

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

**LAND CASE APPEAL NO. 46 OF 2021**

*(Originating from Land Application No. 24/202 of the District Land and Housing Tribunal at Karagwe)*

**NOVATH SELESTINE.....APPELLANT**

***VERSUS***

**KAITAMBUZI VILLAGE COUNCIL.....1<sup>ST</sup> RESPONDENT**

**GODWINE ATHANAZI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*13<sup>th</sup> September & 13<sup>th</sup> September 2022*

***Kilekamajenga, J.***

The appellant filed land application No. 24 of 2020 in the District Land and Housing Tribunal for Kagera at Karagwe seeking a declaration that the he (appellant) is the lawful owner of the land in dispute. The respondents objected the application contending that, the appellant did not lodge a notice of intention to sue the respondents and the Attorney General. The objection further stated that some necessary parties were not joined in the suit. As a result, the District Land and Housing Tribunal sustained the points of objection and finally dismissed the application. The appellant was not happy with the dismissal order, hence this appeal. In this appeal, the appellant raised one ground to challenge the dismissal order that:

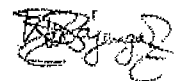


*1. That, the trial tribunal erred in law. It entered into an illegal decision contrary to the statutory provisions.*

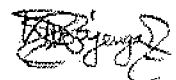
This court invited the parties to argue the appeal. The appellant hired the legal services of the learned advocate, Ms. Joanitha Jonathan whereas the learned Stated Attorney, Mr. Lameck Butuntu appeared for the first respondent. The second respondent appeared in person and without representation. The counsel for the appellant argued that it was wrong for the trial tribunal to dismiss the application instead of striking it out. Though the trial tribunal had no jurisdiction to try the case, the right remedy was to strike it out and not to dismiss it. The dismissal order denied the appellant the right to correct and approach a competent court. In building up his argument, the counsel referred the court to the cases of **Adrea Martin Msamba v. The Village Executive Officer, Ndiwili Village**, DC Civil Appeal No. 07 of 2020 and **Henry Mtei and Others v. Waziri Maneno Choka**, PC Civil Appeal No. 86 of 2018. He finally urged the court to set aside the dismissal order so as to allow the appellant file a fresh suit in a competent forum.

In response, the learned State Attorney did not object the counsel submission but prayed for the costs of the case. The second respondent had no objection.

In the brief rejoinder, the counsel for the appellant prayed for each party to bear his/her own costs as the error was occasioned by the trial tribunal.



This court after considering the submissions from the parties, it allowed the appeal by setting aside the dismissal order and replaced it with an order to strike it out. The court, however, reserved the reasoning, hence this brief judgment. According to the information available in the record and submission made by the parties, it leaves no doubt that the appellant's case was dismissed based on the point of preliminary objection. The counsel for the appellant insisted in her submission on the misdirection committed by the trial tribunal by dismissing the case instead of striking it out. He argued that, the dismissal order prevented the appellant from amending and filing a proper suit before a competent court. The only remedy was to challenge the dismissal order by way of appeal. This matter does not need to detain this Honourable Court as it is an established principle that, a court cannot dismiss any matter which was incompetent before it. The absence of notice to sue to the respondent as required by the law rendered the case incompetent. In other words, the case before the trial court was filed prematurely and therefore could not be rightly disposed of. The only remedy available was to strike out the case for the appellant to follow the proper procedure before filing a competent suit. In the case of **Director General NSSF v. Consolata Mwakisu**, Civil Appeal No. 329 of 2018, the Court of Appeal of the Tanzania observed that:



*'It is stated that the proper position is to dismiss only competent application, those which suffer material defects are to be struck out.'*

Furthermore, in the case of **Ngoni Matengo Cooperative Marketing Union Limited v. Ali Mohamed Osmman** [1959] EA 577, the court made a clear distinction between a dismissal order and an order to strike out that:

*'This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not properly constituted appeal at all. What this court ought to strictly to have done in each 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.'*

In an another case of **Olam Uganda Limited v. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2007, the Court of Appeal of Tanzania stated that:

*'In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision, by this Court.'*

Gleaned from the above legal authorities is the principle of the law that, a court can only dismiss a matter which is competent before it. Where an incompetent case is filed in court, the only remedy is to strike it out so that an interested party may file a competent suit. When a suit is dismissed, any aggrieved party cannot refile a fresh suit based on the same cause of action. The only remedy available against a dismissed suit is for the aggrieved party to challenge it by way of appeal, review or revision. Now, having considered the above principle of the law, I find the trial tribunal erroneously dismissed the appellant's case. The case deserved an order to strike it out. For that reason therefore, I hereby set aside the dismissal order for the appellant to file a fresh suit at his wish. No order as to costs. It is so ordered.

**DATED** at **BUKOBA** this 13<sup>th</sup> day of September, 2022.



  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**13/09/2022**



**Court:**

Judgment delivered this 13<sup>th</sup> September 2022 in the presence of the learned State Attorney, Mr. Lameck Butuntu, the learned Advocate for the appellant, Ms. Joanitha Jonathan and the 2<sup>nd</sup> respondent present in person. Right of appeal explained to the parties.



**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**13/09/2022**

