IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 29 OF 2023

(Appeal from the decision of District Land and Housing Tribunal Application of Same at Same dated 30th March, 2023 in Application No. 19 of 2021)

JONATHAN TUMAINI MBWAMBO (as administrator of the estate of the late Tumaini Enock Mbwambo)**..... APPELLANT**

VERSUS

KISAKA ELINAZI.....1st RESPONDENT

THE VILLAGE CHAIRMAN OF HEDARU VILLAGE.....2ndRESPONDENT

RULING

21th Sept. & 26th October 2023

A.P.KILIMI, J.:

The appellant hereinabove initiated land application before District Land and Housing Tribunal Application of Same at Same against the respondents mentioned above seeking orders that; a declaration that appellant is the owner of unsurveyed land measuring 45 feet in width by 90 feet in length being part of 20 acres of land belonging to the estate of Tumaini Enock Mbwambo; Permanent injunction against the Respondents restraining them from trespassing or interfering Appellant's peaceful

possession of the property; Eviction Order against the Respondents; General damages and costs.

The brief facts gave rise to this matter as can be discerned from the record are, the appellant was appointed to be administrator of estate of the late Tumaini Enock Mbwambo, in the course of his administration of that estate, in 2013 he realised that the respondents have trespassed the land, which previously the same tribunal in Land application no. 11 of 2008 declared that Suitland belong to the deceased. At the trial the first respondent did not enter appearance, thus the trial proceeded exparte against him whereas the second respondent defended that he acknowledges the claim by the appellant at the tribunal of compensation of Tshs. 1,800,000/=, which the village and appellant agreed the payment and currently the amount remained unpaid to the appellant is Tsh. 400,000/= because of this case pending.

In its decision, the trial tribunal considered that the said late Tumaini Enock Mbwambo demised in 2006, thus concluded that it is almost 15 years since then, therefore found that the appellant was out of time to bring his claim for recovery of land hence barred by item 22 of the first schedule of

the law of limitation Act Cap. 89 R.E. 2019. Henceforth, dismissed his case and all prayers with costs.

The appellant dissatisfied by the said decision filed this appeal basing on the following grounds; **first,** the tribunal erred in law and fact by failure to evaluate the evidence adduced by the Appellant hence results to miscarriage of justice; **Second,** the tribunal erred in law and fact by deciding on favour the respondents who had no sufficient prove of the ownership of the suit Land; **Third,** that the tribunal erred in Law and fact in computation time for the accruing of cause of action hence miscarriage of justice.

When the above grounds were communicated to the second respondent, Ms. Upendo James Kivuyo learned State Attorney duly representing second respondent filed three preliminary objections on points of law as follows; -

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 Amendments) Act No.1 2020.
2. That, the Appeal is not properly before this Honourable 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 Amendment) Act No.1 of 2020.
3. That there is no cause of action against the 2nd Respondent

At the hearing of these objections, both parties were represented, Mr. Mbaraka Katela learned advocate appeared for the appellant whereas the second respondent had the service of Ms. Upendo Joseph Kivuyo learned State Attorney, and it was decided the hearing be done by written submissions.

Submitting in regard to the first objection, Ms. Upendo argued that it is a cardinal principle of the law that before filing a suit against the Local Government Authority the claimant has to give to the Local Government Authority a ninety days' notice of intention to sue and a copy of that notice should be served to the Attorney General and the Solicitor General. To substantiate her assertion referred section 190 of the local Government (District Authorities) Act Cap 287 R.E 2019 as amended by section 31(1) (a) and (b) of the Written Laws (miscellaneous Amendment) Act No.1 of 2020. She further submitted that according to section 26 of the Local Government (District Authorities) Act Cap 287 R.E 2019 a village council is a body corporate capable of suing or being sued. Moreover, she added that since this law recognise village council as a local Government Authority therefore notice of intention to sue should be communicated before.

