

TANZANIA / JUDGMENT

CIVIL APPEAL NO 552 OF 2024 NASOR HAMIS NASOR VS REGINA ISHEMWAMBURA

COURT
TANZLIIDECIDED
1 January 2024

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: LILA, J.A.. FIKIRINI, J.A.. And MLACHA, J.A.) ^ CIVIL APPEAL NO. 552 OF 2024 NASOR HAMIS NASOR
R APPELLANT VERSUS REGINA ISHEMWAMBURA.....RESPONDENT (Appeal from the judgment of the High Court of Tanzania (Land Division) at Dar es Salaam) (Luvanda, 3.^ dated the 19th day of April, 2024 in Land Case No. 47 of 2014 RULING OF THE COURT 30th October & 12th November, 2024 MLACHA, J.A.: The appellant, Nasor Hamis Nasor was the 1st defendant in the High Court of Tanzania (Land Division) at Dar es Salaam, in Land Case No. 47 of

2014. With him were John Martin Mwanga and Fisha Mashoo who were the 2nd and 3rd defendants, respectively. The respondent, Regina Ishemwabura was the plaintiff. It was the plaintiff's case that she is the lawful owner of the house on plot No. 705, Block F, formerly identified as house on plot No. 94A, Drive in Cinema, Msasani, along old Bagamoyo road, Dar es Salaam. The High Court (Luvanda, J.) found for the plaintiff/respondent who was declared the lawful owner of the land. Aggrieved by the finding and decision, he has come to this Court by way of appeal, challenging the decision. When the appeal was placed before the Court for hearing, the Court was invited to determine 3 grounds of preliminary objections, notice of which was earlier on filed and served to the appellant. They read thus;

1. That, the notice of appeal lodged on 18th April 2024 and filed forming part of the record at pages 566 - 567 does not reflect the judgment and decree by leaving out the other two defendants, Fisha Mashoo and Martin Mwanga.
2. The memorandum of appeal and the record of appeal at pages 1-5 is also in respect of Regina Ishemwabura only and does not include the other defendants, Fisha Mashoo and Martin Mwanga who were parties at the trial court.
3. The record of appeal contains an incorrect certificate of correctness of record of the original record as it contains a judgment containing alterations at pages 551 - 554 and contains documents forming different records of pending cases before this court under C

ivil Appeal No. 83 of 2024 and Civil Reference No. 08 of 2024. Messrs. Tarimo Methodius Melkior and Kessy Ngau, learned advocates, appeared for the appellant, whereas the respondent had the services of Mr. Joseph Rutabingwa, also learned advocate. Counsel were invited to address the Court on the preliminary points of objection. On taking the floor, Mr. Rutabingwa contended that it was not correct to lodge the appeal against one person while the record and judgment of the lower court show that there were three people. He contended further that, attaching an annotated copy of the judgment in the record of appeal made the record defective. His focus was on rule 83 (1) and rule 84 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) upon which he built his contention that it was wrong to file the appeal against one person while the case had three people. There was no reference to the requirements of rule 107 of the Rule. He argued the Court to strike out the appeal with costs. Submitting in reply Mr. Tarimo contended that the points raised do not qualify to be preliminary points of objection within the meaning of the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) 1 EA 696, because they don't contain the specific provisions of the law which were contravened. He added that, even when they can be taken to be valid points of law, for which he disputes, yet, they will not qualify to be preliminary points of objection because they don't have the effect of disposing of the appeal; they may only end up with amendment orders. He based his submission on rule 107 of the Rules and urged the Court to dismiss the preliminary objections. We had time to read the record and consider the submissions of the learned advocates. We think we should start by examining principles governing preliminary objections generally. The leading case in this area is the case of *Mukisa Biscuits Manufacturing Co. Ltd* (supra) where it was stated as under; "A preliminary objection is in the nature of what used to be 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 ... a preliminary objection consists of a point of law which raises by direct implication out of pleadings, and if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or as submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration." (Emphasis supplied) Principles developed in this case have been applied in many decisions of the Court including; *Citibank (T) Ltd v. Tanzania Telecommunications Co. Ltd & 4 others*, Civil Application No. 64 of 2006, *Tanzania Telecommunications Company Limited v. Vedasto Ngashwa & 4 Others*, Civil Application No. 67 of 2009, *Jackline Hamson Ghikas v. Mlatie Richie Assey*, [2022] TZCA 438 (18 July 2022) *TanzLII* and *Moto Matiko Mabanga vs Ophir Energy Pic & Others* [2021] TZCA 599 (22 October 2021). In *Jackline Hamson Ghikas* (supra) it was stated; "We have in mind for instance what we held in *Tanzania Telecommunications Company Limited v. Vedasto Ngashwa & 4 Others*, Civil Application No. 67 of 2009 (unreported). Reaffirming with greater emphasis the position taken by the Court of Appeal for East Africa in *Mukisa Biscuits* (supra), we categorically said that a preliminary objection must satisfy three conditions viz; one, the point of law raised must either be pleaded or must arise as a direct implication from the proceedings; two, that it must be a pure point of law which does not

require dose examination or scrutiny of the affidavit and counter affidavits and three, the determination of such a point of law in issue must not depend on the court's discretion". Preliminary objections before the Court, must abide to the requirements of rule 107 of the Rules. It reads thus;

1. A respondent intending to rely upon a preliminary objection to the hearing of the appeal or application shall give the appellant or applicant three clear days' notice thereof before hearing, setting out the grounds of objection such as the specific law, principle or decision relied upon, and shall file five such copies of the notice with the Registrar within the same time and copies of the law or decision, as the case may be, shall be attached to the notice.
2. A respondent shall not rely upon a preliminary objection unless such objection consists of a point of law which, if argued and sustained, may dispose of the appeal or application
3. A respondent raising a preliminary objection shall provide such necessary particulars to enable the Court and the other party to grasp the nature and scope of such objection. (Emphasis supplied) Rule 107 has 4 conditions which must be met cumulatively: One, the grounds must be based on a specific law, principle or decision of the Court. That is to say, each ground must state a specific law, principle or decision of the Court upon which it is based; two, the copies of the law or decision of the Court must be attached to the notice of objection; three, the grounds must provide the necessary particulars to enable the Court and the other party to grasp the nature and scope of the objection. Four, the point of law, principle or decision of the Court raised, must have the effect of disposing of the appeal or application. The grounds of objection in the case at hand contain mere statements. No specific provision of the law, principle or decision of the Court is cited. No provision of the law or decision is attached in the notice of appeal. Neither is there any indication that the grounds can dispose of the appeal. At most, as correctly observed by Mr. Tarimo, they can lead to orders of amendments. They therefore failed short of the requirements of the law as provided under rule 107 of the Rules. As there is lack of compliance to rule 107 of the Rules, with respect to Mr. Rutabingwa, we will desist to make a finding on the preliminary objection, which we proceed to dismiss with costs. Meanwhile the hearing of the appeal is adjourned in terms of rule 38A (1) of the Rules to the nearest sessions of the Court as shall be fixed by the Registrar. It is ordered so. DATED at DAR ES SALAAM this 11th day of November, 2024. S. A. LILA JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Ruling delivered this 12th day of November, 2024 in the presence of Mr. Tarimo Methodius Melkior, learned counsel for the Appellant and Mr. Petro Frederick Musimwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

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Prepared on 14 October 2026 · Esheria