

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC.LAND APPEAL No. 61 OF 2021

(Originating from the ruling on preliminary objection in Land Application No. 94 of 2019 before the District Land and Housing Tribunal for Kibaha dated 18th January 2021)

ISSA RAJAB MCHOMVU.....APPELLANT

VERSUS

SELEMANI ROTALI MAPUNDA.....RESPONDENT

JUDGMENT

03/03/2022 & 19/05/2022

Masoud J.

The appellant being aggrieved by the ruling on Preliminary Objection of the District Land and Housing Tribunal for Kibaha (“**the trial Tribunal**”) decided to appeal to this court on the following reasons;

1. That the hon. Chairperson erred in law by allowing an amendment that had the effect of introducing a new fact and substituting the entire application contrary to the law governing amendment of pleadings.
2. That the hon. Chairperson erred in law when he held that the real question at issue was 24 acres contrary to the Respondent’s averments that showed the dispute concerned lesser acreage of

only 9 acres which remained upon being disposed of prior to the filing of the case.

3. That the hon. Chairperson erred in law when he reasoned that the amendment did not cause any injustice while being aware that the amendment illegally extended the size of the disputed area an act bound to occasion miscarriage of justice to the appellant.
4. That the hon. Chairperson erred in law and fact by wrongly applying the principle of overriding objective on a fatally defective verification clause.

On account of the above reasons, the appellant prays this court to overrule and set aside orders of the trial Tribunal in the preliminary objection, struck out the amended application filed by the respondent on the 19th October 2020, costs of this appeal and any other orders the court may deem fit and just to grant.

Hearing of this appeal proceeded by way of filing written submissions. Both parties adhered to the submission schedule. During the hearing of this appeal both parties were represented. While the appellant was represented by Mr. Godfrey B. Namoto and Mr. Kawemba George Mwita

Advocates. The respondent was represented by Mr. L.C Mlelwa &Mr. Joseph John Manzi, Advocates.

Here is a brief historical back ground of the appeal at hand. Before the trial Tribunal the applicant (the respondent herein) filed a land dispute claiming that the appellant herein trespassed into his piece of land constituting 9 acres. At paragraph 6 of the application the applicant contended that he owned 24 acres having previously purchased them and disposed part of the Land to different people and was as a result left with 9 acres which the appellant trespassed into. It was thus argued that, the cause of action against the respondent (appellant herein) was in respect of ownership of the said 9 acres.

Before the matter could proceed with the hearing, the respondent made an oral application through his advocate praying to make amendments in his application/pleading claiming that the appellant was trespassing into other remaining parts of the total 24 acres. The trial Tribunal allowed the application for the amendment. Upon being served with a copy of the amended application, the appellant unsuccessfully raised a preliminary objection contending that the amendment effected to the application had the effect of introducing a new case. He argued that the applicant

(respondent herein) did not amend his application as ordered by the trial Tribunal. Rather, he substituted the entire application with distinct claim on the subject matter and distinct documents to support his allegations. hence this appeal.

Going through the records of the appeal, I discovered a point of law which raises a question as to whether the appeal is maintainable as it arises from a decision on a preliminary objection that does not finally determine the matter. The question was not canvassed by the learned counsel. On the 13/12/2021 the parties were given a chance to address the court on the above issue, but the matter was adjourned as the respondent's advocate could not make it to court because she was sick.

On the 3/3/2022 the parties addressed the court on the issue. Mr. Namota submitted that the appeal is proper before the court on the ground that the dispute on 24 acres is totally a new case taking into account that the earlier application was verified that he owned 9 acres. That one of the issues to be answered was on the size of the land in dispute. Mr. Namoto submitted that the circumstances of the case at hand are within the exception that there should be no appeal in interlocutory matters except where the decision being complained of had the effect of finally determining the case.

Mr. Manzi submitted that the appellant appealed on the interlocutory order while the main application is yet to be finalized. He, therefore, prayed to the court to dismiss the appeal with costs.

On my part, the law is very clear that preliminary orders are not appealable unless they have the effect of finally determining the case. The provision of section 74 (2) of the Civil Procedure Code, Cap 33 R.E 2002 provides that;

*"Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any **preliminary** or **interlocutory decision** or order of...any other tribunal, unless such decision or order has effect of **finally determining the suit.**"*

In the case of **Bozson vs Artincham Urban District Council (1903) 1KB 547**, it was held that;

*"It seems to me that the real test for determining this question ought to be this; **Does the judgment or order, as made, finally dispose of the rights of the parties?** If it does, then I think it ought to be treated as final order; but if its dos not, it is then in my opinion, an **interlocutory order**"*

(Emphasize applied)

According to the above cited authorities, the appellant being upset by the decision of the trial Tribunal on the preliminary order which did not finally determine the case, he was not supposed to appeal. Rather, he could have waited till the final determination of the main application. His appeal is not maintainable as it is against the provision of the law stated herein above. With this finding which suffices to dispose of the appeal, I will not labour on the grounds of this appeal.

In the results, the appeal is incompetent before the court. It is accordingly struck out with costs. It is so ordered.

Dated at Dar Es Salaam this 19th day of May 2022.



B.S. Masoud

JUDGE

