

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 65 OF 2019

(Originating decision of the District Land and Housing Tribunal for Arusha. Application No. 149 of 2018)

AND

MISC LAND APPLICATION NO. 101 OF 2019

(C/F High court Appeal No. 65 and Application No. 149 of 2018 both at Arusha District Land and Housing Tribunal for Arusha)

NASIRU SHABAN MAKETI APPELLANT

VERSUS

NATIONA MICROFINANCE BANK PLC 1ST RESPONDENT

ADILI AUCTION MART LTD 2ND RESPONDENT

CONSOLIDATED RULING

17th May & 30th July, 2021.

MZUNA, J.:

In the District Land and Housing Tribunal (the trial Tribunal), **Nasiru Shaban Maketi** (the appellant herein) instituted Application No. 149 of 2018, against the two respondents herein, seeking for an order restraining the respondents from selling his house that he had mortgaged with the 1st respondent. The house subject of this appeal is located at Rekoyan Village, Sekei Ward, Arusha DC within Arusha Region. In the trial Tribunal, the case was scheduled for hearing on 30/10/2019, unfortunately, neither the appellant nor his advocate entered appearance on that day. Consequently, the application was dismissed for non-appearance with costs.

The appellant was dissatisfied by the dismissal order hence the instant appeal. Alongside this appeal, on 6/12/2019 the appellant filed Misc. Land Application No. 101 of 2019 seeking for an order of temporary injunction restraining the respondents from selling the suit property in the public auction pending final determination of the appeal.

On 16/3/2020, the 1st respondent's advocate raised preliminary points of objection on points of law in both Land Appeal No. 65 of 2019 and Misc. Land Application No. 101 of 2019. On 16/2/2021, the court ordered hearing of the preliminary objections in the application and the appeal to be argued by way of written submissions, hence the instant consolidated ruling.

At the hearing of the appeal and the application, the appellant appeared in person, unrepresented while the respondents were represented by Mr. Elinami Lowasa, learned advocate.

Despite the fact that parties were duly informed that the written submissions were in respect of the raised preliminary objections both the appeal and application, neither the applicant nor the respondent filed written submissions in respect of the preliminary objections in Misc. Land Application No. 101 of 2019. The only filed submissions are in respect of the preliminary objections in Land Appeal No. 65 of 2019.

In Misc. Land Application No. 101 of 2019, it was the respondents' advocate who raised the preliminary objection on 16/3/3030, contending that

the applicant's chamber summons is incompetent before this court for want of enabling provision of the law. He was given opportunity to argue and substantiate the preliminary objection, but he opted to waive his right.

What is the effect? It has been held time without number, that failure to file written submissions as ordered by court is tantamount to failure to prosecute one's case. I am fortified to this view by the Court of Appeal decision in **National Insurance Corporation of (T) Ltd & Another v. Shengena Limited**, Civil Application No. 20 of 2007 (unreported) where it was observed that:

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

From the case law above cited, the first respondent has failed to argue the preliminary objection. In the circumstances, this court has no better option than dismissing the raised preliminary objection, as I hereby do. Therefore, the preliminary objection raised in respect of Misc. Land Application No. 101 of 2019 stands dismissed. Be it as it may, the outcome in the pending appeal has an automatic effect on that application.

I now proceed to determine the preliminary objections raised in Land Appeal No. 65 of 2019. The respondents' counsel raised two preliminary objections, couched in the following terms:

- a) *That, the appellant's appeal is incompetent before this court for contravening regulation 11(2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003 G.N No. 174; and*
- b) *That, appellant's petition of appeal is incompetent before this court for contravening Order XXXIX Rule 1(2) of the Civil Procedure Code, Cap 33 [R.E 2002].*

In determining the raised preliminary objection, two issues emanate therefrom.

First, whether appeal can be filed based on a point not otherwise determined in the first court or Tribunal?

Second, if the first issue is answered in the negative, what is the effect of the appeal and pending application?

Let me start with the first issue on the propriety of the appeal. Mr. Elinami Lowasa submitted that the application in the trial Tribunal was dismissed on 30/10/2019 for non-appearance under Regulation 11(1)(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G.N No. 174. He insisted that the appeal in this court is an abuse of the court process because the appellant failed to exhaust the available remedies before coming to this court like seeking an order to set aside the dismissal order. According to Mr. Lowasa, the matter was not determined to its finality.

