

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

LAND APPEAL NO. 08 OF 2020

*(Arising from the decision of the District Land and Housing Tribunal for Chato in
Land Application No. 15 of 2019)*

CHRISPIN B. KAGOMA.....1ST APPELLANT
ANDREW BAHEBANI2ND APPELLANT
MORICE JOSEPH.....3RD APPELLANT
BUZIA BWAHI.....4TH APPELLANT
JONAS B. KUSUHIBWA.....5TH APPELLANT
MASHAKA KITENDE.....6TH APPELLANT
PILI SALEHE.....7TH APPELLANT
ANTHONY GAMBA.....8TH APPELLANT

VERSUS

TARURA.....1ST RESPONDENT
ISSA MOHAMED 2ND RESPONDENT
DAUDI LUSETURA.....3RD RESPONDENT
MASUMBUKO ELIAS.....4TH RESPONDENT
SHISHI EXAVERY.....5TH RESPONDENT
DEUS MUSIBA.....6TH RESPONDENT
PAULO ODEMBA.....7TH RESPONDENT
DAUDI MBALYETABURA.....8TH RESPONDENT
GODFREY MITI.....9TH RESPONDENT
ADA JULIUS.....10TH RESPONDENT
ERNEST MBARAMWEZI.....11TH RESPONDENT
GAVANA MATENE.....12TH RESPONDENT
ALCHARD MKOPI.....13TH RESPONDENT
PETRO MKAMBI.....14TH RESPONDENT
DAUDI KAGOMA.....15TH RESPONDENT
JAJI NTINGWANAMBA (BUSAGARA).....16TH RESPONDENT



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| THOBIAS BUSAGARA..... | 17 TH RESPONDENT |
| LAURENT MTABINGWA KAMALA..... | 18 TH RESPONDENT |
| FUBUSA MUSHINGE..... | 19 TH RESPONDENT |
| MHERESHI MISHAMO..... | 20 TH RESPONDENT |
| ROBINA WILLY..... | 21 ST RESPONDENT |
| YUSUPH IDD BANANA..... | 22 ND RESPONDENT |
| SHABAN ABEID..... | 23 RD RESPONDENT |
| JONAS MALULU..... | 24 TH RESPONDENT |
| ALEX NZIRUHILE..... | 25 TH RESPONDENT |
| MCHUNGAJI MWAMBULA BITABA..... | 26 TH RESPONDENT |
| MCHUNGAJI IKIRI..... | 27 TH RESPONDENT |
| CHRISTINA SAREHE..... | 28 TH RESPONDENT |
| COSMAS MUSIBA..... | 29 TH RESPONDENT |
| ALOYCE JOSEPH GWANCHELE..... | 30 TH RESPONDENT |
| KUNGAYA KATWIZIRA..... | 31 ST RESPONDENT |
| SAID HUSSEIN SUED..... | 32 ND RESPONDENT |
| ROBERT LUBACHA..... | 33 RD RESPONDENT |
| JULIUS ELIKANA | 34 TH RESPONDENT |
| JOHN BOSCO..... | 35 TH RESPONDENT |
| FADHILI MIKIDADI..... | 36 TH RESPONDENT |
| MWAMVUA OMAR..... | 37 TH RESPONDENT |
| REHEMA MAJAGA..... | 38 TH RESPONDENT |
| PAULO GAMBA..... | 39 TH RESPONDENT |
| NTAKWABAYADA MWOGAMPHANDE..... | 40 TH RESPONDENT |
| MERRY JOSEPH..... | 41 ST RESPONDENT |
| ELIA EDWARD BONZE..... | 42 ND RESPONDENT |
| ROBERT MASALA..... | 43 RD RESPONDENT |
| AYUBU MESHAKI..... | 44 TH RESPONDENT |
| ESTER GADY..... | 45 TH RESPONDENT |
| EMMANUEL MATABARAO..... | 46 TH RESPONDENT |
| MUGANYIZI GERGORY..... | 47 TH RESPONDENT |
| EZEKIEL MAKALA..... | 49 TH RESPONDENT |

