IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 82 OF 2020

(Originating from Kinondoni District Land and Housing Tribunal in Land Application No.299 of 2008)

ABDU KHALFAN MPWAPWA.....APPELLANT

VERSUS

KAMULALI MWESINGWA.....RESPONDENT

Date of Last Order: 31.05.2021
Date of Ruling: 30.06.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by ABDU KHALFANI MPWAPWA. He is appealing against the decision of the Kinondoni District Land and Housing Tribunal at Kinondoni (the **Tribunal**) in Land Application No. 299 of 2008 (Hon. R.L. Chenya, Chairman).

At the Tribunal the appellant among other things claimed that the respondent herein trespassed over his land measuring four acres located at Salasala Tegeta Juu Mbezi (the **suit land**) and demolished the applicants house as well as removal of 400 concrete bricks worth TZS 320,000/=. The application was dismissed for being hopelessly time barred. The appellant was dissatisfied with the decision of the

Tribunal hence this appeal with seven grounds of appeal reproduced herein below:

1. *The trial Tribunal Chairman erred in law and in fact in determining the matter before the preliminary objection raised in the respondents written statement of defence before being determined.*

2. *The trial Tribunal Chairperson erred in law and fact in dismissing the application for being hopelessly filed out of time without the appellant being heard.*

3. *That the Trial Tribunal Chairperson erred in law and in fact for holding and concluding that the appellant (Abdu Khalfan Mpwapwa) is a different person from Khalfan Mpwapwa and Athuman Khalfan Mpwapwa while all refers to the same person.*

4. *The Trial Tribunal Chairperson erred in law and in fact for concluding that the evidence made by the prosecution side was hearsay.*

5. *That the Trial Tribunal Chairperson erred in law and in fact for failure to give reasons for differing with assessors' opinion.*

6. *That the trial chairman erred in law and fact for failure to consider the testimonies of DW2.*

7. *That the trial chairman erred in law and fact in holding that the appellant failed to proof special damages because of not calling the mason.*

The appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Samuel Shadrack Ntabaliba,

Advocate and the submissions by the respondent were drawn and filed by Morris C.K.K. Advocate.

In arguing the appeal Mr. Samuel consolidated the first and second grounds of appeal and submitted that the respondent in his written statement of defence raised a point of preliminary objection to the effect that the matter was time barred. But in the course of the proceedings the preliminary objection was not determined at the earliest stage as the law requires. He said the Chairman at page 7 of his judgment admitted that the preliminary objection was not determined and decided to determine it on his own before affording an opportunity to the appellant to defend. He said that the case of **Tanzania China Friendship Textile Company Ltd vs. Our Lady of Usambara Sisters [2006] TLR 70** which the Chairman referred does not permit him to determine preliminary objection while composing judgment before availing the parties to submit thereto. That in composing the judgment the Chairman determined preliminary objection basing on observation made by the respondent's counsel in his final submissions as depicted in page 8 and 9 of his judgment but the appellant was not accorded opportunity to defend the arguments by the respondent's counsel in his final submissions. He said that the

Chairman erred when he stated at page 9 in last line that it is uncertain when exactly the respondent trespassed in the suit land since the respondent holds a title deed as proof that the suit land was surveyed and registered as farm 2300 located at Kunduchi in 1992. He said that the time of surveying the land does not determine the time limitation, rather it is when the trespass or cause of action arose which is when the respondent removed the 400 bricks worth TZS 320,000/= He insisted that although the witnesses delivered their testimonies but the basis of dismissing the suit was on the issue of time bar which was raised in the preliminary objection.

On the third ground of appeal Mr. Samuel said that the Chairman has faulted the name of the applicant that in the form of the application the name appears as Abdu Khalfan Mpwapwa while the person who came to testify at the Tribunal was Athuman Khalfan Mpwapwa, hence different persons. He said that those two names are used by one person who is the appellant herein above. So there was no need of the instrument or Power of Attorney because both names referred to one person who is the appellant.

On the fourth ground Counsel said the Chairman misdirected himself when he concluded that since the applicant did not appear to testify for his claims therefore, he has not made up his case and the prosecution evidence was regarded as hearsay. He said that those names refer to the same person and hence the testimony tendered was not hearsay as it was testified by the applicant who purchased the suit land.

Mr. Samuel opined on the fifth ground that the Chairman erred when he merely stated that he differed with the assessors' opinion but did not put it clear what was assessors' opinion. He said that there were two issues of ownership and damages but in differing with the assessors the Chairman referred to the case of **Mansoor Industries Ltd vs. Minister for Works & 3 Others, Civil Case No. 2 of 2002 (HC-Mwanza)** (unreported) which covers only the issue of specific damages. He cited the case of **Tubone Mwambera vs. Mbeya City Council, Civil Appeal No.287 of 2017** where the Court of Appeal stated that the opinion of the assessors must be on record. He insisted that the Chairman has failed to put the opinion of the assessors on record.

