

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 31 OF 2023

(Appeal from the decision of District Land and Housing Tribunal Application of Same at Same dated 30th March, 2023 in Application No. 21 of 2021)

JONATHAN TUMAINI MBWAMBO (as administrator of the estate of the late Tumaini Enock Mbwambo)..... **APPELLANT**

VERSUS

NAKIJWA NKONDO.....**1st RESPONDENT**

THE VILLAGE CHAIRMAN OF HEDARU VILLAGE.....**2ndRESPONDENT**

RULING

21th Sept. & 26th October 2023

A.P.KILIMI, J.:

The appellant being the administrator of the estate of the late Tumaini Enock Mbwambo initiated this appeal after being aggrieved by the decision of the tribunal mentioned above, when the petition of appeal was communicated to the second respondent, replied by the following three objections on point of law;

1. That, the Appeal is bad in Law for noncompliance with Section 190 of The Local Government (District Authorities) Act, Cap 287 R.E 2019 as Amended by the Written Laws (Miscellaneous Amendments) Act No.1 2020.

2. That, the Appeal is not properly before this Honourable Court as it has violated the Mandatory Provisions of section 6(3) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by the Written laws (Miscellaneous Amendment) Act No.1 of 2020.
3. That there is no cause of action against the 2nd Respondent

The brief facts material to this appeal, as can be gleaned from the record are to the effect that, the appellant was appointed to be administrator of estate of the late Tumaini Enock Mbwambo, in the course of his administration of that estate, in 2013 he realised that the respondents have trespassed the unsurveyed land measuring 45 feet in width by 90 feet which previously the same tribunal in Land application no. 11 of 2008 declared the same disputed land as part of 20 acres which belong to the estate of the deceased.

At the tribunal the first respondent did not enter appearance, so the trial proceeded *ex parte* against him whereas the second respondent defended that he acknowledges the claim by the appellant at the tribunal of compensation of Tshs. 1,800,000/=, which the village and appellant agreed to the payment but currently the amount remained unpaid to the appellant is Tsh. 400,000/= because of this case pending.

In composing the decision, the trial tribunal considered that the said late Tumaini Enock Mbwambo demised in 2006, thus concluded that it is almost 15 years since then, therefore found that the appellant was out of time to bring his claim for recovery of land hence barred by item 22 of the first schedule of the law of limitation Act Cap. 89 R.E. 2019. Further the tribunal observed that the appellant failed to prove that the said suit land was a part of the land of 20 acres decided in Land application no. 11 of 2008. Thus, dismissed his case and all prayers with costs.

When this case was placed before me for hearing of the said objections, both parties were represented, Mr. Mbaraka Katela learned advocate appeared for the appellant whereas the second respondent had the service of Ms. Upendo Joseph Kivuyo learned State Attorney. Both complied to the schedule as agreed to dispose these objections by written submissions.

Submitting in regard to the first objection, Ms. Upendo argued that it is a cardinal principle of the law that before filing a suit against the Local Government Authority the claimant has to give to the Local Government

Authority a ninety days' notice of intention to sue and a copy of that notice should be served to the Attorney General and the Solicitor General. To substantiate her assertion referred section 190 of the local Government (District Authorities) Act Cap 287 R.E 2019 as amended by section 31(1) (a) and (b) of the Written Laws (miscellaneous Amendment) Act No.1 of 2020. She further submitted that according to section 26 of the Local Government (District Authorities) Act Cap 287 R.E 2019 a village council is a body corporate capable of suing or being sued. Moreover, she added that since this law recognise village council as a local Government Authority therefore notice of intention to sue should be communicated before.

In respect to the second point of preliminary objection, Ms. Upendo submitted that the mandatory provision of section 6(3) and (4) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by the Written Laws Miscellaneous Amendment Act no.1 of 2020, gives the mandatory requirement for the suit brought against the Local Government Department, Ministry, Agencies, Public Corporation or company to join the Attorney General as a necessary party, and further said failure to comply with the above section renders the suit to be incompetent before the court. To bolster his submission the counsel referred the cases of **MSK Refinery Ltd vs TIB**

Development Bank Ltd and Another [2020] TZHC 1326 (TANZLII);
**Coseke Tanzania Limited vs the Board of Trustees of the Public
Service Social Security Fund** [2021] TZHCComD 2047 (TANZLII) and
Salim O. Kabora vs Kinondoni Municipal Council and 3 Others [2021]
TZHCLandD 574 (TANZLII)

Submitting to the third ground of preliminary objection, Ms. Upendo argued that the appellant failed to disclose any cause of action against the second respondent by suing the chairman of Hedaru village on its own capacity instead of suing the village council as a body corporate capable of suing and be sued.

Responding to the above, Mr. Katela started praying this court not to consider submission in respect to grounds of appeal done by the 2nd respondent because the order of the court was to argue only on preliminary objections raised.

In respect to preliminary objections argued by respondent, Mr. Katela contended that the second respondent has directed himself wrongly due to the fact that those three preliminary objections were raised during trial tribunal at District Land and Housing Tribunal of Same at Same and the same was dismissed in the favour of the appellant, therefore as the matter of law

and practices cannot be raised on appeal. Then the counsel urged this court that the only remedy for the 2nd respondent, if he was aggrieved by the decision was to face the court with the proper procedure of cross Appeal because the appellant already filed the appeal, to support his argument the counsel referred the case of **Said Mohamed Said vs Muhusin Amiri and Another** [2022] TZCA 208 (TANZLII).

