

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO.450 OF 2020**

(Arising from the decision of the Kinondoni District Land and Housing Tribunal  
in Land Application No. 205 of 2019)

**THEOBALD MAINGU SABI ..... APPLICANT**

**VERSUS**

**1. WILYSON FRANCIS LIWEWA**

**2. MARIAN E. MAKWEGA**

} ..... **RESPONDENTS**

**RULING**

*Date of last order: 29.11.2021*

*Date of Ruling: 30.11.2021*

**A.Z.MGEYEKWA, J**

The application has been preferred under the provisions of Section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E. 2002]. Supporting the application is the affidavit of Theobald Maingu Sabi, the applicant, setting out grounds on which the prayer for extension of time is based.

The application has encountered a formidable opposition from the 1<sup>st</sup> respondent, vide a counter-affidavit sworn by Adrian Mhina, the 1<sup>st</sup> respondent's Advocate. It transpired that the respondent's Advocate had on 23<sup>RD</sup> September, 2021 raised four points of objection which for easy reference, I find it apt to reproduce as hereunder:-

1. *The Honourable Court has not moved properly.*
2. *The present application is res subjudice to Land Application No. 723 of 2020, Kinondoni District Land and Housing Tribunal.*
3. *Affidavit supporting the application is fatal defective for containing argumentative statements and opinions.*
4. *The present application has been brought prematurely.*

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook.

The matter proceeded *exparte* against the 2<sup>nd</sup> respondent. I am alive to the fact that the 2<sup>nd</sup> respondent was notified through publication to appear on 28<sup>th</sup> October, 2021 when this case was fixed for hearing. However, he did not appear on the stated date and the case was fixed hearing on 16<sup>th</sup> November, 2021 and on 22<sup>nd</sup> November, 2021 during which, again, the 2<sup>nd</sup> respondent did not appear. Having regard to the entire circumstances of this case, I am of the considered view that the 2<sup>nd</sup> respondent was duly

being served therefore, I grant the applicant's prayer to proceed *ex parte* against him.

At the hearing date, the parties urged this court to dispose of the preliminary objection by way of written submissions whose filing was to conform to the court schedule. Whilst the respondent was to prefer his on or before 24<sup>th</sup> November, 2021, the applicant was scheduled to file his on or before 29<sup>th</sup> November, 2021, whereas the applicant conformed to the filing schedule.

In his submission in support of the preliminary objection, Adrian Mhina, has begun by tracing the genesis of the matter which I am not going to reproduce in this application.

On the first limb of objection, Mr. Mhina contended that the application is brought under section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2002]. It was his concern that as per item 31 of the Schedule of the GN No.140 of 2020 which came into force on 28<sup>th</sup> February, 2020. He claimed that the revised edition was required to be cited 2019 and not 2002. Fortifying his position he referred this court to the case of **Iddie Mwinyi v National Bank of Commerce & MIS Ngeme Mbitu** [2001] TLR. He went on to argue that the court has a duty to take judicial notice of existence of the Revised Edition 2019 in accordance to GN No. 140 of

2020. It was his view that failure to cite a proper Revised Edition amounts to wrong citation of the law.

Arguing for the second limb of objection, Mr. Mhina argued that the application is *res judicata* to Land Application No. 273 of 2020, Kinondoni District Land and Housing Tribunal. To support his submission he cited section 8 of the Civil Procedure Code Cap.33 [R.E2019]. The learned counsel went on to submit that on 19<sup>th</sup> August, 2020, the applicant lodged a Misc. Land Application No. 723 of 2020 at Kinondoni District Land and Housing Tribunal against the 1<sup>st</sup> respondent seeking for extension of time to appeal from the Ward Tribunal against an *ex parte* judgment in Land Application No. 498 of 2018 dated 02<sup>nd</sup> February, 2019.

Mr. Mhina continued to argue that in the said application the parties were the same except the 2<sup>nd</sup> respondent and they had the same claims litigating on the same title and the same is scheduled for hearing before Hon. Mbilinyi, Chairman on 03<sup>rd</sup> December, 2021. It was his view that the matter be struck out for being *res judicata*.

