

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

**LAND REVISION No.57 OF 2020**

**THADEO FUKUDA RWEYAMBA**

(Administrator of the Estate of the Late

George Thadei Rweyamba) .....**APPLICANT**

**VERSUS**

**MARY KAIJAGE**.....**RESPONDENT**

**RULING**

**Date of last Order: 4/10/2021**

**Date of Ruling: 26/10/2021**

**DR. T. MWENEGOHA, J.**

This is the ruling in respect of the preliminary objections raised by the respondent that;

- 1. The applicant disobeyed Order of this Honourable Court dated on May 17,2021 by Hon. Maghimbi J. to wit non-service of written submission in chief.*
- 2. The application is not maintainable for want of prosecution and / or failure by the applicant to appear and prosecute the Case.*

The Court ordered that the application be argued by way of oral submissions. Advocate Omega Joel represented respondent while Makanja Manono appeared on behalf of the applicant.

Submitting for the first ground of preliminary objection, Mr. Joel said that the matter was called for hearing on 17/05/2021 before Hon. Maghimbi, J. That it was ordered for the matter to proceed by way of written

submissions. He submitted further that the applicant was to file his submission on or before 07/06/2021. That the respondent was to file a reply by 08/07/2021 and rejoinder on 16/07/2021. The ruling was set to be on 16/08/2021. The counsel said that the applicant disobeyed the order and he served the respondent on 21/07/2021, about 44 days later than the scheduled date by the Court. He added that the service of written submission is governed by the law. That the law requires the document to be served either by the party personally, advocate or their address supplied for the service. He added that failure to serve the other party amount to failure to appear on the hearing date. The counsel placed his reliance in the case of **FAMARI INVESTMENT LTD vs ABDALLAH KOMBA, Misc. Civil Application No.41/2018** (unreported) where he said it was stated that if the party fail to act within the time prescribed, he will be guilty of diligence. He insisted that, the applicant in this case has failed to file written submission in time and therefore he has not acted diligently. That he was required to first seek leave of the Court so that it could reschedule the hearing date. The counsel prayed for the court to dismiss this application with costs.

In reply Advocate Makanja said that, the raised preliminary objection is not proper objection as required by law. That in order to ascertain whether submission was file on time the Court has to go through records and ascertain factual issues. The counsel relied on the case of **MOUNT MERU FLOWERS TZ LTD vs BOX BOARD TZ LTD, Civil Appeal No.260 of 2018** (unreported) in which the case of **MUKISA BISCUITS** was referred. That the Court observed that the preliminary objection has to be on pure points of law. The counsel further argued that respondent has not stated any provision of law or case law under which this

application should be dismissed. The counsel conceded to have filed submissions on 07/06/2021. That the applicant did not serve respondent personally because he provided no address. He averred further that, the respondent was present on 17/05/2021 when the Court was giving the order. That respondent was likewise advised to collect his copy. That the applicant left a copy in the Court for the respondent to collect, and that he said, is practise where parties have no clear address. He insisted that the applicant filed his submission. That even if they failed to serve respondent, the remedy is not dismissal, rather the Court should extend time for parties to file submission. The counsel distinguished the case of **FAMARI INVESTMENT LTD** (supra) with the case at hand. That in the former, submissions were not filed while in the case at hand the applicant filed submission. The counsel prayed for the preliminary objection to be overruled with costs.

In rejoinder, the counsel for the respondent reiterated his main submission and added that the applicant knew that respondent appeared in person. That he believed that since he was served through *serikali ya mtaa* he was not required to come to the court and collect his copy. That the applicant served respondent after he had complained.

I have gone through submissions by both parties, the main issue for determination is whether the preliminary point of objection raised by the respondent has merit. Preliminary objection was discussed in the landmark case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD. vs. WEST END DISTRIBUTORS LTD(1969) EA 696**, where Sir Charles Newbold P. had this to say at page 701: -

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on*

*the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion”*

The question to be answered here is whether the preliminary point of objection raised by the respondent qualify to be point of law under the leading case of **MUKISA BISCUITS** (supra). In essence respondent does not complain of the date of filing submission by the applicant. He is rather at issue with the date of being served by the applicant. To establish whether or not respondent was properly served will lead the Court into ascertainment of the facts and evidence. In his reply Mr. Makanja was, among other things, of the opinion that respondent did provide address through which he could be served. Such assertion needs thorough perusal of the case file to see whether or not there was any address by the respondent. This in my view, undermines the principles set down in the case of MUKISA (supra) preliminary objection must be raised on pure points of law, further, it cannot be raised if any fact has to be ascertained. The first point of objection therefore, does not qualify to be preliminary point of objection.

Likewise, the second point of preliminary objection does not qualify under **MUKISA BISCUITS**'s case. The counsel for respondent opined that the application is not maintainable for want of prosecution. The issue of non-appearance, if any, and consequences thereto is worth for determination in the cause of disposing the main application. Not at preliminary stage of this application and I would rather join hand with Advocate Makanja that, in all cases respondent has not stated which provisions of the law have been contravened. This point too is devoid of any qualification under the land case of **MUKISA BISCUITS** (supra).

It is on the above findings that I proceed to dismiss the preliminary objections raised by the respondent. Costs shall be in the due course.

**It is so ordered.**

**Dated at Dar es salaam this 26<sup>th</sup> day of October, 2021.**



  
**T. N. MWENEGOHA.**  
**JUDGE**