In respect to the second point of preliminary objection, Ms. Upendo submitted that the mandatory provision of section 6(3) and (4) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by the Written Laws Miscellaneous Amendment Act no.1 of 2020, gives the mandatory requirement for the suit brought against the Local Government Department, Ministry, Agencies, Public Corporation or company to join the Attorney General as a necessary party, and further said failure to comply with the above section renders the suit to be incompetent before the court. To bolster his submission the counsel referred the cases of **MSK Refinary Ltd vs TIB Development Bank Ltd and Another** [2020] TZHC 1326 (TANZLII); **Coseke Tanzania Limited vs the Board of Trustees of the Public Service Social Security Fund** [2021] TZHCComD 2047 (TANZLII) and **Salim O. Kabora vs Kinondoni Municipal Council and 3 Others** [2021] TZHCLandD 574 (TANZLII)

Submitting to the third ground of preliminary objection, Ms. Upendo argued that the appellant failed to disclose any cause of action against the second respondent by suing the chairman of Hedaru village on its own capacity instead of suing the village council as a body corporate capable of suing and be sued.

Responding to the above, Mr. Katela started praying this court not to consider submission in respect to grounds of appeal done by the 2nd respondent because the order of the court was to argue only on preliminary objections raised.

In respect to preliminary objections argued by respondent, Mr. Katela contended that he has directed himself wrongly due to the fact that those three preliminary objections were raised during trial tribunal at District Land and Housing Tribunal of Same at Same and the same was dismissed in the favour of the appellant, therefore as the matter of law and practices cannot be raised on appeal. Then the counsel urged this court that the only remedy for the 2nd respondent if was aggrieved by the decision was to face the court with the proper procedure of cross Appeal because the appellant already filed the appeal, to support his argument the counsel referred the case of **Said Mohamed Said vs Muhusin Amiri and Another** [2022] TZCA 208 (TANZLII).

The counsel for appellant further contended that the person who is sued in this appeal is the Village Chairman of Hedaru village and not the Village council of Hedaru Village, therefore there is no need to issue notice of 90 days if the chairman is sued under personal capacity. He also added that no need to issue notice in filing an appeal. In respect to cause of action, the counsel contended that the same has been disclosed in the pleading presented and annexures, however he insisted the same was discussed at the trial tribunal and decided, thus no need to deal with it at this stage. Hence the counsel prayed this court to dismissed them with costs and the appeal be heard on merits.

I have dispassionately considered the submission by both learned counsels, I wish to start with the contention by Mr. Katela when he argued that since the above objections were argued and decided at the trial tribunal, then this court is not allowed to entertain them unless they are brought by way of cross appeal.

For purpose of clarity, I find suitable to reiterate the first two objections as follows, **first**, 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 Amendments) Act No.1 2020.

And **second**, the Appeal is not properly before this Honourable 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 Amendment) Act No.1 of 2020.

The above objections in my view are pure point of law, but not only that, these are objections questioning whether this court has jurisdiction to entertain this appeal, therefore, since it is a trite law objection on jurisdiction can be raised even in appeal, I am settled it was right for the respondent to raise them. In the wording of the court of appeal in **Tanzania Revenue Authority v. Tango Transport Company LTD,** Civil Appeal No. 84 of 2009 (unreported) had this to say;

> "*Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained."*

Moreover, this being an appellate court has power to rectify an error material which occasioned injustice at the tribunal, this power has been provided to this court by virtue of section 43 (1) (b) of Land Disputes Courts Act Cap. 216 R.E.2019 which provides that;

> ***43.*** *(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court—*
> *(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction,* ***on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.***
>
> [Emphasis added]

In view of the above law, I am of the view that even if the same was discussed and decided at the tribunal, here they have been brought at another stage of the court which is high court envisaged with the above

power of checking the incorrectness or illegality and rectify the same. Under this power, this court cannot let the case decided unjustly to sustain further stage on the error apparent on the face of record. Thus, the case cited is distinguishable to the facts of this matter.

Now back to the objections raised, the second respondent above is named as the village Chairman of Hedaru Village, the question to be answered is whether the same is capable of being sued on behalf of the village. There is no dispute being not mentioned his name the chairman was sued in his official capacity as the chairman of the village government. The above is revealed from page 17 to page 20 of the typed proceeding when himself testified duty he did in respect to allegation of the appellant as chairman of the village.

