IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CIVIL APPEAL NO.65 OF 2016

FROM ORIGINAL DECREE CIVIL CASE NO.126 OF 2011

OF THE LAND TRIBUNAL - ZANZIBAR

MOH'D SULEIMAN MOH'D ... ... (APPELLANT)

VERSUS

1. MOZA SALUM MOH'D ... ...)
2. AMNE SALUM MOH'D ... ...)
3. ZEYANA SALUM MOH'D ... ...)
4. GHANIYE SULEIMAN KHELEF ... ...)
5. HALIMA SALUM MOH'D ... ...)
6. MOH'D SALUM MOH'D ... ...) (RESPONDENTS)
7. SAID SALUM MOH'D ... ...)
8. RAYA SALUM MOH'D ... ...)
9. JOKHA SALUM MOH'D ... ...)
10. SHEKHA SALUM MOH'D ... ...)
11. FATMA SALUM MOH'D ... ...)

JUDGEMENT

BEFORE: HON. ABDUL-HAKIM A. ISSA. J.

This appeal arises from the decision of the learned magistrate of the Land Tribunal, Said H. Khalfan (RM) in Civil Case No. 126/2011 at Vuga, Zanzibar. The background to the case is that the Respondents, Moza Salum Moh'd and 10 others filed a Civil Suit No. 126 of 2011 at the Land Tribunal against the Appellant, Moh'd Suleiman Moh'd. The Respondents are claiming that the Appellant has trespassed in their plot of land situated at Bububu Kikaangoni in the Urban-west region of Zanzibar. The Respondents claimed to have inherited the said land from their late father Salum Moh'd.

The learned magistrate of the Land Tribunal heard the matter and delivered his judgment against the Appellant on 11.2.2016. The Appellant being aggrieved with the said decision preferred this appeal. He filed a memorandum of appeal which contained seven grounds of appeal, but before hearing of the appeal Mr. Tetere, the Appellant's advocate withdrew 1st, 2nd, 5th, 6th and 7th ground of appeal. On the same time he applied to the Court under Order XLVI Rule 2 to be allowed to add one ground of appeal, which the Court allowed. Therefore the remaining grounds of appeal were 3rd and 4th together with the added one which was numbered 5th. The remaining grounds of appeal can be summarised as follows:

3. That the learned magistrate of the Land Tribunal erred in law by not finding that the Respondents had no locus standi to file the suit as at the time of institution of the suit they have not inherited the land in dispute regardless that their father died long time ago.

4. That the learned magistrate erred in law by allowing the Respondents to file in Court an amended plaint which was objected by the Appellant. That act allowed the Respondent to include new deed which was prepared when the case was already in Court, and thereby there were two different deeds of the land in dispute produced by the Respondent.

5. That the Land Tribunal erred in law for not joining the necessary party in the case.

In the hearing of this appeal the Appellant was represented by the learned advocate Mr. Haji Tetere and the Respondents were represented by learned advocate, Mr. Shaib Ibrahim and Mr. Moh'd Ali.

The Appellant's advocate, Mr. Tetere started his submission on the 3rd ground of appeal. He submitted that there is no doubt that the Respondents have inherited the area in dispute from their late father, but the Respondents had no locus standi to sue as the area in dispute had not been inherited by the Respondents at the time of institution of the suit despite the fact that their father passed away long time ago.

He added that their claim in Court started in 15.11.2011 and in paragraph 5 of their plaint have admitted that the land was the inheritance property. According to the Wakf and Trust Commission Act No. 2 of 2007 the Executive Secretary is the person responsible for the administration of estate of Muslim who dies intestate; and he is the one who has a duty to sue. In addition section 34 (1) of the Wakf Act, the Wakf Commission can appoint an agent of who can institute a suit. He submitted that in this case the procedure was not followed, and therefore, the whole proceedings are null and void. He added that this Court has dealt with the similar matter in Civil Appeal No. 14 of 2015 Katibu wa Tawi la Kizimkazi Dimbani & others V. Kassim Fadhil Ramadhan & 3 Others; on pg 10 second paragraph the Court allowed the appeal. In this case it is very clear that the Respondent did not file the case as administrator of the estate. Hence, he prayed that the appeal should be allowed.

Mr. Moh'd on the other hand submitted that the Appellant does not dispute that the land belongs to the father of the Respondents as explained above, and he added that the fact the inheritance has not taken place does not give a person a right to trespass on the land. He added that when the suit was filed the Respondents have already gone to the Wakf Commission and all procedures were followed. This is seen on pg 33 of the proceedings, where it is shown that inheritance has already taken place, but the inheritance deed was delayed. The inheritance deed was delivered to the beneficiaries on 2012 and was admitted in Court on pg 29-30 of the proceedings.

