IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

MISCELLANEUS LAND CASE APPEAL NO. 19 OF 2019

(From the Decision of the District Land and Housing Tribunal of Korogwe District at Korogwe in Land Case Appeal No. 49 of 2018 and Original Ward Tribunal of Mkata Ward in Application No. 29 of 2018)

1. SAID ALLY OMARY
2. CONSTANTIN SABAS ..... **APPELLANTS**

VERSUS

MBARAKA ALLY MKOLA ..... **RESPONDENT**

RULING

MRUMA,J.

This Appeal is from a decision of the District Land and Housing Tribunal of Korogwe in Land Appeal No. 49 of 2018. It raises a question of law of procedure which I think is of considerable importance. The question is whether moving the court by filing a Memorandum of appeal instead of a petition of appeal as required by section 38(2) of the Land Disputes Courts Act renders the appeal incompetent.

The appeal arises out of alleged disposition of a piece of land to two persons who are now the 2nd Appellant and the Respondent respectively. Both tribunals below ruled in favour of the Respondents.

Section 38(2) of the Land Disputes Courts Act [Cap.216 R.E. 2002] provides as follows:

> *"(2) Every appeal to the High Court (Land Division) shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision or order of which the appeal is brought"*

Submitting in support of the preliminary objection the Respondent contended that sub section (2) of section 38 of the Land Disputes Courts Act contains the word "shall" which denotes that the function so conferred must be performed. This, he said is the requirements of Section 53(2) of the Interpretation of Laws Act [Cap. 1 R.E. 2002].

In reply Ms. Noelina Bippa Ibrahim who represents the Appellant at first conceded that an Appeal to this Court in Land matters where the District Land and Housing Tribunal has exercised its Appellate jurisdiction should be by way of a petition and not a memorandum of appeal. She also conceded to the fact that the word "shall" dictates mandatory state. She however contended that it is not every irregularity or non-compliance with a rule that will necessary render an appeal incompetent. In this regard, while relying on The Case of Maneno Mengi Ltd & 3 Others v. Farida Saidi Nyamachumbe&The Registrar of Companies [2004] TLR 391, she urged

this Court to invoke Article 107A (2) (c) of the Constitution to dispense justice without being tied up with technical provisions which may obstruct dispensation of real justice.

In dealing with this preliminary objection I wish to preface it with Section 38 (2) of the Land Disputes Courts Act, which requires that every appeal to this court against the decision of a District Land and Housing Tribunal in Exercise of its appellate or revisional jurisdiction be by way of petition of appeal. It is important, in my view to note here that petition (and not memorandum) of appeal is required when one is appealing against a decision of the District Land and Housing Tribunal exercising it Appellate and Revisional Jurisdiction. Petition of appeal and memorandum of appeal are two district legal jargons which are sometimes, though wrongly used interchangeably. While an appeal is generally a matter of right which is pursued by filing a memorandum of appeal, a second appeal is not a matter of right and one will be required to petition the court by filing a petition appeal. Both (the memorandum of appeal and Petition of appeal) ask the appellate court to review something in the decision of the lower court but procedures are different. An appeal may involve a transcript while it is not necessary so by a petition. There also differences as to what may be submitted and standard of review may be different. In a first appeal (which is ordinarily prepared by filing a memorandum of appeal), the first appellate court has power and responsibility of re-evaluating the evidence afresh and come to its own conclusion. However, when it comes to a second appeal (which is ordinarily is preferred by filing

a petition of appeal to the court), the second appellate court does not have an obligation to re-evaluate the evidence afresh except where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence – [see **DeemayDaati& 2 Others V. Republic Criminal Appeal No.80 of 1994CAT** (Arusha unreported).

Memorandum of appeal from an order inclusive of an Order determining any question under section 41(1) and (2) of Land Disputes Courts Act (as amended by the Written Laws Miscellaneous Amendment (No.2) of 2016 Act or sections 70 (1) and (2) and 74 of the Civil Procedure Code are intended to cover appeals from subordinate Courts and/or Tribunal while exercising their original jurisdiction. On the other hand evidently petition of appeal is intended to be but a residuary provision for second appeals. This intention of the legislature is obvious in view of the plain and clear language used in section 38 (1) of the Land Disputes Courts Act. "*.....When in the exercise of its appellate or revisional jurisdiction".*

The Law didn't include a situation where the District Land and Housing Tribunal is exercising its original jurisdiction. This situation is covered under section 41 (1) and (2) of the same Act and an appeal arising there from is by way of a memorandum of appeal which denotes that is a matter of right.

It has been submitted for the Appellant that the non-compliance complained of can be over looked because there is substantial compliance. I do not agree. The case of **Maneno Mengi** *(supra)* cited by the learned counsel is distinguishable. In that Case the Court of Appeal was dealing with partial compliance with Court of Appeal Rules. In the present case the non-compliance complainedof is of substantive provision of the law. I also find that Article 107A (2) (e) of the constitution and the overriding objective principle injected in our law of procedure through the Written Laws (Miscellaneous Amendment (No.3) Act 2017 (Act No.8 of 2017) do not apply in the circumstances of this case since they were not meant to enable parties to circumvent mandatory rules of procedure.

The rules of procedure are important in the conduct of litigation. In many cases procedure is so clearly intertwined with the substance of a case to the extent that it befits not the attribute of mere technicality. The conventional wisdom indeed is that procedure is handmaiden of justice. Where like in the present case a procedural objection bears the very ingredients of just determination of the matter, court should not hesitate to declare the attendant pleadings incompetent.

Allowing incompetent pleadings to proceed may have the effect of opening pandora box for such type of proceedings [see **Martin D. Rumalija& 117 Others vs. fromSteel Ltd CivilApplication No.70 of 2018CAT** (unreported].

All Said and done I sustain the preliminary objection for reasons demonstrated above. The Appeal is struck out with costs to the Respondent.

A.R. MRUMA

JUDGE

13/03/2020

Date: 13/03/2020

Coram: A.R. Mruma,J.

Appellant:

Respondent:

Court Clerk: Nakijwa

COURT:

Ruling delivered.

A.R. Mruma

Judge

Dated at TANGA this 13th day of March 2020