IN THE HIGH COURT OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

LAND CASE APPEAL No. 38 OF 2022
(Arising from Application No. 53 of 2021 of the District Land and Housing Tribunal for Kagera at Bukoba)

SEIN TALEMWA NKONGO
(ADMINISTRATOR OF THE ESTATE OF THE LATE AUGUSTINA NKONGO) ..... APPELLANT

VERSUS

1. BUKOBA DISTRICT COUNCIL
2. ASSISTANT REGISTRAR OF VILLAGES
3. THE CHAIRMAN OF BUTAYAIBEGA VILLAGE COUNCIL
4. TIMOTHY NKONGO
5. GRACE NKONGO
6. AMOS NKONGO
7. ALINDA NKONGO
8. KAOJAGE HERIHESHIMA NKONGO
9. TIBELA NKONGO
RESPONDENTS

JUDGMENT

14th December 2022 & 24th February, 2023

OTARU, J.:

The District Land and Housing Tribunal for Kagera at Bukoba (the trial tribunal) upheld the Preliminary Objection raised by the 1st, 2nd and 3rd Respondents, and dismissed the Appellant's Application with costs. The Appellant, Sein Talemwa Nkongo (Administrator of the estate of the late Augustina Nkongo) is contesting that decision.

In the trial tribunal, the Appellant was seeking for, among others, revocation of certificates of rights of occupancy issued to 4th - 9th Respondents by the 1st -3rd Respondents. In their defense, counsel representing the 1st, 2nd

and 3rd Respondents filed a notice of preliminary objection to the effect that (1) the tribunal had no jurisdiction to entertain the matter for non-joinder of the Attorney General (2) that the suit has been filed primaturely and (3) the Applicant has sued a wrong party. The Application was struck out after all three points were upheld.

The Memorandum of Appeal preferred by the Appellant intended to impugn the contested decision contained seven (7) grounds of appeal. The grounds read as follows;-

1. That the learned Chairman of the Bukoba District Land and Housing Tribunal went wrong in law and fact to entertain and decide the raised preliminary objections by dismissing the application No. 53 of 2021 with costs, on the basis of a mere assumption without having jurisdiction over the matter.
2. That the Hon. Chairman of the trial Tribunal misdirected himself to uphold the preliminary objections by dismissing the application with costs, without taking into account that the proper course of action that ought to have been taken was either to allow amendment of the said application or to reject or strike it out.
3. That the learned Chairman of the Bukoba District Land and Housing Tribunal went astray in law and fact to dismiss the application basing on the purported preliminary objections, without taking note that it was

grounded solely on points which were not legally sustainable points of preliminary objections.

4. That the Hon. Chairman misdirected himself to dismiss the said application without taking into consideration that non joinder or mis joinder of the parties alone does not defeat the suit or application.
5. That the learned Chairman of the trial Tribunal erred in law and fact to uphold the raised preliminary objections grounded on non existing application no 530 of 2021 of the Bukoba DLHT.
6. That the trial Tribunal misdirected itself to uphold the so called preliminary objections which were doomed on invalid pleadings and documents for having been prepared and filed without complying with the mandatory legal requirements.
7. That the Hon. Chairman erred in law and fact to hold that the dismissed application was prematurely filed before the expiry of the period of 90 days.

The matter was disposed of by way of written submissions which were filed as per the agreed schedule. The Appellant represented himself in person while the 1st, 2nd and 3rd Respondents were represented by Daniel Mbaki, State Attorney from the District Council of Bukoba and 4th to 9th Respondents, were represented by learned advocate Lameck John Erasto.

I must admit that I had difficulty grasping the Appellant's arguments. They were long, repetitive and at times contradictory. Nevertheless, to avoid losing

focus the way the Appellant did, I extracted what was relevant and pleaded in the Memorandum of Appeal.

On the 1st ground of appeal, the Appellant basically stated that the trial chairman did not have jurisdiction to hear the matter because the Attorney General, being the necessary party, was not joined. He claimed that issue of jurisdiction was fundamental thus the trial tribunal should not have entertained the objections but rather, should have ordered a withdrawal of the said Application with leave to file a fresh suit in another court of competent jurisdiction. In response, the Respondents agreed on importance of the issue of jurisdiction that is why the trial tribunal had to deal with the raised preliminary objections in order to satisfy itself on its jurisdiction. The trial chairman did not hear the matter on merits but only the preliminary objections. They added that without hearing the objection, the chairman would not be in a position to determine the same, as such, he acted correctly thus this ground should collapse.

On the 2nd ground, the Appellant argued that after finding the Application to be incompetent, the trial chairman was to invoke provisions of Order VII Rule 11(c) of the **Civil Procedure Code** (Cap. 33 R.E. 2019) as read together with Section 51(2) of the **Land Disputes Courts Act** (Cap. 216 R.E. 2019) to reject or to strike out the Application for being incompetent. He cited a number of authorities to support his argument. He also added that the after discovery that the Application was incompetent, the trial tribunal ought to have struck it out

without hearing the raised preliminary objection. The Respondent on the other hand argued that the matter was incapable of being filed in the same tribunal that is why the trial magistrate decided the way he did. They also contended that this ground should fail as well.

