

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 73 OF 2021

(Originating from Misc. Application No. 14 of 2021 in the District Land and Housing Tribunal for Kagera at Bukoba)

JOSEPH NDYAMUKAMA.....APPELLANT

VERSUS

GAUDENSIA KAIZILEGE.....RESPONDENT

JUDGMENT

Date of Last Order: 04/03/2022.

Date of Judgment: 04/03/2022.

A. E. MWIPOPO, J.

This appeal originates from the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Misc. Application No. 14 of 2021. The appellant namely Joseph Ndyamukama filed application in the District Land and Housing Tribunal which contain three prayers. The first prayer was for extension of time to set aside dismissal order in Application No. 90 of 2020 dated 17th November, 2020; the second prayer was setting aside dismissal order and re- admit Application No. 90 of 2020 to proceed on merits; and the last prayer is in alternative, to order the respondent to refile within affixed period the withdrawn application No. 172 of

2013. The respondent namely Gaudensia Kaizilege successfully raised preliminary objection containing several points of law as a result the application was dismissed with cost. The applicant was aggrieved by the decision and filed the present application containing four grounds of appeal.

The grounds of appeal of the appellant which are found in his Memorandum of Appeal are as follows hereunder:

- 1. That the trial chairman erred in law to dismiss (kufukuza) Misc. Application No. 14 of 2021 instead of striking out (ondolewa) for being incompetent before it.*
- 2. That the trial chairman misdirected himself to find out that the said Misc. Application was incompetent.*
- 3. That the counsel for both parties in Bukoba District Land and Housing Tribunal Application No. 90 of 2020 misdirected themselves and caused injustice to the appellant when they agreed to dismiss the said application following the raised preliminary objection (P.O.) on point of law by the counsel for the respondent that the said application was res subjudice to Application No. 172 of 2013 instead of staying the proceedings subsequent thereto.*
- 4. That the learned chairman further misdirected himself when he held that the counsel for appellant while submitting on the raised P.O. relied only on the care of the High Court of Tanzania.*

When the case came for hearing both parties were represented. Mr. Ally Chamani, Advocate, appeared for the appellant, whereas, Ms. Gisela Maluka, Advocate, appeared for the respondent.

The learned counsel for the appellant decided to combine submission on the first and second grounds of appeal as they are interrelated and abandoned grounds of appeal No. 3 and 4. Submitting on grounds No. 1 and 2 of the appeal, he said that the Court of Appeal gave directive in the case of **M.I.C. Tanzania Limited v. Minister for Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), at page 11 of the judgment, where it held that:

"After all, it is now a trite law that once an appeal or application is found to be incompetent, the only option is to strike it out even if no objection had been raised to it."

He said that the act of the trial chairman to dismiss the application was against the holding of the Court of Appeal. This affects the aggrieved party from rectifying the defects so that the matter will be heard on merits. The counsel prayed for the Court to rectify the anomaly and order the trial Tribunal to strike out the application instead of dismissing it as it was held. The counsel also prayed for the cost of this suit.

In response, the learned counsel for the respondent admitted that the chairman of the District Land and Housing Tribunal erred to dismiss the application instead of striking it out. She prayed for this Court to substitute the order for dismissing the application to the order of striking out the application. On the issue of cost, she said that the error was done by the trial tribunal and for that reason she prayed for each party to take care of its own cost.

After hearing the submissions from both parties, the only issue for determination is whether the dismissal order in the ruling of the trial tribunal was proper.

Both parties in their submission said that the trial tribunal erred to dismiss the Misc. Application No. 14 of 2021 which was before it after it found out that the application was incompetent. The learned counsel for the applicant said that the dismissal order is affecting his client as they want to rectify the defects in the application so that the matter may be heard on merits.

As it was rightly submitted by both counsels, the matter which is disposed of on preliminary objection has to be struck out by the Court. The reason is that the said suit was not determined on merits. The matter is dismissed when it is determined on merits.

In the case of **Juma Nhandi v. Republic**, Criminal Appeal No. 289 of 2012, Court of Appeal of Tanzania, at Mwanza, (unreported), the Court of Appeal cited with approval the holding in case of **Ngoni - Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman** [1959] E.A. 577, in which the defunct Court of Appeal for East Africa discussed the distinction between "striking out" and "dismissing" and held that, I quote:-

"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 each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it- for the latter 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. But it is the substance of the matter that must be looked at rather than the words used... "

In another case of **Yahaya Khamis vs. Hamida Haji Idd and 2 Others**, Civil Appeal No. 225 of 2018, Court of Appeal of Tanzania, at Bukoba, the Court held that:

".....the remedy of a matter which is incompetent before the Court is to be struck out. The reason for striking it out is that such matter is abortive or rather is incapable of being heard or even to be adjourned. In other words, it carries the implication that there is no matter at all before the Court."

And the remedies when the matter is dismissed is to appeal or file application for revision where there is no right to appeal, while when the matter is struck off the remedy is to file a fresh application (see. **Tanzania Breweries Ltd vs. Edson Muganyizi Barongo and 7 Others**, Misc. Labour Application No. 79 of 2014, High Court Labour Division, at Dar Es Salaam).

From the reasoning of the Courts in the above cited cases, I agree with both counsels that the trial District Land and Housing Tribunal was supposed to strike out the application instead of dismissing it.

Therefore, the present appeal is allowed. The order of the District Land and Housing Tribunal for Kagera at Bukoba dismissing with costs the Misc. Application No. 14 of 2021 is set aside and I substitute it with an order of striking out the said application with cost.

On the prayer for cost in the preset suit by the counsel for the appellant, I agree with the counsel for the respondent that the error in the order of the ruling of the trial tribunal was of made by the trial tribunal. In such circumstances, each party to this suit has to take care of his own cost.



A.E. Mwipopo

Judge

04/03/2022

The Judgment was delivered today, this 04.03.2022 in chamber under the seal of this court in the presence of the counsel for the Appellant and counsel for the Respondent.




A. E. Mwipopo

Judge

04/03/2022