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| MAXIMILIAN KAGOMA..... | 49 TH RESPONDENT |
| MAJALIWA NICHOLAUS..... | 50 TH RESPONDENT |
| MARCO JOSEPH BIRIA..... | 51 ST RESPONDENT |
| HERMAN SAMSON..... | 52 ND RESPONDENT |
| SEBASTIAN DOTO KAKOBE..... | 53 RD RESPONDENT |
| ALFRED DOMISIAN..... | 54 TH RESPONDENT |
| THEONEST LAURENT..... | 55 TH RESPONDENT |
| HOSEA WAMBURA..... | 56 TH RESPONDENT |
| ADAM ABDALLAH (SEBO) | 57 TH RESPONDENT |
| SHISHI KAGOMA..... | 58 TH RESPONDENT |
| SHABANI SEIF..... | 59 TH RESPONDENT |
| IBRAHIM SHABANI..... | 60 TH RESPONDENT |
| KALITASI MATHEW..... | 61 ST RESPONDENT |
| PETER MAKANZA..... | 62 ND RESPONDENT |
| EMMANUEL MUSUKA..... | 63 RD RESPONDENT |
| STEFANO MASALA..... | 64 TH RESPONDENT |
| YOHANA MALUGU..... | 65 TH RESPONDENT |
| RAJABU HARUNA KAPIPI..... | 66 TH RESPONDENT |
| MASTO MASITO..... | 67 TH RESPONDENT |
| NEEMA MWANYAKAMALE..... | 68 TH RESPONDENT |
| CLEMENTINA MANYANGA..... | 69 TH RESPONDENT |
| JUMAPILI ABDUL..... | 70 RESPONDENT |
| HARUNA MRASHANI..... | 71 RESPONDENT |
| RAMADHANI HARUNA..... | 72 ND RESPONDENT |
| BAHATI SEBASTIAN..... | 73 RD RESPONDENT |
| MARIA GUPE | 74 TH RESPONDENT |
| SEMPO KABADI | 75 TH RESPONDENT |
| FAUSTINE KAGEMA..... | 76 TH RESPONDENT |
| JOYCE KOROBOI..... | 77 TH RESPONDENT |
| JUMA ATHUMANI..... | 78 TH RESPONDENT |
| GABRIEL BALIGE..... | 79 TH RESPONDENT |
| LUCIA MZAZI..... | 80 TH RESPONDENT |

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| JULIAN OMARI..... | 81 ^{ST TH} RESPONDENT |
| SAID MANYOGOTE..... | 82 ND RESPONDENT |
| JULIAN KAMWELA..... | 83 RD RESPONDENT |
| YOHANA MASIGO..... | 84 TH RESPONDENT |
| MARCO BUSWETA..... | 85 TH RESPONDENT |
| JUMA RASHIDI..... | 86 TH RESPONDENT |
| PHINIAS MAHENDE..... | 87 TH RESPONDENT |
| MASHAKA MCHELE..... | 88 TH RESPONDENT |
| KALITAS MATHEW..... | 89 TH RESPONDENT |
| PETER MAKANZA..... | 90 TH RESPONDENT |
| EMMANUEL MSUKA..... | 91 TH RESPONDENT |
| STEPHEN MASALA..... | 92 ND RESPONDENT |
| PAULINA MASITO..... | 93 RD RESPONDENT |
| LAURENT ZANZIBA..... | 94 TH RESPONDENT |
| MASTU KITUNGURA..... | 95 TH RESPONDENT |
| HAMIS ABDUL..... | 96 TH RESPONDENT |
| NOEL GABRIEL..... | 97 TH RESPONDENT |
| DEUSI KAMENYA..... | 98 TH RESPONDENT |
| DAUDI KAGOMA..... | 99 TH RESPONDENT |

JUDGEMENT

Date of Last order: 18/1/2021

Date of Judgement: 30/3/2021

F. K. MANYANDA, J.

In this land appeal, the Appellants are challenging a decision of the District Land and Housing Tribunal (DLHT) for Chato by Hon. Colex, Chairman dated 26/02/2020 in which he sustained a preliminary objection raised by the Respondents to the hearing of the case.



