

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION NO. 109 OF 2020

(Arising from Mwanza District Land and Housing Tribunal in Appeal No. 90/2018)

HELENA MAKOYE APPLICANT

VERSUS

CHINA PAUL RESPONDENT

RULING

19/05/2021 & 30/06/2021

W. R. MASHAURI, J;

This is an application for extension of time within which to file an appeal out of time against the judgment and decree of the District and Housing Tribunal in Appeal No. 90 of 2018.

It has been filed in this court under section 14(I) of the law of Limitation Act Cap. 89 R.E. 2019 and section 38(I) of the Land Disputes Courts Act Cap. 216 R.E. 2019.

There is however a notice of preliminary objections filed by learned counsel for the respondent to the effect that: -

1. Abuse of court process.

2. Application is incompetent as the court has been improperly moved.
3. High court has no jurisdiction to grant the relief sought.

The applicant is represented by Mr. Erick Katemi and the respondent by Mr. Majura Jackson Kiboga learned counsel. Parties unanimously agreed to dispose of the points of preliminary objection by filing written submissions.

In his written submission in support of the points of preliminary objection, Mr. Majura Jackson Kiboga counsel for the respondent, submitted in respect of the 1st preliminary objection that, the applicant abused of court process. that, this matter before this court is originating from Kayenze Ward Tribunal and due to the decision, the appellant herein was dissatisfied with the decision hence appealed to the District Land and Housing Tribunal for Mwanza. Unfortunately, the Tribunal decided on the respondent's favour and being aggrieved the applicant appealed to the High court in Land Appeal No. 27 of 2020 and the same was dismissed for want of prosecution on 08/10/2020.

That, the law clearly directs that, there are different courts that an individual may seek redress if at all he thinks he has a right to claim and in this instance the appellant is duty bound to appeal to the Court of Appeal of Tanzania as the higher court to seek for redress of the substation of the

word dismiss into strike out so that, to enable her to knock the door to this court to file application for extension of time to appeal out of time. But to jump into filing another application before this court while that is still an order of dismissal, it is an abuse of the court process.

That, this Miscellaneous Land Application is like to abuse court process because the reliefs thought (sic) are untenable whereas this court cannot be granted even if are not fruitful to the applicant.

For the 2nd preliminary objection that the applicant's application is incompetent as the court has been improperly moved, the learned counsel for the respondent submitted that, the application is incompetent as the applicant has moved the court without seeking a proper court procedure. The applicant was supposed to appeal to the Court of Appeal because for the Land Appeal No. 27 of 2020 was dismissed for want of prosecution and the only remedy was to appeal to the Court of Appeal.

That, this application is improper as the court is "*functus officio*" for it cannot proceed for the matter which was finally decided on merit on Land Appeal No. 27 of 2020.

This was clearly stated in the case of **Abdallah Hemed HAKI YA MUNGU V/S SELEMAN MARANDO** High court of Tanzania Dar es Salaam Registry Civil Appeal No. 12 of 2020 in which it was held that: -

"once the appeal has been dismissed for want of prosecution the right thing to do is to appeal to the Court of Appeal of Tanzania and that after dismissing the appeal the court's hands are filed."

For the 3rd point of preliminary objection that the High court has no jurisdiction to grant the relief sought, the learned counsel for the respondent submitted that, this court cannot extend the time to appeal for the applicant's relief sought are not maintainable and if so granted the applicant cannot appeal as the matter will be Res-judicata.

The applicant was required to appeal to the Court of Appeal so as to substitute the word dismissal for want of prosecution in Land No. 27 of 2020 into struck out. And thereafter the applicant will be in good position to lodge an application for extension of time to file an appeal out of time. To back up his submission, the learned counsel for the respondent cited the case of **Zacharia Elias Mabula & Another v/s Managing Director Sinoyoro Cooperation Revision No. 18 of 2017 Hc Mwanza** Registry (unreported) in which, the High court. Hon M. M. Siyani, J. held:

"Where the appeal was time barred and the same was granted whereas the applicant filed the application for revision as seen in the case of Zacharia Elias Mabula (supra) whereas the same was dismissed for being Res-judicata"

Having so submitted, the learned counsel for the respondent finally submitted that, the current Miscellaneous Land Application No. 109 of 2020 has the similar material fact meaning that, even if will be granted there is likelihood his appeal will be dismissed for being "*Res-judicata*" The reliefs thought (sic) is untenable and this court has no jurisdiction grant to rather than to dismiss the Miscellaneous Land Application No. 109 of 2020.