It was his view that the remedy for a case that is dismissed for non-appearance is well provided under Regulation 11(2) of G.N No. 174 by making an application in the trial Tribunal moving it to set aside the dismissal order. In case his application would be refused, he would appeal to this court. Mr. Lowasa

fortified that a party cannot appeal against an order since it does not determine the case to its finality. He cited section 74(2) of the Civil Procedure code, Cap 33 [R.E 2019] and regulation 22 of G.N No. 174 of 2003, which share the same view. Basing on the submission, the learned advocate for the first respondent implored the court to uphold the preliminary objection and strike out the appeal with costs.

On his part, the appellant argued that his appeal was brought under regulation 24 of G.N No. 174 of 2003, which provides for a procedure for a person who is aggrieved by the decision of the trial Tribunal. That, the wording of that provision does not impose restrictions whether the case in the Tribunal was dismissed for non-appearance of the parties or not. Further that he filed the petition of appeal not memorandum of appeal and therefore the objection is misplaced. He urged this court to overrule the objections which according to him, is a wastage of time, aiming at depriving him his rights.

Reading from the above submissions, it is not in dispute that Application No. 149 of 2018 was dismissed by the trial Tribunal on 30/10/2019 for non-appearance of the parties. It was dismissed under regulation 11(1)(b) of G.N No. 174 of 2003. The question which follows, was the matter determined on merits? Is the dismissal order appealable?

Regulation 11(2) of G.N No. 174 of 2003, provides:

*"A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), **within 30 days apply to have the orders set aside, and the Tribunal may set its orders if it***

thinks fit so to do and in case of refusal appeal to the high Court."

(underscoring mine).

The above provision provides an option first to apply "*to have the orders set aside*", if the application to set it aside is refused, then a party can appeal to this court.

It is therefore correct to say, and I agree, as well submitted by Mr. Lowasa that, the remedy for a person who is aggrieved by dismissal order is to apply in the same court/tribunal to set aside the dismissal order within 30 days. If the order to set aside the dismissal order is allowed, definitely his case will be determined on merits. Should the application to set aside the order refused, the law allows him/her to lodge appeal to this court.

This appeal was lodged prematurely. The appellant took a wrong path. He ought to have applied for setting aside the dismissal order, before lodging this appeal. There is no appeal against orders, unless they determine the matter to finality. The Court of Appeal on various occasions has held that one cannot appeal against dismissal order before he applies for setting aside such order. In **Pangaea Minerals Ltd v. Petrofuel (T) Ltd and 2 Others**, Civil Appeal No. 96 of 2015 (unreported), it was held:

"In the circumstances, we are satisfied that the appellants have lodged the appeal and the cross appeal prematurely without exhausting all the

available remedies in the High Court, hence rendering the same incompetent."

That procedure is applicable not only in the Tribunals but also in normal Courts. When faced with a similar situation, the Court of Appeal in **Paul A. Kweka and Another Vs. Ngorika Bus Services and Another**, Civil Appeal No. 129 of 2002 (unreported), held:

"It is our considered opinion that with respect to orders under Order IX, rule 13 of the C.P.C, the written law for the time being in force, is, the C.P.C. It is provided in Order XL, rule 1 (d) that an appeal shall lie only from an order under rule 13 of Order-IX rejecting an application for an order to set aside a decree or judgement passed ex parte (in a case open to appeal). That being the legal position, it will be accepted without further elaboration that this appeal is barred by the C.P.C."

This appeal is limited subject to exhausting the remedy available under regulation 11(2) of G.N no. 174 of 2003. It was preferred prematurely in contravention of the law and one can safely say, it is an abuse of the court process.

Merely preferring a petition of appeal instead of memorandum of appeal as the appellant put it, does not alter the position of the law. It was also wrong to refer as a petition of appeal because the matter originated from the District Tribunal not the Ward Tribunal, though this omission is minor. It makes the second preliminary point of objection of less importance.

For the above reasons, the first issue relevant for the first preliminary objection succeeds. I sustain it. Since the appeal is found to be incompetent, its ultimate effect is that Misc. Land Application No. 101 of 2019 must flop, it has no legs to stand on. I say so because it emanates from an incompetent appeal.

Consequently, both Misc. Land Application No. 101 of 2019 and the Land Appeal No. 65 of 2019 are struck out with costs.



M.G. MZUNA,
JUDGE.
July 30, 2021