On sixth ground Mr. Samuel submitted that DW2 proved that the suit land belongs to the appellant when she stated that she was shown the appellant's land as neighbouring land during purchase of her land and that the chairman failed to consider her testimony.

Submitting on the last ground of appeal, Mr. Samuel said that the Chairman stated there was no proof of demolition and removal of 400 bricks merely because the mason was not called and there was no police report. He said that was misdirection as the appellant testified to the extent that 400 bricks were removed by the respondent whom he was in dispute with. The need for the mason to testify was a misdirection by the Chairman. He insisted that statement of contradiction in the number of rooms between PW1 and PW2 was a misdirection because it was not among the issues for determination. He prayed for the appeal to be upheld with costs.

In reply, Advocate Morris said that the appellant is misleading the court. He said that both parties in the Tribunal were accorded equal and fair opportunity to pursue and defend their respective fates. He said that preliminary objection was raised in the respondents written statement of defence and was not preliminarily heard. He added that

the step did not occasion any injustice to either party. He said that the applicant throughout the trial did not raise any concern for the preliminary objection being pursued as a preliminary point. He said that trying to raise it now is an afterthought. He said that hearing of the preliminary objection is a procedural requirement which does not go to the root of the matter. That appellant has not cited any law which requires the court to determine preliminary objection first and even if the same existed they would simply be considered as hand maiden of justice instead of being used to undermine it. He relied on the case of **Rawal vs. Mombasa Hardware (1968) EA 392.** He added that the objective of preliminary objection is to invite the court to dismiss or strike out the matter without going to the merit but in the present case the application was not dismissed or struck out preliminarily without hearing the appellant as alleged by the appellant. That it was heard on merit to its finality. That if preliminary objection was to be successfully pursued its objective was to act against the appellants interest prematurely. He said further that all points in the pleadings were traversed, proved and adjudicated during the full trial. That the applicant had all time at his disposal to counter any rival arguments and submissions. That both decided to deliberate ignore this time barred plead not even during the trial of the application. He

said that this ground of appeal is total waste of time and resource. He added that the appellant had qualified and experienced legal experts, that they should have raised the issue before hearing commenced as all matters related to justice should be brought to the attention of the court at the earliest opportunity and as they kept quiet then this is an afterthought.

Mr. Morris further stated that the first and fundamental issue framed at the Tribunal was who is the lawful owner of the suit land in which the appellant herein was fully heard. That one of the defence in the Written Statement of Defence was that respondent enjoyed uninterrupted and peaceful enjoyment of the suit land for over 12 years and that the law allows pleading both points of law and facts in the defence. He relied on Order VIII Rule 2 of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**). He added that during the defence hearing witnesses for the respective party testified to prove that the respondent had been occupying the suit land without interference from applicant or anyone else and the applicant his counsel had a chance to cross examine all defence witnesses and if he decided to leave the matter unattended it was his wish. He said that the Tribunal entertained the subject point because the law permits therefore in the

interest of the timely justice it was not just and logic for the Chairperson to entertain preliminary point on which the parties still had time to address the tribunal on full hearing. He said that the appellant was given chance to prove the allegation of trespass to which he terribly failed.

Mr. Morris argued the third ground that when the appellant lodged his application, he identified himself as Abdu Khalfan Mpwapwa but when he appeared as PW1 he presented himself as Athuman Khalfan Mpwapwa. He said that the latter names would be conclusive in law for he stated them under oath. He said that the appellant never related the names of Abdu to Athumani nor did he testify on oath that he uses the set of names interchangeably and no deed poll was sworn to indicate the change of names. He therefore said it was proper for the Tribunal to consider PW1 as a mere witness for the applicant.

On the fourth ground, the counsel stated that having found that the applicant at the tribunal was not one and the same person the tribunal then justly considered the testimony by PW1 and whatever he said was heard from the purported owner of the suit land. He referred to section 62 of the Evidence Act Cap 6 RE 2019 which states that the

evidence which is not direct is not a good evidence. He also said that DW1 did not testify in favour of the appellant and that the stating of the applicant midst the judgment at page 11 of the judgment is a mere slip of the pen.

Submitting for the fifth ground the counsel said that both appellant and his Counsel are misleading the court. That the Chairman is not only recording his concession with the assessors but is giving the reasons where he differs with them. He said that at page 11 of the judgment the Chairman used "we" to connote the compromising of the Chairman and assessors. That he also indicated at page 12 in 3rd paragraph that he differs with the opinion of his assessors. That the reasons for differing with the assessors was enunciated in the cited case of **M/S Mansoor Industries** (supra) there it is not true as alleged by the appellant that there were no reasons advanced by the chairman for differing with the assessors.

On the sixth ground Mr. Morris said that the testimony of DW2 was fully considered by the Tribunal and that is why the final verdict was delivered in favour of the respondent. That, stating the word applicant in the sentence was mere slip of the pen or keyboard and the law

condones such human mistake. He added that the respondent together with his counsel were present when DW2 gave her evidence and they also wrote down such proceedings. That their records do not indicate such anomaly and that the two would not have left such anomaly uncontested if at all she testified against the respondent either through both examination in chief and re-examination. He insisted that the record of the court take precedence over records of the parties or of their lawyers. That the records are to the effect that DW2 testified that she did not know PW1 as a neighbour.

