

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 09 OF 2017

(Arising from Maswa Land and Housing Tribunal in Land Application No. 16 of 2016 (M.T. Ilanga, Chairman))

ELIAS S/O SENGEREMA.....APPELLANT

VERSUS

SAYAYI S/O ZENGO SENI.....1ST RESPONDENT
FELISTA D/O MAYALA.....2ND RESPONDENT
NYALAGI S/O MALEZU.....3RD RESPONDENT
ABAJAJA CO. LIMITED.....4TH RESPONDENT

Date of Last Order: 11.10.2018
Date of Judgment: 07.12.2018

JUDGMENT

V.L. MAKANI, J

This appeal is by ELIAS S/O SENGEREMA. He is appealing against the decision of Maswa Land and Housing Tribunal in Land Application No. 16 of 2016 (M.T. Ilanga, Chairman). The application was on the question of ownership of the house on Plot 982 Block C Nyalikungu area in Maswa Township (the **suit house**) whereby it was alleged that the 2nd respondent had sold the suit house to three different people that is the appellant, 1st respondent and the 3rd respondent at different purchase prices.

The appeal before this court is against the ruling of the Chairman of the Tribunal in respect of preliminary objections that were raised by

the appellant herein in the said Land Application No. 16 of 2016. The objections were dismissed and the Chairman ordered the matter to be heard on merit. The appellant being dissatisfied with this decision has filed this appeal with four lengthy grounds, as follows:

1. *That the trial District Land and Housing Tribunal for Maswa grossly erred in law to entertain a matter which was res judicata in that the appellant nor the 1st respondent were decreed owners of the house situated on Plot No. 982 Block C Nyalikungu area at Maswa Township vide Land Application No. 58 of 2013 accompanied with Misc. Application No. 64 of 2013 (consolidated) of the same Tribunal, let alone that the Respondent also lost objection proceedings in which he alleged to be owner of the house vide Maswa District Court Misc. Civil Application No. 03 of 2016.*
2. *That the Tribunal erred in law and fact when it failed to appreciate the fact that by re-admitting the application (Application No. 16/2016) in law the Tribunal was functus officio.*
3. *That the ruling of the Tribunal was bad in law as it was biased and based on speculations and presumptions and it imported matters that were not pleaded at the trial when it relied on Criminal Appeal No. 115/2016 and disregarded the decision of Maswa District Court in Civil Case No. 01 of 2015 on the appellant's right for compensation where the appellant was awarded Tshs. 10,000,000/=.*
4. *That the trial court erred in law and fact when it failed to consider the preliminary objections raised by the appellant where the application document was incurably defective for offending Order VI Rule 15(3) of the Civil Procedure Code CAP 33 RE 2002 (**CPC**) for want of*

place where the document was verified and failure for the name of the drawer to be endorsed.

At the hearing of the appeal the appellant was represented by Mr. Masige, Advocate and the 1st and 2nd respondents appeared in person. The 3rd and 4th appellants never entered appearance therefore with leave of the court the appeal proceeded in their absence.

Submitting on the first ground of appeal, Mr. Masige said Land Application No. 16 of 2016 was res judicata. He said the principle of res judicata is envisaged in section 9 of the CPC. He said the subject matter of the Land Application No. 16 of 2016 was the suit house and before the application there was Land Application No. 58 of 2013 filed by the appellant herein. He said there was also Land Application No. 64 of 2013 filed by the 3rd respondent. The respondents in Land Application No. 58 of 2013 were Sayayi Zengo Seni and Felister Mayala and in Land Application No. 64 of 2013 the respondents were the same. He said these applications were before the same Chairman and they were consolidated. He said there was Misc. Application No. 31 of 2013 filed by the appellant and the respondents were Sayayi Zengo Seni and Felister Mayala. There was also Misc. Application No. 44 of 2013 by the 3rd respondent and the respondents were the same Sayayi Zengo Seni and Felister Mayala. He said these applications were also consolidated and the main issue for determination in these consolidated applications was who was the genuine buyer of the suit house. The Tribunal's decision was that there was no genuine buyer among the three buyers that is the appellant, the 1st and 3rd

respondents. He said no appeal was preferred until on 23/01/2016 when the 1st respondent filed Land Application No. 16 of 2016 and the respondents were the appellant, the 2nd and 3rd respondents. Mr. Masige said the application was on the suit house and the same parties and the allegations were the same. He said more so, a decision had already been given in respect of the same parties and the cause of action was the same. He thus said the case was res judicata.

