

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

LAND CASE NO. 52 OF 2012

**ADMINISTRATOR GENERAL (as legal personal
representative of the Late SHAFURAEI NSEE MBOWE).....PLAINTIFF**

VERSUS

VICTORIA EPHATA MBOWE.....1ST DEFENDANT

THOMAS KIMARO.....2ND DEFENDANT

RULING

17th August, 2022 & 16th Sept 2022

E.E. KAKOLAKI J.

The plaintiff before this court was appointed as administrator of the estate of the late **Shafrael Nsee Mbowe** vide the ruling of this Court handed down on 6th December 2010, in Probate and Administration Cause No. 39 of 1999. It was further ruled out in the said ruling that, the houses No. 401/402 and No. 338 both situated at Msasani area Mikoroshini Dar es salaam belong to the estate, thus subject to distribution to the heirs. Dissatisfied with the declaration that the two houses were part of the estate, 1st respondent appealed to the Court of Appeal challenging the said decision vide Civil Appeal No. 115 of 2012. It appears that, in the course of discharging his

duties the administrator encountered some snags as houses No.401/402 and No. 338 were occupied by the 1st and 2nd defendants respectively who refused to vacate them. That resistance triggered the plaintiff to file the present case in Land Case No. 52 of 2012, claiming among others reliefs this Court orders that, 1stand 2nd defendant be ordered to vacate the houses No. 401/402 and 338, respectively to enable her distribute them to the legal heirs of the deceased **Shafuraeli Nsee Mbowe**.

When the case was fixed for 1st PTC, the Court was informed that, the 1st defendant on 24/05/2012 had filed a notice of preliminary objection to the effect that, the suit is subjudice as there was a pending appeal before the Court of Appeal, challenging inclusion of the two houses in the deceased estate in which the plaintiff herein was seeking to evict the defendants as occupants. Following that point of objection, this court on 14th March 2014, speaking through R.A Teemba, J (as she then was), stayed the proceedings in this suit pending hearing and determination of the pending appeal in the Court of Appeal which unfortunately was struck out on 13th July 2016. Following the struck out of the said appeal, the first defendant successful applied for extension of time to file notice of appeal out of time hence filed the notice to the Court of Appeal on 18th November 2016, followed by other

notices of motion which are still pending in the Court of appeal of Tanzania to date. He admitted that, respondent in the said notice of motion was yet to be served with the notice of motion/application for extension of time to file appeal as well as application to join the necessary parties, thus were advised to file the application for leave to serve the respondent in the intended appeal out of time. Following that piece of advice the 1st defendant lodged applications to that effect which are still pending in the Court of Appeal.

Now regarding the raised preliminary objection Mr. Zake argued that, the present suit is subjudice in pendency of notice of appeal lodged by the 1st defendant intending to challenge the decision of this court on appointment of the plaintiff as an administrator of the estate and declaration of the two houses in issue as party of the deceased's estate. In his view, the present case should be stayed pending conclusion of the pending appeal. He added that, there are also pending applications in the Court of Appeal which are Civil Application No. 399/01 of 2021 and Civil Application No. 601/01 of 2021 for extension of time to lodge appeal out of time and to serve the notice of appeal to the plaintiff as a necessary party respectively.

In his view, the issue to be determined before this court is whether upon issuing a notice of appeal the trial court is barred from proceeding with the matter related to the subject of appeal. To him the answer is in affirmative. To bolster his stance, Mr. Zake placed reliance on the case of **Mexon Japhta Sanga and Another Vs. NMB Bank Plc**, Land Case No. 03 of 2021, HC (unreported) and the case of **Mark Alexander Gaetje & 2Others**, Civil Revision No.3 of 2011 CAT (unreported) where in both cases it was held that, where there is notice of appeal pending determination of any matter in the Court of Appeal, other directly related suit in the lower court has to wait for the final determination for the intended appeal or until the said notice is withdrawn or strike out by the respective court of appeal. In view thereof, he argued that, this court lacks jurisdiction to proceed entertaining the present case since the matter in issue is directly and substantially in issue with the matter in the intended appeal pending before the Court of Appeal. Mr. Zake added that, the matter is not only res subjudice but also invited the risk of creating conflicting decisions on the same subject matter, since the intended appeal by the first defendant intends to challenge the whole decision in Probate and administration Cause No. 39 of 1999. In further view of Mr. Zake, though parties in the present suit are not all parties in the