On the 3rd ground the Appellant argued that the three points of Preliminary Objection raised are not pure points of law but require determination through facts and evidence. He relied mostly on the case of **Mukisa Biscuits Manufacturing Company v West End Distributors Ltd** [1969] EA 696 in which the court stated that *points of objection should not be subject to proof by some other material facts*. In response, the Respondent argued that all three objections were points of law and were within the definition provided in the case of **Mukisa Biscuits (supra)**.

On the 4th ground, although the Appellant agreed that the Attorney General was the necessary party, he however argued that non joinder of the Attorney General was not fatal as he could have added him at any stage of proceedings. On the part of the Respondents, they argued that non joinder of the Attorney General was fatal and cited some persuasive cases.

Lastly, Appellant denied to have filed the dismissed Application prematurely before the expiration of the legal noticed 90 days. The Respondents vigorously objected that contention and pointed that the same was indeed filed prematurely.

In conclusion, the Appellant prayed for the Appeal to be allowed with costs. The Respondent on the other hand prayed for the dismissal thereof with costs.

Having read the rival submissions, the record of proceedings of the District Land and Housing Tribunal as well as the relevant legislation I endeavored to deal with the question *whether the appeal has merits or otherwise*.

I have observed that the above filed grounds included issues that were raised and dealt with at the trial level, save for the issue of dismissal. The Appellant however, was not amused by the way the trial tribunal dealt with all the issues. Most of all, the Appellant strongly believe that non joinder of the Attorney General was not fatal but could have been easily rectified.

I have given due thought and consideration on the issue of the Attorney General being the necessary party and wish to elaborate to the Appellant why non joinder of the Attorney General if fatal. I wish to cite the case of ***Abdullatif Mohamed Hamis V Mehboob Yusuf Osman & Another***, Civil Appeal No. 6 of 2017, CAT (Unreported) in which a similar question was put forward. In resolving the question, the Court of Appeal relied on the Indian case of ***Baranes Bank Ltd. V Bhagwandas***, A.I.R. (1947) All 18, and adopted the tests laid down by the full bench of the High Court of Allahabad for determining whether a particular party is a necessary party, it stated:-

> *'**First**, there has to be a right of relief against such a party in respect of the matters involved in the suit and;*

***second**, the court must not be in a position to pass an effective decree in the absence of such a party'.*

According to the facts of this Appeal, the Appellant had intended to challenge the grant of Rights of Occupancy to the 4th to 9th Respondents. Rights of Occupancy are granted by the Government on behalf of the President of the United Republic of Tanzania. This being the case, it goes without saying that in order to challenge the grant of such rights, one has to sue the Government Ministry/Independent Department responsible for the grant. Therefore, the procedure of suing the Government as narrated by counsels for the Respondents has to be followed. Following the steps in **Abdullatif's** case (supra), the instant matter has *prima facie* right of relief against the Government, which requires to be properly moved because no effective decree may be passed in the absence of the relevant Government department. Once the decision to sue the Government is made, the law is settled under Section 25 of the **Written Law (Miscellaneous Amendments) Act**, Act No. 1 of 2020 that Attorney General has to be joined. From the above analysis it is evident that the Attorney General is indeed a necessary party without whom the suit is incompetent. I am as well persuaded by the decision of the High Court of Tanzania in **Wambura Maswe Karera and 5 Others v the Village Council of Mori and Another**, Civil Case No. 5 of 2020 (HC Musoma) cited by the Respondents, where it was held that without joining the Attorney General the suit is incompetent. Further, once the Attorney General is joined as a necessary party, the suit has to be filed in the

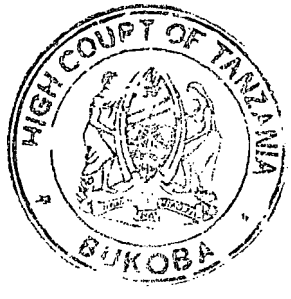
High Court by virtue of Section 6(3) of the **Government Proceedings Act** (Cap. 5 R.E. 2019), as amended by GN No. 8 of 2020. Noncompliance thereof vitiates the proceedings.

In recognition that the Attorney General is a necessary party, the Appellant complied with the legal requirement of giving a 90 days' notice to the Government Department he intended to sue. He filed the suit before the expiry of the 90 days, the fact which is clear as the notice was dated 2nd July 2021 and the suit was filed on 23rd August 2021, hardly fifty (50) days from the date of the notice. Consequently, the trial chairman correctly upheld the preliminary objections as they were all valid legal points and dismissed the suit accordingly. As the matter was not heard on merits, the order of dismissal of the suit is substituted with an order to strike it out. Therefore, the Appeal is allowed to the extent stated.

Each party to bear own costs.

It is so ordered.

DATED at **BUKOBA** this 24th day of February, 2023.



M.P. Otaru
JUDGE