As for the second ground, Mr. Masige said the court was functus officio to admit the said application. He said in the consolidated applications, the Tribunal irrespective of not knowing the genuine buyer but it directed the parties to find the seller (2nd respondent herein) who was not present so that she is brought to court. He said according to the principle of functus officio in a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudication Tribunal becomes functus officio. He cited the case of **Bibi Kisomoko Medard vs. Minister for Lands & Another [1983] TLR 250** and **Laemthong Rice Company Limited vs. Principal Secretary, Minister of Finance [2002] TLR 392**. He said by admitting Land Application No. 16 of 2016 the Tribunal was going against the said principle as it already had decided that there was no bonafide purchaser of the suit premises and there was an order of the Tribunal awaiting execution. He said the incoming chairman also used the documents used by the outgoing chairman.

On the third ground Mr. Masige submitted that the Tribunal entertained matters, which were not pleaded at the trial. The decision of the Tribunal stated that the appellant was not supposed to be paid because the 2nd respondent had filed Criminal Appeal No. 115 of 2016 at the High Court which originated from the Maswa District Court Criminal Case No. 16 of 2015 in respect of Tshs. 10,000,000/= and so he had nothing to claim. He said these were new issues which were not even raised when arguing the preliminary objection. He said in the case of **PBZ vs. Sulemani Haji Sulemani [2000] TLR 347** the court can frame new issues but the parties must have opportunities to address the said new issues failure of which the decision has to be quashed. He said the court has to decide on the basis of pleadings and not otherwise and he cited the case of **Posinet Adriano vs. Gilo Guest Limited & Another [2000] TLR 49**. Mr. Masige said the act by the Tribunal to raise and decide on issues not pleaded by the parties made the decision defective and bad in law and hence is not binding and is not existent.

As for the last ground, Mr. Masige said the appellant at the Tribunal raised an objection that the application document was incurably defective. He said the said document offended Order VI Rule 15(3) of the CPC. The application was not verified and it was not endorsed with the name of the drawer. The verification did not state the place of verification and the document had no title and it was contrary to section 44(1) of the Advocates Act CAP 341 RE 2002. He relied on the case of **Bank of Africa (T) Ltd vs. Inter Sales (T) Ltd & 2 Others [2016] TLS Reports 452**. He said the application was

defective and did not qualify to be a court document but a mere paper. For these reasons Mr. Masige prayed that the appeal be allowed with costs and the preliminary objection raised at the Tribunal be sustained and the decision in Land Application No. 16 of 2016 be quashed.

The 1st respondent Sayayi Zengo Seni said that the previous case the seller Felister Mayala (2nd respondent) was not present and the decision was to find her so that he could come to court and state who was the lawful buyer. He said Land Application No. 16 of 2016 was for that purpose, that is, to bring the 2nd respondent to court to state who was the genuine buyer and so it was not res judicata. He said his exhibits were complete including his Sale Agreement. He said the decision of the Tribunal was therefore correct and he prayed the appeal to be dismissed with costs.

The 2nd respondent Felister Mayala said he was imprisoned because of a criminal case that was brought against her by the appellant. She said the property was sold to the 1st respondent and she was brought to court to clarify that. He said it was the 1st respondent who gave her money but the appellant only wrote an agreement and failed to pay the money. The 3rd respondent never made any payment he only expressed his intention to the Chairman. She said the 1st respondent was the lawful owner of the suit houses.