intended appeal, but the respondents in the intended appeal who were caveators, are beneficiaries of the estate of the late Shafuraeli Nsee Mbowe, whose legal representative is the plaintiff of which her appointment and declaration are being challenged. He added that, the suit contravenes the provisions of Section 8 of the CPC.

Mr. Zake rested his submission by requesting the court to stay the present suit pending determination or results of the pending matter before the Court of Appeal arising from the decision of this Court.

In response, Mr. Mutabuzi conceded to the preliminary objection submitting that it is true that, whenever an appeal is lodged the proceedings in the lower court should be stayed until the intended appeal is determined or the notice is withdrawn or struck out by the respective court of appeal. Despite of such concession he lamented that, the 1st defendant had been filing several appeals as it has been explained in her submissions, but failing to make follow ups of the same since she knows that, once the proceedings are stayed she continues to benefit from the suit property to the detriment of beneficiaries, hence keep on causing unreasonably delays in the hearing of the present case. He added that, in other occasions 1st defendant claimed to have filed an appeal while in fact there is none lodged as per copy of the

letter from Judiciary which he attached to the submission for court's reference. While in agreement that this Court may stay the proceedings, he was quick to argue that, the Court can do so by ordering the matter be mentioned in intervals of time to allow the court to track the records and progress of the cases instituted in the Court of Appeal. Mr. Mutabuzi placed reliance in the case of **Ongujo Wakibara Nyamarwa vs Prime Catch (Export) Co. Ltd & Another**, Commercial Case No.80 of 2016 (HC-unreported) where, the Court when faced with the situation akin to the present one stayed the proceedings but ordered for the same to be mentioned after every 3 months. He implored the court to be persuaded and adopt the above cited position to avoid losing track of the record and the progress of the appeal in the Court of Appeal.

I have dispassionately considered the submissions as made by both parties. It is true and I subscribe to Mr. Zake assertion that, as the law stands, once the notice of appeal is successfully lodged to the Court of Appeal, the same operates as a bar against the High Court or trial court in proceeding with the matter, thus the lower court is enjoined to stay the proceedings pending determination of the intended appeal or until the notice of appeal is struck out or withdrawn by the party.

The above position of the law is articulated in the the case of **Milcan Kalondu Mrema Vs. Felix Christopher Mrema**, Civil Appeal No. 64 of 2011 quoted with approval by the case of **Mexon Japhta Sanga and Another vs NMB Bank PLC**, land case No. 3 of 2021 where the Court observed that: -

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

Much as the 1st defendant’s counsel attached the copy of the notice of appeal filed on 18th November 2016, and having in mind that the notice of appeal initiates the appeal in the Court of Appeal, and since the plaintiff counsel admitted/conceded to the Preliminary Objection, I hold that the proceedings of the Land Case No 52 of 2012 is stayed pending finalization of the appeal process in the Court of Appeal as at the moment this court’s jurisdiction is halted.

As to the plaintiff’s prayer that the matter be mentioned from time to time so as to avoid losing track, I find it to be convincing hence the same is accepted. It is hereby ordered that, the matter will be mentioned in every three (3) months from the date of this ruling.

Each part to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 16th September, 2022.



E. E. KAKOLAKI

JUDGE

16/09/2022.

The Ruling has been delivered at Dar es Salaam today 16th day of September, 2022 in the presence of Mr. Samwel Mutabazi Principal State Attorney for the Plaintiff, Mr. Protas K. Zake, advocate for the 1st Defendant, Mr. Masunda G. Kunju and Ms. Rashid Umande, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

16/09/2022.

