

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF MANYARA**

**AT BABATI**

**LAND APPEAL NO. 17 OF 2022**

*(Arising from decision of the District Land and Housing Tribunal for Babati at Babati in Land Application No. 15 of 2022)*

**UDABONGAY @ HELENA MUHENDI.....APPELLANT**

**VERSUS**

**DANIEL MUHENDI.....1<sup>st</sup> RESPONDENT**

**GIDAMEYESHA DEGE.....2<sup>nd</sup> RESPONDENT**

**KIBAIGWA AUCTION MART..... 3<sup>rd</sup> RESPONDENT**

*Date of last order: 13/1/2023*

*Date of Ruling: 8/3/2023*

**RULING**

**BARTHY, J.**

This ruling follows the preliminary objection raised by the above-named first and second respondents on the following preliminary points

*That this appeal is incompetent for contravening Order XXXIX R. 1(1) of the Civil Procedure Code [Cap 33 R.E 2019] for being preferred as "petition of appeal" instead of "memorandum of appeal."*

Therefore, they were praying for the preliminary objection to be sustained and the appeal be dismissed with costs.

On the date fixed for hearing Mr. Omary Gyunda the learned advocate appeared for the appellant, whereas the first and respondents appeared in person, while the third respondent appeared through its principal officer namely Mr. Jeremiah Mtangwa.

By consent of the parties, the court ordered the preliminary objection be disposed of by way of written submissions.

The first and second respondents dully filed their submission in chief timely, but the appellant did not file her reply submission as per the schedule of the court. Hence, the determination of the preliminary objection raised will base on respondents' submission only.

Submitting on the above preliminary objection, it was contended that the appeal before this court is incompetent for being brought under wrong title. It therefore contravened with Order XXXIX Rule 1 (1) of the Civil Procedure Code [CAP 33 R.E 2022], (the CPC).

It was submitted further that the appeal is filed as the petition of appeal contrary to the Order XXXIX Rule 1(1) of the CPC which requires the appeal be by way of memorandum.



It was contended further that; the provisions of Order XXXIX Rule 1(1) of the CPC have been couched in mandatory terms. Hence by virtue of Section 53 (2) of the Interpretation of Laws Act [CAP 1 R.E 2019] it has mandatorily required the appeal to be by way of memorandum and not otherwise. He thus prayed the appeal be dismissed with costs.

Having gone through the submission in support of the preliminary objection raised, the sole issue for determination is whether the said objection has merits.

It is not in dispute that, the instant appeal lodged before this court is titled as "petition of appeal". It is however the appellant's submissions that appeal should have been titled as "memorandum of appeal" as required by Order XXXIX Rule 1(1) of the CPC.

In determining the preliminary objection raised, I regarded the law applicable to appeals arising from the District Land and Housing Tribunals (the tribunals) to the High Court.

There are several laws applicable before the trial tribunal, however the primary laws are the Land Disputes Courts Act [CAP 216 R.E 2019], (the Act)



and the Land Disputes Courts (the District Land and Housing Tribunal) Regulations GN. No. 174 of 2003 (the Regulations).

The CPC is only applicable to the proceedings before the tribunals, but where there is inadequacy in the Act or Regulations, the recourse is Section 51 (2) of the Act.

It is therefore clear that, any person aggrieved with the decision of the tribunal whether in the exercise of its respective original, appellate or revisional jurisdictions, is required to lodge an appeal to this Court in terms of Sections 38(1) or 41 of the Act.

The provisions of Section 38(1) of the Act governs the appeals from the tribunals when exercising its appellate or revisional jurisdiction. Whereas, Section 41(1) deals with appeals from tribunals when exercising its original jurisdiction.

Unlike the provision of Section 38 (2) of the Act which expressly requires the appeal to be filed by way of "petition", Section 41 of the Act is silent as to whether an appeal to this Court should be preferred by petition or memorandum.



In those perimeters, the fundamental issue which needs to be addressed is whether the use of the word "petition" instead of "memorandum" renders the instant appeal incompetent.

In our jurisdiction both the petition of appeals or the memorandum of appeal, are used to challenge the impugned decision to the superior court. The distinction is only drawn when there is the statute couching a mandatory provision.

A similar situation was decided in the case of **Mary Mwambene v. Benson Mwashambwa**, Land Appeal No. 42 of 2016 (HC at Mbeya, unreported) which also referred to the case of **Basil Masare v. Petro Michael** [1996] TLR 226 where the court was ruled that the use of the word petition, though not consistent with the normal term used in appeal from the District court or Land Tribunal is not fatal to the appeal.

The court has been put to task in a couple of times to distinguish between petition and memorandum of appeal. As in the case of **Basil Masare v Petro Michael** (supra), where it observed this;

*What substantive distinction can one make from the use of the words 'petition' or 'memorandum' when referring to*

A handwritten signature in blue ink, appearing to read "E.H. Army".

*grounds of appeal to a higher court? I must confess, **I can see no such distinction** although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. In my view, if an appellant uses the word 'memorandum' instead of the word 'petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent. That would be making a mountain out of a mouse mound unnecessarily. [Emphasis added].*

The respondents were not prejudiced by the use of the word "petition" instead of "memorandum" as the law did not stipulate what to be opted to initiate the appeal. I am therefore of the settled mind that, there is no injustice caused to the respondents.

Consequently, the preliminary objection raised by the respondents is hereby overruled with no order as to costs since the appellant did not file reply submission.

It is so ordered.

**DATED** at **Babati** this 8<sup>th</sup> day of March, 2023.





*G. N. Barthly*

**G. N. BARTHY,**

**JUDGE**

**8/3/2023**

Delivered in the presence of Mr. Omary Gyunda the counsel for the appellant and the first and second respondents in person.