

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MUSOMA**

**AT MUSOMA**

**LAND APPEAL NO. 42 OF 2021**

**MCHARI MWITA ..... APPELLANT**

***VERSUS***

**NDEGE WAMBURA ..... RESPONDENT**

***(Appeal from the decision of the District Land and Housing Tribunal  
for Mara at Musoma in Application No. 162 of 2020)***

**JUDGMENT**

9<sup>th</sup> and 10<sup>th</sup> September, 2021

**KISANYA, J.:**

This appeal stems from the ruling of the District Land and Housing Tribunal for Mara sitting at Musoma (the Tribunal) in Application No. 162 of 2020 which sustained the respondent's preliminary objection that the appellant had sued a wrong party and in consequence struck out the appellant's suit against the respondent.

A brief background leading to the appeal is that the appellant sued the respondent over trespassing into his piece of land measuring 5 acres located at Nyamono area, Majimoto village, Mugumu in Serengeti District. He therefore prayed for the Tribunal to issue an order of permanent injunction against the respondent. The respondent resisted the application. He lodged the written statement of defence in which he raised a notice of preliminary objection on the following points of law:

1. That, the Tribunal had no jurisdiction to try the matter relating to the Government.
2. That the application was incompetent for want of notice to sue the local government as required under the Local Government (District Authorities) Act [Cap. 287, R.E. 2019] read together with the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020.
3. That, the appellant had sued the wrong party as the Respondent was not capable of being sued in his name.

As hinted earlier, the learned Chairman sustained the objection basing on the third point of objection that the appellant had sued a wrong party and went on to strike out the application. It is that decision which culminated into the appeal at hand. The appellant has raised the following grounds of appeal:

1. That, the Chairman erred in law and facts by refusing to hear the matter inter-parties.
2. That, the Chairman erred in law and fact by failing to consider the pleadings filed by the appellant.
3. That, the decision of the District Land and Housing Tribunal had no legal basis.

At the hearing of this appeal, Mr. Godwilly Mweya, learned advocate appeared for the appellant while the respondent enjoyed the service of Ms. Veronica Lukanda, learned State Attorney.

In his submission in support of all grounds of appeal, Mr. Mweya was brief and straight forward. He faulted the learned Chairman of the Tribunal for holding that the respondent was sued in his capacity of hamlet chairman. The learned counsel was of the firm view that the said finding by the Tribunal was contrary to the pleadings lodged before it. He pointed out that, in terms of the pleadings lodged by the appellant, the respondent was sued in his personal capacity. Therefore, he asked me to allow the appeal, quash and set aside the decision of the Tribunal. He also pressed for the costs of this appeal.

Ms. Lukanda resisted the appeal. She contended that the respondent is the chairman of Nyamono hamlet within Majimoto Village in Serengeti District. It was the learned counsel's contention that the appellant ought to have sued the Majimoto Village Council because the acts complained were committed by the respondent in his official capacity of hamlet chairman. She referred the Court to the decision of this Court in **Ramadhan Kisuda and Mdillu Ujamaa Village vs Adam Nyalundu and Another** [1990] TLR 69, where it was held that the village chairman is no personally liable when implementing the villagers decision.

Referring further to the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 and section 19 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC), the learned counsel submitted that the Tribunal was enjoined to dispose of the preliminary objection at the earliest stage. She was of the firm view that, since the Government had the interest on the matter, the Tribunal was right in striking out the same and advise the appellant to sue the proper party. She argued further that the village chairman is not personally liable for the acts done in his position.

I have dispassionately considered the records before the Tribunal, the ground of appeal and the submissions by both parties. In my view, this appeal can be disposed of by addressing the issue whether the preliminary objections before the Tribunal were meritorious.

At the very outset, I wish to restate the meaning of preliminary objection and the proper time to raise the same as underscored in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 where it was held that:-

*"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 if what is sought is the exercise of judicial discretion".*

It is therefore apparent that, apart from being premised on a pure point of law, a preliminary objection is based on the assumption that the facts averred by the adverse party are true. In the same case (**Mukisa Biscuits-supra**), LAW, JA went on to hold as follows at page 700:-

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit."*

That is the position of law which will govern us in determining the merit of this appeal.

It is on record that all three points of preliminary objection were premised on the ground that the respondent was sued in his capacity as the Chairman of Nyamono hamlet. This assertion is also reflected in the submission in support of the preliminary objection where the learned counsel for the respondent submitted as follows:

*"The respondent is the Nyamono hamlet chairman. The applicant was supposed to sue the Maji Moto Village Council after following the procedure of serving notice. That is accordance to the Local Government Act No. 7 of 192, section 191 amended by Act No. 1/2020 which requires the joining of the Attorney Attorney (sic). Section 26 of the Act also requires the joining of the District Executive Director. In view of the foregoing this tribunal*

*lacks jurisdiction. Second, the respondent is not a legal entity. So we pray that the application be struck out.*

Likewise, the said contention is deduced from the ruling of the learned Chairman in which he reasoned as follows:-

*"...I am satisfied that the respondent acted on his capacity as a Kitongoji Chairman. The applicant is therefore suing a wrong person. I advise the applicant to sue a proper party in accordance with the law. The preliminary objection is sustained."*

In that regard, I was inclined to go through the pleadings lodged by the appellant before the DLHT. As rightly argued by Mr. Mweya, the pleadings show that the respondent was sued in his own name. He was not sued as the Chairman of Nyamono hamlet. As that was not enough, in the brief statement of facts constituting the claim, the appellant averred that it is the respondent and his agents who trespassed into his shamba. This is pursuant to paragraph 6 of the application when the appellant averred:

*THAT ON 13<sup>TH</sup> Day of February 2020 at about 10.00 hours at NYAMONO MAJIMOTO VILLAGE, The respondent and his agent without any permission entered in the Applicants SHAMBA of RISE (sic) measure 5 acres and dig a well which after then killed my son called KIRISA MCHARI aged 10 years, the said boy was in my shamba looking the birds who was eating the rise (sic)."*

From the foregoing pleadings, I am satisfied that the appellant did not sue the respondent in his capacity of hamlet chairman. The fact that the respondent acted in the capacity of hamlet chairperson was raised in the written statement of defence. There is nothing on the application filed by the appellant or arising from the said application that supports the points of objection raised by the respondent.

It follows that all objections were based on the respondent's own pleadings and not the appellant's pleadings. This contravened the principle established in the case **Mukisa Biscuits** (supra) that, a preliminary objection is based on the assumption that the facts pleaded by the adverse party is correct.

Furthermore, the fact whether the respondent acted in the capacity of chairman of Nyamono hamlet needed evidence. The appellant was duty bound to prove that the respondent acted in his personal capacity. In that regard, the fact that the respondent acted in his capacity as hamlet chairperson could not give rise to the three points of objection.

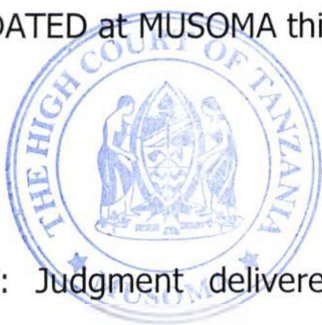
I have also considered Ms. Lukanda's contention that the Government had interest in the matter lodged against the respondent. If that is the case, the respondent ought to have moved the Tribunal under Order I, Rule 10(2) of the CPC to strike out his name and add the name of

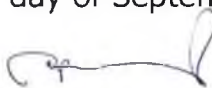


the parties who ought to have been joined as the respondent or whose presence are necessary in order to enable the Tribunal to adjudicate the matter accordingly.

For the reasons stated, I find merit in the appeal and allow it. In end result, I quash and set aside the ruling of the District Land and Housing Tribunal for Mara at Musoma and order that the case file be remitted back to the trial Tribunal to proceed where it ended before the preliminary objection. Costs shall follow the event.

DATED at MUSOMA this 10<sup>th</sup> day of September, 2021.



  
E.S. Kisanya  
JUDGE

COURT: Judgment delivered through teleconference this 10<sup>th</sup> day of September, 2021 in the presence of Mr. Godwilly Mweya, learned advocate for the appellant and Ms. Veronica Lukanda, learned State Attorney for the respondent.



  
E. S. Kisanya  
JUDGE  
10/09/2021