

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 194 OF 2022**

(Originating from the District Land and Housing Tribunal for Mkuranga in
Land Appeal No.30 of 2021 by Hon. R. Mwakibuja dated 2nd August, 2022)

FIDELIS FELIX IZENGO (Administrator of the Estate of

The late Calist Dioniz Masalu) **APPELLANT**

VERSUS

1. KALIPI ZEFANIA MINJA

2. EDWIN TIMONTH MSIGWA

}

..... **RESPONDENTS**

JUDGMENT

Date of last Order: 24.02.2023

Date of Judgment: 28.02.2023

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the District Land and Housing Tribunal (DLHT) for Mkuranga in Land Application No.30 of 2021.

The material background facts to the dispute are briefly as follows, the

appellant instituted an Application at the DLHT for Mkuranga vide Land Application No 30 of 2021 claiming that the first respondent has trespassed his pieces of land located at the Local Government of Utengemwage and the second respondent has trespassed his pieces of land located at local Government of Binguni B. Before hearing the matter on merit, the second respondent raised preliminary of objections. After the hearing of the preliminary objections, the trial court took the view that the second objection is meritorious. In the trial court's wisdom, he sustain the second objection and ruled out that the Application was incompetent for joinder of parties.

The DLHT decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on two grounds of grievance, namely:-

- 1. That the Honourable Chairperson of the Tribunal erred in law and fact when she held that the suit is bad in law for joinder of parties.*
- 2. That the Honourable Chairperson erred in law and fact when she upheld the preliminary objection without considering the preliminary objection should be purely on point of law.*

When the appeal was called for hearing on 24th February, 2023, the appellant enjoyed the legal service of Ms. Rosemary Kirigiti, learned counsel, and the 2nd respondent appeared in person.

The appellant's Advocate opted to combine and argue the two grounds together. She contended that the appellant the second objection raised by the second respondent was based on point of fact and not on point of law. She submitted that it is trite law that a point of objection must be on a point of law and able to dispose of the suit to its finality. To buttress her contention she referred this Court to the principle of preliminary objection as held in the cases of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd** EALR (1969), **Samia Mohamed v Sophia Bakari Imonje**, Land Case No. 75 of 2017 and **Wilson Renard v Salum Salim Nassor**, Civil Appeal No. 169 of 2017 HC (unreported). She stated in the case of **Samia Mohamed** (supra), Hon. Mgonya, J on page 5 mentioned the ingredients of preliminary objection such as; strictly on point of law, and parties not issuing evidence to determine the said preliminary objections.

The learned counsel for the appellant continued to argue that non-joinder, misjoinder, or joinder of parties cannot defeat a suit. She spiritedly argued a preliminary objection on non-joinder, misjoinder, or joinder is a pure point of fact that require parties to produce evidence of the same. She stressed that the preliminary objection was wrongly upheld, it required parties to adduce evidence to find out whether the joinder of parties was proper or not. She added that the DLHT was required to overrule the raised objection and

determine the matter on merit to find whether the parties were properly joined.

Ms. Rosemary went on to submit that the complainant has a right to file a case against a party whom he wants to sue and in the case at hand, the respondents are trespassers.

In conclusion, the learned counsel for the appellant beckoned upon this Court to consider the cited authorities and quash the decision and orders of the DLHT. She urged this Court to allow the appeal, order retrial and the respondents to pay damage to the tune of 10,000,000/= and the costs of the case.

Responding, the second respondent was firm in defence of the trial Tribunal decision. He stated that the trial tribunal determined the second objection and its decision as sound and reasoned. The second respondent valiantly submitted that the raised preliminary objection is not on point of fact but it was a pure point of law. He stated that Order I of the Civil Procedure Code Cap. 33 [R.E 2019] states who are the parties to the suit, therefore, he stressed that the preliminary objection was correct and the same was in conformity with the law. The second respondent submitted that the previous legal representative at the DLHT did not address the said objection, therefore, in his view, the counsel for the appellant cannot raise the same

before this Court. He insisted that there is no any evidence adduced at the hearing of the said preliminary objection instead parties argued only on joinder of parties. He added that they explained in detail that the respondents are two different people with different personalities, purchased the suit land differently and it is not a co-owned piece of land. We have never joined the said pieces of land. Mr. Edwin argued that for those reasons, it was not proper in the eyes of the law to join the respondents in one case and they could not defend their case because they have no common interest. The second respondent stressed that the appellant could join the respondents only if they had a common interest in the subject matter.

In conclusion, the learned counsel urged this Court to dismiss the appeal with costs.

In her rejoinder, the learned counsel for the appellant reiterated her submission in chief. She added that Oder I of the Civil Procedure Code Cap.33 [R.E 2019] supports joinder of parties to expedient the hearing of cases. She valiantly argued that saying the two plots are separate plots is mere words. Ending, Ms. Rosemary, prayed this Court to grant the appeal.

After I heard the submission of the learned counsel for the appellant and the second respondent for and against the appeal, I should state at the outset

that the main issue for determination is *whether the appeal is meritorious*.

The appellant is faulting the District Land and Housing Tribunal's findings that the suit is bad in law for joinder of parties. I had to peruse the tribunal records and find out what transpired during the hearing of the preliminary objection. Records reveal that before hearing the matter on merit, the 2nd respondent raised three objections and the tribunal sustained the second objection and struck out the appeal for joinder of parties.

At the tribunal, the second respondent claimed that the two parties are owning two different pieces of land, and learned counsel for the appellant one Samson Russumo admitted that the respondents are occupying two different pieces of land. In my considered view, I find that Mr. Samson Russumo was bound by his admission, much as it was the case that the two had been jointly, together and severally sued while each of them is alleged to occupy a different plot. Therefore, proceeding with hearing the suit on merit would be nothing material to be determined by the tribunal. Besides, the appellant himself in his Complaint specifically paragraph 3 (a) (i) acknowledged that the 1st respondent trespassed the piece of land which is under the Local Government of Utengemwage and the 2nd respondent trespassed into a piece of land which is under the Local Government of Binguni B.

For ease of reference, I find it apposite to reproduce paragraph 3 (a) (i) of the first applicant's Application thus:-

“ That on an unknown day the two respondents trespassed on the disputed land knowing that it is the property of the late CALIST DIONIZ MASALU. The 1st respondent trespassed on the piece of land which is under the Local Government of Utengemwage and the 2nd respondent trespassed on a piece of land which is under the Local Government of Binguni B.”

The above excerpt clearly shows that pieces of suit land are located in two different areas. In my considered view, the trial Tribunal was spot on in his contention that it cannot determine one suit which involves two different pieces of land which are allocated in different areas. Therefore, I am in accord with the second respondent and the trial Tribunal holding that the parties were not supposed to be joined in one case. Had it been that the respondents had a common interest in the subject matter then the appellant could have joined them. Also, had the appellant in his Application stated that both respondents have trespassed the suit land located in the Local Government of Utungemwage or Binguni 'B', then the raised objection could not have passed the test of preliminary objection which is not the case in the matter at hand.

From the string of the authorities above and the facts borne in the pleadings, I see no good cause to interfere with the concurrent findings of facts by the District below for the reasons shown above.

In consequence of all this, I dismiss the appeal and uphold the trial tribunal's decision. The respondents will have the costs of the matter.

Order accordingly.

Dated at Dar es Salaam this date 28th February, 2023.




A.Z. MGEYEKWA

JUDGE

28.02.2023

Judgment delivered on 28th February, 2023 in the presence of respondents.




A.Z. MGEYEKWA

JUDGE

28.02.2023

Right to appeal fully explained.