

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT TANGA

**CONSOLIDATED LAND APPEALS NO. 7 AND 8 OF 2019
IN THE MATTER OF LAND REGISTRATION ACT, CAP 334
SECTION 102 (1) AND (2)**

AND

IN THE MATTER OF CERTIFICATE OF TITLE NO. 16066

AND

IN THE MATTER OF CERTIFICATE OF TITLE NO. 7902

AND

**IN THE MATTER OF APPEALS AGAINST THE DECISION OF THE REGISTRAR
OF TITLES TO RECTIFY THE LAND REGISTER**

BETWEEN

MOHAMED ENTERPRISES (TANZANIA) LIMITED PETITIONER

VERSUS

BALANGAI ESTATES LIMITED 1ST RESPONDENT

DINDIRA TEA ESTATE LIMITED 2ND RESPONDENT

THE REGISTRAR OF TITLES 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

MKASIMONGWA, J.

When this appeal came for hearing sometime on 21/06/2021 Mr. Elisa Abel Msuya (Adv) and Ms. Zakhiya (Adv) appeared for the Petitioner one Mohamed Enterprises Tanzania Limited whereas Mr. Nduluma Keya Majembe (Adv) and Mr. Charles Mtae (SA) appeared on behalf of the first

two and last two Respondents, respectively. By way of a Preliminary Objection, Mr. Msuya faulted the first two Respondents' Joint Answer to the Petition alleging that it contains additional evidence filed without leave of the Court and that the facts deposed by the first two Respondents were not part of the proceedings before the Registrar.

In substantiating the allegations, Mr. Msuya in the first place referred the court to the provisions of Section 102 (4) of the Land Registration Act [Cap 334 R.E 2019] which requires that a copy of every Petition of Appeal to be delivered to the Registrar who shall there upon send to the High Court the record of the Proceedings before him, if any and the names of any person who ought, in his opinion, to be given an opportunity of being heard on the appeal. This, Mr. Msuya said, was not done. He added that going by the Amended Joint Answer to the Petition of Appeal filed on 06/04/2021 by the first and second Respondents; substantially the same contains records which were not first presented before the Registrar and constitute the record. The only documents, among the filed ones, which formed part of the Registrar's record are those marked BDA8, BDA9, BDA19, (A), (B), (C) and (D), BDA 21 (E), BDA22 (A) and (B), BDA23 and BDA 24. In terms of Section 142 (8) of the Land Act [Cap 113 R.E 2019]

the provisions of the Civil Procedure Code [Cap 33 R.E 2019] shall apply mutatis mutandis to any appeal preferred to the High Court against the decision, order or act of the Registrar. The learned counsel submitted that under the Civil Procedure Code, where one wishes to submit additional documents, he must first seek and obtain leave of the court to do so. In the case at hand there was no leave of the Court granted to the Respondents in terms of Section 142 (8) of the Land Act, to allow them to submit additional evidence. As such all documents annexed to the answer to the Petition of Appeal filed by the first and second Respondents which did not form part of the Registrar's record shall be expunged.

As regards to the defects in the Affidavit, that the first Respondent deposed facts which did not form part of the proceedings before the Registrar, Mr. Msuya contended that the Joint Amended Answer to the Petition of Appeal filed by the first and second Respondents has 23 paragraphs. Out of them, only paragraph 2, Part of Paragraph 3, Paragraphs 4. 27, 4.28 (1) and (2), 4.33, 4.34, 4.34.5, 4.37, 4.40, 4.41, 5, 6, 8, 10 and 11 contain facts declared by the Respondents which form part of the record of proceedings before the Registrar. He reiterated that the rest of the averments in the answer do not constitute the record of the

Proceedings before the Registrar. As such they should not be considered as part of the record and consequently Mr. Msuya humbly prayed the court that they should be expunged from the court record.

