

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LAND CASE APPEAL NO. 6 OF 2022

(C/F Application No. 150 of 2018 Moshi District Land and Housing Tribunal)

RENALDA A. SHAYO.....1ST APPELLANT
ELIZABETH NDJIKE.....2ND APPELLANT
M/S FHS ENGINEERING LTD.....3RD APPELLANT
Versus

FATUMA ALLY SHOO.....RESPONDENT

Last Order: 15th August, 2022


Date of Ruling: 15th July, 2022

RULING

MWENEMPAZI, J.

This is a ruling in respect of four points of preliminary objection raised by the respondent namely:

1. That the appeal is incompetent for being filed out of the statutory time of 45 days after delivery of the Tribunal judgment as per section 41(1) and (2) of the Land Disputes Courts Act, Cap 216 of the Laws of Tanzania mainland, as revised in 2019 and without seeking extension of time to file the same out of time.



2. That the appeal is incompetent for omitting a necessary party who was the 1st respondent at the Tribunal trial(sic) from this appeal.

On 5th July, 2022 parties were ordered to file written submissions regarding the preliminary point of objection upon the respondent's request. Mr. Armando Swenya learned advocate appeared and filed submission on behalf of the Appellants while Mr. Nicholas Mugarura learned advocate prepared and filed submissions for the respondent.

Submitting in respect of the 1st point of preliminary objection the respondent's counsel quoted the provision of Section 41(1) and (2) of the **Land Disputes Courts Act, Cap 216 R.E 2019** which provides for 45 days after the date of the decision being time limit within which an appeal may be filed in court. Submitting further he argued that counting from the day the tribunal delivered its judgment 18th December 2021 to the date when this appeal was filed 1st February 2022 it is a total of 46 days. He contended that the appeal was therefore filed late by one day. Arguing further the learned counsel submitted that the last day of filling was 31st January which was neither a weekend nor did it fall on a public holiday. It was his view that since no extension of time was sought by the Appellants

remedy is dismissing the appeal in accordance with **Section 3(1) of the Law of Limitation Act, Cap 89 R.E 2019**. Based on his submission he prayed for the appeal to be dismissed with cost.

Submitting on the second point of preliminary objection which stated that the appeal had been lodged prematurely by omission of a party to the proceedings before the trial tribunal, Mr. Nicholas Mugarura, Advocate, stated that this was another pertinent objection which requires urgent legal address before the appeal can proceed any further. He stated that the proceedings before the trial tribunal had the first respondent as one Isack Emily Lyimo but the said individual had been omitted from this appeal deliberately and without reasons whatsoever. He argued that at the trial tribunal the omitted party gave evidence as crucial party who sold land to the respondent in this matter and that the first issue for determination at the tribunal was whether the agreement between the omitted party and the respondent was valid. Arguing further he stated that on the second ground of appeal the said party has been mentioned by name to the effect that the tribunal erred in finding that the said party had good title to pass on to the respondent. He contended that in such circumstances the matter could not



be properly heard in absence of the said individual being made a party to the appeal proceedings.

Supporting his submission, the learned counsel moved this court to refer to the Court of Appeal decision in the cases of **Isaack Wilfred Kassanga vs. Standard Chartered Bank Tanzania Limited, Civil Application 453 of 2019** available at TANZLII on page 9, 10 and 11. In this he submitted that the court laid down principles on why a party in previous proceedings must be part of subsequent proceedings. Based on that submission the learned counsel argued that the appeal could not be heard without the first respondent in the trial tribunal being made a party to the appeal. He then prayed for this court to adopt the position in the cited case of **Isaack Wilfred Kassanga** (supra) and order amendment of the memorandum of appeal to include the omitted party then service be dully done so that hearing could proceed in a proper legal manner.


Responding to the submission Mr. Swenya, learned counsel for the Appellants submitted by first conceding with the first point of the preliminary objection that it was true that the appeal was filed one day out of the statutory period. He thus submitted that the appeal was certainly incompetent to the extent that it was filed outside the statutory period and

without leave. However, the learned counsel disputed that the remedy in this case should be dismissal of the appeal.

It was the learned counsel's further submission that in as far as the limitation period in matters arising from the District Land and Housing Tribunal is concerned, the law applicable is the Land Disputes Courts Act, Cap 216 R.E. 2019. He argued that the mentioned law does not contain any provision for dismissal of an appeal instituted under the act. He further contended that the respondent had erroneously requested for the appeal to be dismissed relying on the provision of section 63(1) (sic) of the Law of Limitation Act on proceedings filed out of time. He argued that the provision is not applicable to proceedings provided in other legislation. The learned counsel submitted further that this position of the law was also stated in the case of **HTT INFRANCO LIMITED t/a HELIOS TOWERS TANZANIA VS. JULIANO CHARLES MIKONGOMI & TWO OTHERS**, Land Appeal No. 25 of 2020 where it was held that the Law of Limitation Act could not apply in the case while the Land Disputes Courts Act was a specific law prescribing the time limit for an appeal to the high court when District Land and Housing tribunal was exercising original jurisdiction.

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The learned counsel further submitted that the position of the law when an appeal is incompetent such as the case at hand the remedy is to order striking out of the appeal and not to dismiss it. He went on submitting that an order for dismissal connotes that an appeal has been determined on merit while a striking out order implies that the appeal was incompetent. Supporting his submission, the learned counsel stated that the legal position was so stated in the case of **MABIBO WINE AND SPIRITS VS. FAIR COMPETITION COMMISSION & THREE OTHERS**, Civil Appeal No. 132 of 2015 CAT at Dar es Salaam (unreported) where the court cited an old case of **NGONI MATENGO COOPERATIVE MARKETING UNION LTD VS. ALIMAHOMED OSMAN** [1959] EA 577. In this case he submitted that the defunct Court of Appeal for Eastern Africa made the following statement of principle: - *"... this court accordingly had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in this case was to "strike" out the appeal as being incompetent, rather than to have "dismissed" it for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of"*. The learned



counsel was of the view that the proper legal recourse for this court to take is strike out the appeal as it was done in the cited cases. He thus prayed for this court to strike out the appeal and to make no orders as to costs because the matter was among relatives.