On the last ground of appeal Mr. Morris said that the claim of TZS 2,320,000/= loss for applicant's bricks and demolition of the was not proved at the tribunal during the hearing. That both **PW1** and **PW2** did not produce evidence to prove the same. That the law demand specific damages to be pleaded and proved. He relied on the case of **Zuberi Augustino vs. Anicet Mugabe (1992) TLR 137.** He said that where a party, for undisclosed reasons fails to call material witness on his side the court is entitled to draw an inference that if the witness were called, he would have given evidence contrary to such party's interest. That the appellant had that chance to call

material witnesses to prove the alleged loss but he refrained. He prayed for the appeal to be dismissed with costs.

In rejoinder Mr. Samuel reiterated his main submissions and added that the respondent in his main submission had admitted that the preliminary objection was not heard but did not occasion injustice to the parties. He said that it is a misconception argument because once there is a notice of preliminary objection the parties are obliged to be accorded time to dispose it first before trial commences.

I have listened to the submissions by Counsel, the main issue for determination is whether this appeal has merit.

The records of the Tribunal in Land Application No. 299 of 2008 reveal that the respondent in his Written Statement of Defence raised a preliminary objection that the application was time barred. However, the same was not determined at the earliest stage as required. The Chairman proceeded to hear and determine the said application. In the parties' final submission, the respondent herein among other things, submitted on the point of preliminary objection. However, the appellant was not afforded any opportunity to submit on the

preliminary objection. Worse enough the Chairman dismissed the application basing on the preliminary objection raised by the respondent. In the final verdict the application was dismissed for being time barred. Since the preliminary objection was not heard it follows therefore that the appellant's right to be heard was curtailed by the Tribunal. In composing the judgment, the Chairman acknowledged at page 8 of the judgment that the preliminary objection was raised but was not determined at the earliest stage. Then the Chairman at page 9 considered part of the final submission by the respondent on the issue of time limitation. The Chairman then proceeded to make his own findings that the matter was indeed time barred without even considering that the appellant had been afforded no chance to submit on the issue of time limitation. This is irregular and unprocedural. At page 7 of the judgment the Chairman stated that preliminary objection can be resolved at any stage, however, the preliminary objection in this case was raised at the earliest stage in the proceedings and there are no reasons as to why it was not determined first, and no reasons as to why parties were not afforded the right to submit on the preliminary objection before making the Chairman making the decision. It is well known that a preliminary objection is a matter of law which when raised needs to be determined

first as against matters of facts. Order XIV, Rule 2 of the Civil Procedure Code, Cap 33, RE 2019 provides:

> *"Where issues both of law and of fact arise In the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined"*

The issue of time limitation being the issue of law could have disposed of the whole application at the earliest stage. It was improper for the Chairman to proceed determining the preliminary objection without affording the appellant (then applicant) an opportunity to be heard.

Besides and as pointed out earlier, that the parties specifically the appellant herein was not afforded the right to be heard on the preliminary objection raised. As stated before, the Chairman based his verdict on the respondent's final submissions and his own findings. In the case of **Khaji Abubajar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another, Civil Appeal No. 86 of 2018 (CAT-Mwanza)** (unreported) it was stated:

> *"...we reinforce the same position that the trial judge ought to have heard first the preliminary objections raised by the 2nd respondent in its written statement of defence before proceeding to the full trial of the suit and issue its findings either before or in its judgment,*

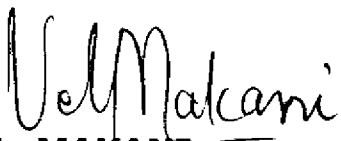
depending on the circumstances of each case. Given the fact that one of the points of law raised by the 2nd respondent touches the issue of jurisdiction of the trial court which is so basic and goes to the very root of authority of the trial court to adjudicate the case, it was fundamental for the trial judge to determine that issue of time limitation first before proceeding with the trial of the suit (See the case of ***Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda and 20 others, Civil Appeal No. 8 of 1995*** *(unreported)). If the trial judge was of the view that the objection of time limitation required evidence it ought to have made it one of the contested issues which required evidence to be adduced during trial.*

In the matter at hand, it does not matter whether Land Application No.299 of 2008 was time barred or not, since the appellant herein was not afforded the right to be heard then the whole proceedings, judgment and decree of the Tribunal should be nullified, and I hold as such.

In the premises, I find no reasons to labour much on the remaining grounds of appeal as they are based on the void proceedings and judgment.

In the result, this appeal is allowed. The proceedings, judgment and decree of the Tribunal are hereby quashed and set aside. The file is to be returned to the Tribunal for the preliminary objection to be

determined expeditiously before another Chairman. Since the omission was not caused by the parties, there shall be no order as to costs. It is so ordered.



V.L. MAKANI
JUDGE
30/06/2021