

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA
LAND APPEAL NO.22 OF 2022**

(C/F in Misc. Application No. 169 of 2021)

ANGELA ERO.....APPELLANT

VERSUS

STEPHANO QWARSE.....RESPONDENT

JUDGMENT

08/11/2022 & 07/02/2023

GWAE, J

The respondent, Stephano Qware filed an application for execution of his decree via Miscellaneous Application No. 169 of 2021 in the District Land and Housing Tribunal of Babati at Babati (herein "DLHT"). Her application faced a preliminary objection canvassed by the respondent, Angela Ero.

However, the respondent's preliminary objection was overruled. The DLHT having overruled the respondent's PO, it ordered that, the appellant, on her accord, to hand over the suit land to the respondent within 14 days or otherwise the appellant be evicted from the suit land by the tribunal broker.

The factual background of the parties' dispute being as follows; that, the respondent unsuccessfully instituted before Wareta Ward Tribunal vide Application No. 33 of 2017. The respondent appealed to DLHT where he won his appeal vide Land Appeal No. 114 of 2018. DLHT's decision reversing the ward tribunal's award aggrieved the appellant who is said to have appealed to the court on 16th day of June 2020. Meanwhile the respondent filed an application for execution through Application No. 224 of 2020 on 25th August 2020 which was dismissed for want of showing of the suit land's boundaries. Subsequently, the respondent filed another application for execution in the DLHT (Application. No. 169 of 2021) which granted.

Dissatisfied with the order of the DLHT dated 23rd February 2022, the appellant referred this appeal comprised of three grounds of appeal to wit;

1. That, the trial tribunal erred both in law and fact by delivering a decision founded on res-judicata after being finalized on merit vide Miscellaneous Application No. 224 of 2020 delivered on 30th July 2021 in the same forum amongst the same disputants

2. That, the whole ruling and drawn order in Misc. Application No. 169 of 2021 involving serious irregularities and painted with illegalities
3. That, the trial tribunal failed to properly evaluate evidence, hence arrived into a wrong verdict

On 4th October 2022 when this appeal was called on for hearing, the parties sought and obtained leave to dispose the same by way of written submission.

Supporting his 1st ground of appeal, the appellant argued that it was improper for the DLHT to entertain another application whereas the same application between the same parties, over the same subject matter and at the same forum had been determined on merit. It is his opinion that the respondent ought to have challenged the dismissal order to the higher court instead of re-filing the application which was dismissed. She argued this court to refer to section 9 of the Civil Procedure Code, Cap 33, R. E, 2019 (CPC). Also, case law in **Olam Uganda Limited** suing through its **Attorney United Youth Shipping Company Limited vs. Tanzania Harbours Authority (THA)**, Civil Appeal No. 57 of 2002 (unreported) and in **East African Development Bank vs. Blueline Enterprises**

Limited, Civil Appeal No. 101 of 2009 (unreported) where the Court of Appeal held that;

"In our considered opinion, then the dismissal amounted to a conclusion determination of the suit by the High Court as it was found not to be legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this court".

She further invited the reference by this court to the case of **Peniel Lotta vs. Gabriel Tanaki and two others** (2003) TLR 314 and **Karshe vs. Uganda Transport Company** (1967) EA 777.

Arguing for the 2nd ground, the appellant stated that the respondent neither pleaded or prescribed boundaries of the land subject of the intended application nor in his written submission. She thus argued that the 2nd application was not in conformity with the first order of the DLHT. She further submitted that, the 2nd DLHT's chairperson presiding the latter application emerged with his speculative boundaries as opposed to the finding of his predecessor. He referred a case of this court (**Mzuna, J**) in **John Maromboso vs. John Kinda**, Land Appeal No. 28 of 2019 (unreported) where it was held that an execution order must be in

conformity with the judgment and the map tendered during trial and not a new map.

The appellant also argued that it was wrong for the tribunal's chairperson who presided over the 2nd application without giving reason of inability of the former chairperson to conclude the matter. Then, she invited the court to the decision of the Court of Appeal **Joseph Wasonga Otienovs. Assumpter Nshunju Mshana**, Civil Appeal No. 97 of 2016 (unreported).

