IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. LAND APPLICATION NO. 4 OF 2020

(Arising from the Land Application No. 26 of 2016 H/C Shinyanga Originating from land Appeal No 17 of 2015 Shinyanga District Land and Housing Tribunal)

SHIJA MHEKELA..... .....APPLICANT

VERSUS

GASPER MBABALA SIGALA@MALYOHE..... .....RESPONDENT

RULING

Date of Last Order: 20th April, 2020
Date of Ruling: 22th May, 2020

MKWIZU,J.:

By a Chamber summons filed in this Court on the 25th day of February, 2020, the applicant, SHIJA MHEKELA through the services of Mr. Musa Kassim, Advocate, presented two prayers, one, to be granted extension of time to file application for leave out of time and secondly, after the grant of the extension of time applicant be granted leave. His application was predicated under section 11 (1) of the Appellate Jurisdiction Act (Cap 141 R.E 2002), Section 47 (2) of the Land Disputes Court Act, CAP 216 R.E 2002. In support of his chamber summons, the applicant affirmed his own affidavit on 21st February, 2020.

The application was opposed, apart from his counter affidavit, respondent through his advocate Audax Theonest Constantine, filed a notice of preliminary objection on 3rd April 2020 to the effect that: -

1. That this court having heard Misc. Land Application No. 17 of 2018 on merits, this court lacks jurisdiction to entertain the applicant's application.

2. That as prayers (1) and (2) asked for in the chamber summons are catered under different laws, this Honourable Court cannot lawfully entertain and deal with the applicant's application.

This matter had a long history. Applicant had filed a land application before the District Land and Housing Tribunal for a declaration that he is a lawful owner of the suit premises. The Tribunals' decision was in his favour. Respondent appealed to the High Court via Land Appeal No. 26 of 2016.The High court ruled out that the tribunal lacked jurisdiction to preside over the matter and declared all the proceedings a nullity. Appellant was not happy, he filed a notice of appeal against the decision of this court. As the matters was appealable only on leave of this court, applicant filed Misc. Application

No. 36 of 2016 for leave to appeal. This application did not survive, it was struck out for being incompetent on 20/4/2018.

Undeterred, applicant filed another application No. 17 of 2018, this time for extension of time to file application for leave to appeal and subsequently leave to appeal. Again, on 11/2/2020 this application was struck out, hence this application which again had faced another obstruction, the fore mentioned objections.

When the application came up for hearing of the filed preliminary objections, the applicant was represented by Mr. Musa Kassim, advocate whereas Mr. Mutabingwa Mbatina, also learned advocate , appeared for the respondent.

Arguing the 1st preliminary point, Mr. Mbatina stated that applicant had filled Misc. Land application No 17 of 2018 which was heard on merit before it was struck out on 11/2/2020. He contended that having been heard on merit, regardless the order of striking out the application at the end of the court's ruling, applicant was barred from filing similar application in this court. Mr. Mbatina cited the case of **Hashim Madongo and 2 Other V.**

Minister for Industry and Trade and 2 Others, Civil Application No. 27 of 2003 (unreported). Mr. Mbatina suggested that, if aggrieved, applicant ought to have filed an appeal to the court of appeal or a second bite to the court of appeal but not filing the same application before this court.

Submitting on the second preliminary point, Mr Mbatina contended that, the application contains two prayers grantable under two different laws, one for extension of time under section 11 (1) of AJA while the second one is for leave to appeal under section 47 (2) of the Land Disputes Court Act. He said, the two prayers could not be asked for in one application. He refereed the court to the case of **Jovin Mtagwaba and 85 Others V.Geita Gold Mining Ltd**, Civil Appeal No. 23 of 2014 CAT (unreported) .He said, should the court sustain the first preliminary point, the application should be dismissed, and if not, and in case the second preliminary objection is found meritious, the application should stand struck out with costs.

On his part, Mr. Kassim strongly opposed the preliminary points raised. He contended that the 2nd preliminary objection is a misconception. The cited case of **Jovin Mutagwaba (Supra)** had similar prayers like in the application at hand but they were all brought under section 11 (1) of AJA. He cited the

case of **Zubeda Jan Mohamed and Another V. Abdulhakim Abdul Mukbel**, Misc. Land Application No 55 of 2018 High court Tabora (unreported) in support of the position that the application is maintainable.

