

**IN THE HIGH COURT OF TANZANIA
(MWANZA REGISTRY)
AT MWANZA**

LAND APPEAL NO.114 OF 2016

*(Arising from the decision of the Mwanza District Land and Housing Tribunal Land
Application No. 201 of 2014 dated 27-7-2016)*

SAMSON HARUNI BINAAPPELLANT

VERSUS

NMB BANKRESPONDENT

Last order: 15/02/2018

Ruling: 16/03/2018

RULING

MAKARAMBA, J.:

This Ruling is in respect of two points of preliminary objection the Respondent, **NMB Bank**, raised by way of Notice on **04th of October 2016**, that, the appeal is time barred and that it is incompetent for having been lodged without being accompanied by a copy of the judgment and decree appealed from.

The Respondent moved this Court to dismiss and/or strike out the Appeal, the Appellant, **Samson Haruni Bina** lodged in this Court on **26th of August 2016**, to contest the decision of the *Mwanza District Land and Housing Tribunal Land Application No. 20 of 2014 dated 27th July, 2016*. By Order of this Court of **15/02/2018**, the two points of preliminary objection were ordered to be disposed of by way of written submissions to which Order the parties have duly complied with.

In the course of his submissions however, Dr. Mwaisondola, learned Counsel for the Respondent elected to abandon the first point of preliminary objection that, the appeal is time barred for the reason that there is some confusion as to which of the two matters that came before the Mwanza District Land and Housing Tribunal, namely, **Application No. 201 of 2014** and **Application No. 33 of 2014** respectively, the impugned appeal is concerned with. Amplifying on this, Dr. Mwaisondola stated that, there are no facts at his disposal to show when the judgment of the District Land and Housing Tribunal in **Application No. 201 of 2014** was delivered. Dr. Mwaisondola further pointed out that, **Application No. 201 of 2014** was between *Elizabeth Salum vs NMB-Kenyatta Branch and Samson Haruni Bina*, which Elizabeth Salum had instituted claiming to be the lawful wife of **Samson Bina**. In the same District Land and Housing Tribunal, Dr. Mwaisondola further stated, there was also **Application No. 33 of 2014** between *Samson Bina vs Branch Manager NMB Kenyatta Mwanza and Dolphin General Business Enterprises Co. Ltd.*

Dr. Mwaisondola surmised that, it is on the apparent confusion on the propriety of the instant appeal, which is respect of **Application No. 201 of 2014**, that he elected to abandon his first point of preliminary objection that the appeal is time barred and proceeded to submit on the second point of preliminary objection that, the appeal is incompetent for not having been accompanied by a copy of the judgment and decree appealed from.

Much as Dr. Mwaisondola elected to abandon his first point of preliminary objection that, the appeal is time barred, I wish to traverse albeit very briefly his submissions with regard to the parties who were

before the Mwanza District Land and Housing Tribunal in **Application No. 201 of 2014**. Clearly, the parties in that Application are not the same as those who are before this Court in **Land Appeal No. 114 of 2016**, which is the subject of the preliminary points of objection. Noteworthy, before the Mwanza District Land and Housing Tribunal in **Application No. 201 of 2014** there were ***Elizabeth Salum vs. NMB-Kenyatta Branch and Samson Haruni Bina***. In the instant appeal before this Court, ***Land Appeal No. 114 of 2016*** there are ***Samson Haruni Bina vs NMB Bank***. In **Application No. 201 of 2014** Samson Haruni Bina was the 2nd Respondent and he was the Applicant in **Application No. 33 of 2014**, the other parties in that Application were ***Branch Manager NMB Kenyatta Mwanza and Dolphin General Business Enterprises Co. Ltd.*** Quite interestingly, **Elizabeth Salum** who claimed to be the wife of **Samson Haruni Bina**, and **Samson Haruni Bina**, who I do not have any reason not to believe that he is husband to **Elizabeth Salum**, each elected to bring a separate application before the trial Tribunal. However rather interestingly also, it is only **Samson Haruni Bina** who has elected to contest the decision in **Application No. 201 of 2014**, which had been brought by his wife **Elizabeth Salum** against him and **NMB Bank**.

