

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION
AT MOSHI**

LAND APPEAL NO. 30 OF 2023

(Originating from Application No. 20 of 2021 of the District Land and
Housing Tribunal for Same at Same).

JONATHAN TUMAINI MBWAMBO (As the administrator of the
estate of the late Tumaini Enock Mbwambo **APPELLANT**

VERSUS

JOSEPH ELINAZI **1ST RESPONDENT**
THE VILLAGE CHAIRMAN OF HEDARU **2ND RESPONDENT**

RULING

20/09/2023 & 23/10/2023

SIMFUKWE, J.

Before the District Land and Housing Tribunal for Same at Same (The trial Tribunal), the appellant herein instituted a land dispute against Joseph Elinazi, the 1st respondent and The Village Chairman of Hedaru, the 2nd respondent. The gist of the dispute is that the appellant herein alleged that he was declared the lawful owner of 20 acres situated at Hedaru 'A' at Majengo Village Hedaru Ward, Same District in Kilimanjaro region in Application No. 11 of 2008. It happened that in 2013 he discovered that

the respondents herein trespassed into part of the said 20 acres measuring 45 feet to 90 feet. Thus, he decided to institute a land dispute against them.

The first respondent contended that, he bought the said disputed land on 18/02/2010 from one White Elimiliki Kinyongo at a price of Tshs 19,500,000/=. He tendered the sale agreement to that effect. The second respondent averred that, apart from the dispute which was instituted previously by the appellant which is Application No. 11 of 2008, there is no any other trespass.

After a full trial, the trial Tribunal was satisfied that the applicant did not manage to prove his case. Thus, it dismissed the application with costs. The appellant was aggrieved, he preferred the instant appeal. However, the 2nd respondent raised the following grounds of preliminary objections:

- 1. That, the appeal is bad in law for noncompliance with section 190 of the Local Government (District Authorities) Act, Cap 287 R.E 2019 as amended by the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.*
- 2. That the Appeal is not properly before this Honorable Court as it has violated the mandatory provisions of section 6(3) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by The Written Laws (Miscellaneous Amendments) Act No. 1 of 2020.*
- 3. That there is no cause of action against the second respondent.*

The court ordered the preliminary objections to be argued by way of filing written submissions. The 2nd respondent was represented by Ms. Upendo Joseph Kivuyo, the learned State Attorney, while the appellant was represented by Mr. Mbaraka Katela, the learned counsel.

Supporting the first ground of objection that the appeal is bad in law for non-compliance with **section 190 of the Local Government (District Authorities) Act** (supra), Ms. Upendo submitted that according to the cited provision, before filing a suit against the Local Government Authority, the claimant has to give the Local Government Authority 90 days' notice of intention to sue and a copy of that notice should be served to the Attorney General and the Solicitor General.

She continued to cite **section 26** of the Act which is to the effect that the Village Council is a body Corporate capable of suing and being sued. Also, she referred to **section 3** of the Act which defines a Local Government Authority as a District Authority to include a Village Council hence, it is a Local Government Authority. That, being a Local Government Authority a suit against the Village Council should be preceded by the notice of intention to sue which should be served upon the Village Executive Officer or Village chairman on behalf of the Village Council. The learned State Attorney commented that, instituting a case against the Government without notice renders the suit incompetent before the court.

The second point of objection is that the appeal is improperly before this court as it contravened the mandatory provision of **section 6(3) and (4) of the Government Proceedings Act** (supra) which requires the

Attorney General to be joined as necessary party in suits filed against a Local Government Department, Ministry, Agencies, Public Corporation or Company. That, failure to join the Attorney General renders the suit incompetent. She made reference to the cases of **MSK Refinery Ltd vs TIB Development Bank and Yono Auction Mart Co. Ltd**, Misc. Civil Application No. 307 of 2020, **COSEKE Tanzania Ltd vs Board of Trustees of the Public Service Social Security Fund**, Commercial Case No. 143 of 2019 and the case of **Salimu O. Kabora vs Kinondoni Municipal and 3 Others**, Land Case No. 10 of 2020 (HC).

Ms. Upendo submitted further that, the amendment which requires the Attorney General to be joined as a necessary Party to a suit is a procedural requirement which applies to all suits instituted after and before the amendment.

On the third ground of objection which concerns cause of action, Ms. Upendo contended that, there is no cause of action against the 2nd respondent. That, the appellant failed to disclose a cause of action against the 2nd respondent by suing the Village Chairman of Hedaru on his own capacity instead of suing the Village Council as a Body Corporate capable of suing and being sued.

Apart from the above submission, Ms. Upendo opted to submit against the grounds of appeal, which I will not consider for being misplaced.

Replying to the submission in chief, Mr. Mbaraka condemned Ms. Upendo for raising the preliminary objections which were also raised, discussed

and dismissed before the trial Tribunal on 19/07/2022 in Application No. 20 of 2021. He continued to explain that, the preliminary objection cannot be raised on appeal since it was already discussed during the trial. The learned advocate suggested that the only remedy for the 2nd respondent if at all he was aggrieved with the decision of the trial tribunal was to file Cross appeal since the appellant has already filed the appeal. He referred to the case of **Said Mohamed Said vs Muhusin Amiri and Muharami Juma**, Civil Appeal No. 110 of 2020 which states that a cross appeal is an appeal within appeal where the parties being aggrieved by the decision of the trial court have room to appeal whereas the respondents may cross appeal on the said grounds of appeal.

The learned advocate insisted that, the preliminary objections were raised wrongly, unprocedural and offending the law which need not to be entertained at the stage of appeal as the same were raised during the trial.

Mr. Mbaraka was of the view that, if the preliminary objection raised by the 2nd respondent will be sustained, will it strike out this appeal or application filed before the trial tribunal? His suggestive answer was that the preliminary objection raised cannot struck out or dismiss the application because the application was filed before the Tribunal and this court is here to determine the appeal on merit.

