

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI**

LAND CASE APPEAL NO. 43 OF 2022

(C/F Land Application No. 82 of 2022 and original Land Application No. 30 of 2020
at the District Land and Housing Tribunal of Moshi at Moshi)

ZAKARIA NDEWINGIA MWACHA1ST APPELLANT
RICHARD ZAKARIA NDEWINGIA.....2ND APPELLANT
SIJAONA ZAKARIA NDEWINGIA.....3RD APPELLANT
VERSUS
DAMAS MANDARI NGOIYARESPONDENT

RULING

Last order: 14/03/2023

Ruling: 28/04/2023

MASABO, J:-

This is a ruling on a preliminary objection raised by the respondent against the appeal brought by the appellants. Briefly, the respondent herein had instituted a claim against the respondents in the District Land and Housing Tribunal of Moshi at Moshi in Land Application No. 30 of 2020. Due to nonattendance, the application was heard *ex-parte* and a judgment was pronounced in favour of the respondent. Aggrieved, the appellants filed Land Application No. 82 of 2022 before the tribunal praying that the *ex-parte* order, judgment and decree be set aside. His application ended barren after the trial court found that there were no reasonable grounds to grant the orders sought henceforth, it dismissed the application. Aggrieved by the dismissal order, the appellants filed this appeal. Upon being served, the respondent raised a notice of preliminary objection premised on the following two limbs:

1. The appeal is hopelessly time barred for being filed in the High Court Registry out of time and in alternative;

2. The appeal is prematurely filed in the High Court registry contrary to the law and practice.

Hearing of the preliminary objection proceeded in writing. Both parties had representation. The respondent was represented by Mr. Patrick Paul, whereas the appellants were represented by Mr. Ulrick Shayo, all learned counsels.

Submitting in support of the first limb of the preliminary objection, Mr. Paul argued that the appeal is hopelessly time barred as it was filed out of time. He clarified that the judgment sought to be challenged was delivered on 19th February 2021 whereas the memorandum of appeal appears to have been filed on 12th May 2022. He argued that, impliedly, the appeal was filed 267 days from the date of delivery of the judgement thus beyond the period of 45 days set under section 41(2) of the Land Disputes Courts Act [Cap 216 RE 2019]. He proceeded that, the remedy for an appeal lodged out of time is set out under Section 3(1) of the Law of Limitation Act, Cap 88 RE 2019 which provides that, the remedy for a time barred matter is dismissal.

He then cited the **James Funke Ngagilo vs A.G** [2004] TLR 161; **Scan Tan Tour vs Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012, CAT and **Barclays Bank vs Jacob Muro**, Civil Appel No. 357 of 2018, CAT in support of his argument that the parties are bound by their pleadings and so is the appellants who have pleaded that the decision appealed against was delivered on 19th February 2021, hence the appeal is out of time.

On the alternative limb, Mr. Paul argued that if the appellants have instituted their appeal against Misc. Application No. 82 of 2022 then, the same has been filed prematurely before this court which is contrary to the law, practice and logic. Amplifying his argument, he stated that this appeal was instituted on 12th May 2022 while the ruling was delivered on 8th July 2022. Thus, the appeal was improperly lodged before this court 60 days prior delivery of the ruling in Misc. Application no. 82 of 2022 which it seeks to challenge.

Mr. Shayo was ardently opposed. He submitted that the preliminary objection is misguided as it is based on an application that was never filed by appellants in this court. The appeal before this court is against the judgment of the tribunal in Land Application No. 82 of 2022 which originates from the *ex parte* judgment and decree pronounced in favour of the respondent by the trial tribunal in Land Application No. 30 of 2020. He argued further that, the decision in Application No. 30 of 2020 was conveniently appended to assist the court to appreciate the background of the appeal before it.

On the argument that the appeal was prematurely presented for filing on 12th May 2022, Mr. Shayo submitted that it was a clerical error as the appeal was filed electronically in July 2022 prior to the expiration of 45 days within which to file the appeal against the ruling in Misc. Application No. 82 of 2022. In fortification, he cited the provision of Rule 21(1) of the Judicature and Application of Laws (Electronic) Rules GN No. 148 of 2018 in support of his argument that a document filed electronically is considered to have been properly filed unless it is rejected. Mr. Shayo

argued that the order in Misc. Land Application No. 82 of 2022 denied the appellants their right to be heard in the *ex-parte* judgment of the trial tribunal in Land Application No. 30 of 2020 hence this appeal. In the alternative, he argued that the objection is based on technicalities which inhibit timely dispensation of justice and hence offends the oxygen principle. He prayed that the objection be dismissed and the court proceed to hear the appeal on merit.

In rejoinder, Mr. Paul reiterated his submission in chief and proceeded that, much as the appellants contend that there was a clerical error and that the appeal was filed electronically, they have not rendered any evidence to it nor specifically stated the date on which the appeal was electronically filed. Thus, there is nothing in support of the averments made by the appellants' counsel. Mr. Paul argued further that, it is not the duty of the court to make an inquiry to check the filing system to see the date on which the appeal was it was filed. The duty rest on the party. He supported his arguments with a passage quoted from an article by Sir Jack I.H Jacob, "The Present Importance of Pleadings," **in Current Legal Problems** (1960). He further cited the decision of the Court of Appeal in **Salim Said Mtomekela vs Mohamed Abdallah Mohamed**, Civil Appeal No. 149 of 2019 and reiterated his prayer that the appeal be dismissed.

