

TANZANIA / JUDGMENT

SALIM HAMISI AND ELEVEN OTHERS VALLY MBILIKIRA 2024 TZCA 868 28 June 2024

COURT
TZCADECIDED
28 June 2024

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IN THE HIGH COURT OF TANZANIA (MOROGORO SUB- REGISTRY) AT I3C MOROGORO LAND
APPEAL NO. 25517 OF 2023 SALIM HAMISI..... 1 st APPELLANT
RAJABU JUM A..... 2nd APPELLANT HAMISI
MGAGALA.....3 rd APPELLANT KHAMISI
RAMADHANI.....4TM APPELLANT JUMA
MGUDE..... 5th APPELLANT ASHA
MWINYIMVUA.....6th APPELLANT SAIDI MRISHO
MGUDE.....7th APPELLANT SALAMA
RAMADHAN..... 8th APPELLANT HIDAYA HASSAN
MINUNE.....9th APPELLANT HALIMA
SELEMAN.....10 th APPELLANT JUMA
RAMADHAN..... 11th APPELLANT MBARAKA
AHMAD.....12 th APPELLANT (ADMINISTRATRIX OF THE ESTATE
OF THE LATE AHMAD KOVA)

• i 1 I Page VERSUS ALLY MBILIKIRA.....RESPONDENT

JUDGEMENT

DATE OF JUDGEMENT- 28TM JUNE 2024 MANSOOR, J. This is an appeal emanating from the decision of the District Land and Housing Tribunal for Morogoro in Miscellaneous Application No. 130 of 2023 delivered on 30th October 2023, which was an application to set aside the exparte decree issued against the appellants herein in Land Application No. 48 of 2010. The application was struck out by the Tribunal following an objection raised by the respondent's herein on the competency of the application. The reasons for striking out the application is that the appellants herein did not join in the application the necessary party, which was Kizinga Village Council as Kizinga Village Council appeared as a party in the original exparte decree which the appellants herein sought to be set aside. The appellants concede that they did not include the Kizinga Village Council in Application No. 130 of 2023 as the co-appellant since the Village Council 2 |P a g e is the Local Government and the individuals cannot sue on its behalf. They said that the

proceedings for and against the Local Government must be taken by the Attorney General on behalf of the Local Government or on behalf of the Village. It be noted that in the exparte decree in Land Application No. 48 of 2010, Kizinga Village Council was the 1st respondent, and there were a total of 15 respondents affected by the exparte decree, including the Kizinga Village Council. The land in dispute which is 50 acres located at Kizinga Village, in Msinune Ward was declared to be the property of Ally Mbilikila, the respondent in this appeal. The exparte decree was delivered by Hon. E. Mogasa, the Chairperson of the Tribunal on 14th March 2022. The appellants also state that Kizinga Village Council is not aggrieved by the decree passed exparte, thus, the appellants herein cannot force the Village or the Attorney General to appeal or to join them in the appeal. They also argue that the Chairman of the Tribunal erred to dismiss the application on an objection which was not a pure point of law, and relied on the case of Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Ltd (1969) EA 696, at page 700. 3 | P a g e In the Reply submissions filed by the respondent, the respondent says that the Kizinga Village Council is the necessary party, and it was mandatory that he is made a party to the application, and that the application become incompetent for failure to include the Kizinga Village Council as one of the applicants in the application. The respondent relied on the decision in the case of Salim Amour Diwani vs the Vice Chancellor Nelson Mandela African Institution of Science and Technology and another, Civil Application No. 116 of 2021 (2023) TZCA 33 (21 February 2023), tanzlii at page 4 and 5, in which it was held that: "court records are considered authentic and should not be easily altered as parties would wish to. It bears reaffirming that parties in the proceedings should at any given time appear as they did in the previous proceedings unless there is a reason for not observing that and only with the leave of the Court. I have considered the parties' arguments, and also perused through the records of the Tribunal in both the application and the original suit which was heard and determined exparte against the appellants herein. It is apparent that the appeal is taken by the aggrieved persons who believes that their rights have been deprived. The appellants are entitled to take care of their personal interest through an appeal and they have no powers or authority to force an un-aggrieved party to join in the appeal. Moreover, the laws relating to appeals grants a right to file an appeal by any person aggrieved by any final decision or order of the tribunals or courts or any administrative authority. When there is no bar in the law for one person to appeal, that one person can file the appeal leaving the other parties who are not aggrieved, and that shall not amount to altering the authentic court records. For example, that a member of the village can file an appeal apart from the appeal filed by the village, there cannot be any valid legal objection for filing an appeal by the members of the village alone without joining the village. Moreover, when the impugned exparte decree passed by the Tribunal is adversely affecting the individual right of the land owners and the appellants are personally aggrieved, there cannot be a bar to file an appeal by the aggrieved land owners, and they have no power to force the Village to also join them in the appeal, doing that would be a total miscarriage of justice. Further, the Village is only an authorised representative to administer any right in allocation of the village land to its people and not beyond that. Therefore, there cannot be any objection in filing the appeals by the land owners individually and there is no law that requires an un-aggrieved party to the proceedings to forcefully file an appeal. I also agree that the Tribunal's chairman erred to entertain and sustain

