

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

LAND APPEAL NO. 39 OF 2023

(C/F Arusha District Land and Housing Tribunal Application No. 09 of 2023)

ELIAS LUKAS PALLANGYO..... APPELLANT

VERSUS

GODLOVE LUKAS PALLANGYO..... RESPONDENT

RULING

06/11/2023 & 13/11/2023

KINYAKA, J.:

Dissatisfied with the decision of the District Land and Housing Tribunal of Arusha in Land Application No. 9 of 2016 hereinafter referred to as 'the trial Tribunal', the Appellant preferred the present appeal on the ground that the trial Tribunal erred in law and in fact in failing to properly analyze the evidence adduced by the parties ending with an erroneous decision.

On 11/10/2023, Counsel for the Respondent informed the Court that when the appeal was filed, it was not accompanied by a copy of the judgement and decree of the trial Tribunal. He intimated that he will raise a

preliminary objection on a point of law. On 31/10/2023, the Respondent lodged a preliminary objection on the ground that the appeal is incompetent before the Honourable Court for not being accompanied with a copy of the decree appealed against and the judgement from which it is founded.

At the hearing of the appeal, the Appellant was represented by Advocate Emmanuel Kileo while the Respondent enjoyed the services of Advocate Julius Sabuni.

When called upon to address the court, Counsel for the Appellant, Mr. Kileo, quickly pointed out that the Appellant concedes to the preliminary objection on the Appellant's failure to attach a copy of the decree of the trial Tribunal. He contended that the Appellant wrote a letter to request for copies of judgement and decree but he was availed with only a copy of the judgement by the time the appeal was due for filing. Counsel submitted that contrary to the Respondent's prayer for dismissal of the appeal, he prayed for the same to be struck out as the case is not heard on merit.

Counsel prayed to be spared with costs as the failure to attach a copy of the decree was not occasioned by the Appellant's fault but it was due to the failure by the trial Tribunal to supply him with a copy of the decree within

time. He added that the parties who are in dispute are blood relatives and granting costs will severely affect their relationship.

In response, Mr. Sabuni was of the view that the appeal failed to comply with Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap. R.E. 2019 (herein, the CPC) which is mandatory and not optional. He argued that the law gives room to the Appellant to wait for copies of judgement and decree and apply for extension of time if the said copies are availed to him after expiry of the time for filing an appeal. Counsel contended that the consequence of noncompliance of Order XXXIX Rule 1(1) of the CPC is to dismiss the appeal with costs referring to the case of **H.J. Stanley & Sons Limited v. Ally Ramadhani Kunyamale (1988) TLR 250** and the case of **Stanley Kalama Mariki v. Chichiyo Kwasiya (1981) TLR 143**.

Regarding costs, Mr. Sabuni was of the view that the appeal was lodged by the Appellant with an assistance of an advocate who knew the legal requirements of lodging appeals and who should have advised his client to wait for a copy of the decree. He urged the Court to grant costs to the Respondent including costs for hiring an advocate to represent him before the Court.

Mr. Kileo reiterated his prayer to the Court to strike out the appeal without costs.

It is clear from the submissions of the parties that, they are in agreement that the appeal is incompetent for failure to attach a copy of the decree. I will therefore not waste the time of the Court to reiterate the requirement of Order XXXIX Rule 1(1) of the CPC and section 53(1) of the Interpretation of Laws Act Cap. 1 R.E. 2019, on the mandatory nature of the word 'shall' in Order XXXIX Rule 1(1) of the CPC. I agree with the parties that the present appeal is incompetent for not being accompanied with a copy of the decree of the trial Tribunal.

I will now determine whether an incompetent appeal ought to be dismissed or struck out. In my considered view, an incompetent appeal which has not been heard on merit, justifies to be struck out and not to be dismissed. I have read the decision of this Court in the cases of **H.J. Stanley & Sons Limited (supra)** and **Stanley Kalama Mariki (supra)**. In the two cases, the Court dismissed the appeals similar to the present appeal, for failure by the Appellant to attach a copy of the decree to the memorandum

of appeal. I, however, differ with the position taken by the Court in the two decisions for two reasons, which are provided herein below.

The first reason, is that the position in the above cited cases, is obsolete. There have been, indeed, new developments in our jurisprudence that states a contrary view. These include, the decision of this Court in the cases of **Paul Charles Mhere v. Felistas James Mwinga, Probate Appeal No. 36 of 2020** (unreported), and **Muca Trading Company v. Jacqueline Michael Baruti and 4 Others, Civil Appeal 158 of 2022** (unreported), where on page 8 of the decisions, the appeals, similar to the present one, were struck out by the Court for being incompetent.

The second reason, is the settled position of the law that, dismissal implies that a competent matter before the court has been disposed of, and to strike out implies that, there was no proper appeal capable of being disposed of. I am guided by the decision of the Court of Appeal in the case of **Cyprian Mamboleo Hizza v. Eva Kioso and Another, Civil Application No. 3 of 2010**, where on page 8 of the decision, the Court of Appeal cited with approval its holding in the case of **Ngoni-Matengo**

Cooperative Marketing Union Ltd v. Alimahomed Osman (1959) EA

577, where on page 580, the Court of Appeal held that: -

".....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 phrase implies that a competent appeal has been disposed of, while the former implies there was no proper appeal capable of being disposed of".

I, therefore, find that the incompetence of the present appeal calls for striking out of the appeal and not dismissing the same. I am guided by the wording of the Court in the case of **Paul Charles Mhere (supra)**, where the Court held on page 8 of the decision that:-

"As I approach to the conclusion of this ruling, I find important to state that when a party is in a wrong road to the ends of justice, the best option is to retreat and go back to where he went wrong, with a view to find the right road to the ends of justice. In this appeal the appellant is in a wrong road based on failure to properly observe the governing mandatory procedural rules in presenting his appeal, the best option may be to retreat and look for the better road to the ends of justice. Consequently, the present appeal is caught in the web of procedural irregularities which nullifies its validity. Having so said and for the reasons so stated, the objection is meritorious same is sustained, consequently I proceed to strike out the appeal with costs".

With regards to an order for costs, I agree with Mr. Kileo that it is within the discretion of the Court which discretion should be exercised

judiciously. There is no dispute that the parties to the appeal are brothers. It is fair that each party should bear its own costs to prevent further disharmony between them. I also find that the Appellant's concession to the Respondent's preliminary objection at an earliest stage, has greatly saved the time of the Court and the parties. With the above two reasons, I will not order for costs.

On the basis of the above, I hereby strike out the appeal with no order as to costs.

It is ordered accordingly.

DATED at ARUSHA this 13th November, 2023




H. A. KINYAKA

JUDGE

13/11/2023