On his part Mr. Katemi learned counsel for the applicant conceded all three points of preliminary objections to be correct at law. He however prayed the court not to condemn the applicant with costs to whatever decision to be reached by this court.

On my side, before reaching the final verdict in this matter, I have deemed it prudent to vouchsafe the submission by counsel for the respondent rather than leaving the submission just like that.

In support of the 1st point of preliminary objection, the learned counsel for the respondent submitted that, this matter started at Kayenze Primary court where the same was decided against the appellant. Being dissatisfied,

the appellant appealed to the District Land and Housing Tribunal for Mwanza at Mwanza. He lost his appeal. He appealed to the High court and on 08/10/2020 his appeal was dismissed for want of prosecution. That, the law clearly directs that, there are different courts that an individual may seek redress if at all he has a right to claim and in this instance matter, the applicant is supposed to appeal to the Court of Appeal of Tanzania as the Higher court to seek for redress of the substitution of the word dismiss into struck out so as to enable her to knock the door of this court to file application for extension of time to appeal out of time. But by jumping into filing another application before this court while there is still an order of dismissal, it is an abuse of the court process.

Although the learned counsel did not cite any section of the law to back up his submission, this much I don't join his hands. However, I absolutely don't agree with his submission that, the law clearly directs that, there are different courts that an individual may seek redress if at all he thinks has a right to claim and in this instance the applicant is duty bound to appeal to the Court of Appeal of Tanzania as the Higher court to seek for redress of substitution of the word dismiss into struck out so that he can go to the High court and file an application for extension of time to appeal. Here, I think the learned counsel had in mind and he meant that, when a

matter is dismissed by the High court for want of prosecution is not appealable anywhere unless by way of appeal upon the Court of Appeal has removed the word dismissed and substituted thereof the word struck out and thereafter an individual can go to the High court and filed an application for extension of time to appeal out of time. This in fact is a grave misconception at law.

An appeal as defined under O. XXXIX of the CPC Cap 33 R.E. 2002 is a challenge by an aggrieved party of the correctness of the decision of the court of first instance.

The learned counsel also has submitted that, when a matter is dismissed for want of prosecution, the only redress of seeking a right is to go to the Court of Appeal by way of appeal for removing from the order of the High Court the word dismiss and substituted thereof the word struck out.

It is general Rule at law that, an incompetent application ought to be struck out and not dismissal. However, the same can be dismissed if it was heard on merit and found both incompetent and also lacks merit.

The learned counsel also submitted on the doctrine of Res-judicata.


The test for Res-judicata is whether the cause of action in the previous suit was the same or embraces the cause of action in the subsequent suit. The dismissal of suit which operate as Res-judicata are: -

1. Dismissal in default of appearance by the plaintiff.
2. Dismissal to a decision on merit.

Since the previous suit was dismissed for want of prosecution, the doctrine of Res-judicata cannot lie.

For having so submitted *suo moto* and since the applicant has conceded the points preliminary objections this application is dismissed. No order as to costs is made.




W. R. MASHAURI
JUDGE
30/06/2021

Date: 30/06/2021

Coram: Hon. w. R. Mashauri, J

Applicant:

Respondent:

B/c: Elizabeth Kayamba

Mr. Katemi, Advocate: I appear for the applicant.

Mr. Majura, Advocate: For the respondent. We are ready for ruling.

Court: ruling delivered in court in the presence of Mr. Katemi learned counsel for the applicant and Mr. Majura for respondent this 30th day of June, 2021.

Right of appeal explained.




W. R. MASHAURI
JUDGE
30/06/2021