IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LAND APPEAL NO. 03 OF 2020

(Origination from Application No. 115 of 2018 of District Land and Housing Tribunal for Iringa at Iringa)

AMIDU DAMIAN LIKILIWIKE (Administrator of the Estate of the Lade DAMIAN BOIMANDA LIKILIWIKE ..... APPELLANT

VERSUS

STEVEN TEMBA ..... RESPONDENT

Date of Last Order: 30/04/2020
Date of Ruling: 16/06/2020

RULING

MATOGOLO, J.

The appellant Amidu Damian Likiliwike as the administrator of the estates of the late Boimanda Likiliwike had sued the respondent one Steven Temba in the District Land and Housing Tribunal over a Plot No. 95 Block "N" located at Mjimwema area within Iringa Municipality. But the said suit was decided in favour of the respondent thus dismissed with costs.

Aggrieved, the appellant has come to this court where he filed petition of appeal comprising of four grounds of appeal.

The appellant was represented by Mr. Joshua Evaristo Chussy learned advocate from JOESAC Company and advocates.

The respondent was represented by Mr. Barnabas Pascal Nyalusi learned advocate. Mr. Nyalusi raised notice of preliminary objection on point of law to the effect that the appeal is incompetent and defective for being brought as petition instead of memorandum as required by Order XXXIX rule(1) of the Civil Procedure Code [Cap. 33 R.E. 2002].

As usual once there is a preliminary objection raised, the same is to be disposed of first. The preliminary objection was argued by way of written submissions.

In support of the preliminary objection Mr. Nyalusi contended that the preliminary objection is typically based on one issue as to whether the appeal which originated from the decision of the District Land and Housing Tribunal when exercising its original jurisdiction to the High Court can be preferred by way of petition.

He argued, according to Section 38(1) of the Land Disputes Courts Act [Cap. 216 R. E. 2019] provides that any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in exercise of its Appellate or revisionary jurisdiction may within sixty days after the date of the decision or order, appeal to the High Court (Land Division). The same Section on subsection (2) provides that every appeal to the High Court (Land Division) 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 argued that petition of appeal to this court may only be filed for an appeal which originated from the decision of the District Land and Housing Tribunal when exercising appellate or revisionary jurisdiction.

That Regulation 24 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003(GN 174 of 27/06/2003) provides that any party who is aggrieved by the decision of the District Land and Housing Tribunal may lodged his appeal to the High Court Land Division, however the learned counsel said the Act is silent on the form on which the appeal may be lodged to this court. However Section 51 of the Land Disputes Act provides for the application of the Civil Procedure Code by the District Land and Housing Tribunal. Therefore if a party desires to file his appeal to this court against the decision of the District Land and Housing Tribunal when exercising original jurisdiction he should resort to the Civil Procure Code Order XXXIX Rule (1) which provides inter alia that every appeal to this court shall be preferred in the form of a memorandum.

The learned counsel argued that the appellant was supposed to prefer this appeal in a form of a memorandum of appeal and not by petition of appeal. Mr. Nyalusi learned counsel supported his argument by citing the case of ***Tadei Msamba Shabani vs. Ibrahim Luwumba***, Misc. Land Case Appeal No. 17 of 2014 High Court Iringa and the case of ***Edward Oteso vs. Maingwa Mario***, Miscellaneous Land Appeal No. 36 of 2019 in which the question for determination was whether the use of the title "Memorandum of Appeal" instead of "Petition of Appeal" in the Appellant's appeal is fatal and renders the appeal incompetent. He said the court resolved that issue and sustained the preliminary objection that although the use of the word "shall" does not in every case mean that the requirement is mandatory, however this position changed since the coming into force of the interpretation of Laws Act. Mr. Nyalusi asked this court to be persuaded by the reasoning in the above cases and hold that the appeal

is wrongly brought as a petition of appeal and hence defective. The learned counsel prayed for it to be struck out with costs.

In his reply submission Mr. Joshua Erasto Chussy learned advocate contended that the objection and submission thereon are unworthy to be considered seriously by this court. He said the decision in ***Tadei Msamba Shabani case*** (supra) is not binding upon this court. The said decision was made *suo moto* without inviting opinion of the learned counsel for the parties to address the court on the mischief such that the court deprived itself of the immense benefit it would have got through the legal minds of the counsel.