It is a trite law only natural persons or legal/artificial persons can sue or be sued in their own names. Therefore, for non-natural persons to sue or to be sued in their own names, they must have legal personalities. This was also the holding of this court in the cases of **The Registered Trustees of the Catholic Diocese of Arusha vs. The Board of Trustees of Simanjiro Pastoral Education Trust,** Civil Case No. 3 of 1998, HC at

Arusha and **Unilife Group Investiment vs Biafra Secondary School,** Civil Appeal No. 144 (B) of 2008, HC at Dsm (Both unreported).

In view of the above, I have considered the law concern, as rightly pointed out by the counsel for the respondent by virtue of section 3 and 26 of the Local Government (District Authorities) Act Cap 287 R.E 2019 a village council is a body corporate capable of suing or being sued, thus the law does not provides for official capacity for the chairman of the village or Village Executive Officer VEO to be sued in his official capacity. Therefore, it is my settled opinion it was illegal for the said Chairman acted on behalf of the village Government, the actual party to suit should be the village council and not the Charman in his capacity. (See **Farao Raiton Mtafya vs Veo Chamoto Village** [2020] TZHC 2285 (TANZLII). The contention that by the counsel that the chairman was sued in his personal capacity under above law cannot be a refuge, thus it was misconception to do so.

In respect to second point of objection, I also subscribe with the respondent argument that, the Appeal is not properly before this Court as it has violated the Mandatory provision of section 6(3) and (4) of the Government Proceedings Act, Cap 5 R.E 2019. I have read the law it is true

and precisely; The Written Laws Miscellaneous Amendment Act no.1 of 2020 amended section 6 of Government Proceedings Act (supra) provides as hereunder; -

> *"25. The principal Act is amended in section 6, by (a) deleting subsection (3) and substituting for it the following-*
> *"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the* ***Attorney General shall be joined as a necessary party.***
> *(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall v****itiate the proceedings of any suit brought in terms of subsection*** *(3)."*
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> [Emphasis added]

This law was published on the Gazette of the United Republic of Tanzania No. 8 Vol. 101 dated 21st February, 2020 and this case was filed

at the tribunal on 6th October 2021. Therefore, in considering of the above law is coached in mandatory terms, thus the appellant was required to comply with the said requirement. This is because, it is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53(2) of the Interpretation of Laws Act, [Cap. 1 of the Revised Edition, 2002]. (See the **Godfrey Kimbe vs Peter Ngonyani** [2017] TZCA 1 (TANZLII). Consequently, as rightly argued by respondent's counsel the issue of notice of intention to sue was unavoidable by virtue section 190 of the local Government (District Authorities) Act Cap 287 R.E 2019 as amended by section 31(1) (a) and (b) of the Written Laws (miscellaneous Amendment) Act No.1 of 2020. Meanwhile the tribunal lacked jurisdiction by virtue of section 6 (4) of Government Proceeding Act.

In view of what I have endeavoured to discuss above, I find the first two preliminary objections raised by respondent are meritorious and is accordingly upheld and sustained. Consequently, I find the same are sufficient to dispose this matter and no need to determine the remaining objection.

In the premises and from the foregoing reasons as pointed above that this case was flawed from the trial tribunal, I invoke revisional powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the proceedings of the executing District tribunal are hereby nullified and consequently its Ruling and drawn order thereon is hereby quashed and set aside. After considering the circumstances of the case, I order each party to bear its own costs.

It is so ordered.

DATED at **MOSHI** this day of 26th October, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

JUDGE
Signed by: A. P. KILIMI

Court: - Ruling delivered today on 26th October, 2023 in the presence of Mr. Gidion Mushi holding brief of Mbaraka Katela for Appellant and Gloria Isangwa, State Attorney for second Respondent, Appellant and Respondent absent.

Sgd: A. P. KILIMI
JUDGE
26/10/2023

Court:- Right of Appeal Explained.

Sgd: A. P. KILIMI
JUDGE
26/10/2023