On the third limb of objection, the learned counsel for the respondents complained that the application is supported by a defective affidavit. Mr. Mhina contended that the affidavit contains argumentative paragraphs and opinions contrary to the law. Fortifying his position he referred this

court to paragraph 6 of the applicant's affidavit. He also cited the cases of **Afro –Aid Development Consultanta (T) Ltd v The Commissioner for Lands & Others**, Misc. Land Application No. 430 of 2019 (unreported) and **Samson Kishosha v Charles Kingongo Gabba** [1990] TLR.

Submitting in support of the fourth limb of objection, the learned counsel for the respondent threw his last jab by contending that the decision which the applicants intends to appeal was procured *ex parte* against him, to fortify his submission he referred this court to paragraphs 4 and 6 of the applicant's affidavit. He also cited the case of **COTWO (T) Ottu Union & Another v Honourable Iddi Simba Minister of Industries & Trade and Others** TLR [2002]. The Court held that:-

*" a preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained, and if sustained a preliminary objection should be capable of disposing of a case."*

It was his submission that the fact that the applicant wants to appeal against *ex parte* decision is ascertained facts and is sustained the same will be capable disposing of this application. Mr. Mhina went on to submit that the applicant applied for an extension of time to appeal against *ex parte* decision issued by the trial tribunal, instead of applying setting aside *ex parte* first before applying for something else. In the case **MIC**

**Tanzania Ltd v Kijitonyama Lutheran Choir**, Civil Application No. 109 of 2015 (unreported). The Court of Appeal of Tanzania held that:-

*"In the circumstances of this case, the applicant should have applied to set aside ex parte judgment."*

Similarly, in the case of **Artibes Pius Ishebabi v Hassan Issa Likwedembe**, Civil Appeal No. 05 of 2019.

Mr. Mhina insisted that the applicant should apply to set aside *ex parte* decision firstly before coming to your Honourable court. He contended that the application is an abuse of the court process and will lead to multi-application which is meaningless.

On the strength of the above, he stressed that the application is brought prematurely.

In reply, Mr. Mulebya valiantly opposed the preliminary objections raised by the learned counsel for the respondent. On the first objection, the applicant's Advocate in his written submission stated that, the learned counsel for the respondent contended the applicant did not cite a proper provision of section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. It was on his view, that the omission is minor and not fatal and the same is curable since it was a slip of a pen. To bolster his submission he cited the cases of **OTTU on behalf of P.L Asenga & 106 and 3 others v**

**AMI Tanzania Ltd**, Civil Application No. 35 of 2011 (unreported) and the case of **Amani Girls Home v Isack Charles Kanela**, Civil Application No. 325/08 of 2019, CAT (unreported). He distinguished the cited case of **Iddi Mwinyi** (supra) since in the cited case the applicant did not cite proper enabling provision contrary to the case at hand.

Arguing for the second limb of objection, Mr. Mulebya in his written submission argued that this point of objection does not meet the pre requisite condition of being a preliminary objection. Supporting his position he cited the cases of **Mukisa Biscuit Company Ltd v West End Distributors Ltd** (1969) EACA and **Sameer Mohamed v Sophia Bakari Imonje**, Land Case No. 75 of 2015, HC, Land Division at Dar es Salaam (unreported). In regard to *res judicata*. Mr. Mulebya claimed that the learned counsel for the respondents has alleged that the matter is *res judicata* but the same requires the court to examine the tribunal records. To support his submission he cited the case of **Exim Bank (T) Ltd v M/A Ace Distributors (T) Ltd**, Commercial Case No. 83 of 2019 HC (unreported).

As to the third limb of objection. The applicant's Advocate complained that whether the paragraph 6 of the applicant's affidavit is argumentative or contains opinion is a matter of fact and not a point of law. He valiantly contended that in the eyes of other people, the paragraph 6 is not

argumentative not does it contain opinion. To buttress his position he cited the case of **Mukisa Biscuits** (supra). Mr. Mulebya added in case this court will determining this objection then it will go against the principle of preliminary objection since the same is raised while evidence is needed to ascertain this objection.

