

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
{ARUSHA DISTRICT REGISTRY}
AT ARUSHA

LAND APPEAL NO. 181 OF 2022

CAROLINE ERNEST PAULO _____ **APPELLANT**

VERSUS

JULIANA MESIAKI _____ **RESPONDENT**

& 22/09/2023

RULING

BADE, J.

The named above Appellant having been aggrieved and dissatisfied with the ruling delivered on 26th September 2022 by **Hon F. MDACHI** lodged this appeal through a petition of appeal on 10th November 2022.

The Appeal was preferred to this Court with the following grounds:

1. That the trial Chairman erred in law and in fact when he refused the Applicant's Application without considering that the Respondent did not prove service to the Applicant.
2. That the Trial Tribunal erred in law when did not decide on the gist of Application number 33/2021 before it.

3. That, the trial Chairman erred in law and in facts when the trial tribunal did not consider that the original case was illegal

Before the matter could proceed to be heard on merits, the counsel for the Respondent raised a point in *limini litis* to the effect that

“That the appeal is hopelessly time barred”

And urged the court to dismiss the same. Upon being called for hearing, the parties sought the leave of the court to argue the preliminary objection in writing, and each side has abided by the court filing schedule to present its writings on the raised objection.

Supporting the preliminary objection, the counsel for the Respondent Mr. Malick contends that the disputed District Land and Housing Tribunal of Arusha (DLHT) Application No. 165 of 2018 judgment and decree was delivered on 15 October, 2021, having heard and finally determined by the Honorable G. Kagaruki (Chairperson), and the same was heard *ex parte*, but with an outcome in favor of the respondent herein.

The law as provided under section 41(1) & (2) of the Land Disputes Courts Act, Chapter 216, RE 2019 thus:

"subject to the provision of any law for the time being in force, all appeals, revisions and similar proceeding from or in respect of any proceeding in a District Land and Housing Tribunal exercising its original jurisdiction shall be heard by the High court."

The law further provides that under subsection (1) of the said section that an appeal may be lodged within forty-five days after the date of the decision or Order, and that the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days.

The counsel for the Respondent maintains that the decision in Application No. 165 of 2018 was delivered on 15th October, 2021. This appeal against the said decision was filed in this Court on 10/11/2022, according to the record on the copy of the petition filed in the court's registry.

That from the date the Judgment was delivered by the Trial Tribunal Chairperson to the date this Appeal was filed in court is about 1,470 days which is 1435 days after the lapse of the prescribed days for filing an Appeal to this Court as per the cited law since the Trial Tribunal exercised its original jurisdiction in entertaining the said application.

The provision of subsection 2 of the above-mentioned law vests this court with the powers to grant an extension of time in which to file an appeal for good cause. This means that this appeal is brought after the lapse of 1435 days and without prior application filed to this court for the appellant to have the time to file the appeal extended.

He insists that the Appeal is hopelessly time barred and this court is precluded from the jurisdiction to entertain it with merits and thus urged for it to be dismissed with costs.

The counsel for the Appellant Mr. Rwahira was ardently opposed. He submitted that it is now an elementary principle that a Preliminary point of Objection must really be a pure point of law that requires no evidential proof and that cannot be scrutinized, citing **Jackline Hamson Ghikas vs Malatie Richie Assey**, Civil Application No. 651/01 Of 2021 (unreported) where the Court of Appeal quoted the celebrated case of **MUKISA BISCUIT**.

In his view, the gist of the appeal lies in the Petition of Appeal, the grounds of appeal therein, and the attached Ruling which is being appealed against. He discerns that the appellant appealed against the Ruling delivered by Hon. F. Mdachi and not G. Kagaruki. On the second ground

of appeal, the appellant specifically challenged the Tribunal on application No. 33 of 2021. Apart from that, the appellant prayed for the dismissal of the ruling delivered on 26/9/2022. He insists that the appellant did attach to the petition of appeal the relevant Ruling delivered by Hon. F. Mdachi on 26/9/2022, and that is the Ruling they are aggrieved of. He thus concludes that one cannot say the appellant appealed against Application No. 165/2018 which was before Hon. Kagaruki.

He insists that the mere cross-filing of Application No. 165/2018 can not be construed to mean that the appellant appealed against that application. The ruling delivered on 26/9/2022 was founded on application No. 165/2018 and therefore filing it in our view was a mistake nor should it prejudice the respondent.

Rejoining, the Counsel for Respondent submits that Mr. Rwahira's argument that the preliminary objection must really be a pure point of law that requires no evidential proof reflects the truth and the nature of the preliminary objection raised. He maintains that the appeal is time-barred and should be dismissed with costs. In his view, this is a fact that is apparent on the face, of the Arusha District Land & Housing Tribunal Application no. 165 of 2018, whose judgment was delivered on the 15th day of October 2021. Also, according to the record of the petition of appeal filed, the disputed judgment on which the appeal seeks to challenge is

none other than the Tribunal's Ruling and Decree on the said Application no. 165 of 2018 (referencing page 1 of the petition of appeal and particularly on the title of the case).

He insists that the correct understanding of the referred phrase on the title of the document filed in court is that the appellant is appealing against the Arusha District Land and Housing Tribunal Application No, 165 of 2018. In any case, if the number of days that have passed is calculated before the appeal was filed, it is obvious that the time lapsed is 1435 days outside the allowed time limit, and without the delay in filing the application being condoned through a grant of an extension of time to file the appeal.

