

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND APPEAL NO 84 OF 2021

*(Arising from the Ruling of District Land and Housing Tribunal for Tarime at Tarime
in Miscellaneous Application No 49 of 2021)*

WASONGA OSUMAAPPELLANT

VERSUS

THE REGISTERED TRUSTEES OF THE

CATHOLIC OF DIOCESE OF MUSOMA..... RESPONDENT

JUDGMENT

29th March & 28th April, 2022

F. H. Mahimbali, J.:

Originally, the applicant through Land Application No 62 of 2009 filed before District Land and Housing Tribunal of Tarime hereinafter to be called the DLHT. He was sued for having trespassed the respondent's land. He defaulted appearance, the matter then proceeded *ex parte* against him and was then declared trespasser to the said land.

During its execution stage is when he got up and filed Misc. Application No 49 of 2021 seeking extension of time for him to set aside the *ex parte* judgment of the DLHT.

The said application was struck out with costs for being incompetent contrary to order XIX, Rule 3 (1) of the CPC as per preliminary objection filed and argued.

Aggrieved by that decision, the appellant has knocked the doors of this court challenging the decision of the DLHT on the following grounds of appeal, namely:

- 1. That the Trial Tribunal erred in law and in fact to struck out the Appellant's Application basing on the ground that, the Appellant's Affidavit was defective for containing legal Arguments and that the verification clause was defective.*
- 2. That the trial Tribunal's chairman mistakenly struck out the Appellant's Application with costs basing on the so-called preliminary objection of the Respondent, without taking into consideration that the defect in the Appellant's Affidavit was curable defect under the principle of Overriding Objective.*
- 3. That the Trial Tribunal's chairman erred in law and in fact for ignoring the fact that, in achieving substantive justice, the remedy for affidavit containing defective verification clause is tribunal to order amendment/ to order rectification of the error in the said verification clause and for Affidavit containing legal Arguments the remedy is tribunal to expunge the paragraphs containing legal Argument and the remaining paragraphs in the Affidavit if any, to support the*

application. Not to strike out the Application with costs as it was done by trial tribunal.

- 4. That the trial tribunal's chairman erred in law and in fact for failure to exercise his power judiciously by failure to take into consideration matters which he should have taken into consideration and in doing so he arrived at a wrong conclusion.*
- 5. That the trial Tribunal erred in law and in fact to pronounce judgment in favour of the respondent without the Appellant defence.*
- 6. That, the trial tribunal erred in law and in fact for failure to properly evaluate the evidence on records.*

Again the said appeal has been attacked on preliminary objection, firstly that the appeal contravenes the provision of Order XXXIX, Rule 1(1) and (2) of the CPC for want of attaching the decree or order appealed against. Secondly, the said memorandum of appeal is defective as it is against an order which was not made by the trial court.

During the hearing of the appeal, the appellant appeared in person whereas the respondent was represented by Rev. Fr. Aristaric Bahati, learned advocate.

As there was preliminary objection duly filed, I ordered that the preliminary objection be argued simultaneously with the appeal itself.

I have keenly digested the submissions of both sides for and against the appeal. I am of the considered view that the appeal is bad in law for it has contravened the mandatory legal provision for failure to attach the decree/order appealed against. This is contrary to what is provided for under Order XXXIX, rule 1 (1) and (2) of the CPC.

Secondly, as the application No 49 of 2021 was not conclusively determined, the appropriate course was to challenge the dismissal order of the DLHT so that he could have refiled his application of setting aside *exparte* judgment out of time upon rectification of his affidavit.

In consideration to the case of **Prime Catch (Exports) Limited and 5 others vs Diamond Trust Bank Tanzania Ltd**, Civil Application No 296/16 of 2017, CAT an appeal or revision is only filed where the matter has been conclusively determined. In the current matter, I am of the legal mind that the appellant's application before the DLHT was not finally determined for it to attack an appeal to this court.

As I agree with Rev. Fr. Aristaric Bahati learned advocate for the respondent in preliminary objection that the appeal lacks an attached decree/order appealed against, yet the appellant had no right of appeal in the circumstances of this case where his application was ruled being

incompetent before the DLHT. The appropriate course was but to refile his application before the same DLHT for it to determine the application on merit. Thus, the order of dismissal by the DLHT is hereby vacated and replaced with strike out order.

That said, I uphold the preliminary objection on one hand but on the other hand the appellant is advised to take appropriate legal course following the ruling in Misc. Land application No 49 of 2021.

That said, the appeal is struck out. As per nature of this case, each party shall bear its own costs.

DATED at MUSOMA this 28th day of April, 2022.



F. H. Mahimbali

Judge

Court: Judgment delivered this 28th day of April, 2022 in the presence of Appellant, Fr. Aristaric Bahati, advocate for the Respondent and Mr. Gidion Mugo – RMA.

F. H. Mahimbali

Judge

28/04/2022