There is no doubt whatsoever that, **Application No. 33 of 2014** between **Samson Haruni Bina** and ***Branch Manager NMB Kenyatta Mwanza and Dolphin General Business Enterprises Co. Ltd.*** is not the subject of the instant appeal. There is therefore no confusion as to which of the two Applications which were before the trial Tribunal is the subject of the instant appeal. The only issue is as to the date of the delivery of the Judgment in **Application No. 201 of 2014**. I have had

a look at the copy of the Judgment by Silas J. (Chairman) in **Application No. 201 of 2014**, which is on the Court record. It is stated at its foot that it was delivered by the Chairman on **27th July, 2016** in the presence of the Applicant and Advocate Marina for the **1st Respondent**, and the Chairman duly explained to the parties as to their right to appeal. With due respect to Dr. Mwaisondola I do not find any confusion as to the date of the delivery of the Judgment in **Application No. 201 of 2014**. On this I find the choice by Dr. Mwaisondola to abandon to pursue the first ground of preliminary objection that, the appeal is time barred due to the apparent confusion between the two matters before the trial Tribunal to have been wrongly exercised.

Given that the learned Counsel for the Respondent chose to abandon the first point of preliminary objection that, the appeal is time barred, and having pointed out that there is no confusion as to the date of the delivery of the Judgment the impugned Application and further that there is no confusion as to which of the two Applications before the trial Tribunal is the subject of the instant appeal, I shall let the first point of preliminary to rest and therefore do not intend to pursue it any further. The first point of preliminary objection that the appeal is time barred stands abandoned.

Let me now traverse the respective submissions of the parties in support and rival on the second point of preliminary objection that, **the appeal is not accompanied by a copy of judgment and decree appealed from and hence it is incompetent** and should be dismissed or struck out.

The learned Counsel for the Respondent premised his argument that the instant appeal has been filed in clear contravention of the provisions of **Order XXXIX Rule 1(1)** of the **Civil Procedure Code Cap.33 R.E. 2002**, which demands that a Memorandum of Appeal must be accompanied by a copy of the judgment and decree appealed from. The basis of the argument by the learned Counsel for the Respondent is **Order XXXIX Rule 1(1)** of the **Civil Procedure Code Cap.33 R.E. 2002** which stipulates thus;

*"(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and **the memorandum shall be accompanied by a copy of the decree appealed from** and (unless the Court dispenses therewith) of the judgment on which it is founded."* (the emphasis is of the learned Counsel for the Respondent).

Dr. Mwaiondola insisted that since the provisions of the law requiring a Memorandum of Appeal to be accompanied by a copy of the Judgment and decree appealed from are couched in mandatory terms by using the term **"shall"**, the Memorandum of Appeal in the instant having not so accompanied by a copy of the Judgment and decree appealed from, this renders the appeal incompetent and must be dismissed. Dr. Mwaiondola buttressed his submissions on this point by citing in his submissions the decision of the Court of Appeal of Tanzania in the case of **Stanley Kalawa Mariki vs Chihyo Kwisiya Nigomoa [1981] TLR 143**, where it was held at page 146 that, a Memorandum of Appeal must be accompanied by a copy of judgment and decree as

per **Order XXXIX Rule 1(1) of the Civil Procedure Code** otherwise the appeal will be incompetent.

In his brief reply to the submissions of Dr. Mwaisondola, the Appellant, **Samson Haruni Bina**, who fended for himself unrepresented, stated that, since the instant appeal concerns land matters, the most appropriate applicable laws are land laws and specifically, the ***Court (Land Disputes Settlements) Act, Cap. 2 (sic!) of 2002***. This law, which provides for appeals from District Land and Housing Tribunal to the High Court, stipulates that not every memorandum of appeal is to be accompanied with copy of judgment and decree as the learned Counsel for the Respondent maintains. The Appellant prayed that the preliminary point of objection be dismissed with costs for being devoid of any merit and that this Court should proceed to determine the appeal on its merits and not to buy the submissions by the learned Counsel for the Respondent which are based on technicalities intended to deny the Appellant his basis right of appeal.

On the respective submissions of the parties in support and rival to the preliminary point of objection, I wish to state at the outset that the provisions of **Order XXXIX Rule 1(1) of the Civil Procedure Code Cap.33 R.E. 2002** on which the preliminary objection is pegged makes it mandatory for a memorandum of appeal to be accompanied by a copy of the decree, and unless the Court dispenses with, a copy of the judgment. It is without much controversy and on the binding authority in the cited decision of the Court of Appeal in the case of ***Stanley Kalawa Mariki vs. Chihiyokwisiya Nigomoa [1981] TLR 143a*** Memorandum of Appeal not accompanied by a copy of judgment and

decree as per **Order XXXIX Rule 1(1)** of *the Civil Procedure Code* renders the appeal incompetent.