In his view, Application no 33 of 2021 is quite different than Application no 165 of 2018, as one is a Miscellaneous Application and the other one is the main Application. Again, a copy of the alleged Application No. 33 of 2021 is not attached to the petition of appeal filed.

The counsel controverts the submission by the appellant that they have attached the relevant Ruling delivered by honorable F. Mdachi on 26/09/2022 as being incorrect, noting that the title of the documents as filed speaks of some other facts. He charges that anybody looking at the petition of appeal would see that the same is for the purpose of

challenging the trial tribunal Application no. 165 of 2018 since that is what is illustrated on the first page of the petition of appeal. The attached Ruling does not feature anywhere on the title of the petition of appeal.

He reasons that the information gathered on the cross-filing is crucial to notify the case to be brought about or to be dealt with thereon. Had there been any information about the alleged Miscellaneous Application No 33 of the Trial Tribunal, the story would have been different.

In further argument, the counsel maintains that there was ample time for the counsel for the appellant to make corrections to the filed documents but chose to do nothing, and in consequence, the counsel should not be allowed to preempt the raised preliminary objection and occasioned injustice.

He reiterates his position that this appeal is brought late in the day and thus it is time-barred praying to have the preliminary objection be sustained and dismiss the appeal with costs for being brought hopelessly out of time.

Having gone through the submissions of the parties and the filed documents, I am obliged to determine if the preliminary objections raised are meritorious, particularly whether the appeal before this court is time-

barred; and incompetently filed for lack of supporting documents.

The provision relating to the limitation of time is clear that for appeals from the decisions of the DLHT exercising its original jurisdiction, the prescribed time for filing an appeal is 45 days from the date of judgment and in case there is good and sufficient cause for the appellant to be late to file the same, then the procedure is for the aggrieved party to apply for extension of time in which to file an appeal.

I must agree with the contention of Counsel Mr. Malick that the petition of appeal is referring to Application No. 165 of 2018. It is pertinent to note that parties are bound by their pleadings and it is the appellant who has pleaded that they are challenging the said decision, whose judgment was delivered on the 15th day of October 2021, hence the appeal is out of time.

See **James Funke Ngagilo vs A.G** [2004] TLR 161; **Scan Tan Tour vs Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012, and **Barclays Bank vs Jacob Muro**, Civil Appeal No. 357 of 2018.

The said attached Ruling is none the wiser in being a useful document since it has no connection with the title of the petition of appeal. Nowhere the said Application No. 33 of 2021 is mentioned. In other words, there had been no Application No. 33 of 2021 of the trial tribunal between the parties. The document which is attached with the petition of appeal is the

Ruling from trial tribunal's Misc. Application No 33 of 2021, but not the above-mentioned Application. The title of the document reads thus: **"MAOMBI MADOGO NA. 33 YA 2021"** meaning **"MISCELLANEOUS APPLICATION NO. 33 OF 2021"**. So there had never been in the said Trial Tribunal Application No. 33 of 2021 between the parties herein, noting in agreement with Mr. Malick that there is a difference between the District Land & Housing Tribunal **Application** and the **Misc. Application**. The former is the main Application in which a party that has a claim in the District Land & Housing Tribunal files to initiate their suit, while the latter is more often than not, an interlocutory application.

The period of 45 days is set under section 41(2) of the Land Disputes Courts Act [Cap 216 RE 2019]. Also, the remedy for an appeal lodged out of time is set out under Section 3(1) of the Law of Limitation Act, Cap 89 RE 2019 which provides that the remedy for a time-barred matter is dismissal.

Looking at the record of appeal as filed in court, and the submission by the appellant's counsel, in an attempt to save the day, he has introduced a new argument through his reply submission, which is neither notified in the petition of appeal, nor was it contended by the respondent's counsel when he submitted for the preliminary objection. I take note that nothing

is stated about the purported Ruling that was delivered on 26 September 2022. I also decline the invitation by the counsel for the Appellant to treat the mix-up as a mere mistake that the court should ignore. Like Mr. Malick said, that would be pre-empting the preliminary objection raised. In this aspect, even the overriding principle or the argument that technicalities should not hold against the dispensation of justice will not hold water. In my view, there is nothing much in support of the averments made by the appellant's counsel that the Appeal is preferred against Misc. Application No. 33 of 2021. With much respect to Mr. Rwahira, I decline the invitation to treat the anomaly as a mere mistake of the pen.

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] 77CA 495 [Tanzlii], the Court of Appeal while reflecting on its previous decisions on the

application of the overriding principle, it stated that:

*"In **Jeremiah L. Kunisindah vs 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 as set in the Rules. The overriding objective principle was not meant to be a magic wand for those who disregard procedural rules."*

I find it inconceivable how the Application as found on the record of appeal could be ignored and be treated as if it is an appeal against Application No. 33 of 2021 and not an appeal against Application No. 165 of 2018.

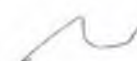
On the basis of the foregoing, the preliminary objection is sustained, and based on the same, the appeal is dismissed for being time-barred. Costs shall follow the event.

I order accordingly.

DATED at ARUSHA this 22nd day of September 2023



**A. Z. BADE
JUDGE
22/09/2023**



Judgment delivered in the presence of parties / their representatives in chambers /virtually on the **22nd** day of **September 2023**.



A handwritten signature in blue ink, appearing to read "A. Z. Bade", is written above a horizontal line.

A. Z. BADE
JUDGE
22/09/2023