Mr. Mbaraka advised the learned State Attorney for the 2nd respondent as a friend of the court to move the court properly for proper dispensation of justice.

The learned advocate continued to state that, despite the fact that the raised preliminary objections are offending the law, the learned State Attorney for the 2nd respondent should take into account that the person who was sued before the Tribunal and the respondent herein is the Village Chairman of Hedaru village and not the Village Council of Hedaru. Thus, there is no need of issuing 90 days' notice if the Chairman is sued under personal capacity. That, to issue notice before filing an appeal is an awkward argument.

Concerning the issue of cause of action, Mr. Mbaraka was of the view that in order to determine whether there is cause of action or not the court need to go through the pleadings presented and annexures. That, considering the fact that the suit is at appellate stage and the grounds of appeal has already been tabled, the issue of cause of action was discussed at the trial tribunal and this court need to deal with an appeal. He was of the opinion that the preliminary objections raised could have succeeded if the 2nd respondent filed cross appeal.

The learned advocate for the appellant prayed the court to disregard the raised objections by dismissing the same with costs and proceed to consider the appeal on merit.

I have examined the submissions of the learned counsels of both parties. The issue for determination is ***whether the raised objections have merit.***

Before going to the gist of the raised preliminary objections, I would like to start with the complaint raised by Mr. Mbaraka that the preliminary objections were unprocedurally raised as the same were raised during the trial. The trial Tribunal heard and overruled them. He opined that the remedy was for the 2nd respondent to file cross appeal.

With due respect to Mr. Mbaraka, preliminary objections on point of law can be raised at any stage and can be entertained at any stage. The court cannot blink its justice eyes on the points of law raised on appeal just because the same were not raised in cross appeal. Cross appeal is another option. Based on the fact that the adverse party had an opportunity to respond to them, I think they are worth to be determined. Two wrongs don't make a right, as the fact that the trial tribunal dismissed the preliminary objections does not mean that this appeal is competent before the court despite nonjoinder of the Attorney General.

Having established the above basis, I now turn to merit of the preliminary objections. I will determine the first and second grounds of objections which are to the effect that the appeal is bad in law for non-compliance to **section 190 of the Local Government (District Authorities) Act**, (supra) which requires the party to issue notice of intention to sue the 2nd respondent. Under the second ground of objection, it has been argued that the appeal contravened **section 6(3) of the Government Proceedings Act** (supra) for failure to join the Attorney General as a necessary Party. Responding to the objection, Mr. Mbaraka for the

appellant submitted that the 2nd respondent was sued as Village Chairman of Hedaru and not as the Village Council of Hedaru.

My perusal of the proceedings of the trial Tribunal, revealed that the above objections were raised before the hearing of the dispute. The trial Chairman overruled both objections. While discussing the two objections above, the learned Chairman at page 6 of the Ruling stated that:

"Kuhusu mapingamizi ya mjibu maombi wa pili hakuna mahali Serikali ya Kijiji imeshtakiwa bali anayeshtakiwa ni The Village Chairman of Hedaru. Kwa kuwa sasa Serikali ya Kijiji haijashtakiwa hivyo hakuna sababu ya kumuunganisha Mkurugenzi Mtendaji wa Halmashauri na Mwanasheria Mkuu wa Serikali..."

With due respect, I disagree with the allegation that there is no place the village government is mentioned. The 2nd respondent is **'The Village Chairman of Hedaru'** meaning that the Chairman was sued not in his capacity but by virtue of being the Village Chairman. Had it been that he was sued in his personal capacity, the second respondent could have been sued as **'Zawadi Mnyongo Sue'** as it appears at page 27 of the typed proceedings and not under the title of his work.

This argument is supplemented by the words of the appellant himself at page 19 of the typed proceedings when he was cross examined by the 2nd respondent, he explained that:

"- Haukuwa mwenyekiti wa Kijiji"

- *Mwenyekiti alikuwa anaitwa Maneno*
- *Baraza linaomba Kijiji kutolewa kwa nguvu.*
- *Baada ya kupewa amri ya utekelezaji nilikuta Kijiji pale kwa kuwa wewe ndiyo msimamizi wa ardhi hapo Hedaru.*
- *Hakuna tofauti ila Kijiji ni Kijiji na kiongozi wa Kijiji ni wewe unaongoza Kijiji*
- ***Umerithi matatizo ya aliyekuwepo.***”Emphasis added

The above quoted words show that it is the Village which was sued. Thus, it was necessary for the Attorney General to be notified and joined as necessary Party, as per the requirement of **section 190 of the Local Government (District Authority) Act** (supra) and **section 6(3) of the Government Proceedings Act** (supra). I am of considered opinion that the Attorney General was a necessary party to the application which was before the trial Tribunal. Failure to join the Attorney General as a necessary party vitiates not only the appeal but also the application before the trial Tribunal. In the case of **Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] EA. 55** (SCU), it was observed that:

"For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit one of two things has to be shown. Either it has to be shown that orders, which the Plaintiff seeks in the suit would legally affect the interests of that person, and it is desirable, for

avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit."

In the case at hand, it is crystal clear that the Attorney General has interests in this matter which can be affected if the matter is decided for the appellant. Thus, it is necessary to join him so that he may defend the said interests.

In the event, for the foregoing reasons I hereby nullify the proceedings, decision and orders of the trial Tribunal for being founded on an incompetent application and find this appeal incompetent for non-joinder of the Attorney General as a necessary party. Consequently, I strike it out. If the appellant still desires to pursue his case, he should comply to the requirements of the law.

Considering the circumstances of this case, I make no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 23rd day of October 2023.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

23/10/2023

