IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL NO. 3 OF 2015

(From the order of the District Land and Housing Tribunal of Mtwara District at Mtwara in Land Case No. 35 of 2013)

HAMIS JULIUS.....1ST APPELLANT

BAKARI FUMAO.....2ND APPELLANT

JUMA SELEMANI.....3RD APPELLANT

HASSANI ALLY.....4TH APPELLANT

SUWEDI SAID.....5TH APPELLANT

MOHAMED GUMBO.....6TH APPELLANT

SAID MKOWEKA.....7TH APPELLANT

ISSA HATIBU.....8TH APPELLANT

OMARY ALLY.....9TH APPELLANT

SAID HASSANI KITUBA.....10TH APPELLANT

MOHAMED MKOWEKA.....11TH APPELLANT

ABREHEMAN MKOWEKA.....12TH APPELLANT

SAID ISMAIL DADI.....13TH APPELLANT

JUMA DADY.....14TH APPELLANT

VERSUS

AZARAMO MOHAMEDI.....RESPONDENT

Date of last order: 10/09/2015

Date of Judgment: 08/12/2015

JUDGMENT

F. Twaib, J:

The appellants herein filed the instant appeal on 18th March 2015, seeking to set aside a preliminary order of the District Land and Housing Tribunal dated 6th November 2014 in Land Application No. 35 of 2013, pending at the District Tribunal.

Originally, the respondent sued the appellants in the District Land and Housing Tribunal through Land Application No. 43 of 2012. The application was dismissed on 14th May 2013 after the respondent had defaulted to appear. He thereafter applied for restoration of his case through Misc. Application No. 37 of 2013. This application was dismissed. No appeal or revision was preferred thereafter against any of the two decisions.

Instead, on 12th December 2013 the respondent filed a fresh case through Land Case No. 35 of 2013. When the same was called on for hearing, the appellants herein, who were the respondents, raised a preliminary objection to the effect that the respondent application was *res judicata*. Having heard the parties on the preliminary objection, the trial tribunal overruled the preliminary objection and ordered the matter to be heard on merits. The appellants were dissatisfied with that decision and preferred this appeal, relying on five grounds.

However, as I was preparing the judgment, I noticed that the appeal might be time-barred. It was also an appeal from an interlocutory decision, rather than one that will finally determine the case. I thus invited the parties to address me on those two issues.

The respondent has been represented herein by advocate Kibasi, but expressed the view that he would fend for himself in submissions on the two matters. On the first point, the 1st appellant spoke on behalf of his co-appellants and

explained that they had given notice of intention to appeal orally before Chairman of the trial tribunal, which is why he did not proceed with the hearing. He further said that they had not received a copy of proceedings before they filed the appeal even though they were following it up with the tribunal. They were only supplied with the same after they filed the appeal. The respondent, on his part, left the matter to the court, but also said that he got his copies here in the High Court.

The record of the tribunal shows that the order which is the subject matter of the appeal is dated 6th November, 2014. The exchequer receipt with No. 2338200 shows that the appellants were supplied with certified copy of ruling for appeal purposes on 5th December, 2014. There is no indication as to when were they supplied with a copy of the proceedings. However, the copy of the proceedings in the file shows that the same was certified as true copy of the proceedings by the Chairman on 25th May 2015—well after the appeal was filed. This supports the contention of both parties that certified copies of the proceedings were not ready up to the time the appellants filed the appeal.

In these circumstances, even though the appeal was received well over forty five days after the copy of the ruling was availed to the appellants, they would still be deemed to have filed the appeal within time because they were entitled to the exception provided for by section 19 (5) of the Law of Limitation Act, which states:

> *(5) Where the court to which an appeal or application for leave to appeal or application for review is made, is satisfied that it was necessary for the appellant or, as the case may be, the applicant, to obtain a copy of the proceedings of the relevant suit or proceeding before lodging or making the appeal or the application, the court may allow to be excluded from the*

period of limitation prescribed for such appeal or application, the period of time requisite for obtaining a copy of the proceedings.

Even though the appellants ultimately filed their appeal before obtaining a copy of the proceedings, I would consider the fact that they did not have the same until the time they filed the appeal sufficient justification for the delay, and would, pursuant to this court's powers under the above subsection, allow the time until the date of filing the appeal to be excluded in the computation of time. Furthermore, such a decision is justified by the crucial legal question that the appeal raises, as I now proceed to explain.

The second issue that the court raised *suo motu* is whether the appeal should be entertained, given that the decision being appealed against is interlocutory, in that it does not finally determine the rights of the parties. Ordinarily, that is the law. However, it is the general rule. Case law has developed a qualification to that general rule, to the effect that where there irregularities resulting in injustice, the court is justified in entertaining a revision or even an appeal.

Looking at the memorandum of appeal, though it has five grounds of appeal, their central point is that the application that was filed at the District Land Tribunal is *res judicata*. It was the tribunal's refusal to hold that the case was *res judicata* that the appellants are challenging in this appeal. I thus feel that there is need for this court to enquire into the issue and determine it. This is more so because, if it is found that the matter is indeed *res judicata*, the tribunal has no jurisdiction to entertain the case, and allowing it to proceed to hear the same on merit would be to allow an abuse of the process of the court.

In support of the allegation that the suit is *res judicata*, the applicants give a narration of the proceedings and decisions taken. Speaking through the 1st appellant Hamisi Julius, argued that the respondent had at first sued them in the

District Land Tribunal in Land Application No. 43 of 2012. On 14th May 2013, the Tribunal dismissed the case. The respondent herein did not appeal. The respondent applied (through Land Application No. 37 of 2013) to have the application restored. After hearing both sides, on 11th December 2013, the Chairman dismissed the application.

Later on, the respondent filed a new case, Land Application No. 43 of 2012. The appellants objected. The Tribunal heard the application by way of written submissions. It ultimately decided that the claim was not *res judice*. It reasoned that since the wording of section 9 of the CPC was that the matter in issue must have been "heard and finally decided", and the subject suit had been dismissed and not "heard and finally determined", then section 9 cannot apply. This was, with due respect to the learned Chairman, an error of law. His decision was made *per incurium* the provisions of Order IX rule 9 (1) CPC, which stipulate:

> *9 (1) Where a suit is wholly or partly dismissed under rule 8,* ***the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action****, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.*

Hence, while it is true that the phraseology of section 9 CPC would tend to require that the earlier case had been "heard and decided", when read together with Order IX rule 8 of the CPC, it cannot allow a claimant whose claim has been dismissed to re-file the case and still get entertained as if nothing has happened. After his application to set aside the dismissal was rejected, the respondent should have filed an appeal, revision or review against the dismissal. Re-filing a

new appeal was not open him. The appellants were perfectly entitled to raise the issue of *res judicata*.

For the foregoing reasons, I hold that this appeal is meritorious and I allow it. Application No. 3 of 2015 is *res judicata*, and the Tribunal has no power, in view of the fact that his earlier suit (Application No. 43 of 2012) was dismissed.

Consequently, the appeal is allowed with costs.

DATED and DELIVERED at Mtwara this 8th December, 2015

F.A. Twaib

Judge

08/12/2015