

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

LAND APPEAL NO. 267 OF 2020

(Originating from Kinondoni District Land and Housing Tribunal in Land Application No.633 of 2019)

ABDUL HASSAN MSUYA (Administrator of the Estates of the
Deceased IBRAHIM HASSAN MGHAMBA)**APPELLANT**

VERSUS

MONICA AMANI MSUYA.....**RESPONDENT**

Date of Last Order: 26.01.2022
Date of Judgement: 21.02.2022

JUDGMENT

V.L. MAKANI, J

The Appellant ABDUL HASSAN MSUYA is appealing against the decision of Kinondoni District Land and Housing Tribunal (the **Tribunal**) in Land Application No. 633 of 2019 (Hon. L.R. Rugarabamu, Chairman).

At the Tribunal the appellant herein was claiming that the suit premises located at Mbweni area Kinondoni Municipal (the **suit land**) is the property of the late Ibrahim Hassan Mghamba and that the respondent herein be ordered to give vacant possession of the suit

points of preliminary objection that, the applicant was suing the wrong person and that the Tribunal lacked jurisdiction to try the matter. The objections were sustained, and the application was dismissed with costs. Being dissatisfied with the decision, the appellant preferred this appeal on two grounds that:

- 1. The Chairman of the Tribunal erred in law to desist off the suit on preliminary objection basing on a matter of fact alleged by one side and disputed by the other side which formed an issue for determination on merits and subject to be proved by evidence.*
- 2. That the Chairman erred to hold that the applicant ought to have sued the administrator of estates of the deceased Gideon Mghamba without regard that the applicant has no cause of action against the administrator as the suit land is not part of the estates of the deceased Gideon Danson Mghamba and the administrator of estates is not the trespasser in to the suit land save the respondent who is the trespasser.*

The appellant prayed for this appeal to be allowed with costs and the suit be remitted to the Tribunal for trial before another Chairman.

Submissions on behalf of the appellant were drawn and filed by Mr. Benedict Bahati, Advocate. While the respondent's submissions in reply were drawn gratis by Ms. Grace Daffa, Advocate from Women Legal Aid Centre and signed and filed by the respondent.

As regards the first ground of appeal, Mr. Bahati said that it is a settled law that the court has to confine itself to the framed issues. He said soon after framing the issues the Chairman did not determine them. That the Chairman did not make any reasoning on whether the preliminary objections are pure points of law or not, rather he jumped at page 8 of the ruling to hold that he agrees with respondent that the proper person to be sued is the administrator of the estate of the late Gidion Danson Mghamba. He said in his pleadings the appellant stated that the suit land is not part of the estate of the late Gidion Danson Mghamba and that the letter of the administrator was attached to form part of the application.

Mr. Bahati went on to say that the allegation that the suit land is not part of the estate of the late Gidion Danson Mghamba is denied by respondent who maintains that the suit land is the one listed in the estates of the deceased. He said in such a situation where the party is alleging to prove by evidence it cannot therefore be a point of law capable of being disposed on preliminary objection. Counsel observed that had the Chairman proceeded to determine the issue he had framed he would have arrived at the finding that the preliminary

objections are not pure points of law. That the Chairman could have also found that the issue of non-joinder of the party raised as the first point of preliminary objection was nothing but a matter within the discretion of the court and thus not pure point of law. Counsel relied further on Order 1 rule 9 of the Civil Procedure Code Cap 33 RE 2019 (the **CPC**) that a suit shall not be defeated by reasons of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties before it. He said that even if the respondent was wrongly sued the suit would not be subjected to dismissal rather the court's remedy would have been to order the name of the respondent improperly joined to be struck out and the proper party be added. He relied on Order 1 rule 10 (2) of the CPC and the case of **Tanzania Railway Corporation (TRC) vs. GBP (T) LTD, Civil Appeal No.218 of 2020.**