Upon a thorough consideration of the submissions made by both advocates, I will now proceed to determine the preliminary objection starting with its first limb. Before I proceed further on this limb, I will briefly set out the background of the appeal as discerned from the

tribunal's record. As stated in prelude, the matter landed in the tribunal for the first time in 2020 through Land Application No. 30 of 2020, which proceeded *ex parte* the appellants and decided in favour of the respondent. Thereafter, the appellants having obtained a leave for extension of time in Misc. Land Application No. 272 of 2021 and further extension through Misc. Land Application No. 447 of 2021, both before the trial tribunal, they jointly instituted Misc. Land Application No. 82 of 2022 seeking to set aside the *ex parte* decree and order. The application was dismissed on 8/7/2022. Meanwhile, on 12th May 2022 they filed this appeal.

On the merit of this limb, as correctly submitted by Mr. Paul, Section of 41(2) of the Land Dispute Courts Acts, sets a period of 45 days as the time limit within which to appeal against the decision of the tribunal. Reckoned from 8/7/2022 when the decision in Misc. Land Application No. 82 of 2022, which is the subject of this appeal was pronounced, it is obvious that the duration of 45 days lapsed on or before 21/8/2022. Supporting the first limb of the preliminary objection, Mr. Paul has invited this court to hold that the appeal is time barred, an invitation which, considering the sequence of events above narrated, I respectfully decline as it was based on a misconceived assumption that the appeal is against Land Application No.30 of 2020 which is not the case as the present appeal is against the dismissal order in Misc. Land Application No. 82 of 2022 which was delivered on 8/7/2022. The first limb of the preliminary objection is thus overruled.

Inversely, I see merit in the second limb of the preliminary objection. In this limb, Mr. Paul has passionately submitted that the appeal is incompetent as the memorandum of appeal appears to have preceded the decision it seeks to challenge as it shows that it was presented for filing in court on 12/5/2022, approximately 60 days before the pronouncement of the decision it seeks to challenge which, as afore stated, was pronounced on 8/7/2022. On the other hand, the appellants' counsel is of the view that the anomaly, the existence of which he does not contest, is a merely clerical error which should be disregarded to give room for substantive justice. With much respect to Mr. Shayo, I decline the invitation as the anomaly is not clerical as he has stated. The court record consistently shows 12th May 2022 as the date on which the present appeal was filed in this court. To be specific, the memorandum of appeal shows it was presented for filing on 12th May 2022 and so is the seal endorsed on it by the Deputy Registrar of this registry. Besides, an exchequer receipt with number 25286257 appended to the memorandum of appeal shows that the filling fee in respect of the present appeal was paid on 12th May 2022. It surpasses my imagination how, in the view of the above, the anomaly can be deemed a simple clerical error.

Further to his prayer that the anomaly be deemed a clerical one, Mr. Shayo has invited this court to find the said 'clerical error' curable by the overriding objective, the invitation which I similarly decline being guided by the decision of the Court of Appeal in **Mondorosi Village Council & Others vs Tanzania Breweries Ltd & Others** (Civil Appeal 66 of 2017) [2018] TZCA 303 [Tanzlii] where it emphatically stated that:

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied

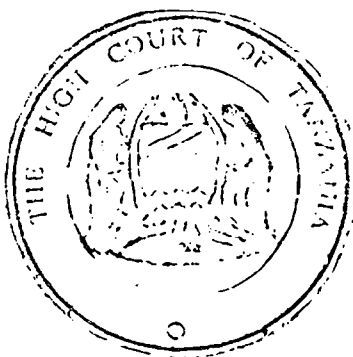
blindly against the mandatory provisions of the procedural law which go to the very root of the foundation of the case."

In a subsequent decision in **Kellen Rose Rwakatare Kuntu & Others vs Zithay Kabuga**, Civil Appeal 406 of 2020, [2022] TZCA 495 [Tanzlii], the Court of Appeal while reflecting its previous decisions, it stated that:

In **Jeremiah L. Kunsindah v. Leila John Kunisindah**, Civil Appeal No. 260 of 2017 (unreported), we underscored that the overriding objective did not replace the duty of parties, especially advocates, to observe the rules of the game set in the Rules. The overriding objective principle was not meant to be a magic wand for those who disregard procedural rules.

Thus guided, I find it inconceivable how the overriding principle would cure the above anomaly. The argument as to electronic filing will not detain me as it is not substantiated on record. In the foregoing, the 2nd limb of the preliminary objection is sustained and based on this ground, the appeal is struck out for incompetence. The costs shall follow the event.

DATED and DELIVERED at Moshi this 28th day of April 2023.



X

A handwritten signature in black ink, appearing to be "J.L. MASABO", written over a horizontal line.

J.L. MASABO

JUDGE