IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND CASE APPEAL NO. 45 OF 2022

(C/F The decision of Karatu District Land and Housing Tribunal, Land Application No. 32 of 2020)

MARTIN QAMUNGA ..... APPELLANT

VERSUS

JOSEPH PAULO TLEHHEMA .....1ST RESPONDENT

MATLE KWAANG'W .....2ND RESPONDENT

JUDGMENT

25/11/2022 & 27/01/2023

GWAE, J

The appellant, Martin Qamunga filed an application in the District Land Housing Tribunal of Karatu at Karatu ("DLHT") praying for payments of costs, damages and economic hardship emanating from prosecution of a land case and allocation of another piece of land measuring 80 x 80 by the respondents named herein and the village council of Gyekrum Lambo Village.

Upon service of the copy of the application, the respondents and another canvassed a preliminary objection in three points of law to wit;

1. That, the applicant's application is incompetent before the DLHT by being barred by the principle of res-judicata
2. That, the applicant's application is incompetent before the DLHT for being filed in alternative as bills of costs
3. That, the applicant has no locus standi against the respondents herein

The respondents' PO was disposed of by way of written submission. The DLHT had considered the parties' written submissions before it concluded that, the appellant's application was incompetent for being filed without leave to re-file since the same matter was previously withdrawn at the appellant's instance. Aggrieved by the ruling of the DLHT delivered on 14th day of December 2021, the appellant has knocked the doors of the court advancing seven grounds of appeal, to wit;

1. That, the DLHT erred in law and fact for finding that the Land Application No. 32 of 2020 was res-judicata before the court without ascertaining principles of res-judicata while Land Application No. 49 of 2015 was withdrawn with an intent to amend boundaries of the subject matter
2. That, the DLHT erred in law and fact by deciding the matter that the appellant had no locus standi to sue the respondents while the appellant is the lawful owner of the disputed land

3. That, the DLHT erred in law and fact to make its decision in favour of the respondents without determining the matter in merit as required by oxygen principles
4. That, the DLHT erred in law and fact for finding by failing to give sufficient consideration to the appellant's submission that the Land Application No. 49 of 2015 was not determined on merit but withdrawn by the appellant with an intent to amend boundaries of the suit land
5. That, the DLHT erred in law and fact by awarding costs to the respondents while the respondents filed their written submission in support of the PO out of time.
6. That, the DLHT erred in law and fact for failing to observe that Application No. 32 of 2020 and Land Application No. 49 of 2015 were different, thus the doctrine of res-judicata cannot apply.
7. That, the DLHT erred in law and fact for dismissing the appellant's application while the proper remedy was an order striking out the same.

This appeal was orally argued, the appellant appeared in person while Mr. Qamara, the learned counsel appeared representing both respondents. Supporting his appeal, the appellant combined ground 1 and 5 by stating

that the decision of the DLHT aggrieved earnestly him since his Application No. 49 of 2015 is not the same as the one with registration No. 32 of 2020 which he re-filed after the former being withdrawn. He added that, the former application bore different respondents' namely; respondents and Gyekrum Village Council whereas in the later Application No. 32 of 2020 is related to different parties. He further submitted that, the matter that, was instituted via Application No. 49 of 2015 had never been heard. The appellant also argued ground 4 by stating that, the order made by DLHT through Application No. 49 of 2015 did not preclude him from re-filing it as he withdrew it with an objective of making an amendment.

Contesting this appeal, Mr. Qamara strongly submitted that, the DLHT's order dated 8th day of November 2018 via Application No. 49 of 2015, the appellant sought withdrawal of his application. Hence, his application was incompetent since the applicant did not pray for leave to re-file his Application.

Mr. Qamara also submitted that, since the appellant was not granted leave to re-file, his subsequent application was therefore not competent. He invited this court to Oder XXVII Rule 2 (b) of the Civil Procedure Code, Cap 33 Revised Edition, 2019 as well as this court's decision via Land Appeal No. 56 of 2018 of 2020 (unreported) between **Emmanuel v. Erock Nyabakari** (unreported).

The respondents' learned counsel went on arguing that, the appellant's act of excluding the village council, does not mean that, the suit land is different from the former since subject matter is the same as was the case in the former Application No. 49 of 2015. He also added that, the appellant could not be entitled to sue the respondent who acted in the capacity of the village leaders.

