

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[ARUSHA SUB-REGISTRY]
AT ARUSHA**

MISCELLANEOUS LAND APPLICATION NO. 1397 OF 2024

(Cf High Court of Tanzania at Arusha Land Appeal No 54 of 2022 originating from District Land & Housing Tribunal for Kiteto at Kibaya Land Application No 11 of 2021)

BETWEEN

MARTHA KITEMBELE _____ **APPLICANT**

VERSUS

PAPAA LEPAPA _____ **RESPONDENT**

RULING

06/03/2024 & 08/03/2024

BADE, J.

This is a Ruling on a point of contention regarding costs that the counsel for the Respondent Ms. Asha Chande would not relent against the Applicant's counsel Ms. Edna Mndeme. The genesis of the matter is an application for leave to appeal to the court of appeal preferred by the Applicant having been aggrieved by the decision of the District Land & Housing Tribunal of Kiteto sitting in Kibaya.

The Application was preferred by way of chamber summons under section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 (the LDCA), section

5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) and Rule 45 (a) of the Court of Appeal Rules, 2009 henceforth the Court of Appeal Rules, as the enabling provisions. The Application was also supported by the affidavit duly sworn by the applicant, in which she averred, among other things, that she was aggrieved by the decision of the court and wishes to appeal to the Court of Appeal against the decision in Land Appeal No 54 of 2022, which cannot be done unless she obtains the leave of this court.

The Respondent had previously filed a preliminary objection on the Applicant's application. When the matter was called for hearing of the preliminary objection, the counsel for the Respondent Ms. Chande informed the court that she was having the brief from Counsel Beatrice Mboya with instructions to proceed, and proceeded to submit in prayer that they are withdrawing their preliminary objection under Order XXIII Rule 1(1) of the Civil Procedure Code, Cap 33 RE 2019 since the counsel who had the conduct of the matter overlooked the fact that the application that was instituted in the Ward Tribunal had been dismissed, after which it was freshly instituted in the District Land & Housing Tribunal. In that regard, they realized that their Preliminary Objection had no chance of succeeding, and thus prayed to withdraw it without being condemned to costs.

The Applicant's counsel on her side welcomed such invitation to have the preliminary objection withdrawn, but prayed for their costs since there were no reasonable grounds adduced by the counsel for the Respondent as to why costs should not be awarded.

The unfolding of the said course of action made me aware that following the filing of the necessary documents by the parties herein, the remaining application ought to have undergone the normal procedure of hearing it on merit after the withdrawal of the preliminary objections. However, due to the reasons which will be displayed shortly, I did not let it go that way, rather I prompted the counsel for the Applicant to address this court on the competency of the Application that was before the court hitherto, and as she responded that the same was for leave to appeal to the court of appeal, the court ordered both counsel to address it on the competency and appropriateness of the pending application.

On this regard, both counsel prayed for a short adjournment and resumed in no time to address the court on the issue raised.

On the resumption of the session, the counsel submitted that she understood there had been a change in the law regarding the Appellate Jurisdiction, that

leave was not required for one to appeal to the Court of Appeal, however, she was not certain if the position would have affected land matters originated from the District Land & Housing Tribunal on the same way, as they were guided by section 47(2) of the Land Disputes Court Act RE 2019.

Having found out that the GN no 48 that came into force on 1st December 2023 also amended the Land Disputes Courts Act Cap 216 by deleting subsection 2 of section 47 of the mentioned law, through its section 46 (10) (b). She was now of the firm opinion that the application before the court had been affected by the operation of the law which made the leave application no longer a requirement. She thus prayed to have the same marked withdrawn without being condemned to costs. Her reason for *praying to not be condemned to costs* was the fact that at the time they filed the said Application, leave was still a requirement of the law and had to be procedurally applied and granted before one could appeal to the Court of Appeal.

Responding, the counsel for the Respondent registered her part concurrence on the proposition by the learned counsel for the applicant, particularly the



withdrawal of the application for leave now pending before the court, but disagreed that the Applicants should not be condemned with costs as they had an earlier opportunity to withdraw the said application, since they had already made an appearance in court before the present occasion.

Rejoining, the counsel for the Applicant retorted that the last time this matter came before the court it was for scheduling the arguing of the raised preliminary objection, which could not proceed then, and that on the present occasion, they had once again come for the hearing of the said preliminary objection, where the Respondent's counsel has taken the opportunity to pray for withdrawal of the raised objection. She contends that there was no room to withdraw the application as it would have amounted to pre-empting the respondent on the preliminary objection which was already raised. On further argument, she intimated her awareness of the practice that whenever there is raised a preliminary objection, the same would have been heard first, insisting that they should be allowed to withdraw the pending application with no order to costs as its withdrawal was at no fault of the applicant.

Having heard the counsel for both parties, as there is no issue with the withdrawal of the preliminary objection and the pending application, I am

inclined to rule on the argued point particularly relating to cost. However, I wish to point out at this juncture obtaining leave of the High Court to appeal to the Court of Appeal against the decision made by the High Court while exercising its revisional or appellate jurisdiction over land matters, is not a requisite requirement. The above court position is fortified by the current amendment of the provisions of section 5 of the Appellate Jurisdiction Act, by section 10 of the Legal Sector Laws (Miscellaneous Amendments) Act No. 11 of 2023 that came into effect on the 1st day of December 2023. The same provides:

"10. The principal Act is amended in section 5- (a) by deleting subsection (1) and substituting for it the following: "(1) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal against every order or decree, including an ex-parte or preliminary decree made by the High Court, in the exercise of its original, appellate or revisional jurisdiction."

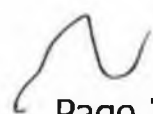
From the above provisions of the law, it is quite clear that obtaining leave to appeal to the Court of Appeal against every order or decree including an ex-parte or preliminary decree made by the High Court, in the exercise of its original, appellate or revisional jurisdiction, is no longer existing. In the

circumstances and given the fact that procedural laws are retrospective unless the legislature expressly says they are not, it is my settled view that the present application is untenable due to the reasons stated.

As for the way forward, it is my considered opinion that the remedy is to strike out the application for being affected by the operation of the law, hence I hereby do, as the withdrawal action cannot sustain as the same has been prompted by the court.

Now regarding the prayer as to costs, The Court of Appeal has ruled in Petro Robert Myavilwa vs Zera Myavilwa and Anor, Civ Appl No 117/06 of 2022. The Court specifically on Pg 7 while refusing costs was of the view that the law has a retrospective effect, and as such, the application for leave becomes obsolete, its only remedy is to strike it out and award no cost as the move was caused by the operation of the law.

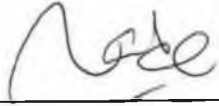
On the other hand, I find the Respondent's preliminary objection was frivolous and I must agree with the Applicant's counsel that the Respondent's withdrawal of the Preliminary objection should be with costs since the reason of slipping in deciding to raise the preliminary objection is but reckless. While awarding costs is discretionary to the court, the thinking behind costs is that



they provide some compensation, encourage parties to settle their disputes, and encourage people not to bring hopeless lawsuits and frivolous objections that stall the proceedings and steal the court's precious time to adjudicate on real burning issues. The Respondent is allowed to withdraw their preliminary objection, but the same is so withdrawn with costs to the Respondent despite striking out the Application. The Applicants will have their costs.

It is so ordered.


DATED at ARUSHA this 08th day of March 2024



A. Z. Bade
Judge
08/03/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **08th** day of **March 2024**





A. Z. BADE
JUDGE
08/03/2024