With respect to the last objection, the applicant's Advocate argued that the court requires to determine the evidence on record to determine whether the application for extension of time is prematurely before this court. To bolster his position he cited the cases of **Mukisa Biscuits** (supra), **Sameer Mohamed** (supra) and the case of **Group Six International Company Ltd v Central Paris Complex Ltd**, Misc. Civil Cause No.5 of 2020, HC at Moshi.

On the strength of the above submission, Mr. Mulebya beckoned upon this court to strike out the preliminary objection with costs.

I have given careful deliberation to the arguments for the application herein advanced by both learned counsels on the preliminary objection so raised. In tackling the preliminary objection, I think I will not be detained by it. The central issue for consideration and determination is ***whether the points of preliminary objection are meritorious.***



Deciding on the matter at hand, I find it prudent to first venture on the fourth objection. It is trite law that a party cannot file an appeal against an *ex parte* judgment without setting aside the *ex parte* judgment. The applicant claimed that this point is not a point of law the same requires evidence. On the other hand, in the instant application, the applicant did not dispute that he did not set aside the *ex parte* Ruling. The applicant's affidavit specifically on paragraph 4 reveals that the District Land and Housing Tribunal issued an *ex parte* Ruling in Land Application No. 205 of 2019 dated 19<sup>th</sup> December, 2019 which the applicant is applying for extension of time to lodge an appeal against the said *ex parte* Ruling. In the case of

In determining as to whether an *ex parte* judgment is appealable in law; I am in accord with the learned counsel for the appellants' submission that an appeal against an *ex parte* decree or order is possible, however, there is a limitation as stated in the case of **Managing Director Precision Air Service LTD v Leonard F. Kachebonaho**, Civil Appeal No. 8 of 200 (unreported) by my brother Hon. Mjemas, J (as he then was) that:-

*" The appellant on appeal will not be allowed to challenge the order posting the suit for ex parte hearing by the trial court and the existence of a sufficient case for nonappearance of the defendant before it. He could only challenge*

*the merit of the suit to enable him to contend that the materials brought on record by the plaintiff were not sufficient for passing a decree in his favor."*

From the aforesaid authority, there is no doubt that it is possible to appeal against an *ex parte* decree subject to the condition stated in the above-cited case. I am not in accord with the applicant's Advocate submission that this is not a point of law. I am saying so because it trite law that an *ex parte* judgement be set aside before exhausting other remedies such as appeal.

From my observation on records, I fully subscribe to Mr. Mhina's submission that the appellants ought to exhaust the remedy by applying to set aside the appeal at the District Land and Housing Tribunal before embarking to apply for an extension of time to file an appeal before this court. I have also considered the holding in the cases of **Paul A. Kweka and Hilary P. Kweka v Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002 and **Jaffari Sanya Jussa & Ismail Sanya Jussa v Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 (both unreported). The Court of Appeal of Tanzania observed that an appeal is the last resort after exhausting all available remedies.

For the reasons canvassed above, I am satisfied that the preliminary objection is meritorious and it is accordingly sustained. The applicant's application for extension of time to file an appeal is prematurely filed

before this court without exhausting all the available remedies at the District Land and Housing Tribunal. Hence rendering the same incompetent. Having so found, I refrain from deciding the three points of preliminary objections. It will be an academic endeavour.

Eventually and for the foregoing reasons, the incompetent application for extension of time to lodge an appeal out of time is hereby struck out without costs.

Order accordingly.

Dated at Dar es Salaam this date 30<sup>th</sup> November, 2021.



A.Z MGEYEKWA

JUDGE

30.11.2021

Ruling delivered on 30<sup>th</sup> November, 2021 via audio teleconference whereas Mr. Mulebya, learned counsel for the applicant and Mr. Mhina, learned counsel for the respondents were remotely present.



A.Z MGEYEKWA

JUDGE

30.11.2020