**IN THE COURT OF APPEAL OF TANZANIA**
**AT DODOMA**

**(CORAM: MUSSA, J.A, MWARIJA, J.A., And MZIRAY, J.A.)**

**CIVIL APPEAL NO. 256 OF 2017**

**OMARY SHABAN S. NYAMBU**
**(as the Administrator of estate**
**of the late IDDI MOHA (Deceased).....APPELLANT**

**VERSUS**

**1. CAPITAL DEVELOPMENT AUTHORITY**

**2. THE REGISTERED TRUSTEES OF THE DAR ES SALAAM YEMEN COMMUNITY FOR CHARITY & CULTURE (DYCCC)**

**3. BAHAJ CONSTRUCTION WORKS LIMITED** **.....RESPONDENTS**

**(Appeal from the Ruling and Order of the High Court of Tanzania at Dodoma)**

**(Sehel,J.)**

**dated the 24th day of May, 2016**
**in**
**Land Case No. 12 of 2015**

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## RULING OF THE COURT

11th & 17th July ,2018

**MWARIJA, J.A.:**

The appellant, Omari Shaban S. Nyambu who is the administrator of the estate of the late Iddi Moha, instituted a suit in High Court of Tanzania, Dodoma, Land Case No. 12 of 2015. His main claim against the respondents, Capital Development Authority, the Registered Trustees of the Dar es Salaam Yemen Community for Culture (DYCCC) and Bahaj

Construction Works Limited (the 1st - 3rd respondents respectively) is ownership of a piece of Land, Plot No. 26 which he alleges, was formerly No. 21, situated on Block 16 within Dodoma City. In the suit, he sought to be declared the lawful owner of the disputed plot into which the 2nd respondent has allegedly trespassed.

In their written statements of defence, the respondents denied the claim. They contended that the disputed plot was lawfully allocated to the 2nd respondent. They further denied the appellant's claim that the said respondent is a trespasser. Apart from their defence, in their joint written statement of defence, the 2nd and the 3rd respondents raised a preliminary objection consisting of three grounds. One of the raised grounds is to the effect that:

> *"...there presently exist Land Case No.4 of 2015 in the High Court of Tanzania at Dodoma between the plaintiff and the 2nd and 3rd defendants, based on same claims and same property in issue, this suit against the 2nd and 3rd defendants contravene (sic)*

*section 8 of the Civil Procedure Code, Cap 33 R.E. 2012."*

The High Court upheld that ground of the preliminary objection. The learned High Court judge (Sehel, J) found that there existed in the same Court, another suit, Land Case No. 4 of 2015 which, with the exception of the 1st respondent, is between the same parties and involves the same subject matter; that is, Plot No. 26 Block 16 claimed by appellant to have been previously designated as Plot No. 21. Having considered the relevant authorities on the application of the principle of re-subjudice, including the case of **Lotta v Gabriel Tanaki and 2 others** [2003] TLR 312, the learned High Court judge held that:

*"All in all it suffices to say that the present suit is barred by the doctrine of subjudice."*

In this appeal, the appellant is challenging that decision raising the following grounds of appeal:-

1. *That the trial court erred in law by dismissing Land Case No. 12 of 2015.*

2. *That the trial court erred in applying the principle of Res- Judicata to dismiss the Land Case No. 12 of 2015 while there was no pending case in court.*

3. *That the trial court erred in law by relying on technicalities to dismiss the Land Case No. 12 of 2015 without giving opportunity to the parties to be heard on merit.*

4. *That the trial Judge erred in law by ordering the amendment of the Plaint to join the 2nd and 3rd Defendants to the suit against the 1st Defendant while the same were parties to a separate case before the same court.*

At the hearing of the appeal, the appellant was represented by Mr. Mohamed Tibanyendera, learned counsel. The 1st respondent was represented by its present city solicitor, Mr. Said Kasumbile, learned

counsel whereas the 2nd and the 3rd respondents were represented by Mr. Deus Nyabiri, learned counsel.

The learned counsel for the 2nd and 3rd respondents had earlier on 3/11/2017, raised a preliminary objection. We therefore, had to hear and determine it first. The objection consists of three grounds as follows:-

1. *That, the appeal which is captioned as Civil Appeal is legally incompetent as it does not emanate from any civil case.*

2. *That, the Appeal is time barred in terms of Rule 90(1) of the Tanzania Court of Appeal Rules, 2009.*

3. *That, the appeal is incompetent for contravening Rule 97(1) of the Tanzania Court of Appeal Rules, 2009.*

Submitting in support of the 1st ground of the preliminary objection, Mr. Nyabiri argued that the appeal is incompetent because, although it originates from a land case, both the notice and the record of appeal have been captioned as if the matter is a Civil Appeal. He argued that since

land cases are distinct from civil cases, the irregularity renders the appeal incompetent. He relied on the existence of two different legislation, the Land Disputes Courts Act [Cap. 216 R.E. 2002] and the Civil Procedure Code [Cap. 33 R.E. 2002] which regulate appellate process in land cases and other civil cases respectively.

Responding to the submission made by Mr. Nyabiri on that ground of the preliminary objection, Mr. Tibanyendera submitted that in law, a land case is a civil matter and for that reason, captioning the present matter as civil appeal does not render it incompetent. He argued further that, in any case, the learned counsel for the 2nd and 3rd respondents did not cite any provision of the law upon which the objection has been based. In the circumstances, the learned counsel argued, this ground of the preliminary objection does not raise a pure point of law.

