IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CIVIL APPEAL NO. 225 OF 2018

YAHYA KHAMIS .....APPELLANT

VERSUS

1. HAMIDA HAJI IDD
2. ADVENTINA ANDREA } **.....RESPONDENTS**
3. DIOCLES MARTIN

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

dated the 18th October, 2016
in
HC. Land Case Appeal No. 50 of 2014

JUDGMENT OF THE COURT

10th & 16th May, 2019

MKUYE, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Bukoba in Land Appeal Case No. 50 (Matogolo, J.) dated 18th October 2016 which upheld the decision of the District Land and Housing Tribunal for Kagera in Bukoba (DLHT) in Land Application No. 213 of 2012. The facts giving rise to this appeal are that the appellant Yahaya Khamis (Administrator of estate of the late Iddi Seifi) filed a Land Application in the

DLHT against the respondents Hamida Haji Idd (1st respondent) for having sold a disputed land to Adventina Andrea and Diocles Martin (the 2nd and 3rd respondents). In the said application the appellant prayed for the reliefs as follows: a declaration that the sale agreement among the respondents is null and void; a declaration that the suit land is a clan land; an order for eviction to the 2nd and 3rd respondents; and the costs of the application.

The respondents through their joint written statement of defence resisted the application on account that the 1st respondent had a good title to pass to the co-respondents (2nd and 3rd respondents) since the suit land was not a clan land but she inherited it from her deceased husband. The hearing of the matter commenced whereupon the appellant gave his testimony as shown at pages 44-46, 48-49 and 54-56 of the record of appeal. It appears that in the course of hearing, the Chairman realized that there were two conflicting wills in relation to the administration of the deceased's estate particularly, on the disputed land. Hence, the DLHT referred the parties to the primary court in order to sort out the matter and proceeded with striking out the application without costs. In this regard, we find it appropriate to reproduce part of the DLHT's Order as hereunder:

"In the event, I hereby refer the parties to the Primary Court which will find out which "will" is valid in law and thereafter the administrator will have an opportunity to sue any necessary party before this tribunal. In the upshot this application is struck out without costs. It is so ordered."

Aggrieved by that order the appellant appealed to the High Court but his appeal was dismissed. While admitting that the matter was not finally determined it found out that the DLHT properly struck out the application to enable the primary court with competent jurisdiction sort out the issue of the conflicting wills before either party could sue. The High Court in part stated as follows:

"... Application No. 213 of 2012 which was filed by the appellant before the DLHT of Bukoba was not finally determined. But it was struck out after the Tribunal Chairman had learnt that there were two competing wills alleged to be prepared by the deceased before he met his death... Striking out the application does not mean that the matter was finally determined. The parties are still at liberty to refile the application before the DLHT after the validity of the will is determined... There is nothing

wrong with the procedure because by ascertaining which is valid and which cannot be acted upon, according to that will the necessary parties who the appellant can sue can also be easily ascertained."

Still aggrieved by the decision of the High Court, the appellant has brought the appeal to this Court. He also filed written submissions in support of the appeal which he sought to adopt to form part of his submission.

Though the appellant has fronted eight grounds of appeal, after having examined them we are of the considered view that the appeal can conveniently be disposed of by determining grounds 2, 7 and 8 which hinge on the issue of whether the first appellate court erred in upholding the DLHT's decision of striking out the application before its final determination.

At the hearing of the appeal, the appellant appeared in person and unrepresented and so were the respondents.

Before proceeding with the hearing of the appeal on merit, the respondents intimated the Court that they were only served with a notice of hearing without the memorandum of appeal. On the other hand, the

appellant informed the Court that he had effected service through Mr. Lameck John Erasto, the learned counsel who had represented them at the High Court. After the respondents had denied to have engaged any advocate in the present appeal, and upon a short dialogue with the Court, they agreed to proceed with hearing.

When given an opportunity to amplify his complaint, the appellant assailed the first appellate court for upholding the trial Tribunal's decision of striking out the land application without costs. He pointed out that, after learning that there were two conflicting wills which needed the primary courts' determination on their validity, the DLHT ought to have stayed or adjourned the said Application pending such determination instead of striking it out. He added that, striking out the application had the implication of time limitation and more expenses should he be required to go back to the DLHT. In those circumstances, he urged the Court to allow the appeal, quash the lower court's decision and remit the matter to the DLHT for continuation from where it ended.

