IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISCELLANEOUS LAND APPEAL NO 36 OF 2019

(C/F Original District Land and Housing Tribunal for Kiteto at Kibaya, land Appeal no 9 of 2019 koriginating from Partimbo Ward Tribunal land Case No 14 of 2019)

EDWARD OTESOI .....APPELLANT

VERSUS

MAINGWA MARIO ..... RESPONDENT

RULING

Robert, J.

This appeal centres on the disputed ownership of land situated at Partimbo village in Kiteto District. The Appellant Edward Otesoi successfully sued the Respondent, Maingwa Mario, on a claim of ownership of the disputed land at Partimbo Ward Tribunal in Land case No. 14 of 2018. Aggrieved, the Respondent appealed successfully to the District Land and Housing Tribunal which revised the decision of the Ward Tribunal and gave judgment and decree in favour of the Respondent. Aggrieved, the Appellant filed this appeal challenging the decision of the District land and Housing Tribunal for Kiteto at Kibaya in Land Appeal No. 9 of 2019 delivered on 13thSeptember 2019.

The Respondent through his Reply to the Petition of Appeal raised a preliminary objection on a point of law and prayed for this appeal to be struck out with costs on the point that:

> ***"The Appellant's appeal is hopeless for being brought under wrong legal title contrary to section 38(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002."***

When the appeal was called for hearing on 11th of March 2020, the Appellant was represented by Mr. Mughwai, learned counsel while the Respondent was represented by Mr. Mathias, learned counsel. As a practice of the court, before we could deliberate on the appeal I invited the learned counsel for the parties to address the court on the preliminary objection.

Supporting his ground of preliminary objection, Mr. Mathias submitted that the appeal by the Appellant is incompetent because as an appeal originating from the Ward Tribunal it is required to be brought by way of petition of Appeal under section 38(2) of the Land Disputes Courts Act, Cap. 216 R.E, 2002 and not by way of Memorandum of Appeal as filed in this appeal. He submitted further that the requirements under section 38(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 are mandatory because the provision uses the word "shall" which according to section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 is a mandatory requirement.

On the adversarial side, the Counsel for the Appellant, Mr. Mughwai, vehemently opposed the submission by Respondent's counsel by submitting that the preliminary objection lacks merit. He argued that although the appeal is instituted by way of Memorandum of Appeal instead of Petition of

Appeal, this defect is just a mere irregularity on a matter of procedure which is not fatal to the Appeal as long as the appeal was instituted within time and the Court has Jurisdiction to hear it.

He went on submitting that, this court has held on several occasions that the use of the word "memorandum of appeal" and/or "petition of appeal" is a matter of form not substance. In support of his argument, Mr. Mughwai made reference to the case of Basil Masare vs Petro Michael, (1996) TLR 226; the case of Mary Mwambene vs Benson Mwashamwa, Land Appeal No. 42 of 2016, High Court of Tanzania at Mbeya, (Unreported) as well as the case of Longido Njege vs Meibuko Njege PC Civ. Appeal No. 5/1997, High Court of Tanzania, Arusha (unreported) which is referred to at page 182 of the book titled: "Pitfalls in Litigation" written by Ben Lobulu.

As regards to the use of the word "shall" at section 38 (2) of Land Disputes Courts Act, Cap. 216 R.E 2002, Mr. Mughwai submitted that the use of the word "shall" does not in every case mean that the requirement is mandatory. He argued that the section is merely directory and not compulsory because it does not provide for a sanction for failure to follow it.

He made reference to the case of Fortunatus Masha vs Wiiliam Shija and another, Court of Appeal of Tanzania (1997) page 41 at page 43 para (d) and (e) and the case of Peter Thomas alias Peter Toshi vs Republic (1996) TLR 370 at page 372 para F and G.

Finally, Mr. Mughwai submitted that Article 107A (2)(e) of the United Republic of Tanzania Constitution, 1977 as amended direct the courts to dispense justice without being tied with undue technicalities of procedure.

He prayed that the Court should reject the preliminary objection and the appeal be disposed on merit as the objection can only delay the final disposal of the dispute.