The first Respondent TARURA raised objection on three points of law namely: -

- 1. That the foregoing matter is un-maintainable, improperly and prematurely instituted in this honourable tribunal for failure to submit a notice of intention to sue the Government.*
- 2. That, the application is legally defective for failure to join the Solicitor General as required by law.*
- 3. That, this suit be dismissed for want of jurisdiction.*

The 2nd up to 98th Respondents also raised a preliminary objection to the hearing of the case on three similar points of objection which read as follows: -

- 1. That the application is legally incompetent for failure to issue and serve the 1st Respondent with a statutory notice to sue the central Government.*
- 2. That, the application is legally incompetent for omission to join the Attorney General as per law.*
- 3. That, the applicants herein have no cause of action*

The Appellants responded to the objections arguing that the same are baseless because the case emanates from implementation of a contract by the TARURA.

The Respondents argued that the pleadings did not bear facts establishing a cause of action between the Applicant and the Respondents, hence, it was not a case based on a contract.

Chairman sustained the objections on main one ground that the DLHT has no jurisdiction to try the case because the 1st Respondent been a Government Agency and the case not been emanating from a contract, was wrongly sued. Secondly, the Attorney General ought to be sued as a necessary part and once the Attorney General is made a party, the DLHT ceases to have jurisdiction because the case becomes triable by the High Court.

The Appellants are aggrieved by the decision of the DLHT, hence this appeal on the following grounds: -

- 1. That the trial tribunal erred to hold that Application No. 15/2019 of the DLHT for Chato was silent on the mode of relationship of the respondents whereas not.*

2. *That the trial tribunal mis-directed itself to dispose of the Application No. 15/2019 of the DLHT for Chato at a Preliminary stage on matters that require proof.*
3. *That, the trial tribunal non-directed on the ultra vires actions of 1st Respondent demolitions of appellants' building structures.*
4. *That the trial tribunal erred in law and in facts to hold in favour of the respondents who did not rebut by proof the fact that they were operating under contract; and*
5. *The case was decided basing on presumptive facts than the law.*

Hearing of this appeal, with the leave of the court, was conducted by way of written submissions. The submissions by the Appellants were drawn and filed by **Mr. Pauline Michael**, learned Advocate and the submissions by the 2nd to 98th Respondents were drawn and filed by **Mr. Laurent Francis Bugoti**, learned Advocate and those of the 1st Respondent were drawn and filed by **Ms. Kahdija Tekka**, Legal Officer.

Mr. Michael chose to argue grounds 2, 4 and 5 together and grounds 1 and 3 separately, hence making three tier arguments.



Starting with the tier containing grounds 2, 4 and 5, Mr. Michael submitted that the DLHT went wrong when disposed the matter on a preliminary objection which needed proof. It was his views that TARURA is established under Order 2 of the Establishment Order, it is capable of suing and been sued in two ways. One in its name on matters based on contract. Two on matters not based on contract can be sued jointly with the Solicitor General. He argued that the issue of whether the matter is based on contract or not cannot be answered without production of evidence. He cited the case of **Masato Manyama vs. Lushamba Village Council**, Civil Case No. 39 of 2018 which insisted the authority in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd**, [1969] EA 696 which sets test for a valid preliminary objection, that, the same must be on point of law.

In respect of the second tier comprising of ground 1, Mr. Michael submitted that Land Application No. 15 of 2019 was not silent on the relationship of the Appellants with the Respondents. He cited paragraph 6(a)(iii) of the Application which shows that some of the Respondents acting under the instruction of the 1st Respondent marked "X" and "BOMOA" and then dismantled the houses of the Appellants and cut down big trees which fell over their houses, hence demolished them. Mr.



Michael opined that the DLHT was not realistic in holding that the application was silent on the mode of the relationship of the Respondents.

In regard to the third tier which comprise of ground 3, Mr. Michael submitted that TARURA acted ultra vires when pulled down houses of the Appellant's without following procedure laid down such as giving a notice and also giving them a grace period before executing demolishing. TARURA cannot take cover under the umbrella of the Attorney General.

He prayed the appeal to be allowed and the matter be ordered to proceed to hearing in the DLHT.