On the other Mr. Ndurumah (Adv) agreed with Mr. Msuya that indeed in the Appeal, proceedings before the Registrar were not made available to the Court. He wondered if proceedings are not there where there is justification of all what is submitted by his learned friend counsel for the Petitioner. Mr. Ndurumah referred the Court to Section 102 of the Land Registration Act [Cap 334 R.E 2019] which provides to the effect that appeals to the High Court shall be by way of a Petition and it is anticipated that the Petition contains the grounds of Appeal and reliefs sought by the Petitioner. In the petition of Appeal filed in the Appeal at hand, the Petitioner came up with allegations against the first and second Respondent which allegations by order of the Court the first and second Respondents were required to respond to. In responding to the Petition of Appeal, the first two Respondents expressed and impeached the allegations made against them. They thus attached annextures tending to respond to the Petition. Mr. Ndurumah contended that the door to file the documents which were not there before the Registrar was first opened by the Petitioner. As the

documents attached to the Answer were only those responding to the filed documents by the Petitioner, the Respondents could not be faulted for attaching them. Mr. Ndurumah expounded that under paragraph 5 of the Amended Petition of Appeal the Petitioner attached the Memorandum of Understanding (TMA1) and Paragraph 4.1, 4.2 and Annexure BDA1 – BDA16 (c) of the Amended Answer to the Petition are in response to Annexure TMA of the Amended Petition. He added that it is not disputed that the first and second Respondents and again the Petitioner were involved in consolidated Land Case No. 53 of 2007 (DSM) and Land Case No. 20 of 2002 (Tanga) which were determined on 29/09/2016. Mr. Ndurumah submitted that Paragraph 4.27 – 4.30 of the Joint Answer to the Petition and Part of Annexure TMA9 are in respect of those consolidated cases. Similarly, Paragraph 4.33 of the Joint Answer to the Petitioner of Appeal is about signing of Annexure TMA3 to the Petition of Appeal (Annexure BDA 19 of the Answer). Paragraph 4.31 – 4.33 of the answer are in respect of matters transpired before 09/12/2016 the day when TMA3 and other documents were signed. It is the first two Respondents' allegations that the documents made on 09/12/2016 were made under duress and that Paragraph 4.31 – 4.33 expound the allegation which was

denied by the Petitioner, Paragraph 4.34 of the Answer provides for narration about the circumstances of the financial liability of the first two Respondents to the Petitioner.

It is stated further by Mr. Ndurumah that allegations made under paragraph 4.34 and Annextures BDA21 and BDA22 of the Answer are aimed at discrediting Annexure TMA3 of the Petitioner and that Paragraphs 4.36 and 4.37 of the Answer speak of the circumstances under which Annexure TMA3 and documents signed on 09/12/2016 and 28/04/2017 were signed. In respect of the Certificate of Title No. 7130, the Respondents narrated it under Paragraph 4.34 of the Answer and related to Annexure TMA1 to the Amended Petition of Appeal and Civil Case No. 33 of 2005 which is reflected to TMA3 at Paragraph 6 of the Answer.

Mr. Ndurumah submitted also that under Paragraph 4.39 – 4.41 the first two Respondents state the circumstances under which they moved the Registrar and Paragraph 4.42 it is stated what happened to them following the decision of the Registrar of Titles and supported this by Annextures BDA26 and BDA27. Paragraph 5 of the Answer to the Petitioner responds to paragraph 7 (a) - (e) of the Petition of Appeal which speaks of the

Certificate of Title No. 7130. In responding to the Paragraph Mr. Ndurumah stated that it was important to refer to and adopt what was stated under paragraph 4.

Mr. Ndurumah submitted further that in each Paragraph of the Amended Answer to the Petition of Appeal, the Respondents used words *'Leave of the court is craved for copies of ... to form part hereof.'* As such, the Respondents had at the earliest opportune sought for leave. Secondly it is only when a party adopts the documents to be part of the submission and the record of the Court; they can be admitted by the Court. The Adoption of the document changes the Annextures to be exhibits. Given the state of the case, the Annextures are yet to be adopted for purposes of becoming exhibit/evidence. In that premise, the Preliminary Objection was pre-maturely raised by the Applicants.