In rejoinder Mr. Masige said the Land Application No. 16 of 2016 was not complete as the documents presented/filed were those from the

previous consolidated application. He reiterated that the Tribunal was not moved by proper documents. He said the decision of the Tribunal was on preliminary objections and did not finish the matter but added that each case has to be decided on its own merits. He said objections differ and allowing some that are res judicata or functus officio means everything would be a nullity. He said the appeal was not premature as there was no other option but an appeal to pave way for proper proceedings to be initiated and the Tribunal to be properly moved. He reiterated his prayers in the main submissions.

I will first consider if the decision of the Tribunal is appealable. As it has been stated above the decision subject of this appeal was based on preliminary objections that were raised by the appellant in the course of the trial at the Tribunal whereby the Tribunal dismissed the preliminary objections for want of merit.

Regulation 22 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 (**GN No. 174 of 2003**) states:

"The Chairman of the Tribunal shall have powers to determine:

- (a) preliminary objections based on points of laws;*
- (b) applications for execution of orders and decrees;*
- (c) objections arising out of execution of orders and decrees;*
- (d) interlocutory applications.*

Provided that a ruling on a preliminary point of law or on any interlocutory application which have no effect of finally deciding the case shall not be appealable."

The above provision is similar to sections 5(2)(d) of the Appellate Jurisdiction Act (**AJA**) which states:

"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit"

In the cases of **Tanzania Motor Services Limited & Parastatal Sector Reform Commission vs. Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005** and **Mahendra Kumar Govindji Monani vs. Tata Holdings Limited, Civil Application No. 50 of 2002** (both unreported), the Court of Appeal in analysing section 5(2)(d) of AJA held that decisions on interlocutory applications and preliminary objections are not appealable unless they finally dispose of the matter. The rationale behind these provisions that is Regulation 22 of GN 174 of 2003, section 5(2)(d) of AJA and section 74(2) of the CPC can be observed in the case of **Karibu Textiles Mills Limited vs. New Mbeya Textiles Mills Limited & Others, Civil Application No. 27 of 2006** (unreported) where the Court of Appeal stated:

"We further agree with Dr. Lamwai's submission that the spirit of the amendment of the provision of the section 5(2)(d) of the Appellate Jurisdiction Act 1979 is to prevent unnecessary delays. This is rightly so because interlocutory orders do not finally and conclusively determine the rights of the parties. Where a party is aggrieved by an interlocutory order, that can form a ground of appeal or revision if the party is dissatisfied with the final decision of the court...."

Now, did the decision of the Tribunal finally and conclusively determine the matter? In the ruling delivered by the Tribunal the Chairman stated:


"That said and done, I am constrained to dismiss the preliminary objections the matter proceed on merits. Costs to be in the course (sic)."

The decision of the Tribunal above clearly shows that the matter was not conclusively determined. In other words, the application before the Tribunal was yet to be heard on merit. Indeed in my view, if the appellant was not satisfied with the decision of the Tribunal then that would have formed a ground of appeal or revision. (see also **Karibu Textiles Mills Limited** (supra). Mr. Masige admitted that the decision of the Tribunal was on a preliminary objection but went on to say this was a peculiar matter and each case has to be decided on its own circumstances. In my view, I do not see any peculiarity of the matter, as the law in this matter is very specific (and in mandatory terms) that no appeal shall lie on an interlocutory order or a decision on a preliminary objection. As was in **Mahendra Kumar Govindji Monani** (supra), if the decision of the court on preliminary matter does not finally determine the case one has to wait until the final outcome is known and if dissatisfied, appeal against all the points including the preliminary interlocutory decision or order with which one was aggrieved. This, in my view, was what Counsel for the appellant ought to have done instead of rushing to file an appeal against decision on a preliminary objection.

For the reasons above, it is apparent that the appeal herein is premature and incompetent for having arisen from a decision based on a preliminary objection, which did not finally determine the matter. Essentially, the decision of the Tribunal on the preliminary objections is not appealable.

In the end result the appeal is hereby dismissed with costs.

It is so ordered.

 V.L. Makani
V.L. MAKANI
JUDGE
07/12/2018