Similarly, the appellant complained that, the impugned ruling of the DLHT contains serious irregularity since no reason that was given to substantiate its finding leaving the parties in vacuum. Bolstering her argument, she invited the court to the decision of this court in the case **of Bahati Moshi Masabile T/A Ndonu Filingstation vs. Camel Oil**, Civil Appeal No. 216 of 2018 (unreported).

In his response to the appellant's written submissions in respect of the 1st and 2nd ground of appeal, the respondent attacked the 1st ground by stating that there is no applicability of section 9 of CPC in his latter application since the former application did not indicate the requisite boundaries as opposed to the latter application. He added that, the issue of boundaries is baseless since before the ward tribunal where the

appellant won, neither of the parties complained in that regard. He further argued that, this appeal is aimed at endless litigation since the appellant has not appealed against the DLHT's decision exercising its appellate jurisdiction.

He further urged this court to abide to the principle of overriding objective introduced in our laws through Written Law (Miscellaneous Amendments) (Act No. 8 of 2018). He cited the case of **Yakobo Magoiga vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported-CAT) where it was held;

"With advent of the principle of overriding objective by the Written Law (Miscellaneous Amendments) (Act No. 8 of 2018) which requires the court to deal with cases justly and have regard to substantive justice; section 45 of the Land Disputes Act (which prohibits reversing decisions on account of errors which do not occasion failure of justice), should be given more prominence to cut back on over reliance on procedural technicalities"

Basing on the above decision, the respondent prayed this appeal be dismissed and the decision of the DLHT be upheld.

Reiterating her submission in chief, the appellant made her brief rejoinder by stating that, the doctrine of res-judicata applies in the respondent's latter application for execution before DLHT since the

principle of overriding objective was not meant to circumvent procedural rules duly enacted. She argued that, the anomalies in the DLHT's decision go to the root of the case. In support of her rejoinder submission, the appellant cited the decision of the Court of Appeal in **Jeremiah L. Kunsindar vs. Leila John Kunsindar**, Civil Appeal No. 260 of 2017 (unreported) where it was held;

"We readily agree with the learned counsel that the introduction of the overriding objective principle into our laws through section 3A of the Appellate Jurisdiction Act, Cap 141 R.E, 2002 (The Act) did not replace the duty of the parties, especially learned advocates, to observe the rules of the game set in the Rules. The overriding objective principle was not meant to a magic wand for those who disregard procedural rules".

The appellant also stated that, the rules of procedures should be adhered in order to enhance consistent application of given norms in order to avoid our judiciary being into disrepute.

Back to the determination of this appeal, starting with the **1st ground** of appeal. Having closely considered the parties' written submissions, I am in agreement with the argument that, on the doctrine of preclusion envisaged under section 9 of the CPC from re-filing a suit is applicable in

order to do away with repetitive litigation. Therefore, it is trite law that, no subsequent suit or an application that, can be instituted where the former suit or an application of the same nature, involving the same parties or privies on the same subject matter has been directly and substantially in issue and it had been heard and determined in its finality. This legal position was emphasized in **Umoja Garage vs. NBC Holding Corporation** (2003) TLR 339, it was correctly and authoritatively held;

"Like the previous case, the subsequent case was based on the alleged breaches of the agreement by the respondent. Since by the time the previous suit was filed the facts giving rise to the cause of action in the subsequent suit were known to the appellant, the matter raised in the subsequent case are deemed to have been a matter, directly and substantially, in issue in the previous case and principle for res-judicata applies".

See also **Ester Igbinas Luambano vs. Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014 (unreported-CAT) and **Marato s/o Matiku v Wankyo Sanawa** (1987) TLR 150.

As the appellant is found complaining that, the DLHT's dismissal order (**Hon. Mdachi, Esq**) through Misc. Application No. 224 of 2020 bars the respondent from filing another application for execution afresh. This being the case, I am therefore obligated to examine the order to ascertain if the

order amounted to a dismissal of the matter, respondent's application for execution or otherwise.