Mr. Moh'd added that the Respondents amended the plaint as per Court order and the Appellant did not object it. The practice is that after amendment the first plaint is not considered and it is the amended plaint which is considered. He added that the amended plaint was filed in 2013, and at that time the beneficiaries had already inherited the land. He cited the case of ***Consolidated Holding*** V. ***Nyakato Soap Industries Ltd***, Civil Appeal No. 58 of 2000 where on pg 3 the Court of Appeal said amended pleading is the one having the force of law. Therefore, the ground that the Respondents had no locus is baseless. Regarding the case of ***Katibu wa Tawi la Kizimkazi*** (supra) he said the parties

did not inherit the property, while in this case the Respondents have already inherited the property. He prayed for the dismissal of this ground.

With respect to the fourth ground of appeal, Mr. Tetere submitted that the Court erred in allowing amendment of the plaint where there were already preliminary objections before the Court. The proceedings on pg 13 shows that the matter was fixed for hearing of p.o. on 16.7.2013, but it was adjourned to 31.7.2013 where the Respondents prayed for amendment of plaint which was allowed and they filed amended plaint on 11.9.2013. He submitted that the practice of the Court is that when there is p.o. a party cannot be allowed to amend what has been objected. The act of the magistrate allowing amendment of plaint has tainted the whole proceedings. He cited the case of ***Thabit Ramadhan Maziku*** V. ***Amina Khamis Tyela***, Civil Appeal No. 98 of 2011 (Unrep.) where the Court of Appeal directed that p.o. should be heard first. The Court in that case ordered a trial do novo.

Mr. Moh'd on the other hand, submitted that the p.o. raised were there in Court and they were heard and decided first before amendment as seen on pg 18 of the proceedings. He prayed that this ground lacks merit and should be dismissed.

With respect to the fifth ground of appeal, Mr. Tetere submitted that the Court heard the matter without involving the necessary party. In this case it is shown on pg 43 that the land belonged to Suleiman Azan Muhsin, and the Appellant was just taking care of the land. Suleiman Azan was not joined as a party; he just appeared as a witness. He added that the order of the Court affects him when he was not involved in the case, and this error makes the whole proceedings null and void. He cited the case of ***Masoud Salum Said*** V. ***Abdalla Moh'd Mbarouk***, Civil Application No. 2 of 2013 where this Court held that the Land Tribunal should not have entertained the case as it is a case of non-joinder of the necessary party. Mr. Tetere submitted that the whole proceedings is void and the decision is also void for failure to follow the law and procedure. He prayed for setting aside the decision of the Land Tribunal and the Respondents be ordered

to follow the procedure and file a new suit if they wish. The appeal should be allowed with cost.

With respect to this ground of appeal, Mr. Moh'd submitted that their understanding is that the necessary party is the Appellant who trespassed on the land of Respondents, dividing plots and selling them. There was no one else who trespassed on that land. The Appellant confirmed on pg 43 of the proceedings that he was the one seen in that area. He is the necessary party, but if there is another person who feels should be the necessary party he should have asked the Court to join him as the party. He submitted that Order I Rule 3 is very clear how necessary party could be joined in a suit. Further, section 32 (1) of the Land Tribunal Act gives power to allow addition of a party. He added that the said necessary party came to Court and produce a document which was marked as Exhibit SMS 1. This document was found to be fake or forgery as per the testimony of the Registrar of documents. This is seen on pg 37 and 40 of the proceedings. Further, he said even if Suleiman Azan is sued the land in dispute still remains the property of the Respondents.

Mr. Shaib on the part of the Respondents added that all cases cited by the Appellant's advocate are distinguishable. The p.o were heard before amendment. The inheritance was done in accordance with law. Further, DW2 did not produce anything to prove ownership of the disputed land. In addition he said Order 1 Rule 10 allows a person to make application to be joined as a party, DW2 did not make the application. He prayed that the Court should dismiss this appeal with cost.

Mr. Tetere on his reply submitted that when the case was filed in Court the inheritance matters were going on and they filed their case on their own and not as administrator of the estate. They got the document of title in 2012. Regarding amendment he submitted that the proceedings is very clear: the plaint was filed on 15.11.2011, the Appellant filed WSD on 13.12.2011 and raised p.o. which was fixed for hearing on 16.7.2013. The hearing of p.o. was adjourned to 31.7.2013 where on that day the Respondents asked for amendment, which was allowed

and the amended plaint was filed on 11.9.2013. The Appellant filed amended WSD in which he brought another p.o. which was heard by the Court.

Regarding the third ground, he submitted that non-joinder of parties involves all parties as well as the Court. When Appellant said the land is not his, prudence is that the necessary party should have been included. The procedure was not followed and the proceedings are null and void.