On his part, Mr. Kasumbile supported the submission of Mr. Nyabiri that the appeal is incompetent on account of being misdescribed as "Civil Appeal" instead of being titled as a Land Appeal.

Having considered the submissions made by the learned counsel for the parties on the 1st ground of the preliminary objection, we think we need not be detained much in determining the issue whether or not the irregularity renders the appeal incompetent. We are of the settled view that the defect of title alone does not render an appeal incompetent.

In this case, there is no dispute that the appeal arose from a land case and, from the record, there is nothing which suggests otherwise. The misdescription of the appeal as "Civil Appeal" in the notice of appeal and the record is, in our view, a curable irregularity. We are supported in this view by the case of **Gapoil (Tanzania) Limited v. The Tanzania Revenue Authority and 2 others,** Civil Appeal No. 9 of 2000 (unreported). In that case, the parties were misdescribed in the drawn order and the ruling. In those documents, the appellant was erroneously titled as "appellant" instead of "applicant". The Court held that the misdescription of the parties was a minor defect which is curable under the slip rule because, the particular errors are not reflected in the text of the drawn order and the ruling.

Similarly, in the case of **Mohamed Hashim Ismail v. Nadhra Salum Mbarak and Another,** Civil Appeal No. 101 of 2006 (unreported), the decree was mistitled as a drawn order. The Court found that the wrong captioning of the decree was a technical error which did not go into the root of the decree and so, the mistitling was a curable defect. In principle therefore since misdescription in the title of the appeal as "Civil Appeal" instead of Land Appeal in the notice and the record of appeal does not go to the root of the contents of the appeal, we hold that the defect is minor and curable. This ground of the preliminary objection is therefore, hereby overruled.

With regard to the 2nd ground of the preliminary objection, Mr. Nyabiri submitted that the appeal is time barred. He argued that, whereas the appellant was supplied with copies of judgment and proceedings (the Copies) on 23/11/2016 and a certificate of delay excluding the period between 6/6/2016 when the appellant applied for the Copies and 23/11/2016 when he was supplied with the same, under Rule 90(1) of the Tanzania Court of Rules, 2009, (the Rules) the appeal ought to have

been filed on 24/1/2017. According to the learned counsel, because the appeal was filed on 18/10/2017, the same is time barred.

Mr. Nyabiri went on to argue that, although after he had issued the certificate of delay on 23/6/2016, the Registrar proceeded to issue two more certificates, the second one on 3/7/2017 and the third on 5/9/2017, excluding the period up to 23/11/2016, the two subsequently issued certificates are invalid because the first one was not withdrawn. He added that the subsequent certificates bear repetitive contents not disclosing the purpose for which the excluded period kept on being extended. To bolster his argument on invalidity of the two subsequent certificates, Mr. Nyabiri cited the case of **Maneno Mengi Limited and Three others v. Farida Said Nyamachumbe and the Registrar of Companies** [2004] TLR 391.

Mr. Kamsubile maintained the position he took in the 1st ground of the preliminary objection by supporting the submission of Mr. Nyabiri in this ground as well.

On his part, Mr. Tibanyendera opposed the position taken by the respondents' advocates. He submitted that the two subsequent certificates of delay were properly issued by the Registrar. It was the learned counsel's argument that the appellant was supplied with the Copies certified by the Registrar on 4/9/2017 but the appellant found that the same were not complete. As a result, he said, the appellant requested twice for the missing parts of the proceedings and documents, hence the reason for the two subsequent certificates of delay. He referred the Court to pages 663 and 664 – 667 of the record to support his argument that the two latter certificates were issued with a view of excluding the period spent by the appellant in obtaining the documents which were belatedly supplied to him by the Registrar.

Having given due consideration to the submissions of the learned counsels for the parties, we hasten to state that this ground of the preliminary objection has merit. After the Registrar had issud a certificate of delay on 23/11/2016, excluding the period which was required for preparation and delivery of the Copies under the proviso to Rule 90(1) of the Rules, as submitted by Mr. Nyabiri, the appellant ought to have filed

his appeal on 24/1/2017. The appellant cannot rely on the subsequent certificates in the presence of first one which had not been withdrawn. The three certificates of delay cannot co-exist.

In the case of **Maneno Mengi Limited** (supra) cited by Mr. Nyabiri, the Court stated as follows on existence of more than one certificate of delay in the same appeal:-

> *"There cannot be two certificates of delay concurrently applicable in respect of the same matter; in this case the certificate of 8th June, 2003 was the valid one and the second certificate of 8th July, 2003 was of no legal consequence as it amounted to extending the time within which to file appeal, something the Registrar had no power to do".*

*The Court went on to state that:*

> *"It was also wrong for the Registrar to issue a second certificate while the first one had not been withdrawn; if the intention was to*

*withdrawn the first certificate, then the Registrar should have indicated so when issuing the second certificate."*

Since therefore, as we have held above that in the present case, the two subsequent certificates are invalid, there is no gainsaying that the appeal is time barred.

The finding on this ground suffices to dispose of the preliminary objection. In the circumstance, the need for consideration of the 3rd ground does not arise. In the event, the appeal is hereby struck out for being time barred.

**DATED** at **DODOMA** this 16th day of July, 2018.

K. M. MUSSA
**JUSTICE OF APPEAL**

A.G.MWARIJA
**JUSTICE OF APPEAL**

R.E. MZIRAY
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

E.Y. MKWIZU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**