. P. KILIMI

JUDGE

20/09/2023