

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**LAND APPEAL NO. 18 OF 2022**

*(Originating from Land Application No. 176 of 2014 District Land and Housing Tribunal for Bukoba)*

**NESTORY PAULO RUGARABAMU..... APPELLANT**

**VERSUS**

**KATTY KATEGA..... 1<sup>ST</sup> RESPONDENT**

**MATHIAS RWEYEMAMU..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

21<sup>st</sup> November & 8<sup>th</sup> December, 2023

**BANZI, J.:**

On 6<sup>th</sup> November, 2014, the appellant filed Application No.176 of 2014 before the District Land and Housing Tribunal for Bukoba (the tribunal) against the first respondent and Municipal Director, Bukoba Municipal claiming that, the first respondent trespassed into his land located at Plot No. 338 Block B Rwamishenye area, which he acquired from Bukoba Municipal.

Before hearing and by order of the tribunal, the appellant through his counsel, Ms. Theresia Bujiku from legal aid provider namely, Mama's Hope Organisation for Legal Assistance ("MHOLA") amended the application by

joining the second respondent in lieu of the Municipal Director, Bukoba Municipal alleging that, the second respondent used the documents entrusted to him as his advocate and sold the suit land to the first respondent. On 23<sup>rd</sup> April, 2020, the second respondent raised a preliminary objection to the effect that, MHOLA which per its constitution provides services to women, children and widow, it has no capacity to represent the appellant who is a male. After hearing both parties, the learned chairman sustained the objection by holding that, MHOLA has no capacity to represent the appellant after it had failed to tender any document showing that they are eligible to represent men. Thereafter, he struck out the application with costs. Dissatisfied with such decision, the appellant filed the appeal before this Court containing three grounds, thus:

- 1. That the Trial Tribunal erred in law to entertain the raised preliminary objection on the point of law that MHOLA has no locus standi to represent the Appellant;*
- 2. That the Trial Chairperson erred in law to strike out the Appellant's case on the ground that MHOLA failed to produce evidence to prove that she has locus standi to make court representation and draft court documents for the Appellant;*

*3. That the Honorable Chairman erred in law for entertaining and making decision thereto on the issue which was not the basis of the case at hand.*

Before the appeal was heard, on 27<sup>th</sup> July, 2023, learned counsel for the appellant successfully prayed to amend the memorandum of appeal in order to remove the first respondent on the reason that; one, their efforts to trace him proved futile after being informed that, he is living out of country and two, the decision of the tribunal subject to this appeal did not involve him as he was not heard on preliminary objection. The appellant complied with the order of this Court and on 10<sup>th</sup> August, 2023, the amended memorandum of appeal was duly filed. Nevertheless, on 4<sup>th</sup> October, 2023, the first respondent appeared before this Court and under legal representation of Mr. Pereus Mutasingwa, learned counsel prayed to be rejoined. In upholding the right to be heard, this Court vacated its order dated 27<sup>th</sup> July, 2023 and ordered the first respondent to be re-joined in this appeal.

After filing amended memorandum of appeal, the respondents unsuccessfully raised preliminary objection challenging the capacity of MHOLA to represent the appellant in this appeal under the umbrella of legal aid provider. After the objection was overruled, and when the appeal was

set for hearing, the second respondent once again raised another preliminary objection to the effect that:

*“TAKE NOTICE: That at the time of hearing this Appeal, the 2<sup>nd</sup> Respondent shall raise a preliminary objection point (sic) of law that the appellant has failed to accompanied (sic) the drawn order and ruling appealed against to the Amended Memorandum of Appeal. The appeal is incompetent for contravening order XL, Rule 2 of the Civil Procedure Code [Cap.33 R.E. 2022].”*

For purpose of convenience, the preliminary objection and the main appeal were argued jointly. The appellant was represented by Ms. Theresia Bujiku, learned counsel from MHOLA, whereas, the first respondent was represented by Mr. Pereus Mutasingwa, learned counsel and the second respondent who is also an advocate appeared in person unrepresented.