On the 1st preliminary objection Mr. Kassim conceded to the fact that the application No 17 of 2018 was heard on merit as parties were called upon to submit thereto, but was quick to add that, it was not decided on merit. He explained that the decision was based on the contents of paragraph 4 of the applicant's affidavit which was found to be incompetent resulting into the striking out the application. The case of **Zanzibar Shipping Corporation V. Mkunazini General Traders**, Civil ApplicationNo.3 of 2011 CAT (Unreported) was cited to support the argument that the striking out order under the circumstances of this case, allows the applicant to refile the matter.

In his rejoinder Mr. Mbatina insisted that the application was heard and decided on merit and therefore could not be refiled again in this court. He again, prayed for the dismissal of the application.

I will go straight to the first preliminary objection which calls upon this court to see whether application No.17 of 2018 was decided on merit or not. As

stated by the parties, application No 17 of 2018 proceeded to hearing on merit where in the course of the hearing, there arose a question of a defective affidavit which was said to contain lies. In his decision Hon Mkeha J, at page 3 and 4 of the typed ruling said:-

"It is true that illegality has been specified in the applicant's affidavit as the main ground for seeking extension of time. ***See****: paragraph 7 of the applicant's affidavit. It is equally true that illegality alone suffices to be a ground for extension of time regardless of the extent of delay. However, the two applications* ***are supported with an affidavit tainted with lies****. Mr. Audax learned advocate referred to paragraph 4 of the applicant's affidavit on the aspect that Miscellaneous land Application No. 04 of 2015 has never been before this court involving the parties in the present application. The learned advocate for the applicant did not dispute the said fact. I need not cite ant authority to the effect that* ***an affidavit tainted with lies cannot be acted upon****.*

For the afore going reasons, the present application stand struck out. Each party to bear own costs. It is so held." (emphasis added).

Reading closely the paragraphs of this court's decision above, it is without doubt that my brother, Hon Mkeha J refrained from deciding the merit of the application after having noted that the application is supported by a defective affidavit which contained lies. In other words, this court was convinced that the averment as to the illegality of the decision would have alone warranted the grant of the application, but, the application was accompanied by a blemished affidavit which by any standard could not be acted upon.

Just by extension, and reading through the above extract of this court's ruling dated 11 /2/2020, it may be observed here that, it is a trite law that every chamber summons should be supported by an affidavit. With the incurable defective affidavit particularly the pointed-out paragraph 4 of the applicant's affidavit, the chamber summons in Misc. Land Application No. 17 of 2018 was left without legs to stand on, resulting to it being struck out.

I have carefully considered the decision of **Hashim Madongo** (Supra) cited by the counsel for the respondent Mr. Mbatina, in that appeal, the struck out decision was heard and decided on the aspect of time limitation whose

remedy is specifically a dismissal order. In that decision Court of appeal cited with approval the case of Ngoni **Matengo cooperative Marketing Union Ltd. V. Alimahomed Osman** (1959) EA.577 at page 580 which discussed in length the distinction between "striking out" and "dismissing" an appeal. The court said, I quote for convenience:-

> *"...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 later phrase 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 is mine).*

Going by the substance of the matter at hand as explained above, it goes without saying that application No 17 of 2018 was struck out on technicalities and therefore the applicant has an option of refiling the same in this court.

For the reasons stated above and guided by the above authority, I find the first objection unjustified. It is hereby overruled.

On the second preliminary objection this court is invited to see whether the two prayers presented can legaly stand together for determination by this court. Without more ado, I think this objection is misconceived, as correctly stated by Mr. Kassim, the case of **Jovin Mtagwaba** (Supra) cited by the counsel for the respondent is distinguishable. In that case, the applicant had brought two prayers laying from two different laws but pegged them under one provision of the law. In our case, the applicant brought two prayers and cited specific law for each prayer.

It should be observed here that, combination of more than one prayer under one application is not bad in law. See for instance the decision in the case of **MIC Tanzania Ltd V. Minister for Labour and Youth Development and The Attorney General**, Civil appeal No.103 of 2004 (Unreported).The test in such a case, as said in the above cited case, should be that the combined prayers should not diametrically opposed to each other, one should follow the other.

In our application, the applicant prayers are one, for extension of time to file application for leave to appeal and the second prayer is for leave to appeal. I find no wrong with the said combination as once the prayer for extension of time is granted, then an application for leave follows.

The 2nd preliminary objection also collapses.

All said and done, all the two preliminary objections are overruled with costs. The application to continue to hearing on merit.

Order accordingly.

Dated at **Shinyanga**, this date of 22nd May, 2020

THE HIGH COURT OF TANZANIA

E.Y.MKWIZU
JUDGE
22/5/2020