

IN THE HIGH COURT OF TANZANIA

AT MWANZA

(LAND DIVISION)

MISC. LAND APPEAL NO. 28 OF 2010

**(Appeal from the Judgment of the District Land and Housing Tribunal for
Musoma at Musoma in Land Appeal No. 32/2008)**

BAKWATA MUGANGO.....APPELANT

VERSUS

MAFURU KIRAKA.....RESPONDENT

JUDGEMENT

Latifa Mansoor, J.

The Appellant is neither a natural person nor a registered entity. The Appellant does not legally exist. There is no institution registered known as BAKWATA MUGANGO. BAKWATA is the registered institution; it is a society for all Tanzanian Muslims while MUGANGO is the Village.

An action must be prosecuted in the name of the real party in interest. Capacity to sue or be sued is determined for a corporation or Trust, by the law under which it was organized.

The trial Ward Tribunal entered a judgment for the nonexistent Appellant and the District Land and Housing Tribunal

reversed the Trial Ward Tribunal's judgment for the disputed land against Mafuru Kiraka, the Respondent herein, a person sued but with no *locus standi* to be sued for this disputed piece of land.

The Counsel for the Appellant submitted that BAKWATA MUGANGO is not a registered entity and has no capacity to sue or be sued. Even if, the Appellant was BAKWATA, which is a registered entity, the Counsel for the Appellant points out that a trust is not a legal entity. BAKWATA as a Trust does not have capacity to sue or be sued." The trial court should have rejected the application by BAKWATA MUGANGO, as this entity does not exist.

BAKWATA can operate countrywide, it is a registered entity capable to sue and being sued and could not be named as a party without inclusion of a trustee. The term 'trust' refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property. Treating trust rather than trustee as a party to a suit "is inconsistent with the law of trusts". The general rule has long been that suits against a trust must be brought against its legal representative, the trustees.

BAKWATA MUGANGO is not a legal entity and may not properly sue or be sued as such.

Trust is defined as a relationship rather than a legal entity. It is the trustees that "may compromise, contest, arbitrate, or settle claims" against or for a trust. Since the trustee is "the person

holding the property in trust, a judgment against that property must be brought against the person who holds it.

The Legislature, the Trustees Incorporation Ordinance allow suit by or against a trust in the name of its trustee and not in the trust own name. Trustees could “sue and be sued, complain and defend, in its trust name. A trust cannot sue or be sued directly.

On the other hand, MAFURU KIRAKA is also not the proper party to sue or be sued in this matter. MAFURU KIRAKA admits that the land does not belong to him. The land belongs to his late brother who passed away since 1980, and that he was appointed by the clan to be the administrator of the deceased, the late Mr. Wanzagi Changwe. He agrees however that he was never appointed by any court of competent jurisdiction to be the Administrator of the estates of the late Wanzagi Changwe. In that sense, the Respondent before the Ward Tribunal had no *locus standi* to stand as a party to the proceedings for lack of letters of Administration, it follows therefore that he had no capacity to make any appeal to the District Land and Housing Tribunal. The District Land and Housing Tribunal, as rightly pointed out by the Counsel for the Appellant by using its revisional powers conferred to it by S. 36 of the Land Disputes Courts, Act, 2002 or its appellate powers under S. 34 of the same Act, should have quashed the proceedings of the Ward Tribunal for being instituted by a nonexistent entity, against the person who had no *locus standi* to defend the case. Since that was not done by the First Appellate Court, this Court quashes all the

proceedings of the Ward Tribunal as well as those of the District Land and Housing Tribunal for these irregularities.

As for the 1st and 2nd ground of Appeal regarding additional evidence, whether the First Appellate Court was correct to have called for additional evidence to verify the Respondent's explanation that the land is his or his brother Wanzage Changwa, I would say the following;

The legal duty of a first Appellate Court is to re-evaluate the evidence on which the trial court has founded and makes its own finding based on the facts and the evidence presented before the Trial Court/Tribunal. This means that where an appeal turns on a question of fact, the First Appellate Court/Tribunal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the trial court with such other materials as it may have decided to admit.

The First Appellate Tribunal has powers to call for additional evidence; this power is conferred to it by S. 34(1) (b), of the Courts (Land Dispute Settlements) Act, 2002. The question to be determined here is what mode is to be used when calling for additional evidence. The law provides that there must be an application made by a party to the proceedings requesting the First Appellate Court to exercise its discretion under S. 34(1) (b) of the Courts (Land Dispute Settlements) Act, 2002 for calling additional evidence. It is usually the practice that such applications are made

by one party or the other. The Applicant must indicate the nature of additional evidence which the Court/Tribunal exercising its Appellate Jurisdiction should have called and who was to give the additional evidence. And that the application for calling additional evidence must show that the evidence which could have been called on appeal was not available during trial.

The principles to be applied by the Court exercising its appellate powers when considering whether to call for additional evidence are that; the evidence sought to be called was not available during the trial; it must be evidence relevant to the trial; it must be credible evidence. An application must usually be made by the interested party to move the court to call for additional evidence. The principles applicable in calling for additional evidence were not met and the Appellant, if it were an existing entity was not afforded a chance to cross examine the additional witnesses called by the Appellate Tribunal *suo moto*, or a chance to challenge additional documentary evidence tendered by the Respondent.

For all these reasons the proceedings and Judgment of the Ward Tribunal as well as those of the District Land and Housing Tribunal are quashed, and the matter to start de novo by proper parties.

Appeal allowed with costs.


Latifa Mansoor
Judge
31 OCTOBER 2012