He said the similar problem was raised in the case of ***Basil Masare vs. Petro Michael (1996) TLR 226*** by Mroso, J. as he then was where he held that the use of memorandum instead of petition in connection with ground of appeal in a case originating in the Primary Court that alone cannot render the appeal incompetent. The learned counsel cited the case of ***Mary Mwambene vs Besons Mwashambwa***, Land Appeal No. 42 of 2016 High Court Mbeya on the same position. He said had the above decisions have been brought to the attention of the judge in ***Tadei Msamba Shabani case,*** the court would have reached a different conclusion on the basis of the doctrine of precedent as was emphasized by the Court of Appeal in the case of ***Ally Linus and 11 Others vs. Tanzania Harbours Authority and Another (1998) TLR 5.***

The learned counsel contended that his position is fortified by the advent of the principle of overriding objective in which courts are argued to do substantial justice rather than being tied up to the technicalities and

prayed to this court to consider provision of Section 45 of the Land Disputes Courts Act to decide the appeal on substantial justice.

On the issue of interpretation of the word "shall" Mr. Joshua learned counsel argued that he is aware of the definition introduced in Section 53(1) of the interpretation of the Laws Act. But said the word has been considered in several cases by the Court of Appeal of Tanzania before and after the Act came into force. But the court has consistently held that whether the word is mandatory and has a nullification effect will depend on whether the legislature has laid down the consequences of no observance of the mandatory act or procedure. To that end he cited the Court of Appeal decision in the case of ***Mwita Sigore @ Ogora vs. Republic***, Criminal Appeal No. 54 of 2008.

The learned counsel prayed to this court to overrule the preliminary objection with costs.

The respondent's counsel filed a rejoinder in which he reiterated what he had stated in submission in chief with few emphasis.

I have seriously considered the parties submissions and the rival arguments by the learned advocates, and the courts decisions cited by the respective counsel.

It appears generally the issue is not so far settled as to whether or not filing appeals to this court for matters which originate from the District Land and Housing Tribunal exercising its original jurisdiction as a petition of appeal instead of a memorandum of appeal is fatal.

There are two positions, there are those who have strict interpretation of the law, Order XXXIX rule 1 of the Civil Procedure Code that such an appeal shall be brought by way of a memorandum of appeal as the law dictates.

But there are others who say yes, the law directs so but even if a party has filed his appeal by way a petition of appeal that is not fatal.

The crucial question for determination here is whether an appeal which is lodged by a Petition of Appeal is fatal and renders the appeal incompetent. Mr. Nyalusi contention is that the appeal is incompetent because according to Section 38(1) of the Land Dispute Courts Act, any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in exercise of its appellate or revisionary jurisdiction may appeal to the High Court. Section 38(1) clearly provides that every appeal to the High Court (Land Division) shall be by way of petition and shall be filed in the District Land and Housing Tribunal.

As correctly submitted by Mr. Nyalusi, where the law, Cap. 216 does not provide for procedure of appeal for matters originating from the District Land and Housing Tribunal exercising original jurisdiction we have to resort to the Civil Procedure Code where Order XXXIX rule (1) provides for the procedure. The same provides:-

> *" Every appeal **shall** be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this order referred to as "the court" or to such officer as it appoints in this behalf and*

the memorandum shall be accompanied by a copy of the decree appealed from and (unless the court dispenses there with) of the judgment on which it is founded".

There is therefore a mandatory requirement for the appeal to be in a form of "memorandum of appeal" due to the word "shall" used which has mandatory requirement. There is another argument that not always where the word "shall" is used there is mandatory requirement. This has been the argument by Mr. Joshua Erasto Chussy and supported his position by the decision of this court in ***Mary Mwambene case*** (supra).

However again this court, Robert, J. in a recent decision in ***Edward Otesoi vs. Maingwa Mario*** (supra) while referring to the decision of the Court of Appeal of Tanzania in the case of ***Njake Enterprises Limited vs. Blue rock Limited and Another***, Civil Appeal No. 69 of 2017 (unreported) was of the view that since the provision is couched in mandatory terms the court cannot disregard it.

In actual fact there is no gain saying first that there is no difference of memorandum of appeal and petition of appeal. This is because the law itself has made a distinction. An appeal is preferred by a petition of appeal where it originated from the District Land and Housing Tribunal while exercising appellate or revisionary jurisdiction in accordance to Section 38(1) of the Land Dispute Courts Act, and the procedure is that the appeal is to be lodged in the District Land and Housing Tribunal from which the decision sought to be challenged was decided. But where the appeal originates from the decision of the District Land and Housing Tribunal

exercising original jurisdiction the same is to be by a memorandum of appeal and must be lodged to the High Court. But above all the time limitations in lodging appeals are different for appeals originating from the Ward Tribunal, that is decided by the District Land and Housing Tribunal in exercise of appellate or revisionary jurisdiction is sixty days pursuant to Section 38(1). But where an appeal lies to the High Court from the District Land and Housing Tribunal exercising original jurisdiction is 45 days pursuant to Section 41 of the Land Disputes Courts Act, Cap 216 as amended by the Written Laws (Miscellaneous Amendment) Act (No.2) of 2016.