In his rejoinder, the appellant's counsel reminded the Court that, this is a court of law and we are bound by the law. The cases cited by the Counsel for the respondent are High Court cases which do not bind this court.

I have given deserving consideration to the submissions by the learned counsel of both parties. It is not disputed that section 38(2) of Land Disputes Courts Act, Cap 216 R.E 2002 require appeals originating from the Ward Tribunal to the High Court to be by way of petition of appeal.

The question for determination is therefore whether the use of the title "Memorandum of appeal" instead of "Petition of Appeal" in the Appellant's appeal is fatal and renders the appeal incompetent.

Mr. Mathias maintains that the appeal is incompetent because the requirements of section 38(2) of Land Disputes Courts Act, Cap 216 R.E 2002 are couched in mandatory terms due to the use of the term "shall" which according to section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 is interpreted to mean where the word "shall" is used in conferring a function the function so conferred must be performed. Mr. Mughwai on the other hand argues that the section is merely directory and not compulsory because it does not provide for a sanction for failure to follow it. He referred the court to the cases of Fortunatus Masha vs William Shija (1997) and the case of Peter Thomas alias Peter Toshi vs Republic (1996) in support of his argument.

I do agree with the argument of Mr. Mughwai that this court and indeed the Court of Appeal have held in various occasions that the use of the word "shall" does not in every case mean that the requirement is mandatory. However, this position changed since the coming into force of the Interpretation of Laws Act. For the purpose of emphasis, I wish to make reference to the decision of the Court of Appeal in the case of **Goodluck Kyando vs Republic (2006) TLR 363 at 368 and 369** in which the Court of Appeal indicated that the meaning of the word "shall" changed since the coming into force of the Interpretation of Laws Act. The Court of Appeal stated as follows:

> ***"This Court in the case of Fortunatus Masha v. William Shija and another had occasion to construe the word "shall" as used in Rule 76(3) of the Court of Appeal Rules, 1979 and stated as follows at page 43D;***
>
> > ***"We think that the use of "shall" does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case"***
>
> ***... we would like to point out however, that since the coming into force of the Interpretation of Laws Act, Chapter 1 on the 1 September, 2004 vide Proclamation number 312 of 2004, the law in this point may change in view of section 53(2) which provides;***

(2) where in any written law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed"

Since section 38(2) of the Land Disputes Courts Act, Cap. 216 R.E 2002 is couched in mandatory terms, the Appellant was required to conform with the requirement of this provision by filing his appeal by way of petition of appeal not memorandum of appeal.

Mr. Mughwai also submitted that the court should consider the provisions of Article 107A(2)(e) of the United Republic of Tanzania Constitution, 1977 as amended which direct the courts to dispense justice without being tied with undue technicalities of procedure.

I wish to equate the underlying principle in the learned counsel's argument with the overriding objective principle introduced by the Written Laws (Miscellaneous Amendments) Act, 2018 in order to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Deliberating on this principle, I am particularly attracted to the reasoning of Kwariko, J.A in the case of **NJAKE ENTERPRISES LTD vs BLUEROCK LTD & ANOTHER, Civil Appeal No. 69 of 2017(Unreported),** in which it was held that;-

> "...the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the bill it was said thus; '...." The proposed amendments are not designed to

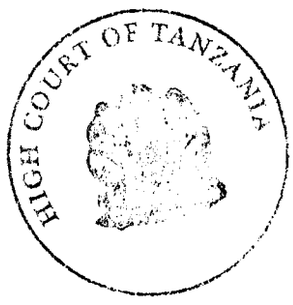
blindly disregard the rules of procedure that are couched in mandatory terms....."

The reasoning and analysis of the Court of Appeal above takes us to the conclusion that, since the provision enabling the Appellant to appeal to this court was couched in mandatory terms, the court cannot disregard the procedural requirements of that provision which goes to the very foundation of the case.

For the foregoing reasons, I find the Respondent's point of preliminary objection to have merit and I sustain it. The appeal is hereby struck out. I give no order as to costs.

Order accordingly.

DATED at ARUSHA this 31st Day of March, 2020



K.N ROBERT

JUDGE