Arguing in support of preliminary objection, the second respondent submitted that, the amended memorandum of appeal filed on 11<sup>th</sup> October, 2023 pursuant to the order of this Court was not accompanied by drawn order and ruling appealed against which makes this appeal to be incompetent as it contravenes the provisions of Order XL, Rule 2 of the Civil Procedure Code [Cap. 33 R.E. 2019] (“the CPC”) since the conditions of Order XXXIX of the CPC are also applicable in appeals against orders. To

buttress his point, he cited the cases of **Gerald Mbanga and Others v. Alexander Rwechungura Ngalinda**, Civil Appeal No. 17 of 2016 HC at Bukoba (unreported) and **Mkama Pastory v. Tanzania Revenue Authority** [2007] TZCA 170 TanzLII which underscored the importance of attaching drawn order and ruling and failure to do so makes the appeal incompetent. Basing on that, he prayed for this appeal to be struck out with costs. On his side, Mr. Mutasingwa supported the submission of the second respondent and added that, the provisions of Order XL, Rule 2 and Order XXXIX, Rule 1 (1) of the CPC are coached in mandatory term. He added that, it was necessary to attach the drawn order and ruling with the amended memorandum of appeal and failure to do so, makes this appeal incompetent deserving to be struck out.

Resisting the preliminary objection, Ms. Bujiku submitted that, Order XL Rule 2 of the CPC being a guiding law in appeals, is not applicable when filing amended memorandum of appeal. She argued that, in their memorandum of appeal, they attached the drawn order but in their amended memorandum of appeal, they were only adding the name of the first respondent, hence, they did not abandon their memorandum of appeal in which both memoranda contain the same grounds. She insisted that, the

cited cases by the second respondent are distinguishable with the matter at hand. She urged this Court to dismiss the preliminary objection and in alternative, it should consider overriding objective as provided under section 3A and 3B of the CPC considering that, failure to attach the drawn order in the amended memorandum of appeal did not prejudice the respondents. She further urged this Court to consider Article 107A (1) of the Constitution of the United Republic of Tanzania.

In his rejoinder, the second respondent argued that, once the memorandum of appeal is abandoned, it cannot be referred by court. What is before the court is the amended memorandum of which its defect goes to the root of the case which cannot be cured by overriding objective because it is the requirement of the law and not a mere technicality. He cited the case of **Hamis Mdida and Another v. The Registered Trustees of Islamic Foundation** [2023] TZCA 17721 TanzLII which emphasised on what matters can be saved by overriding objective. On his side, Mr. Mutasingwa insisted that Order XXXIX and Order XL of CPC govern even amended memorandum of appeal. Therefore, after filing amended memorandum of appeal, the original memorandum died automatically, hence, saying that amended memorandum of appeal is not governed by

Order XXXIX, the counsel for the appellant ought to have mentioned the Order that governs amended memorandum of appeal. He argued that as the first respondent was never served with the original memorandum of appeal, he was supposed to be served with drawn order and ruling. Failure to attach them, makes the appeal incompetent of which the principle of overriding objective cannot apply.

Having carefully considered submissions of both sides, it is now pertinent to determine the merit of the preliminary objection on whether failure to accompany the drawn order and ruling to the amended memorandum of appeal makes the instant appeal incompetent.

It is worthwhile noting here that, pursuant to Order XL, Rule 2 and Order XXXIX, Rule 1 (1) of the CPC, the appeal of this nature must be filed by way of memorandum of appeal accompanied by copy of drawn order and ruling appealed against. It is undisputed that, initially, when the appellant filed his memorandum of appeal before this Court, the same was accompanied by copy of drawn order and ruling appealed against. As it was argued by respondents and stated in the case of **Mkama Pastory v. Tanzania Revenue Authority** (*supra*), the purpose of attaching decree or drawn order among other things is to determine if the appeal is within time.

As intimated above, the appellant had complied with this requirement of the law at the time when he filed his memorandum of appeal by attaching the copy of drawn order and ruling. By doing so, its purpose had already been accomplished.

Besides, it should be noted that, the amended memorandum of appeal in the matter at hand, was not filed pursuant to Order XXXIX, Rule 1 (1) of the CPC but rather, it was filed in compliance with the order of this Court dated 4<sup>th</sup> October, 2023 which did not direct such attachment. Thus, in the particular circumstances of this appeal, and considering the advent of the principle of overriding objective which requires the court to dispense justice without being tied with technicalities, it is the considered view of this Court that, the requirement of Order XXXIX, Rule 1 (1) of the CPC is inapplicable in filing the amended memorandum of appeal in compliance with order of the court.