Mr. Ndurumah, referred the Court to the provisions of Order XXXIX Rule 27 (1) (b) and (2) of the Civil Procedure Code [Cap 33 R.E 2019] which provides for possibility of the Court to admit evidence and all witnesses on appeal. He stated that it is in the discretion of the Court to do so. He concluded that if the provisions of Section 102 of the Land Registration Act [Cap 334 R.E 2019] were faulted then, it is the Petitioner

who erred first when he brought the allegation. He prayed the Court that the Preliminary Objection be overruled with costs.

On his part, Mr. Mtae (SA) contended that before the Registrar, there were only the Application for Rectification of the Register (MEMOS), Power of Attorney and a Caveat attached to the Application filed. He stated that towards determination of the matter parties should focus on them. Regarding to the record of Proceedings before the Registrar, Mr. Mtae contended that all documents constituting proceedings before the Registrar are all there in the pleadings/records.

By way of rejoinder Mr. Msuya briefly stated that he concurs with the submission made by Mr. Mtae regarding to what constituted the proceedings before the Registrar and that what constitutes a record of the Registrar is well known by the parties. As such, Mr. Msuya did not have complaints on the availability of the Registrar's record.

As to the Application, Mr. Msuya contended that the Petition prepared and filed by the Petitioner does not raise new issues and this is contrary to the contention by the first and second Respondents. He referred the Court to the Provisions of Section 102 (1) of the Land Registration Act [Cap 334

R.E 2019] which provides for a right of Appeal to the High Court against the decision of the Registrar and that the Appeal shall be by way of a petition. The section also provides for procedure on how additional evidence can be taken. It is by applying what is directed under the Civil Procedure Code. The law was not complied with in which case the documents tendered on appeal have no room for their admission.

Mr. Msuya contended also that in his submission, the learned counsel for the first two respondents invited the Court that it finds the points of law were permanently raised, for they ought to have been raised at the hearing stage of the matter. He submitted that all the materials the Applicant has submitted were those placed before the Registrar and that the Respondents' documents could not be filed without obtaining a prior consent of the court.

As regards to the contention by the Respondents' counsel that the answer is styled in the way the Petition is and that even the Petition itself contravened the Rule the basis of this preliminary point of law, Mr. Msuya contended that the contention is not correct, for the petition is clear. It is made of a pleading which focused on the decision made by the Registrar in a matter commenced by a caveat accompanied by the statutory declaration

and other documents (TMA 13 – 14). In the answer to the Petition the first two respondents substantially filed documents not only not presented before the Registrar but also irrelevant to the Appeal.

Mr. Msuya submitted by way of conclusion that the procedure introduced by the law does not support the acts of the first and second respondents introducing new matters. He reiterated his prayer to have the documents expunged from the record.

I have alternately considered the submission made by the respective learned counsels representing the parties in the case. Going by the Petition; sometime the Petitioner was notified of a caveat filed by the first Respondent under Filed Documents No. 49215 and Notice of Revocation of Power of Attorney executed on 09/12/2016 by the first Respondent in favour of Mr. Aarif Shwaz Panjwani which was later on 08/05/2017 registered along with the Indemnity Bond. On 06/08/2018 the Petitioner was availed with Certified True Copies of Notice of Caveat, Statutory Declaration and Notice of Revocation of Power of Attorney and she applied to the third Respondent praying for rectification of the third Respondent's Register by expunging from the Register the Notice of Revocation of Power of Attorney given by the first Respondent. The Application was not

successful. Being aggrieved by decision of the Registrar, the Petitioner filed a Notice of Appeal and eventually this Appeal. It is no doubt that this Appeal was preferred by virtue of Part XVI of the Land Registration Act [Cap 334 R.E 2002] which provides for Appeal from the decision of the Registrar. Section 102 (1) of the Act provides for right of Appeal to any person aggrieved by a decision, order or act of the Registrar that he may appeal to the High Court within three months from the date of such decision, order or act. Subsection (3) of the Section provides for a form in which the Appeal shall be made. The subsection reads as follows:

"Every appeal shall be made in the form of petition in writing presented to the High Court by the Appellant or his advocate and every such petition shall be accompanied by a copy of the decision, order or act appealed against"

In terms of the subsection (5) of the Section, the Respondents were served and by virtue of subsection (6) the later, upon application were entitled to a copy of the decision, order or act appealed against a copy of the record proceedings, if any, and a copy of the Petition. The Respondents filed answers to the Petition of Appeal. To my understanding it is the record of proceedings which bears the evidence the parties had in the matter before the Registrar and I will agree therefore with Mr. Msuya that like in any

other appeal parties to the appeal should argue the appeal on the basis of the record of proceedings and that the parties are not entitled as of right to adduce additional evidence. Where a need to have additional evidence been adduced arises, in terms of subsection (8) of the Section, the provisions of the Civil Procedure Code [Cap 33 R.E 2019] shall apply. Order XXXIX Rule 27 (1) of the Civil Procedure is on production of additional evidence in the High Court by the parties. The Rule reads as follows;

"27.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) (b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Court may allow such evidence or document to be produced, or the witness to be examined."

In the Petition of Appeal filed, the Appellant accompanied it with twelve Annextures. It is unfortunate that out of the twelve Annextures

marked TMA 1 - TMA 12, it is only part of Annexure TMA 11 bears the necessary annexures to the Petition of Appeal mentioned under subsection 3 of Section 102 of the Land Registration Act [Cap 334 R.E 2012]. It is the Registrar's letter which constituted the decision the Appellant is appealing against. One May ask what was the purpose of annexing the Annexures to the petition by the Petitioner? The answer is simple. It is to provide material necessary to the determination of the matter, that is evidence. The same is for the first and second Respondents. In their joint answer to the Petition, the Respondents had annexed a total of 27 Annexure marked Annexure BDA 1 to BDA27. As submitted by the learned counsel for the Petitioner and not disputed by his learned brother counsel for the Respondents, these constituted evidence in the Appeal. In supplying the additional evidence neither the Appellant nor the first and second respondents complied with the requirements of Order XXXIX Rule 27 (1) of the Civil Procedure Code [Cap 33 R.E 2012]. The Appellant again did not comply with the provision of Section 102 (3) of the Land Registration Act [Cap 334 of 2019]. Indeed, the Petitioner properly accused the first and second Respondents. It is unfortunately that he did that with no clean hands for he was dirty of the same fault. It is the known principle of law

that he who goes to equity must go with clean hands. This the Petitioner did not do.

All in all, whereas the points of law raised by the Appellant against the first and second Respondents are sustained, I find this matter was not properly instituted, for it did not comply with the provisions of Section 102 (3) of the Land Registration Act [Cap 334 R.E 2002], the fact which rendered it incompetent. For being incompetent these consolidated Appeals are hereby struck out. Keeping in minds of all what is dismissed and found above, I make no any order as to costs.

Dated at Tanga this 22nd of September, 2021.




E.J. Mkasimongwa,

JUDGE

22/09/2021

Date: 22/09/2021

Coram: E. J. Mkasimongwa, J.

For Appellant: Ms. Linda Lugano (Adv) h.b of Mr. Elisa Abel Msuya

For 1st Respondent: } Mr. Deusdedit Lutija (Adv)

For 2nd Respondent: }

For 3rd Respondent: } Mr. Charles Mtae (SA)

For 4th Respondent: }

C/Clerk: Alex Kamwaya

Court: Ruling delivered in Chambers, this 22nd day of September, 2021

in the presence of Ms. Linda Lugano (Adv) h.b for the Appellant and
Mr. Deusdedit Luteja (Adv) and Mr. Charles Mtae (SA) for the first –
second and third – fourth Respondents, respectively.

Right of Appeal is explained.




E. J. Mkasimongwa

JUDGE

22/09/2021