

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 425 OF 2023**

**BETWEEN**

**MILTON LUSAJO LAZARO ..... APPLICANT**

**VERSUS**

**ELIZABETH THOMAS OLOTU ..... RESPONDENT**

**RULING**

*Date of last Order: 21/08/2023*

*Date of Ruling: 28/08/2023*

**A. MSAFIRI, J.**

The applicant has brought this Application under Section 47(1) of the Land Disputes Courts Act, Cap. 216 R. E. 2019 and Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141, R.E 2019 seeking leave to appeal to the Court of Appeal of Tanzania (herein CAT) against the whole decision on the points of preliminary objection which was delivered on 30<sup>th</sup> June 2023 by Hon. I Arufani, J.

A brief background of this Application is that, the respondent in this Application one Elizabeth Thomas Olotu has sued the applicant Milton Lusajo Lazaro over a landed property, vide Land Case No. 326 of 2022. The suit is still pending before this Court. In the course of proceedings, *Aule*

the applicant (defendant) raised a preliminary objection on two points of law that;

a) The suit which is in respect of land is time barred by virtue of limitation.

b) The subject matter of the suit, which is a joint venture, is a contract as such the suit is time barred by virtue of limitation.

After hearing the preliminary objections, this Court found that the same are devoid of merits, overruled the objections and ordered the matter (main suit), to proceed on merit.

The applicant who is a defendant in the main case and the one who raised the preliminary objections, was aggrieved and now have come before me seeking for leave to appeal to the CAT.

At the hearing of this Application, the applicant was represented by learned senior advocate Mr. John B. Tendwa, with Mr. Bernad Ngatunga, learned advocate, while the respondent was represented by Mr. Walter Massawe, learned advocate.

Having heard the submissions by both parties which was oral, the pertinent issue before this Court is whether the decision of this Court overruling the preliminary objections is appealable to the CAT. Submitting in support of the application, Mr. Tendwa prayed to adopt both the

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affidavit sworn by Milton Lusajo Lazaro, the applicant, and reply to the counter affidavit. Mr. Tendwa said that the Ruling of Hon. Arufani, J. dated 30/6/2023 is not interlocutory, but it brought the matter to its finality. He pointed that the applicant is seeking leave to appeal to CAT because there are vital legal issues which were raised during the hearing of preliminary objection which needs attention of CAT.

He named the legal issues to be first, the limitation of time on institution of land matters, and limitation of time on matters of contract. The second issue is the issue of fraud which standard of proof is higher in criminal matters. It was Mr. Tendwa's view that those issues which were raised during the preliminary objection has the consequence of taking the matter to its finality and for that, they need attention of CAT.

In addition, Mr. Tendwa submitted further that the contents of the counter affidavit raises issues of opinions and conclusion which is fatal. That the counter affidavit has farfetched issues which intends to tarnish the image of the applicant. He prayed that the contents of the counter affidavit be expunged from the record.

In response, Mr. Massawe prayed to adopt the contents of the counter affidavit sworn by Juvenalis Joseph Ngowi, advocate of the respondent. Mr. Massawe cited the provisions of Section 5(1) (d) of the Appellate Jurisdiction Act, Cap 141, R.E 2019 (AJA), which provides that

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no appeal shall lie against any preliminary or interlocutory decision of High Court unless such decision has final decision on the matter.

He said that the decision which the applicant intends to appeal to CAT is the Ruling of this Court by Hon. Arufani, J on preliminary objection which was raised by the applicant who is the defendant in Land Case No. 326 of 2022. That the preliminary objections were overruled by this Court, and Land Case No. 326 of 2022 is pending before this Court, as it was not finalized.

He argued that the Ruling on Land Case No. 326 of 2022 is not appealable to CAT. He cited the case of **Rev. Asumwisye Mwafongo Mwaisabila & 3 others vs. The Registered Trustees of the Evangelistic Assemblies of God Tanzania**, Misc. Civil Application No. 69 of 2022, HC MZA (unreported), where this Court, in similar position as the current matter, held that the ruling on interlocutory or preliminary order is not appealable in terms of Section 5(2) of the AJA. Mr. Massawe prayed for the dismissal of the application with costs.

In rejoinder, Mr. Tendwa reiterated his submissions in chief. He added that, the Ruling in the cited case of **Rev. Asumwisye Mwafongo Mwaisabila (Supra)** was the Hon. Judge's opinion! That the provision of Section 5(2) (d), of AJA is about interlocutory orders which are within

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the parameters of temporary injunction, which is not the case in the present matter. He prayed for the Court to grant the prayers sought.

Submitting in addition, Mr. Ngatunga argued that the preliminary objection was on issues of limitation of time which has the effect of determining finality of the case. He added that, it is not interlocutory matter hence Section 5(2) (d) of the AJA is not applicable.

Having heard both rival parties on their submissions for and against this Application, the pertinent issue is whether this Application is competent before this Court.

This is an Application where the applicant is seeking for this Court to grant him leave to appeal to the CAT against the whole decision on points of preliminary objection. The respondent through the advocate Mr. Massawe has contended that this application is not competent before this Court as the decision which the applicant seek to appeal against, is actually not appealable. Mr. Tendwa and Mr. Ngatunga, for the applicant were adamant that the decision on the preliminary objection is not interlocutory hence it is appealable.

Section 5(2) (d) of the Appellate Jurisdiction Act, provides as follows;

*(2) Notwithstanding the provisions of subsection (1),* 

*(d) no appeal or application for revision shall lie against or be made in respect **of any preliminary or interlocutory decision** or order of the High Court **unless such decision or order has the effect of finally determining the suit**".*  
(Emphasis added).

With due respect, I don't agree with the submissions by the counsels for the applicant that the decision of Hon. Arufani, J in the impugned Ruling on preliminary objection is not interlocutory.

The word interlocutory has been defined by **Black's Law Dictionary** 8<sup>th</sup> Edition at page 832 to mean;

*"Interim or temporary, not constituting a final resolution of the whole controversy"*

The decision of Hon. Arufani, J. was not final as it did not brought the matter i.e. Land Case No. 326 of 2022 to its finality. The case is still pending before this Court as per the Ruling on the said case which held that the conduct of the matter shall proceed on merit.

The counsels for the applicants argued that since the issues raised on the preliminary objection were the issues of limitation of time which has the effect of determining the finality of the case, then the Ruling is not interlocutory. However, again, I distance myself from this views by the counsels for the applicant. It is crystal clear that, despite the fact that

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the issues raised were on the limitation of time, they did not finalize the matter, as the Land Case No. 326 of 2022 was not dismissed but rather those preliminary objections were overruled.

Hence, it does not matter whether the raised issues were on subject of limitation of time, what is important point of law is that the matter was not final and conclusive. The decision of the Ruling on preliminary objection neither determined the rights of the parties nor closed the doors to any of the parties. The applicant's rights are yet to be determined as the main case is scheduled to proceed on merit. The applicant also still have a right to present his evidence before this Court on the issues in controversy and further the right to appeal when the case is finally determined and concluded on merit.

I find that this application seeks to appeal against the preliminary decision of this Court which did not finally determine the suit, and hence, it falls squarely under Section 5(2) (d) of the AJA, and it is not appealable. Consequently, this Application lacks merit and it is hereby dismissed in its entirety, with costs.



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**A. MSAFIRI**  
**JUDGE**  
**28/8/2023**