After hearing both counsels with respect to the grounds of appeal which are all points of law. This Court will start with the third ground of appeal. With respect to the issue of locus standi. The law is very clear as pointed out by Mr. Tetere. In all cases involving administration of the estate of deceased Muslim who died intestate the suit ought to be instituted by the Executive Secretary of the Wakf Commission who has the sole powers to administer all estates of Muslim deceased person in Zanzibar who died intestate (Section 32(1) (a) of the Wakf and Trust Commission Act, 2007) or can be instituted by an agent who has been appointed by the Wakf and Trust Commission under section 34 (1). Section 34 (1) provides:

> ***"34.(1) The Commission may appoint such person or persons, as it shall think fit, to act as its agent or agents in the administration of estates of deceased persons, and, at its discretion, may delegate to them any or all of the powers and duties conferred or imposed upon it by this Act".***

This provision is very clear that the Commission can appoint a person or persons to be agent in the administration of the estate of the deceased person. It can also delegate its powers and duties to that person or persons. Those powers include filing a suit on behalf of the estate of the deceased person. Hence, what is required is that there must be a deed or instrument issued by Wakf Commission appointing a person to be an agent in the administration of the deceased person's estate. Absence of such an instrument a person cannot claim to be the agent of the Wakf Commission and thereby cannot file a suit on behalf of the estate of the deceased person.

In the present case, the suit has not been filed by Executive Secretary of the Wakf Commission, and there is no such deed or instrument appointing the Respondents as agent. It was the argument of Mr. Tetere that the Respondents had no locus standi to file the suit before the Land Tribunal. On the other hand, the Respondents have argued that they have locus standi as the plaint was later amended and at that time the inheritance was completed, and the deed was tendered in Court. Fortunately, this issue was addressed by the Court when it was determining the p.o. and the ruling was as follows:

> ***"Mahakama imepitia jalada hili kwa umakini kabisa na kugundua ni kweli Wadai wakati wanafungua shauri hili walikuwa hawajarithishwa. Lakini waliomba kufanya marekebisho ya hati ya madai ndipo walipoambatanisha na hati ya kurithishwa katika marekebisho yao. Hivyo Mahakama inaungana na kesi ya Consolidated Holding Corporation V. Nyakato Soap Industries Ltd Civil Appeal No. 58 of 2000, ambayo imeeleza kwamba iwapo kutakuwa na marekebisho ya pleadings basi zile zilizopita zitatupiliwa mbali na kuzingatia marekebisho hayo".***

From the findings of the Land Tribunal, it is clear that the Respondents had no locus standi to file the suit at the time of institution of the suit as they had not yet inherited the property. But the plaint was amended by leave of the Court, and when the amended plaint was filed in Court the Respondents had the required locus. Hence, it is the view of this Court that this ground of appeal lacked merit and is dismissed. When the Respondents filed the amended plaint the property has been inherited and they being the beneficiaries they have the locus to file the suit against any trespass.

With respect to the fourth ground of appeal; it is centred on the issue of whether amendment of plaint can be allowed by the court when there is p.o. in Court pending to be heard. The facts of what transpired in the Land Tribunal has been clearly explained by Mr. Tetere. The plaint was filed on 15.11.2011, the Appellant

filed WSD on 13.12.2011 and raised p.o. which was fixed for hearing on 16.7.2013. The hearing of p.o. was adjourned to 31.7.2013 where on that day the Respondents asked for amendment, which was allowed and the amended plaint was filed on 11.9.2013. The Appellant filed amended WSD in which he brought another p.o. which was heard by the Court. The Respondents on the other hand have argued that the p.o. were heard before amendment was done, but looking on the proceedings this is not true the correct version is what has been produced by Mr. Tetere above. The p.o. raised on the original WSD was not heard, and the Respondent was allowed to file an amended plaint Later the Appellant also filed an amended WSD and again raised p.o. which were heard by the Court.

The law is very much settled on this matter, in ***Thabit Ramadhan Maziku and Another*** V. ***Amina Khamis Tyela and Another*** Civil Appeal No. 98 of 2011, the Court of Appeal held that: "The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it".

In this case the learned RM with extended jurisdiction delivered a judgment, but failed to deliver the ruling on the preliminary objection. The Court held it:

> ***"constituted a colossal procedural flaw that went to the root of the trial. It matters not, whether it was advertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all the subsequent proceedings a nullity"***.

In the present case the matter is a little different, the p.o. raised in the original plaint filed on 13.12.2011 were three and can be summarised as follows:

i) The plaint lacks the cause of action;
ii) The Plaintiffs have no locus standi
iii) The claim is bad in law and will put Appellants in bad situation if the Defendant will ask for compensation for harassment.