Submitting on the second ground, Mr. Bahati reiterated the submissions on the first ground. He added that it is the respondent in person who has trespassed the suit land and not the administrator of the estate of deceased. That the administrator of the estate of the late Gidion Danson Mghamba as clearly stated in para 6 (a) (xi) went

further in writing a letter denying the suit property to be one of the estates he administers, and the said letter has been annexed to the application. Therefore, the applicant could not join the administrator as he has no cause of action against him. That it is upon the respondent being an interested party in the estate of the deceased to have sued the administrator of the deceased and any other person claiming the suit property as clearly stated in the decision of the Primary Court. He said that *KIWANJA CHA MBWENI* listed as part of deceased's estate is different from the suit property. He said since the administrator also proved the same, the respondent would therefore have a fit case against the administrator. He insisted that it is the respondent who trespassed the suit land and not the administrator. He prayed for the appeal to be allowed with costs.

In reply, Ms. Grace submitted that the suit land is the same premises which formed part of the estate of deceased husband and was subject to Probate and Administration cause in Kawe Primary Court. She said the appellant ought to have sued the administrator of the estate and not the beneficiary as correctly ruled by the Chairman. She said that appellant is lying to defeat the ends of justice as the suit property is the same to that of the deceased and it is a matrimonial home which

the respondent and her late husband lived during the lifetime of the deceased. For the interest of justice, Counsel prayed for the appeal to be dismissed with costs.

In rejoinder Mr. Bahati repeated the main submissions and added that the suit land is different from the one listed in item 10 as *KIWANJA CHA MBWENI*, that the suit land is referred to as *KIWANJA CHA BIASHARA MBWENI*.

Having gone through submissions from both parties and the records from the case file, the main point for determination is whether this appeal has merit.

The matter at the Tribunal was disposed of by way of preliminary objections. But according to Mr. Bahati the points raised were not pure points of law within the confines of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696**. It is common knowledge that a preliminary objection on a point of law cannot be raised if there are facts to be ascertained. In the case of **Karata Ernest & Others vs. Attorney General, Civil Revision No. 10 of 2010 (CAT-DSM)**(unreported)

the Court of Appeal quoted with approval the case of **Mukisa Biscuits** (supra) and went on to explain what a preliminary objection on a point of law entails stated:

*"At the outset we showed that it is trite law 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"**. Obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law".*

It is without doubt that the preliminary objections that were raised at the Tribunal required ascertainment by way of evidence and hence were not purely points of law. For instance, the issue whether the suit property was among the properties listed in the estate of the late Gidion Danson Mghamba requires evidence to reflect, as claimed by the appellant, that it is not part of the deceased's estate. Equally the issue of jurisdiction of the Tribunal vis a viz the existence of Probate and Administration Cause No. 222 of 2014 at Kawe Primary Court and entails going through the evidence for ascertainment of these facts.

Further, when the Tribunal started looking at the annexures to the application this clearly meant it was analysing the evidence, therefore the objections raised were not pure preliminary objections on points of law.

The Tribunal in dismissing the application also observed that the administrator of the estate of the late Gidion Danson Mghamba was the one who ought to have been sued and not the respondent. In essence the Chairman pointed out that there was an issue of misjoinder of parties which as narrated above required evidence. In any case, a suit cannot be defeated by mere misjoinder or non-joinder of parties. And this is asserted in Order I Rule 9 of the CPC which goes further to state that the court may in every suit deal with the matter in controversy according to the rights and interests of the parties therein. If it is necessary for the application to be removed from the court record, then it cannot be dismissed but struck out. All in all, the preliminary objections raised at the Tribunal had no merit and the decision in view thereof is quashed and set aside as the Chairman erred in dismissing the application based on the said objections.

In the result, the appeal has merit, and it is allowed. The decision of the Tribunal is quashed and set aside. The file is hereby returned to the Tribunal for determination of the application on merits before another Chairman. There shall be no order as to costs as the respondent is under Legal Aid services.

It is so ordered.


V.L. MAKANI
JUDGE
21/02/2022