Moreover, I don't see how the first respondent was prejudiced who for the reasons known to himself chose not to get involved in the hearing of the preliminary objection before the tribunal which resulted into the ruling and drawn order in question. Under these circumstances, the cited cases of **Gerald Mbangwa and Others v. Alexander Rwechungura Ngalinda** and



**Mkama Pastory v. Tanzania Revenue Authority** are distinguishable because they are about filing the memorandum of appeal in the first instance and not amended memorandum of appeal by order of the court. On these bases, I find no speck of merit on the preliminary objection and it is hereby overruled.

Reverting to the main appeal, Ms. Bujiku began her submission with a prayer to abandon the third ground. Arguing in support of the first ground, she cited the case of **Mbarala A. Maharagande and Others v. Mahiku A. Marahagande** [2022] TZHC 13103 TanzLII which referred to the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 696 and submitted on what amounts to preliminary objection. According to her, the objection raised by the respondent did not meet the condition of being preliminary objection because, it was on matters of facts whose determination required evidence. She added that, their status of being legal aid provider was not objected by the second respondent. In their submission before the tribunal, they explained to have mandate to represent the appellant under the Legal Aid Act [Cap. 21 R.E. 2019] (the Legal Aid Act). However, in his ruling, the learned Chairman blamed them for not providing documentary evidence to establish whether they had capacity to

represent male. In that regard, the Chairman misguided himself to strike out the application.

In respect of the second ground, she argued that, since the centre of grievance was on whether MHOLA can represent men while it deals with women, children and widows, as per section 110 of the Evidence Act [Cap. 6 R.E. 2019], the second respondent was supposed to prove that MHOLA has no such capacity. Nonetheless, the learned Chairman shifted that burden to MHOLA to prove their capacity. Moreover, the Legal Aid Act prohibits discrimination in providing legal aid to indigent persons. She insisted that, as the pleadings before the tribunal were drawn in compliance with the law, the tribunal ought to have determined the propriety of pleadings before it that were drawn by MHOLA. Therefore, it was an error to strike out the application. She urged this Court to allow the appeal by remitting the case before the tribunal to continue with hearing of the application.

In response, the second respondent argued that, the appellant informed the tribunal that, he had engaged advocate Theresia Bujiku. But he did not state to have engaged legal aid provider. In that regard, Theresia Bujiku was hired as a private advocate and thus, they are estopped to state otherwise as prohibited under section 123 of the Evidence Act. Also, in 2014

when the case was instituted and by the time he raised the objection, MHOLA was not registered as legal aid provider and was neither among the registered legal aid providers. It was just a non-governmental organisation (NGO) which according to its constitutional, its scope of services did not include men. According to him, the raised objection was a pure point of law which demurred the pleadings, hence, it was proper for the Chairman to demand them to provide proof over their capacity. He urged this Court to dismiss the appeal with costs.

On his side, Mr. Mutasingwa supported the submission of the second respondent and insisted that, the decision of the Chairman was proper because the appellant at page 22 of the proceedings informed the tribunal that, he engaged advocate Theresia Bujiku and not MHOLA as legal aid provider. Also, when Ms. Theresia appeared before the tribunal, she did not introduce herself as she was there on behalf of MHOLA that is why in her absence, she was sending other advocates to hold brief for her. For that matter, the appellant hired Theresia Bujiku as a private advocate and he was paying court fees but advocate Bujiku was compelling him to be indigent in order to get legal aid services. He further submitted that, Ms. Bujiku under her personal capacity is not allowed to provide legal aid because legal aid is

provided by institutions pursuant to section 24 of the Legal Aid Act. He prayed for the appeal to be dismissed for want of merit.

In her rejoinder, Ms. Bujiku stated that, the first plaint was drawn by the appellant himself but the amended plaint filed on 10/07/2018 was drawn by her in gratis from MHOLA. She argued that, by the time when the second respondent raised the objection, MHOLA had already been registered as the legal aid provider with number LAP-219005 dated 30/04/2019 and the registration is renewed after every three years. She insisted that, bringing constitution of MHOLA is a matter of evidence and thus, the preliminary objection did not meet the requirement of the law.

