

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MISC. LAND APPLICATION No. 1 OF 2022

(Arising from High Court Land Appeal No. 48 of 2020)

SASUMA KULABYA.....APPLICANT

VERSUS

ZAKARIA SITTA MAGEMBE RESPONDENT

RULING

11th & 27th May 2022

MKWIZU, J:

At his capacity as an administrator of estate of the late Magembe, the respondent had successful in the DLHT filed a suit against the appellant, the administrator of the estate of the late Matumbati Ngwenda claiming ownership of the 45 acres of land located at Bushusika hamlet, Sali Village in Chinamili Ward within Itilima District in Simiyu Region. The appellant herein was aggrieved by the decision. He, unsuccessfully appealed to this Court via Land Appeal No. 48 of 2020. He was again not happy, he on 31/1/2022 filed a review application before this court under order XLII Rule 1 and 3 of the Civil Procedure Code (Cap 33 R:E 2019) on the following grounds :-

- 1. **That**, the Hon. Judge presiding the matter under appellate jurisdiction misdirected himself when he dismissed the Applicant's appeal relying on the proceedings dated on 01/06/2020 and statement made by Mr. Lugundika learned*

advocate that the applicant opted to proceed on his own which is not the fact.

2. ***That,*** the Hon. Judge presiding the matter under appellate jurisdiction misdirected himself when he disregarded exhibit "D2" tendered by the Respondent and relied on exhibit "P2" tendered by the Applicant in entering judgement in favour of the Respondent while both exhibits suffer some irregularity.
3. ***That,*** the Hon. Judge presiding the matter under the appellate jurisdiction misdirected himself when he denied the Applicant's prayer on adding additional documentary evidence while there was proof of contradictory documentary evidence annexed by the respondent to his application and amended application filed by him at the District Land and Housing Tribunal for Maswa at Maswa.
4. ***That,*** the Hon. Judge presiding the matter under the appellate jurisdiction misdirected himself by not ordering return of the case file to the District Land and Housing Tribunal for Maswa at Maswa for visting locus in quo upon finding that there was dispute between the parties with regard to the size of the Land alleged to have been entrusted or sold to the Applicant herein by two different persons.

Having been served with the application, Respondent's counsel on 30/3/2022 filed two points of preliminary objection to wit:

- 1. That this application for Review has been filed in the names of a wrong parties contrary to the law*
- 2. In the alternative to point 1, the Notice of Appeal to challenge the judgement and the decree of the High Court of Tanzania at Shinyanga District Registry in Land Appeal No 48 of 2020 having being filed in the court of Appeal of Tanzania at Shinyanga on 20/12/2021, this Application for Review contravens the provisions of Order XLII Rule 1(1) (a) (2) of the Civil Procedure Code (Cap 33 R E 2019).*

The Preliminary objections were orally heard. Mr. Audax Constantine for the respondent argued that Land Appeal No 48 of 2020 was between Sasuma Kulabya as an administrator of the estate of the Late Matumabati Mwenda and Zacharia Sitta Magembe as an administrator of the estate of the Late Magembe Buzasi and therefore both parties are administrators of their respective estates while the review emanated therefrom is preferred by the applicant against the respondent on their personal capacity. He on this point cited to the Court the case of **CRDB Bank, PLC (Formerly CRDB 1996 LTD) V Georgy Mathew Kilindu**, Civil Appeal No 110 of 2017 page 11 stating that the error is not a mere clerical error and therefore the application is incompetent.

Submitting for the second preliminary objection, Mr. Audax stated that the remedy for Review is available to a party who has not appealed under XLII Rule 1(1)(a) (2) of the CPC. There is a filed Notice of appeal by the applicant against the decision subject of this review to the Court of Appeal of Tanzania on 20/12/2021 in Shinyanga sub and therefore the application for the review in this court cannot stand without proof of the

withdrawal of the Notice by the applicant. He prayed for the striking out of the Review.

