

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

**LAND APPEAL NO. 24 OF 2021**

*(From the Decision of the District Land and Housing Tribunal for Tarime  
at Tarime in Misc. Land Application No. 137 of 2018)*

**BETWEEN**

**KYARIKO VILLAGE COUNCIL..... APPELLANT**

**VERSUS**

**KISERU SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD ...RESPONDENT**

**JUDGMENT**

**A.A. MBAGWA, J.:**

This is an appeal against the ruling and dismissal order of the District Land and Housing Tribunal for Tarime at Tarime in Misc. Land Application No. 137 of 2018.

Initially, the respondent, Kiseru Saving and Credit Co-operative Society LTD instituted a land case No. 65 of 2012 in the District Land and Housing Tribunal for Tarime at Tarime against the appellant, Kyariko Village Council. The said case proceeded *ex parte* and, in the end, the Tribunal entered judgment in favour of the respondent.

Upon becoming aware of the *ex parte* judgment, the appellant Kyariko Village Council, filed Misc. Application No. 137 of 2018 for extension of time

within which to file an application to set aside the *ex parte* judgment. As the bad luck would have it, the application met an objection to the effect that the affidavit was sworn by a person who does not exist hence he had no locus standi. As such, the tribunal sustained the preliminary objection and consequently dismissed the application.

The appellant was not pleased by the ruling and order dismissing the application hence she filed this appeal. In the petition of appeal, the appellant raised four grounds of grievance namely;

- 1. That, the trial Tribunal erred in law and fact by dismissing Application No. 137 of 2018 instead of striking it.***
- 2. That, the trial Tribunal erred in law and fact by failing to issue summons to the Appellant for attending the Tribunal on the date of the decision of Application No. 137 of 2018***
- 3. That, the trial Tribunal erred in law and fact by misconstruing the concept of a person who is competent to swear an affidavit***
- 4. That, the trial Tribunal erred in law and fact by allowing Application No. 137 of 2018 to be entertained and presided over by two Chairpersons at the same time.***

When the matter was called on for hearing, the appellant was represented by Kitia Turoke, learned State Attorney whereas the respondent was represented by its chairman one Paul Okoch.

Mr. Turoke abandoned the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds and argued only the first ground. It was Turoke's submission that the Chairman erred in law to dismiss the application instead of striking it out. He said, by dismissing the application it implies that the application was heard on merits which was not true. The learned State Attorney was thus opined that since the application was not heard on merits, the appropriate remedy was to strike it out and not to dismiss. To bolster his argument, Mr. Turoke referred this court to the case of **Yahya Khamis vs Hamida Haji Idd and two others**, Civil Appeal No. 225 of 2018, CAT at Bukoba in particular at page 6-8. He elaborated that the Court of Appeal made it clear that where a matter is terminated on technical grounds, the consequential order is striking out.

In light of the above authority, Mr. Kitia Turoke beseeched the court to exercise its powers provided under section 95 of the Civil Procedure Code by revising the dismissal order and substituting it for striking out. He further prayed each party to bear its own costs as the error on which the appeal is pegged was occasioned by the tribunal.

In reply, Mr. Paul Okech, being a layperson, had nothing substantial to submit. He simply told the court that he had nothing to comment.

Having gone through the submissions and the record of appeal, the issue for determination is relatively straight one, that is whether the Chairman erred to dismiss the application.

There is no gainsaying that the application from which this appeal emanates was disposed of following the preliminary objection that was raised by the respondent. As such, the application was not heard on merits as rightly submitted by the learned State Attorney.

It is a settled position of law that where a matter is disposed of on technical grounds that is to say, without going into the merits of matter, the appropriate consequential order is striking and not dismissal.

In the case of **Bernard Balele vs the Republic**, Criminal Appeal No. 81 of 2011, CAT at Mwanza, the Court of Appeal had the following to say;

***'It is now settled law that an incompetent appeal is struck out not dismissed. An order of dismissal implies that, a competent appeal has been heard on merit. Whereas an order of striking out an***

***appeal implies that an incompetent appeal has been disposed of on account of irregularities or defects therein'***

Further, the similar position was followed by this court in **Warioba Phinias and Lucas Anthony vs Mwanza Sattelite Cable TV**, Revision Application No. 52 of 2017, HC at Mwanza where his **Lordship** Ismail held that dismissal order arises only where the applications or suits are heard and determined on merits and not on account of or as a result of technical errors that render the applications or suits incompetent exception being on matters which are found time barred.

In view of the foregoing authorities, it is my unfeigned findings that an application or suit can only be dismissed where it is heard and determined on merits save where there is a clear provision of law to that effect such as section 3 of the Law of Limitation Act, Section 26(a) of the Magistrates' Courts Act and Rules 63 and 80 of the Tanzania Court of Appeal Rules, 2009. Under the mentioned provisions of law a matter can be dismissed though not heard and determined on merits. Where the application or suit is disposed of on technical grounds like in the present appeal, the consequential order is striking and not dismissal.

In the event, I agree with the appellant's counsel that the Chairman erred in law to dismiss the application instead of striking it out. As the application was disposed of on account of technicalities, the Chairman was supposed to strike it out. I therefore find the appeal meritorious. Consequently, I set aside the dismissal order and substitute it for a striking order. Each party should bear its own costs.

It is so ordered.

Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "A.A. Mbagwa".

**A.A. Mbagwa**

**JUDGE**

**05/10/2022**

**Court:** The Judgment has been delivered via teleconference in the presence Kitia Turoke (SA) for the appellant and in absence of the respondent this 5<sup>th</sup> day of October, 2022 at 11:40hrs

A handwritten signature in blue ink, appearing to read "A.A. Mbagwa".

**A.A. Mbagwa**

**JUDGE**

**05/10/2022**