IN THE HIGH COURT OF TANZANIA
DAR ES SLAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL APPEAL NO. 152 OF 2017

(Arising from the decision of Resident Magistrates' Court of Dar es salaam at Kisutu in Civil Case No. 16 of 2016 Hon. Mashauri - PRM)

AHMED SAID KINDAMBA ..... APPELLANT

VERSUS

WANANCHI GROUP (TZ) LIMITED.....RESPONDENT

JUDGMENT

7/6/2018 & 27/6/2018

Mugeta, J.

The appellant sued the respondent for damages for unauthorized painting and advertising its business on the appellant's house. The suit was filed with the Resident Magistrates' Court of Dar es salaam at Kisutu. The respondent raised a preliminary objection that the court had no jurisdiction to adjudicate on matters involving land. The objection was upheld and consequently the suit was dismissed. The appellant is aggrieved and has filed a petition of appeal with two grounds of appeal.

The first ground is that the trial court erred in law and in fact to apply the principle of "quiquid plantatur solo solo cedit" without considering the nature of the complaint. The second ground is that the trial court erred in law to dismiss the suit instead of striking it out.

On the hearing date counsel for the respondent, Francis Kamuzora, raised a point of objection that the appeal is incompetent for moving the court with a petition of appeal instead of a memorandum of appeal as required by order XXXIX rule 1(1) of the Civil Procedure Act (Cp.33 R.E. 2002) of the law of Tanzania (CPC). In this regard, counsel for the respondent requested the court to follow the rules of procedure strictly in accordance with the rule laid down by the Court of Appeal in Civil Application No. 64/2003, **Citibank Tanzania Ltd vs Tanzania Telecommunication Co. Ltd and others**, where it was held that rules of procedure need to be followed strictly. He prayed the court to uphold the objection and strike out the appeal. In reply, Mr. Tika Hamis, counsel for the appellant, admitted the anomaly and submitted that the error is curable under Article 107A of the Constitution of the United Republic of Tanzania which enjoins courts to do justice without undue regard to technicality. He also referred to section 70 the CPC and submitted that this section provides opportunity for appeal which cannot be fettered with technicality. On the cited case he distinguished it in that the issue involved was wrong citation of the enabling provision of the law.

I shall determine this preliminary objection first. The issue is whether use of the words petition of appeal instead of memorandum of appeal can render the appeal incompetent. While I admit that rules of procedure must be followed, I do not think it should be to the extent of unreasonably defeating justice. In this case the appellant had cited the impugned decision. This mattered most because it put to the knowledge of the court and both parties the actual decision subject of the dispute. So, when counsel for the respondent came to argue the appeal, he knew for sure what the challenged decision was. This being the case, I hold that the mix up on the use of the two words did not prejudice the respondent. Consequently, I find no sufficient cause to strike out the appeal. The objection is overruled.

Turning to the grounds of appeal, counsel for the respondent conceded to the second ground of appeal in that after upholding the objection the trial court ought to have struck out the case instead of dismissing it. This is according to the principle in the case of **NIC of Tanzania and another VS Shengano Limited**, Civil Application No. 20 of 2007, Court of Appeal (unreported) where it was held that dismissal implies that the matter has finally been determined and generally after hearing merits of the argument. I find merit in this ground of appeal because after upholding the objection, the trial court dismissed the suit. This was an error. The correct order was to strike it out. For this reason, I do hereby set aside the dismissal order.

On the first ground of appeal, counsel for the appellant submitted that the dispute before the trial court was based on a tort of trespass to property which is not a land dispute justiciable by the District Land and Housing Tribunals under section 33 of the Courts Land Dispute Act, 2002. He referred this court to the decision of the Court of Appeal in the case of **Mariam Ghahae Vs Fatuma Ghahae**, Civil Appeal No. 43 of 2009, Court of Appeal (unreported) where it was held that the said tribunals have jurisdiction on land matters where the dispute is about ownership or occupation of land which includes tenancy.

In reply, counsel for the respondent submitted that, to establish trespass, issue of ownership must be determined first. Therefore, the trial court was right to rule that the suit was a land dispute.

I have gone through the pleadings at the lower and I am of the firm opinion that there is between the parties neither a dispute on ownership nor occupation of a landed property. Therefore, the principle in **Mariam Ghahae** case (supra) applies. I tend to agree with the appellant that the dispute is purely a tort case which is justiciable in ordinary courts. The trial court erred in law to hold that before it was a land dispute, therefore it has no jurisdiction.

In the upshot, I hold that the appeal is allowed with cost. I direct the trial court to proceed with the hearing of the suit on its merits.

I.C Mugeta

JUDGE

27/6/2018

27/6/2018

Coram: Hon. Mugeta, J

For the Appellant: Tika Hamis, Advocate

For the Respondent: Francis Kamuzuna, Advocate

Cc: Mayalla

Francis: My Lord, the case is scheduled for judgment. We are ready to receive the same.

Tika: I am also ready my Lord

Court: Judgment delivered.

Sgd. I.C Mugeta
JUDGE
27/6/2018