On their part, the respondents conceded to the argument raised by the appellant. They were of the view that, that was a proper move having in mind that the matter has taken too long.

Having considered the appellant's argument which has not been objected to by the respondents, we think, the issue which needs to be determined is whether or otherwise the DLHT properly struck out the land application which was partly heard instead of staying it.

In that regard, we have found it proper to examine albeit briefly as to what entails "striking out", "struck out" or "strike out" (the phrases being used interchangeably).

It is noteworthy that, in our laws, there is no clear/definite definition of what constitutes "striking out", "struck out" or "strike out". However, this Court in the case of **Juma Nhandi v. Republic**, Criminal Appeal No. 289 of 2012 (unreported) has endeavoured or tried to give explanation of the term "strike out" when making a distinction between "striking out" and "dismissing". While citing with approval the case of **Ngoni – Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** [1959 E.A. 577, in which the erstwhile Court of Appeal for East Africa discussed the

distinction between "striking out" and "dismissing" an appeal, the Court had this to say in relation to "striking out":-

> *"This Court, accordingly,* ***had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent,*** *rather than to have "dismissed" it; for the latter implies that a competent appeal has been disposed of,* ***while the former phrase implies that there was no proper appeal capable of being disposed of.*** *But it is the substance of the matter that must be looked at, rather than the words used..."*
>
> [Emphasis added]

Similarly, in the case of **Emmanuel Luoga v. Republic**, Criminal Appeal No. 281 of 2013 (unreported) where the Court had an occasion of dealing with the issue whether it was proper for the first appellate court to dismiss the appeal which was incompetent, it was stated as follows:

> *"We are of the view that, upon being satisfied that the appeal was incompetent for reason it had*

assigned, it ought to struck out the appeal instead of dismissing it. The reason is clear that by dismissing the appeal, it implies that there was a competent appeal before it which was heard and determined on merit which is not the case."

Also in the case of **Amon Malewo v. Diocese of Mbeya (R.C)**, Civil Appeal No. 22 of 2013 (unreported), the Court refused to adjourn and struck out the appeal which was incompetent before it. It is stated as follows:

"After all it is trite law that any court of law cannot adjourn what is not competently before it.

All said and done, we hold this appeal to be incompetent. We strike it out with no order as to costs."

We have cited all these authorities so as to emphasis that ordinarily, the remedy of a matter which is incompetent before the Court is to be struck out. The reason for striking it out is that such matter is abortive or rather is incapable of being heard or even to be adjourned. In other words, it carries the implication that there is no matter at all before the Court.

On the other hand, "stay" according to Blacks' Law Dictionary means "the postponement or halting of a proceeding, judgment, or the like; **or** an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding". (See – **Blacks' Law Dictionary,** Eighth Edition Bryan A. Garner at page 4432). This implies that the matter to be stayed must be valid or competent before the Court.

Also, in **WIKIPEDIA,** "a stay of proceedings" is described as a ruling by the court in civil and criminal procedure, halting further legal process in a trial or other legal proceedings. It also states that the court can subsequently lift the stay and resume proceedings based on events taking place after the stay is ordered. However, a stay is sometimes used as a device to postpone proceedings indefinitely. (See – **http//en.m Wikipedia. org).**

In the Malawian case of **Mulli Brother Ltd v. Malawi Savings Bank Ltd**, (48 of 2014) [2015] MWSC 467, which we seek inspiration, the Supreme Court described the term "stay" as follows:

> *"As we understand it, a stay is the act of temporarily stopping a judicial proceeding through the order of a court. It is a suspension of a case or*

a suspension of a particular proceeding within a case. A judge may grant a stay on the motion of a party to the case or issue a stay sua sponte, without the request of a party. Courts will grant a stay in a case when it is necessary to secure the rights of a party".

The said Court went on to say that:

"However, a stay of proceedings is the stoppage of an entire case or a specific proceeding within a case. This type of stay is used to postpone a case until a party complies with a court order or procedure. For instance, if a party is required to deposit collateral with the court before a case begins, the court may order the proceedings stayed for a certain period of time until the money or property is delivered to the court. Further, a court may stay a proceeding for a number of reasons. ***One common reason is that another action is under way that may affect the case or the rights of the parties in the case..."***

[Emphasis supplied]

Yet in a Kenyan case of **Kenya Wildlife Service v James Mutembei,** Civil Appeal No 40 of 2018 eKLR, the High Court cited the

passages in **Halsbury's Law of England**, 4th Edition Vol. 37 page 330 and 332 stated as follows:

> *"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."*
>
> *"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."*
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> *"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."*

Unfortunately, there is no provision which deals with stay of proceedings under the **Land Disputes Courts Act,** Cap 216 R.E 2002 (the LDC Act) or the **Land Disputes Courts (the District Land and Housing Tribunal) Regulations,** 2003 (G.N. No 174 of 2003)(the DLHT Regulations) which governed the matter in dispute. The only provision covering stay of suits is section 8 of the **Civil Procedure Code,** Cap 33 R.E 2002 (the CPC). It as states follows:

> *"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same or any other court in Tanzania having jurisdiction to grant the relief claimed."*

The above cited provision, however, does not cover the situation at hand where the Chairman herein referred the parties to the Primary Court for determination of the validity of wills and there was no matter continuing in that court (primary court). The question which has taxed our mind, moreso, since there is no provision for stay of proceedings under the LDC Act and DLHT Regulations is whether in the situation where the DLHT

referred the matter to the primary court, could have proceeded with striking out the matter before it. We think no. This is so because, as we have alluded to earlier on, striking out is applied where the matter is incompetent before the court.

Incidentally, section 51 (1) and (2) permits the HC and the DLHT to apply the provisions of CPC where there is a lacunae. In this regard the High Court in the case of **Kobil Tanzania Limited v Mariam Kisangi and Another,** Commercial Application No. 12 OF 2007 (unreported), of which we are inspired, stated as follows:

> *"In a situation where there is no procedure to cater for a certain situation, the court is obliged to use its common sense, justice, equity and good conscience and resolve the problem before it to further the interests of justice and prevent abuse of the process (See **SARKAR ON CODE OF CIVIL PROCEDURE** 10th ed. p. 9). And that is the philosophy behind the court's inherent powers under s. 95 of the Civil Procedure Code Act 1966."*

In that case, the Court stayed the proceedings on a matter before it under section 95 of the CPC, because there was a Land Case No. 34 of 2006 between the parties at the Land Division of the High Court; and a

pending Civil Application No. 48 of 2007 between the same parties, for leave to appeal against the Ruling of that court dated 16/1/2007 in Misc. Commercial Application No. 38 of 2006 which dismissed an application for temporary injunction pending reference to arbitration in the Court of Appeal. Apart from that there was another matter before it with the same substance in controversy between the same parties, that is, the rights and obligations of the parties under the Lease Agreement and the Dealership Agreement.

In the matter under consideration, the subject matter involved a sale of parcel of land by the 1st respondent to the 2nd and 3rd respondent illegally. Its ownership was yet to be determined and it was a subject in a dispute before the DLHT. However, in the course of hearing, it was confronted with two conflicting wills which could lead the DLHT not resolve the land dispute before it. Nevertheless, we have been unable to glean in the record of appeal where the application was found to be problematic or incompetent before the Tribunal which warranted the same to be struck out. It is our considered view that, even if there was no provision catering for the situation, the DLHT could have invoked section 95 of the CPC to stay the proceedings.

We have also examined the reasoning of the first appellate judge in upholding the DLHT's decision. In our view, he seemed not to have been perturbed by the DLHT's order striking the application. He said that there was nothing wrong with the striking out order since parties would recommence the case before the DLHT after the issue of the conflicting wills is determined. He did not consider the time limitation on the accrual of the right of action as the dispute related to land sold on 20/06/2012. But on our part we consider it to be very crucial more so when taking into account that the appellant had committed no wrong and it was not established that his application was not incompetent before the Tribunal. In the circumstances where Land Application No. 213 of 2012 was not incompetent, we think, it was not proper for the DLHT to strike it out instead of staying the proceeding thereof until the issue of the two conflicting wills is determined by the primary court which had competent jurisdiction to deal with it.

With the above reasoning, we agree with the parties that the DLHT ought to have stayed the proceedings of the application. In the same vain, with respect, it was not proper for the High Court to uphold the DLHT's decision of striking out the application on account of having referred the

parties to the primary court for the determination of the validity of the wills while the application was not incompetent before it.

In view of what we have endeavoured to demonstrate above, we allow the appeal. We set aside the DLHT's striking out order and substitute it with an order of stay of proceedings of Land Application No. 213 of 2012 pending the determination of validity of the conflicting wills by the primary court.

DATED at **BUKOBA** this 16th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E.A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL