

**IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

LAND APPEAL NO. 48 OF 2022

*(Originated from the Decision of the District Land and Housing Tribunal for Mpanda in
Misc. Application No. 388 of 2022)*

ATHUMANI ALI APPELLANT

VERSUS

ROBERT LWICHE RESPONDENT

RULING

24th January, 2023 & 21st March, 2024

MRISHA, J.

The appellant, **Athumani Ali** unsuccessfully sued the respondent **Robert Lwiche** before District Land and Housing Tribunal for Mpanda at Katavi henceforth the trial tribunal, over a piece of land located at Sibwesa Village within Mpanda District. The said decision was made on 29.07.2022 vide Land Application No. 28 of 2017.

Upon realizing that he was time barred, the appellant filed with the trial tribunal Misc. Land Application No. 388 of 2022 in order to seek for extension of time within which to appeal against the abovenamed tribunal's ex parte trial tribunal's judgment.

After hearing submission of both parties, the trial tribunal dismissed the appellant/applicant's application with costs stating that the same was intended to delay justice of the respondent. The appellant was aggrieved by such decision; hence, the present appeal.

He, therefore, decided to approach the court with a petition of appeal containing two grounds of appeal namely,

1. That, the trial Tribunal erred in law and facts by dismissing the application for extension of time while the Appellant managed to advance good and sufficient reasons for time within which to set aside ex-parte judgment.
2. That, trial Tribunal erred in law and facts in holding that Application No. 28 of 2017 did not proceed ex-parte against the Appellant and that the Appellant was not bound to be notified date of judgment.

However, subsequent to filing of the present, the respondent filed a Notice of Preliminary Objection with the following points: -

1. That, the appeal is bad in law for being preferred in form of a petition while the tribunal was exercising jurisdiction when hearing the previous application resulting to this appeal.

As a matter of practice, such preliminary objection had to be heard and determined first. With the consent of the parties, the preliminary objection was heard by way of written submissions and both parties complied with the order of the court.

Through his written submission in support of the preliminary objection, the respondent argued that the appeal is bad in law for being preferred in the form of petition while the tribunal was exercising original jurisdiction when hearing the previous application resulting to this appeal.

He added that the matter at hand originated from the District Land and Housing Tribunal of Mpanda which was exercising its original jurisdiction.

Hence, he was of the view that the correct format which was to be applied by the appellant in filing this appeal with the court, was to file a Memorandum of appeal instead of a Petition of Appeal as the appellant did. He further argued that, the Land Courts Disputes Act Cap 216 R.E. 2019 and Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (GN 174 of 2003) do not provide for the format of filing an appeal to the High Court in appeal which originates from the District Land and Housing Tribunal when exercising original jurisdiction.

To his mind, such lacuna has to be filled by section 51(2) of The Land Disputes Courts Act Cap 216 which allow the use of the Civil Procedure Code Cap 33 R.E. 2019 and that Order XXXIX rule 1 of the CPC prefers the proper format appeal was a memorandum of appeal and he quoted rule 1(1) of the CPC.

Again, he argued that the appellant contravened Order XXXIX rule 1(1) of the CPC because the provision uses the word "*shall*" which is coached in a mandatory term as per section 53(2) of the Interpretation of Laws Act Cap 1 R.E. 2019.

At this time, the respondent cited various cases to support his argumentation, including the case of case of **T.G World International Ltd v. Carries Options Africa (Tanzania) Ltd**, Civil Appeal No 23 of 2021 HCT Arusha, **Josiah Makabilane v. Ngemela Sebastian**, Civil Appeal No. 5 of 2018 HCT Tabora, **Damari Watson Bijinja v. Innocent Sangano**, PC Matrimonial Appeal Cause No 5 of 2021 HCT Kigoma and **Amidu Damian Likiliwike v. Steven Temba**, Land Appeal No. 3 of 2020 HCT Iringa (all unreported) whereby in the later decision the High Court held inter alia that:

"The appellant was required to conform to the requirement of the provision by filing an appeal by way of a memorandum and not a petition."

He further submitted that in all the abovementioned precedents, the court struck out the appeal for being preferred in an incorrect format. He finally argued that appellant is duty bound to follow rules of procedure provided by the law; he also referred the case of **D.T Dobie (Tanzania) Limited and Phantom Modern Transport**, Civil Application No. 131 of 2001 CAT DSM (unreported) where according to him, it was stated that,

"While we do not clasp mere husks, but rather go for the kernel, breaching the rules in a way that suggests a clear disregard of them cannot be brooked or condoned."

He added that the Court of Appeal went further stating that,

"There is no excuse for making errors, errors which could be easily avoided."

And, in connection to the present case, the respondent submitted that the appellant offended the mandatory procedural requirement of the law by filing an appeal in an incompetent format. Thus, he prayed to this court to

follow the decisions in the above cited cases and proceed to struck out the incompetent appeal with costs.

The appellant's reply to the present preliminary point of object was very brief. He submitted that the law is very clear, as provided for under section 38(2) of the Land Disputes Court Act Cap 216 R.E. 2019 that,

"Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought."

He further submitted that the court records reveal that the appellant filed his appeal in the High Court. To his view, the appeal was filed in the proper court.

On the issue of memorandum of appeal or petition of appeal, the appellant argued that the law is very certain that there is no difference between the use of the word memorandum of appeal and petition of appeal as all words are the same.

To bolster that proposition, the appellant cited the cases of **Mussa Clement v. Atanas Mandalu Ntemwa**, Land Appeal No. 76 of 2022

(unreported) and **Basil Masare v. Petro Michael** [1996] TLR, 226 where it was held that,

"There is no substantive distinction can one make from the use of petition or memorandum when referring to the grounds of appeal to the higher court."

In conclusion, the appellant submitted that for the interest of justice and for the reasons stated above and authorities cited, he prayed to this court to dismiss the preliminary objection with costs.

Having read the above rival parties' submissions, the impugned petition of appeal together with a number of authorities cited therein, I will therefore proceed to determine whether the raised preliminary objection has merit.

It is a well-known position of the law that a preliminary objection raises a point of law which if upheld, disposes of the suit and saves the time of the court and of the parties by not going into the merits of the case. This position was stated in the case of **Eusto Ntagalinda vs Tanzania Fish Process Ltd, MZA**, Civil Application No. 8 of 2011 CAT at Mwanza (unreported).

In this case, the respondent claimed that the appeal is in bad in law for being preferred in form of petition while the tribunal was exercising original jurisdiction when the hearing the previous application resulting to this appeal; his argument was disputed by the appellant who submitted that there was no difference between the use of the word memorandum of appeal and petition of appeal all words are the same.

To the respondent, it is his contention that the present appeal originates from the District Land and Housing Tribunal which was exercising original jurisdiction and the correct format which was to be applied by the appellant through a Memorandum of appeal instead of a petition of appeal.

He further contended that the Land Courts Disputes Act and Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003 do not provide for format of appeal to High Court where the case originates from the District Land and Housing Tribunal. He further maintained that the proper format for the appellant to apply, is provided under Order XXXIX rule 1(1) of the CPC. However, the issue is whether the preliminary objection raised by the respondent has merit.

It is undisputed fact that this case originates from the District Land and Housing Tribunal, and the appellant filed petition of appeal for challenging the decision of the trial tribunal. The appellant filed this appeal after being aggrieved by the decision of the tribunal in order to challenge the decision of the trial tribunal.

That being the case, the issue is whether there is a lacuna in the Land Disputes Court Acts on format of appeal to the High Court.

This is indeed the center of contention between the parties in this preliminary objection on point of law where the respondent has contended that there is a lacuna in the Land Disputes Court Act. On the other side, the appellant has contended that there is no such lacuna. This court is of the view that the Land Disputes Court Acts is exhaustive in regards to the format of appeal to the High Court where the land case is originated from the District Land and Housing Tribunal. The format of appeal to the High Court is provided under section 38(2) of the Land Disputes Court Acts as follows: -

"Every appeal to the High Court shall be by way of petition and shall be filled in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought."

Therefore, by virtue of the above provisions of the law, it is a legal requirement that the appeal which is originated from the District Land and Housing Tribunal, should be filed by way of petition. In this case, it is obvious that the appellant filed with the court a petition of appeal with an intention to challenge the decision of the District Land and Housing Tribunal for Mpanda in Misc. Application No. 388 of 2022.

It is also apparent that the appellant complied with section 38(2) of the Land Disputes Act. Hence, in my view that the preliminary objection on point of law raised by the respondent is unmerited.

Again, this court agrees with the submission of the appellant that there is no substantive distinction that one can make from the use of petition or memorandum of appeal to the higher court; See **Mussa Clement vs Atanas Mandalu Ntemwa**(supra). Despite the fact that above mentioned case is of the High Court decision, yet in my opinion it applies mutatis

mutandis to our case; this court is therefore persuaded to follow that position.

More so, the Court of appeal tackled the same scenario in the case of **Basil Masare vs Petro Michael** (supra) where it was held inter alia, that,

"I must confess I can see no such distinction although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. In my view if an appellant uses the word memorandum instead of the word petition in connection with his grounds of appeal in a case originating in the primary court that alone cannot render the appeal incompetent."

Based on the aforesaid position, this court finds out that there was no distinction between the use of the word memorandum and petition of appeal, both words are the same; using of any of those terms cannot render the appeal incompetent.

In the circumstance, and due to the foregoing reasons, I am of the settled view that the preliminary objection on point of law raised by the respondent falls short of merit and it is hereby dismissed with costs. Let

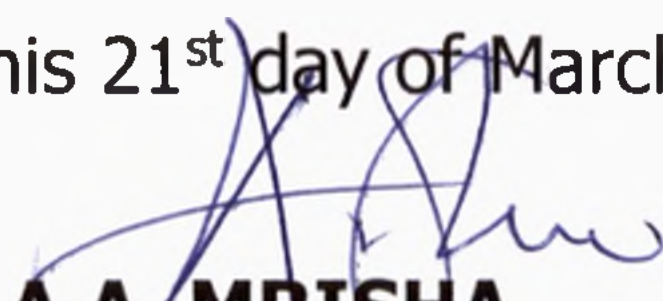
the case proceed with the hearing of the present appeal on merit as per the scheduled date.

It is so ordered.


A.A. MRISHA
JUDGE
21.03.2024

DATED at **SUMBAWANGA** this 21st day of March, 2024.




A.A. MRISHA
JUDGE
21.03.2024