These p.o. were not heard instead the Respondents were allowed to amend their plaint, and the Appellants filed an amended WSD and raised p.o. which can be summarised as follows:

i) The Defendants have no locus standi as they have not inherited the property.

ii) The plaint is bad in law in the verification for want of signatures of other ten Plaintiffs, together with number of paragraphs verified.

iii) The Plaint of the Plaintiff should be dismissed.

The p.o. raised in the amended WSD were heard by the Court and were dismissed for lack of merit. Now, what is the effect of the failure of the Court to hear the p.o. raised in the first WSD and allowed the amendment of the plaint thereafter. The law as stated above is very clear that is an irregularity in the proceedings. Preliminary objections should always be heard first, but this case is distinguishable from the Maziku case where the ruling was not delivered at all regarding p.o., but in this case they were heard later and the ruling was delivered on the p.o. This Court is of the view that we have to look at section 75 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar and see whether that irregularity is cured by this provision. Section 75 provides:

> ***"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or jurisdiction of the court".***

This provision is very clear in order for the Court to interfere in the decree in the appeal the error, defect or irregularity in the proceedings should affect the merits of the case or jurisdiction of the court. The p.o. raised on the original plaint touches on the issue of locus standi and issue of cause of action. There is no doubt that if all the two p.o. were upheld the remedy for lack of locus standi is to

strike out the plaint, and the remedy for lack of cause of action is to reject the plaint in terms of Order VII Rule 12 (a) of CPD. Therefore, none of these P.O. would have led to the dismissal of the suit, and in fact, they don't qualify to be called p.o. under Mukisa biscuit test. (***Mukisa Biscuit Manufacturing Co. Ltd*** V. ***West End Distributors Ltd***, [1969] E.A 696). The Respondents would have got another opportunity to bring another plaint. Hence, it is the view of this Court that the irregularity committed by the trial court did not affect the merits of the case, particularly, since they were later heard and dismissed. Therefore, the irregularity pointed out was there but it is curable under section 75 of CPD. This ground of appeal therefore is dismissed.

With respect to the fifth ground of appeal which talks about non-joinder of the necessary party; the argument of the Appellant's advocate is that the appellant testified in the Land Tribunal that the land in dispute does not belong to him. It belongs to Suleiman Azan, a third party. His argument is that Suleiman should have been joined as a party as the decision the Land Tribunal affects him, and failure to do so renders the whole proceedings a nullity. On the other hand the Respondents have argued that the land in dispute is theirs and what they are claiming is trespass in their land. The Appellant is the only person seen to have trespassed in their land, hence, they rightly sued him for trespass. If there is someone else claiming to be the owner of the land he should have asked the Court to be joined as a party.

This Court fails to grasp the logic of this ground of appeal, Mr. Suleiman Azan was called as an Appellant's witness in the trial court, and hence, he was aware of the case going on in the Land Tribunal. But, he did not make any application before the Land Tribunal to be joined as a party. Further, there is no party who applied for him to be joined as a party. Order I Rule 10 (2) is very clear and it provides:

> ***"(2) The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order the name of any party improperly joined, whether as***

plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or against whom the defendant claims to be entitled to contribution or indemnity, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the question involved in the suit, be added".

The Court heard the testimony of Suleiman Azan and he failed to produce any title to the land. Therefore, it was satisfied that he was not a necessary party. Further, none of the parties or Suleiman Azan himself applied to the Court to be joined as a party. Lastly, Suleiman Azan is not a party to this appeal, and the issue of him being joined as a necessary party did not feature in the trial court and was raised for the first time in this Court. The cardinal principle that you cannot raise an issue for the first time in appeal (except issue of jurisdiction) is applicable and this ground cannot be a ground of appeal before this Court. Order I Rule 13 is very clear when objection of this kind should be brought in Court. It provides:

"13. All objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived".

In the upshot, the Appellant had ample of time to raise the issue of non-joinder in the trial court, but he did not do that. Hence, he cannot raise it now and this ground of appeal is dismissed. Having dismissed all grounds of appeal this appeal is also dismissed with cost, and the order of stay of execution pending the determination of this appeal which was granted by this Court is also vacated.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

25/4/2017

COURT

The judgment was delivered in the presence of Mr. Tetere for the Appellant and in the presence of two Respondents and their advocate, Mr. Shaib Ibrahim on this 25/4/2017.

COURT

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA

JUDGE

25/4/2017

I certify that this is a true copy of the original.

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YESAYA KAYANGE

DEPURTY REGISTRAR

HIGH COURT – ZANZIBAR

/HALLY/