The counsel for appellant further contended that the person who is sued in this appeal is the Village Chairman of Hedaru village and not the Village council of Hedaru Village, therefore there is no need to issue notice of 90 days if the chairman is sued under personal capacity. He also added that no need to issue notice in filing an appeal. In respect to cause of action, the counsel contended that the same has been disclosed in the pleading presented and annexures, however he insisted the same was discussed and decided at the trial tribunal, thus no need to deal with it at this stage. Hence the counsel prayed this court to dismissed them with costs and the appeal be heard on merits.

I have entirely considered the submission by both learned counsels and the record of the trial tribunal, starting with the argument by Mr. Katela

that since the above objections were discussed and decided at the trial tribunal, then this court is not allowed to entertain them unless they are brought by way of cross appeal.

I have scanned the first two objections stated above, in my view, first are pure point of law, but secondly these are objections questioning whether this court has jurisdiction to entertain this appeal, therefore, since it is a trite law objection on jurisdiction can be raised even in appeal, I am settled it was right for the respondent to raise them. In the wording of the court of appeal in **Tanzania Revenue Authority vs Tango Transport Company LTD**, Civil Appeal No. 84 of 2009 (unreported) had this to say;

"Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained."

Moreover, this being an appellate court has power to rectify an error material which occasioned injustice at the tribunal, this power has bestowed

to this court by virtue of section 43 (1) (b) of Land Disputes Courts Act Cap. 216 R.E.2019 which provides that;

43. (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court—

(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.

[Emphasis added]

In view of the above law, I am of the view that even if the same was discussed and decided at the tribunal, here they have been brought at another stage of the court which is the high court envisaged with the above power of checking incorrectness or illegality and rectify the same. Under this power, this court cannot let the case decided unjustly to sustain further stage

on the errors apparent on the face of record. Thus, the case cited is distinguishable to the facts of this matter.

Back home to the objections raised, the second respondent above is named as the village Chairman of Hedaru Village, now the point for determination is whether the same is capable of being sued on behalf of the village. There is no dispute being not mentioned his name, the said chairman was sued at the tribunal in his official capacity as the chairman of the village Government. The above is revealed at page 17 and 18 of the typed proceeding when himself testified on duties he did in respect to allegation of the appellant as chairman of the village.

It is a trite law only natural persons or legal or artificial persons can sue or be sued in their own names. Therefore, for non-natural persons to sue or to be sued in their own names, they must have legal personalities. I am persuaded by the holding of this court in the case of **The Registered Trustees of the Catholic Diocese of Arusha vs. The Board of Trustees of Simanjiro Pastoral Education Trust**, Civil Case No. 3 of 1998, HC at Arusha and **Unilife Group Investment vs Biafra Secondary School**,

Civil Appeal No. 144 (B) of 2008, HC at Dsm (Both unreported) wherein the same were observed.

In view of the above, as rightly pointed out by the counsel for the respondent by virtue of section 3 and 26 of the Local Government (District Authorities) Act Cap 287 R.E 2019 a village council is a body corporate capable of suing or being sued, thus the law does not provides for official capacity of the chairman of the village or Village Executive Officer VEO to be sued in his official capacity. Therefore, it is my settled opinion even where the said Chairman acted on behalf of the village Government, the actual party to suit should be the village council and not the said Charman in his capacity. See **Farao Raiton Mtafya vs Veo Chamoto Village** [2020] TZHC 2285 (TANZLII). The contention that by the counsel that the chairman was sued in his personal capacity under above law cannot be a refuge, thus it was misconception to do so.

In respect to second point of objection, I also subscribe with the respondent argument that this Appeal is not properly before this Court as it has violated the Mandatory provision of section 6(3) and (4) of the Government Proceedings Act, Cap 5 R.E 2019. I have read the law it is true and precisely; The Written Laws Miscellaneous Amendment Act no.1 of 2020

amended section 6 of Government Proceedings Act (supra) which provides as hereunder; -

"25. The principal Act is amended in section 6, by (a) deleting subsection (3) and substituting for it the following-

"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party.

(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)."

[Emphasis added]

This law was published on the Gazette of the United Republic of Tanzania No. 8 Vol. 101 dated 21st February, 2020 and this case was filed at the tribunal on 6th October 2021. Therefore, considering the above is

coached in mandatory terms, thus the appellant was required to comply with the said requirement. This is because, it is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53(2) of the Interpretation of Laws Act, [Cap. 1 of the Revised Edition, 2002]. (See the **Godfrey Kimbe vs Peter Ngonyani** [2017] TZCA 1 (TANZLII)). Consequently, as rightly argued by respondent's counsel the issue of notice of intention to sue was unavoidable by virtue section 190 of the local Government (District Authorities) Act Cap 287 R.E 2019 as amended by section 31(1) (a) and (b) of the Written Laws (miscellaneous Amendment) Act No.1 of 2020. Meanwhile the tribunal lacked jurisdiction by virtue of section 6 (4) of Government Proceeding Act.

In view of what I have endeavoured to discuss above, I find the first two preliminary objections raised by respondent are meritorious and are accordingly upheld and sustained. Consequently, I find the same are sufficient to dispose this matter, therefore no need to determine the remaining objection.

In the final analysis and from the foregoing reasons as pointed above that this case was flawed from the trial tribunal, I invoke revisional powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the proceedings of the executing District tribunal are hereby nullified and consequently its Ruling and drawn order thereon is hereby quashed and set aside. After considering the circumstances of the case, I order each party to bear its own costs.

It is so ordered.

DATED at MOSHI this day of 26th October, 2023.



X

JUDGE

Signed by: A. P. KILIMI

Court:- Ruling delivered today on 26th October, 2023 in the presence of Mr. Gidion Mushi holding brief of Mbaraka Katela for Appellant and Gloria Isangwa, State Attorney for second Respondent, Appellant and Respondent absent.

**Sgd: A. P. KILIMI
JUDGE
26/10/2023**