In reply, Mr. Sululu Advocate for the respondent was of the view that the omission to indicate the capacity of the parties in the review is not fatal because at the trial tribunal and this court on appeal parties were properly referred to in their administrative titles and they are all aware of their administrative capacity. He on this point cited the case of **Suzana S. Waryoba V Shija Dalawa**, Civil Appeal No. 44 of 2017 adding that the omission has occasioned no injustice to the parties. He invited the court to, under the principles of overriding objectives, overrule the objection and proceed to hearing the Review on merit. Distinguishing the cited case of **CRDB Bank PLC** (Supra) with the matter at hand, Mr. Sululu said, in that case there was a total change of the party's name which is not the case here.

Regarding the second preliminary point, Mr Sululu admitted that applicant had filed a notice of appeal to the Court of Appeal, but he has filed a notice of withdrawal on 14/1/2022. He said, though there is no formal order withdrawing the notice of appeal filed, the court should take the applicant expression of his intention to withdraw the said notice as valid and he be allowed to proceed with the Review application on merit.

In rejoinder, Mr. Audax referred the court to the Court of Appeal Rules of Tanzania explaining that withdraw of the appeal is by an order of the Court without which the notice of appeal is regarded as still valid and therefore the Review application cannot stand. He maintained that, non-citation of the party's capacity in the application is fatal, insisting that even the cited case of **Suzana Warioba** (supra) the court had emphasized

on a citation of proper names of parties. In addition to that Mr. Audax implored the court to consider the decision of the Court in **CRDB Bank** as it was a current decision issued on 17/9/2020 compared to that of **Suzani** delivered 11/4/2019

I will begin with the law regulating review before this court. Order XLII (1) and 2 reads as follows:

"(1) Any person considering himself aggrieved-

*(a) by a decree or order from which an appeal is allowed, **but from which no appeal has been preferred**; or*

*(b) **by a decree or order from which no appeal is allowed**, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.*

*(2) **A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is***

common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.” (Emphasis added)

As correctly observed by Mr. Audax, the provision of the CPC above restricts filing of review application where there is an appeal pending before the Court. The Court of Appeal has in times without numbers said, once a notice of appeal is filed in the Court of Appeal, the High court ceases to have jurisdiction over the matter. See for instance the decision in **Milcah Kalonde Mrema v Felix Christopher Mrema**, Civil Appeal No. 64 of 2011 (unreported), the Court observed:

“ it is now settled that once a notice of appeal to this Court have been duly lodged, the High Court ceases to have jurisdiction over the matter.”

And in **Arcado Ntagazwa v Buyogera Bunyambo** [1997] T. L. R. 242, the Court held:

“Once the formal notice of intention to appeal was lodged in the Registry, the trial judge was obliged to halt the proceedings at once and allow for the appeal process to take effect or until that notice was withdrawn or was deemed to be withdrawn.”

See also: **Aero Helicopter Limited v F. N. Jansen** (1990) TLR 142,

While admitting that there is filed a notice of appeal, Mr Sululu, counsel for the applicant said, they have initiated the withdrawal of the said notice by filing a letter signifying their intention to withdraw the notice of appeal

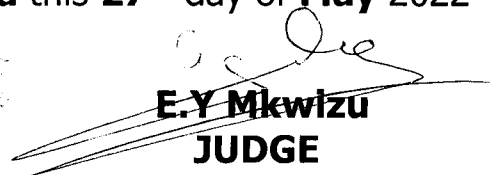
and urged the court to take the said notice as a valid withdrawal order. With due respect to the learned counsel, intention by a party to withdraw a notice of appeal has never been an order of the Court. Having applied for the withdrawal of the said Notice under Rule 89 of the Tanzania Court of Appeal Rules, Applicant ought to have waited processed the application to its completion until he is issued with the withdrawal order by the Court before filing this application. See: **Ottu on Behalf of P.L. Assenga & 106 Others and Three Others Vs. Ami Tanzania Limited**, Civil Application N0.35 Of 2011.

Since the notice of appeal is yet to be formally withdrawn, then its validity is unquestionable. The only rational conclusion is the review has been prematurely brought before the rendering the application incompetent. Second point of preliminary objection is sustained, and I will refrain from determining the first objection since this point alone disposes of the matter.

Accordingly, the application is accordingly struck out for being incompetent. Costs to follow the event.

Dated at Shinyanga this 27th day of May 2022




E.Y Mkwizu
JUDGE
27/5/2020