On the side of the 1st Respondent, Ms. Tekka, submitted that the preliminary objection was on pure points of law. She was of the view that points of law for preliminary objection are born out from the pleadings of the parties. That the issue of contract was not born out in the application by the Appellants. Ms. Tekka argued that there is no cause of action stating that the action arose out of a contract. She cited a case of **African Banking Corporation (Tanzania) Limited vs. TANROADS**, Misc. Commercial Appl. No. 235 of 2016 (unreported)



where it was held that in order for a matter to be instituted in the name of an Executive Agency the same must be based on contract signed by the Agency and there must a statement in the plaint stating to that effect or the contract itself be annexed.

Ms. Tekka argued in respect of ground 2 and 5 that the DLHT was right to deal with the objection which was before it because the same was on point of law. She opined that it is a requirement of the law that for one to sue the Government must serve a notice of his or her intention 90 days prior. TARURA being an agency of the Government deserved to be served with such notice as the matter was not based on contract. She cited the cases of **Thomas Ngawaiya vs. AG and 3 Others**, Civil Case No. 177 of 2013 which set four requirements before one sues the Government including that of a 90 days' notice. She also cited the case of **Arusha Municipal Council vs. Lyamuya Construction Company Ltd** [1998] TLR 13 which held that non-compliance of section 6 of the Government Proceedings Act, [Cap 5 R. E. 2019] makes the suit fatal and unmaintainable. Ms. Tekka submitted further that both non joining the Attorney General into the suit as a necessary party in violation of the Executive Agencies Act [Cap. 245 R. E. 2002] and the Government Proceedings Act is fatal irregularity. She



added that once the Attorney General is made a party, the suit must be instituted in the High Court; the DLHT therefore, lacks jurisdiction.

She concluded that the argument in ground 3 was not a basis of the preliminary objection before the DLHT, it has been raised in this appeal as an afterthought. She prayed the Appeal to be dismissed with costs.

Mr. Bugoti, for the 2nd up to 98 Respondents submitted arguing on one basic issue about the mode of suing an agency of the Government. He submitted that Executive Agencies are established under Section 3(1) of the Executive Agencies Act which empowers the responsible Minister by publication in the Gazette to establish an Executive Agency. That TARURA was established as such via GN No. 211 published on 12/05/2017. Under Section 3(6) of the Executive Agencies Act, the agency can sue or be sued in its name on matters based on contract only otherwise in all matters not based on contract, the Attorney General must be joined. It was his views that since there is no any statement in the pleadings or the annexures showing that the 1st Respondent and the Appellants had a contractual relationship, written or oral, then the 1st Respondent could not be sued in its own name. He cited the case of **African Bank Corporation (Tanzania) Limited**

(supra). He concluded that the Appellants were obliged to join the Attorney General as a necessary party after issuing a 90 days' notice. He cited the case of **Thomas Ngawaiya (supra)**.

He prayed the Appeal to be dismissed with costs.

Having heard the submissions by the Counsel for the parties, let me determine this appeal. Basically, from the submissions by the Counsel, it is not in controversy that the 1st Respondent is an Executive Agency of the Government. It is also not in controversy that as an agency of the Government, it can sue or be sued in its name on matters based on contract only, otherwise, in all other none contractual matters, the Attorney General must be joined, hence the procedures of suing the Government must be followed to the letter including issuance of a 90 days' prior notice.

What is in controversy is whether Land Application No. 15 of 2019 was based on a contract. The Respondent say it is not while the Appellants say it is.

I have gone through the relevant laws and found that, the 1st Respondent was established under GN No. 211 published on 12/05/2017



known by its long title as" the Executive Agencies (Tanzania Rural and Urban Roads Agency) Establishment Order", 2017. The said Establishment Order was made under Section 3(1) of the Executive Agencies Act.

Section 3(6)(a) and (b) of the Executive Agencies Act provides that: -

"3(6) Notwithstanding any other law, an Executive Agency shall-

(a) NA

(b) be capable of suing and being sued in its own name only in contract; and in that respect all laws applicable to legal proceedings other than Government proceedings Act, 1967, shall apply to legal proceedings to which the Agency is a party;

(c) in all matters relating not to contract, not be competent to sue or be sued in its own name; however, any legal proceedings which, but for this paragraph, would have been instituted by or against the executive agency, may only be instituted by or against the Government in accordance with the Government Proceedings Act."