However, in his reply submissions, the Appellant has come up with the novel argument that, in terms of the relevant land laws governing appeals in land matters from District Land and Housing Tribunals to the High Court, and particularly the ***Court (Land Disputes Settlements) Act, Cap. 2 (sic!) of 2002*** not every appeal has to be accompanied by a copy of judgment and appeal. The Appellant did not bother to elaborate on the import and reach of this statement. There are two issues therefore which call for determination by this Court in regard to the statement by the Appellant.

First, whether the provisions of **Order XXXIX Rule 1(1)** of the Civil Procedure Code apply in appeals from originating from the District Court Land and Housing Tribunals in exercise of its original jurisdiction to the High Court and if it is in the affirmative, which provision of the law make applicable the provisions of the Civil Procedure Code in such appeals.

Secondly, whether there is a requirement under the law which governs appeals in land matters originating from the District Land and Housing Tribunal in exercise of its original jurisdiction to the High Court for such appeals to be accompanied by a copy of the judgment and decree appealed from.

On the first issue the Appellant in his reply submissions has strongly impressed upon this Court that, not every appeal in appeals in land matters originating from District Land and Housing Tribunals to the High Court under the ***Court (Land Disputes Settlements) Act, Cap.***

2 (sic!) of 2002 is to be accompanied by a copy of the judgment and decree. However, before I address myself on the issue whether an appeal in land matters originating from the District Land and Housing Tribunal in exercise of its original jurisdiction to the High Court is to be accompanied by a copy of judgment and decree, let me digress a bit so as to clear first the apparent confusion ushered in by the Appellant who has cited in his submissions (Cap.2 sic!) of the ***Court (Land Disputes Settlements) Act of 2002***.

Let me state categorically that, as per the ***Rectification of Printing Errors (The Land Disputes Courts Act, 2002) Order, 2003, Government Notice No. 225*** published on **8/8/2003**, the errors appearing in the ***Land Disputes Courts Act, No. 2 of 2002*** were rectified among others by deleting the title "***Courts (Land Disputes Settlements)***" appearing at the top of every page of the Act and substituting for it the title "**Land Disputes Courts.**" Therefore, as of the date of the publication of **G.N. No. 225 on 08/08/2003**, the **Land Disputes Courts Act, 2002** (Chapter 216 of the Revised Laws of Tanzania) is now the official citation of that particular piece of legislation. The previous citation of the law as ***Courts (Land Disputes Settlements) Act of 2002*** has fallen into disuse. It is no longer a proper citation of that law.

So much for the Appellant, a layperson and unrepresented, could not be expected of him to point out any specific provision in the ***Land Disputes Courts Act, Cap. 216***, with respect to the form and content of appeals from District Land and Housing Tribunals to the High Court so as to clear any doubt about his rather bold statement that not every

appeal in land matters is to be accompanied by a copy of the judgment and decree appealed from.

Let me start by a brief exploration of the relevant provisions of the law with regard to appeals to the High Court in land matters originating from the District Land and Housing Tribunal in exercise of its original jurisdiction. The ***Land Disputes Act, Cap. 216*** as amended in its section 41 by the Written Laws (Miscellaneous Amendments)(No.2) Act No.4 of 2016 provides for appeals to the High Court in land matters originating from the District Land and Housing Tribunal in exercise of its original jurisdiction as follows:

*"41(1) Subject to the provisions of any law for the time being in force, all appeals, revisions and similar proceedings from or in respect of any proceeding in a **District Land and Housing Tribunal** in the exercise of its original jurisdiction shall be heard by the High Court*

(2) An appeal under subsection (1) may be lodged within forty five days after the date of the decision or order.

Provided that, the High Court may, for good cause, extend the time for filing an appeal either before or after the expiration of such period of forty five days."

On the strength of the provisions of section 41 of the Land Disputes Courts Act, Cap.216 as amended by Act No. 4 of 2016, appeal to the High Court in land matters from the District Land and Housing Tribunal exercising its original jurisdiction is to be lodged in the High Court forty five days after the date of the decision or order and the High

Court may extend the time for filing an appeal either before or after the expiration of the time limit of **forty five days**. However, much as the law provides for lodgment of appeal to the High Court in land matters originating from the District Land and Housing Tribunal, it does not stipulate on the form and content of such appeal. The **Land Disputes Courts Act** however was amended by the **Written Laws (Miscellaneous Amendment) Act No. 2 of 2010** by repealing section 51 and replacing for it the following:

*"51(2) The District Land and Housing Tribunal shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it **shall apply the Civil Procedure Code.**" (emphasis supplied).*

The District Land and Housing Tribunal when exercising its jurisdiction over land matters is enjoined to apply the Regulations made under section 56 of the Land Disputes Courts Act and in case of any inadequacy to resort to the Civil Procedure Code. The **Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002**, G.N. No.174 published on 27/6/2003, do not provide for procedure for appeals to the High Court. This inadequacy is therefore to be dealt with by resorting to the Civil Procedure which provide for the mode of appeal and the content. It is for these reasons that I am at one with the submissions by Dr. Mwaisondola that, the Memorandum of Appeal being the legally recognized for lodging appeals to the High Court has to be accompanied by the judgment and decree appealed from as expressly stated under **Order XXXIX Rule 1(1) of the Civil Procedure Code.**

The issue whether a petition of appeal to the High Court in matters originating from Primary Courts is to be accompanied with a certified copy of judgment came for consideration by the Court of Appeal of Tanzania in the case of ***Sophia Mdee vs. Andrew Mdee and Three Others, Civil Appeal No. 5 of 2015 (CAT)(Arusha)(Unreported)*** where at page 12 of its Judgment, the Court cited with approval the decision of the High Court in the case of ***Gregory Raphael vs. Pastory Rwehabula [2005] TLR 99*** thus:

"As it can be seen, attachment of a certified copy of judgment is not one of the contents of the petition of appeal as it used to be in appeals originating from District Courts and Courts of Resident Magistrate as is provided under O.39, rule 1 of the Civil Procedure Code, 1966 which law is not applicable in Primary Courts. Failure to attach memorandum of appeal along with a copy of decree and judgment renders the appeal incompetent. Attachment of copies of decree and judgments is a condition precedent in instituting appeals originating from district courts and courts of resident magistrate."

The above cited authority is relevant to our discussion here given that, the ***Land Disputes Courts Act, 2002*** provides for two avenues for appealing to the High Court in land matters from subordinate land tribunals. The first avenue is concerned with appeals from decisions of the Ward Tribunal which go on appeal to the District Land and Housing Tribunal all through to the High Court as stipulated under section 38 of the Land Disputes Courts Act. The provisions of section 38 of the Land Disputes Court Act which govern such appeals are couched in more or less similar words to the provisions of section 25(3) & (4) of the

Magistrates' Courts Act, Cap. 11 R.E. 2002, which provides for the procedure to appeal to the High Court on matters originating from Primary Courts, which is by way of **petition** to be filed in the District Court, which in turn has **to dispatch** it together with the **proceedings** in the Primary Court and the District Court to the High Court. In such circumstances there is no requirement for the petition of appeal to be accompanied by a copy of the judgment or decree appealed from.

The second avenue for appealing under the Land Disputes Courts Act is the one which is provided for under section 41 of the Act, concerning appeals to the High Court from a decision of the District Land and Housing Tribunal exercising its original jurisdiction. In this regard there is no procedure provided in the **Land Disputes Courts Act** or the ***District Land and Housing Tribunal Regulations***. In terms of section 51 of the Act resort therefore is to be had to the Civil Procedure Code and particularly **Order XXXIX Rule 1(1)** of ***the Civil Procedure Code*** which makes it mandatory for the "Memorandum of Appeal" to be accompanied by the judgment and decree appealed from.

In the instant appeal, the subject of the preliminary objection under consideration, apart from having been preferred as a "**Petition of Appeal**" instead of a "**Memorandum of Appeal**", is not accompanied with a copy of the judgment and decree appealed from, a mandatory legal requirement under **Order XXXIX Rule 1(1)** of the Civil Procedure Code Cap. 33. The **form** for preferring an appeal and the **contents** thereof are a legal requirement. They cannot therefore just be brushed aside as mere procedural or legal technicalities as the Appellant wishes this Court to believe.

Evidently, the "*Petition of Appeal*" presented for filing in the Registry of the High Court at Mwanza on 26th day of August 2016, is accompanied only with a copy judgment and not the decree appealed from, which is a clearcontravention of the mandatory provisions of **Order XXXIX Rule 1(1)**of the Civil Procedure Code Cap. 33.

It is for the above reasons the preliminary objection that the appeal is incompetent for not being accompanied by the judgment and decree appealed from is hereby upheld.

The appeal is hereby struck out with costs for being incompetent.It is so ordered.

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R.V. MAKARAMBA

JUDGE

16/03/2018