The order entered by the DLHT's chairperson on 30th day of July 2021 as reflected at page 5 of the ruling is to the effect and I quote;

"Kutokana na sababu nilizoeleza kwenye hoja namba 2 aliyoibua wakili Mbeya naona kwamba maombi haya hayapo timamu kuamuliwa kwa namna yalivyoletwa. Hivyo, yamefutwa na kila upande ubebe gharama zake".

According to the above quote, my interpretation which is not formal or official is as follows; according to the reasons given above in respect of 2nd limb of objection raised by advocate Mbeya, it is my considered view that, the application at hand is incompetent, the manner it had been presented. Therefore, the same is struck out. It was further the order of the DLHT's learned chairperson that, each party would bear the costs of the application.

In view of the above interpretation of the words written in Swahili, I do not see if the word "dismissal order" was used in the DLHT's order as the appellant incorrectly attempted to persuade the court. It is therefore my considered view that, the word "yamefutwa" in Swahili Language connotes striking out in English due to its incompetency. In my considered view, the respondent's application No. 224 of 2020 was therefore not

dismissed as wrongly argued by the respondent. Had the learned tribunal chairperson meant that, the application was dismissed he would have ordered that, the application is dismissed and use either of the following Swahili words, "Maombi yameondoshwa ama kutupiliwa na kila upande ubebe gharama".

The distinction between dismissal order and an order striking out either an appeal or application was stressed in the case of **Yahya Khamis vs. Hamida Haji Idd and two others**, Civil Appeal No. 225 of 2018 (unreported-CAT). The case of **Yahya** (supra) approved its decision in **Juma Nhandi vs. Republic**, Criminal Appeal No. 289 of 2012 (unreported). Endeavouring to give a distinction between the word "striking out and dismissing" while equally citing with the approval the case of **Ngoni-Matengo Cooperative Marketing Union Ltd vs. Ali Mohamed Osman** (1959) E.A 577 in which erstwhile the Court of Appeal for East Africa held;

"This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court strictly to have done in each case was to strike out the appeal as being incompetent rather than to have dismissed it, for the latter implies that a competent appeal has been disposed of, while the former phrase implies that there

was no proper appeal capable of being disposed of. But it is the substance that must be looked at rather than the words used”.

According to the above judicial jurisprudence, what matters is not only the words used but also the substance of the wording of the court. However, in the former respondent's application the substance of the ruling and words used were meant that, the application before the tribunal was incompetent. Hence, the respondent's application was liable for being struck out as the tribunal rightly did. This finding answers 1st and 2nd ground of appeal not in affirmative.

Regarding the **3rd ground**, from the outset, this ground is unfounded since it challenges the analysis of the parties' evidence which was not the case, reason being the impugned ruling was purely on points of law raised by the appellant's counsel. Hence, there was no any evidence adduced by the parties for LDLT's analysis.

Moreover courts of law usually determine appeals dependent on grounds of appeal so presented or set forth in the Memorandum of Appeal unless leave is sought and obtained by the appellant (See Order XXXIX Rule 2 of CPC). That being the legal position, I am not therefore obliged to determine on whether the DLHT's ruling is illegal for want of reasons

or not since the same was not set forth in the appellant's Memorandum of Appeal.

It is worthy note that, the appellant did not indicate a registration number of his appeal which he alleged to have filed in this court. Thus, I am not persuaded if the appellant really appealed against the decision of the District Land and Housing Tribunal of Babati. Nevertheless, an appeal does not operate as a bar to an application for execution of a decree or order of the court unless the execution is stayed upon showing sufficient cause as per Order XXXIX Rule 5 of the CPC.

In the upshot and for the foregoing reasons, the court is fully satisfied that, this appeal is unmeritorious. It is accordingly dismissed with costs.

It is so ordered.

DATED at ARUSHA this 7th February 2023




M. R. GWAE
JUDGE
07/02/2023