It follows therefor that it is a 'contract' which determines the jurisdiction of the court or tribunal to adjudicate cases in which one of

the parties is an Executive Agency of the Government in its name. If that case concerns a contract, then the court has jurisdiction, but if it does not, the court lacks jurisdiction unless the provisions of the Government Proceedings Act are complied with.

The issue in this appeal is whether Land Application No. 15 of 2019 was based on contractual relationship between the Appellants (who were Applicants in that application) and the Respondents.

As stated above, the Respondent says it is not while the Appellants say it is. The reasons given by the Appellants is that the issues of contract required proof by evidence to ascertain it therefore not eligible to be determined at preliminary stage. They added that their application was not silent on the mode of relationship.

I have gone through the pleadings and found that the plaint discloses issues of dispute over ownership of land. This can be gleaned from paragraph 6 termed as cause of action, where the relevant sub paragraphs reads as follows: -

*"6(i) That the applicants **are the legal owners of the suit premises** and have been living and using their*

properties for a long time without any interruption from the respondents.

(ii) NA

*(iii) That surprisingly on 6th day of April, 2018 the 2nd, 3rd, 4th, 5th and 6th Respondents jointly and together marked "X" and "BOMOA" to the applicants' buildings and instructed the 1st Respondent to **demolish the building structures namely kiosks and living houses for applicants** whereby the 1st Respondent acting under the guidance and instructions of the 2nd to 6th respondents ruined the suit premises by cutting down big trees adjacent to the suit premises which befell on the 4th applicant's structure so destroying it beyond repair **without prior permission from the applicants.***

(iv) NA

*(v) That after ruining the premises, the 1st to 6th respondents **has allocated the same premises to themselves and the remaining part to the 6th to 99th respondents who have built structures therein without any permission from the legal owners id-est the applicants.**"(emphasis added)*

As it can be gleaned, the cause of action is a dispute over ownership of land where the applicants claim to be legal owners of the suit premises and that the respondent trespassed in it and wrongly

assumed ownership without permission from the applicants, the legal owners.

There is no issue of contract here, but land ownership dispute. The applicants submitted that, even if the cause of action is land, the respondents were acting under a contract of construction therefore, the dispute is on implementation of a contract. With due respect the pleadings are clearly indicative that the applicants are disputing over ownership of land not breach of contract.

Does this fact need evidence to be ascertained from evidence as argued by the applicants? The answer is no, the reason is that, the fact is glaring seen from the pleadings. It is a position of the law that for a preliminary objection to be judged as a point of law the same must be drawn from the settled facts pleaded. The famous case of **Mukisa Biscuits Manufacturing Company Ltd (supra)** is relevant, where his Lordship Sir Charles Newbold, President held that: -

*"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 assumption that all the **facts pleaded by the other side are correct.**" (emphasis added).*

What then amounts to point of law. In my understanding a point of law is obtainable from the facts which has been pleaded or which arises from clear implications out of the pleadings. His Lordship, Law, JA, in **Mukisa Biscuits Manufacturing Company Ltd (supra)** as far as what amounts to a preliminary objection had this to say.

*"I am aware, a 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."*

In the case at hand, the respondents raised a point of law challenging the jurisdiction of the DLHT to try the application No. 15 of 2019 on grounds that the applicants sued an Executive Agency of the Government on non-contractual matters without following the procedures under the Government Proceedings Act. This fact, in my firm opinion, is a point of law clearly borne out by the pleadings which does not need evidential ascertainment.

I don't see any place to fault the Chairman of the DLHT decision. He rightly found that the DLHT lacked jurisdiction and rightly sustained the preliminary objection. Having disposed grounds 1, 2, 3, 4, and 5, there is no need of dealing with ground 6 which as rightly argued by the respondents, was not raised at the DLHT when dealing with the preliminary objection and it is dependent upon hearing of the application itself.

In the upshot, for reasons stated above, I hereby dismiss the appeal in its entirety with costs. The ruling of the District Land and Housing Tribunal (DLHT) for Chato by Hon. Colex, Chairman dated 26/02/2020 in which he sustained a preliminary objection raised by the Respondents and struck out the Application No. 15 of 2019 is hereby upheld. Order accordingly.