In regard to the meaning of the word "shall" and its effect, it is the argument by the appellant counsel that the word shall makes the provision mandatory depending on the circumstance of each case as was held in ***Mwita Sigore @ Ogora vs. Republic*** (supra). I must point out that I have no problem with the instruction given in that case. But in no way the highest court of the land has watered down the mandatory requirement of the word. The court just directed under what circumstances the word become mandatory. It is unfortunate that the learned counsel did not explain the circumstances of the present case which makes the word to have no mandatory requirement. It should be noted that procedural law were enacted for a purpose, that is to make sure that dispensation of justice is done smoothly. But it is surprising to note that an advocate with all legal knowledge and trained on how and where to look for the law, is strenuously arguing against the clear provision of the law just for sake of justifying the mistakes he has made or his act of being not diligent while drafting legal documents. I think, in my considered view he does not

deserve mercy of this court. The position would be different had this error committed by a lay person not conversant with legal procedures. This court in the case of ***Martha Daniel vs. Peter Nko (1992) TLR 359***, Mroso, J. as he then was at page 363 has this to say:-

> *"A lawyer is trained on how and where to look for the law. It is easy for a court to reject his plea that he did not realize that a certain legal procedure for filing an appeal existed. But a lay person who has been acting with due diligence may be easily be misled by a wrong practice".*

I fully subscribe to that position, indifference, or lack of diligence on part of an advocate cannot be excused where rules of procedure comes into question.

Previously courts have been taking a relaxed approach on the use of the word "shall". But the position changed since the coming into force of the interpretation of Laws Act and the definition introduced by Section 53(1).

Section 53(2) provides:-

> *"(2) where in any Written Law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".*

If is therefore important to note that where the word "shall" is used it connotes mandatory. The learned counsel for the appellant has cited the

case of ***Mwita Sigore @ Ogora*** (supra) in which four rules of interpretation were formulated which were listed by the learned counsel. However it appears that the learned counsel did not read the case up to the end as it did not come with something different from what is emphasized in Section 53 of the interpretation of Laws Act. The case of ***Basil Masare*** (supra) relied upon by the counsel for the appellant was decided on 27/6/1995 before coming into force of the Interpretation of the Laws Act, [Cap.1 R.E. 2002] on 1/9/2004 and per the decision of the Court of Appeal in ***Goodluck Kyando V. Republic (2006) TLR 363*** at page 369. That decision therefore cannot aid the appellant in any way.

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.

The learned counsel for the appellant appears also to rely on the principle of overriding objective introduced by the Written Laws (Miscellaneous Amendment) (No.3) Act No. 8 of 2018 which enjoins the courts to do away with technicalities and determine case justly.

I am alive to the wake of such important principle, however it cannot be applied blindly even where there are clear rules of procedure couched in mandatory terms. The Court of Appeal of Tanzania had at different occasions discussed the application of the principle. In the case of ***Mondorosi Village Council and 2 Others vs. Tanzania Breweries Limited and 4 Others*** Civil Appeal No. 66 of 2017, the court held:-

> *"Regarding the overriding objective principle we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of*

the procedural law which go to the very foundation of the case...".

See also the case of ***Njake Enterprises Limited vs. Blue Rock Limited and Another*** Civil Appeal No. 69 of 2017 (unreported).

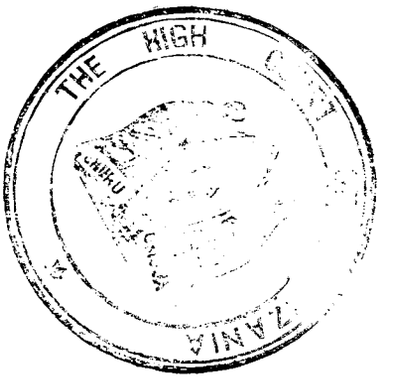
With the foregoing analysis and case law cited, since the provision is couched in mandatory terms and the appellant did not comply with, I find the point of objection raised by the respondent has merit. The same is sustained. The appeal is hereby struck out with costs.

Order accordingly.

F. N. MATOGOLO

JUDGE

16/06/2020



Date: 16/06/2020

Coram: Hon. F. N. Matogolo – Judge

L/A: B. Mwenda

Appellant:

Respondent: Absent

C/C: Grace

Mr. Chussy Joshua – Advocate:

My Lord I appear for the applicant Mr. Alfred Stephan is representing the respondent. The matter is for ruling on the preliminary objection raised by the respondent. We are ready.

COURT:

Ruling delivered this 16th day of June, 2020 in the absence of the parties but in the presence of Mr. Joshua Erasto Chussy learned advocate for the applicant, and in the presence of Mr. Alfred Stephan advocate for the respondent.

F.N. MATOGOLO

JUDGE

16/6/2020.