Having examined the grounds of appeal and considered the submissions of both sides, in line with the record of the tribunal, it is pertinent to determine the merit or demerit of this appeal.

I must hasten to state rightly that, most of parties' submissions are based on new matters that were not part of the decision subject to this appeal. As intimated above, the gist of this appeal arises from the decision of the tribunal that struck out the application on the reason that, being the institution that deals with women, widows and children, MHOLA has no

capacity to represent men. In sustaining the objection, the learned Chairman ruled that:

*"...ilitarajiwa MHOLA waambatanishie japo nyaraka zao za kisheria kuthibitisha kwa mamlaka yao ya uwakilishi yanagusa wanaume, kama ilivyo kwa Mhola ni suala la Kisheria na hata majukumu yao, yako Kisheria, hivyo basi, mara tu unapo hojiwa uhalali wao katika jambo Fulani, basi inatarajiwa waonyeshe nyaraka zinazowapa uhalali wa kufanya jambo hilo.*

*Katika hoja ya maandishi, MHOLA hawakuweka nyaraka yeyote ile kutetea mamlaka yao (Locus Standi) kufungua Shauri hili na kumuwakilisha mleta maombi."*

It is apparent from the extract above that, the basis of the decision was that, MHOLA failed to produce documentary evidence to prove that, they had capacity to represent men. Under these circumstances, the only issue to be determined by this Court is whether the learned Chairman was justifiable to sustain the preliminary objection and struck out the application.

It is an established principle that, a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings such as objection to the jurisdiction

of the court; a plea of limitation just to mention a few. This principle was stated in the case of **Karata Ernest and Others v. Attorney General** [2010] TZCA 30 TanzLII. See also the case of **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd** (*supra*). The Court of Appeal in **Karata Ernest and Others v. Attorney General** (*supra*) went on and held that:

*"All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."*

Having looked critically at the reasoning of the learned Chairman, it is the considered view of this Court that, the raised objection did not qualify to be termed as preliminary objection because its determination required MHOLA to provide evidence to justify their capacity to represent men in which the second respondent would be required to establish long evidence to disprove their capacity. Had MHOLA provided any document to prove their capacity, there would arise the need to scrutinise that document to reach into conclusion on their eligibility to represent men. On that basis, the

requirement of evidence to prove and disprove their capacity, the raised objection lacked qualification to be termed as point of law. In that regard, the learned Chairman was not justified to sustain objection and strike out the application before it.

Without prejudice to the foregoing, in his ruling, the learned Chairman did not fault the fact that, MHOLA is a legal aid provider but the problem was on its coverage in providing legal aid services. The second respondent argued that, MHOLA provides services to women, widows and children; hence, it has no capacity to provide legal aid services to men. It should be noted that, the Legal Aid Act under section 44 prohibits provision of legal aid on the basis of discriminating in respect of gender, religion, race, tribe or political affiliation. In that regard, even if the constitution of MHOLA does not cover men as beneficiaries of their services, yet still, under the provisions of section 44 of the Legal Aid Act, the appellant would not be discriminated just because he is a man. In addition, the issue whether the appellant was eligible to be represented by legal aid provider is within the mandate of MHOLA. Therefore, to say that Ms. Bujiku is compelling the appellant to be indigent is a misplacement of an argument.

That being said, it is the finding of this Court that, the issue on whether MHOLA has capacity to represent men required evidence to prove which as matter of law, it does not qualify to be preliminary objection. Therefore, I find the appeal with merit and I allow it by quashing and setting aside the ruling and order of the tribunal dated 4<sup>th</sup> January, 2022. As a result, I remit the record to the tribunal for it to proceed with hearing of the application on merit. In the circumstances, I make no order as to costs.



**I. K. BANZI**  
**JUDGE**  
**08/12/2023**

Delivered this 8<sup>th</sup> day of December, 2023 in the presence of the appellant in person and in the absence of the respondents.



**I. K. BANZI**  
**JUDGE**  
**08/12/2023**