More so, the respondents' advocate pondered this appeal by stating that the appellant had admitted that, the defect of his Application as depicted in ground No. 7 that is why he stated that, the DLHT ought to have struck out the application. Arguing that, the 6th ground, Mr. Qamara stated that, the ground is baseless due to reason that, the respondents' counsel plainly applied for and obtained leave to file his written submission out of the schedule.

In his rejoinder, the appellant briefly stated that, the nature of his prayer and order of withdrawal did not bar him from instituting another suit afresh and that, he had decided to sue the respondents in their personal capacities and not in their official capacities.

Now, it is the duty of the court to determine the appellant's grounds of appeal depicted herein. In the 1st and 5th ground on the competence of the appellant's subsequent Application No. 32 of 2020 after his withdrawal of the former (Land Application No. 49 of 2015), both filed in the DLHT.

According to the records of DLHT, it is definitely clear that, on 8th November 2018, the appellant sough withdrawal of the suit (Application No. 49 of 2015) and the DLHT's chairperson (Ling'wetu-ESQ) did grant the prayer as prayed and consequently, the appellant's Application was marked withdrawn with costs. However, it is quite strange to see that, after the DLHT's withdrawal order, the appellant did apply for revision through Misc. Land Application No. 146 of 2018 which was dismissed with costs relating to filing fees on 4th September 2020. In that Application before the court, **Hon. Mzuna**, J in his refusal to revise the withdrawal order, he stated and I quote;

> *"I see no error material to the merit of the case involving injustice that may move this court to revise the record and order fresh proceedings for a withdrawal application at the request of a party."*

Subsequent to the above order of the court, on 30th September 2020, the appellant filed the application in the DLHT whose decision is subject of this appeal. Order XXIII Rule 1 & Rule 2 of the Civil Procedure Code (Supra) provide and I reproduce it in extenso;

> 1-*(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*
>
> *(2) Where the court is satisfied-*

(a) That, a suit must fail by reason of some formal defect; or

(b) That, there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim".

The same Position of the law was judicially stressed in the case of **Bramly vs. A and F Contractors Ltd and another** (2003) 2 EA 452 where it was held;

"Under Order XXIII, rule 1 of the Civil Procedure Code, a party who withdraws a suit without first securing leave to institute a fresh suit thereby bars himself from instituting a fresh suit. The Court's discretion to grant leave to institute a fresh suit as envisaged under Order XXIII, rule 1 (2) can only be exercised at the time when the withdrawal order is made and not after. Thus leave granted to the plaintiff in one civil case could not legally extend to another."

Basing on the above precedent and provision of the law, the leave to file a fresh suit or application must be sought at the time of making a prayer

of withdrawal and not afterwards or at the context that the former suit or application was not heard on merit.

A court's comparison of the two Applications is to the effect that, prayers in the withdrawn Application (Former Application No. 49 of 2015) and those contained in the latter Application No. 32 of 2020 show that, the appellant's prayers were substantially the same save for the exclusion or non-joinder of the 1st respondent, Gyekrum Village Council in the former Application.

Since it is undisputed fact that, the appellant's former Application was withdrawn at his request of the appellant but without leave as required by the law under Order XXIII Rule 2 (a) of the CPC. I therefore join hands with the respondents' learned counsel that, the subsequent filing of the appellant's application without leave to re-file at his liberty was contrary to the law. Hence, the same was incompetent.

Similarly, after the order of this court (**Mzuna, J),** the remedy available in favour of the appellant was to file an appeal or an application for revision before the Court of Appeal of Tanzania instead of filing another application of the same nature in the DLHT since his order refusing the appellant's application for revision was clear and final.

Having determined as herein above, I do not see any reasons to be detained by other grounds of appeal as the determination in the 1st and 5th ground suffice to dispose of the appellant's appeal.

In the upshot, I find myself compelled to hold that, this appeal has no merit. Therefore, the same is dismissed with costs. The decision of the DLHT is hereby upheld. It is so ordered.

DATED at **ARUSHA** this 27th January, 2023

M. R. GWAE
JUDGE

Court: Right of Appeal to the Court of Appeal fully explained

M. R. GWAE
JUDGE
27/01/2022