On the second point of preliminary objection which stated that the appeal was incompetent for omitting a necessary party who was the 1st respondent at the tribunal trial from this appeal (sic), Mr. Swenya submitted that the objection was misguided and based on no legal provision or no premises known to law. The learned counsel cited the provision **of Order XXXIX Rule 4 of the Civil Procedure Code**, Cap 33 and prayed for the objection to be overruled.

In his rejoinder submission Mr. Mugarura reiterated his submission in chief and added that the case of HTT Infranco Limited (supra) cited by the Appellants, being a high court case was not binding rather persuasive. He went on submitting that the cited paragraph 13 of the said judgment did not make reference to the remedy in case an appeal was time barred but was rather referring to the time limit for filing an appeal from a District Land and Housing Tribunal in its original jurisdiction stating that the same could not be drawn from the Law of Limitation where there is a specific law


indicating the limit. He also stated that even the case of Mabio Wines & Spirits Limited (supra) did not deal with a time barred appeal thus he prayed that the matter be dismissed.

Rejoining on the second point, the learned counsel reiterated his earlier submission and further stated that the court of appeal decision cited was binding on this court and the parties at the tribunal should remain intact upon appeal.

Lastly Mr. Mugarura prayed for the costs to be awarded arguing that the appellants had time to concede to the objection on time limit even orally when the appeal was called up as the objection had already been filed and served but they opted not to do so an act which caused the respondent to engage counsel to argue the appeal. He also stated that it was not true that any of the appellants are related to the respondent as alleged by their counsel. That concluded the submission by the respondent.

In determining this objection, beginning with the first point which was to the effect that the appeal was incompetent for being filed out of statutory time without leave of this court, the appellants conceded that the objection has merit. However, they disputed on the consequence to follow as to whether the court should dismiss or strike out the appeal for being

incompetent. Mr. Mugarura moved this court to dismiss the appeal with costs based on the provision of **section 3 of the Law of Limitation Act**, Cap 89 RE 2019. The Appellants' counsel opposed the prayer of dismissal arguing that the position of the law when an appeal is incompetent the remedy is to order striking out. This is not a new issue and there is an established principle which was stated in the old famous case of **Ngoni Matengo Cooperative Marketing Union Ltd vs. Alimahomed Osman** (supra) where the court made a distinction on the use of the two orders of dismissal and strike out. The court made it clear when it held that the phrase "dismissed" implies that a competent appeal has been disposed of while "striking out" implies that there was no proper appeal capable of being disposed of. Likewise in the present circumstance, I find the first point of objection with merit and this appeal is therefore incompetent before this court for being filed out of prescribed statutory time. Since the appeal has been found to be incompetent the same has not been heard on merit and therefore in order to allow the appellants an opportunity to refile the appeal if they so wish, the order of dismissal is not preferable at this juncture. In the circumstance, I completely agree with the submission of the learned counsel for the Appellants on this aspect.

A handwritten signature in black ink, appearing to be 'S. M. Mugarura', is located in the bottom right corner of the page.

Moving on to the second point of preliminary objection which challenged the non-joinder of one party who was a party in the previous proceedings at the trial tribunal. Parties argued whether it was necessary for the said party to be joined in the appeal. When opposing the objection, the counsel for the appellants cited the provision of Order XXXIX Rule 4 and submitted that based on the provision the objection was misguided and based on no legal provision. On the contrary I am of the considered opinion that based on the provision of Order XXXIX Rule 4 of the CPC which states that;

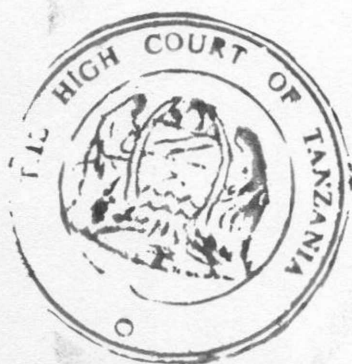
*"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon **the Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be**" (emphasis added)*

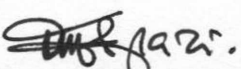
Interpreting the above quoted provision, in the context of the present matter, I am of the view that the provision entails that any of the parties has a right to appeal if aggrieved and that the appellate court may when reaching its decision vary or reverse the decree in favour of all parties as the case may be. Now in the present matter the question that one should

ask is suppose the appeal is decided in favour of the appellants, would it be possible for the party who has been left out to execute the decree on appeal. It is my considered view that, the said party who was left out on appeal will have been denied power or right to challenge the decree if aggrieved. In the circumstance then we can conclude that it was indeed necessary for all the parties to be included in the appeal so that if aggrieved by the decree on appeal they will have a right to challenge the same.

I also subscribe fully to the cited case of Isaack Wilfred Kassanga vs. Standard Chartered Bank Tanzania Limited (supra) as being relevant in as far as this point of objection is concerned. For this reason, I find this point of objection with merit.

In conclusion, the raised preliminary points of objection by the respondent through Mr. Mugarura learned advocate are sustained. I therefore strike out the appeal with costs. It is so ordered.




T. M. MWENEMPAZI
JUDGE
15th SEPTEMBER, 2022