the objection as the objection was not a pure point of law. The matter raised by the respondent at the Tribunal was not one which could be dealt with as a preliminary objection because it was not on point of law but one involving facts. As LAW, J. A. of the East African Court of Appeal observed in *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] E. A. 696 at p. 700: 'So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.' 6 |P a g e '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. (Emphasis is supplied.)' The Court of Appeal of Tanzania in Civil Reference No. 32 of 2005, *Etiennes Hotel V National Housing Corporation* dealt with a similar issue and, after citing *Mukisa Biscuits* with approval, held: 'Here facts have to be ascertained in all the remaining six grounds of the so called preliminary objection and that is why the Respondent has filed two affidavits which have been objected to by the applicant/ I agree that the preliminary objection raised as to whether the appeal was incompetent for not asking the Village Council whether it was aggrieved or not was not a pure point of law and could not have been disposed of without ascertaining facts. The appeal is therefore meritorious and I allow the 7 |P a g e grounds of appeal raised. However, before I give the remedies of whether to remit the Miscellaneous Application No. 130 of 2023 to the Tribunal for hearing it on merits, I shall deploy the Revision Powers conferred by this Court under Section 43 of the Land Disputes Courts Act, Cap 216 to revise not only the proceedings and orders passed in Miscellaneous Application No. 130 of 2023 between the parties herein but also the proceedings, Judgement and Decree passed exparte in Land Application No. 48 of 2010 between the parties herein, and a decision which involved the Village Council. I do so for the reasons that in February, 2020, the Parliament of the United Republic of Tanzania enacted the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 which was assented to by the President of the United Republic of Tanzania on 14th February, 2020 and came into operation on 21st day of February, 2020 as Gazetted in the Gazzette of the United Republic of Tanzania No. 8 Vol. 101 dated 21st February, 2020. This Act provided that ail suits against Public Corporations, Parastatal Organizations, Executive Agencies and Local Government Authorities are suits by or against the Government and falling under the Government Proceedings Act. Before the amendment, the Local 8 |P a g e Government Authorities could sue or be sued without joining the Attorney General but now after the amendment the Village Council being the Local Government cannot sue in its own or be sued in its own without joining the Attorney General, After the amendment any suit by or against such legal entities are suit by or against the Government and the procedure for institution of such proceedings must conform to the provisions of the Government Proceedings Act. Under the current procedure, before suing a public corporation, parastatal organization, executive agency or local government authority the plaintiff is mandatorily required to serve the entity with a 90 days' notice of intention to sue. The notice must state the factual basis of the claim and reliefs sought. Further, a copy of the notice must be served upon the Attorney General and Solicitor

General. The plaintiff may institute the suit after the expiration of the notice period and a copy of the plaint should be served on the defendant and the Solicitor General. Besides, according to section 6 (5) of the Act such actions must be instituted in the High Court. This is the legal position stated in the case of Aloyce Chacha Kenganya v. Mwita Chacha Wambura & 2 Others (HC Civil Case 7 of 2019) [2020] TZHC 90 (6 February 2020); 9 | P a g e Therefore, since the decision in Land Application No. 48 of 2010 was passed on 14th March 2022 after the above cited amendments were already operational, the Tribunal which passed the exparte decree against the Kiziga Village Council did so in violation of Section 6 of the Government Proceedings Act, as no notice of 90 days of intention to sue the Government was issued to the Village as well as to the Attorney General and the Solicitor General before the commencement of the suit, and the suit ought to have been instituted at the High Court. The District Land and Housing Tribunal lacked jurisdiction to entertain Land Application No. 48 of 2010, therefore under the Revision Powers conferred to this Court by Section 43 of the Land Disputes Courts Act, [Cap 216 R: E 2019], the whole proceedings, exparte judgment and decree, and any other orders passed incidental thereto are quashed and set aside. Equally, the proceedings and Orders passed by the Tribunal in Misc. Application No. 130 of 2023 are also quashed and set aside. Parties are at liberty to file a fresh suit at the court with competent jurisdiction, and after following the due procedures available in the statutes. Each party shall bear its, his or her owns costs of the appeal. It is so ordered. DATED AND DELIVERED AT MOROGORO THIS 28th DAY OF JUNE 2024 (LATIFA MANSOOR) JUDGE 28TM JUNE 2024 11 | P a g e

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