

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB- REGISTRY

AT MOSHI

LAND APPEAL NO. 13 OF 2023

IN THE MATTER OF THE LAND REGISTRATION ACT [CAP 334 R.E. 2019]

AND

IN THE MATTER OF AN ACT BY THE REGISTRAR OF TITLES TO ISSUE NOTICE OF INTENTION TO REGISTER BY OPERATION OF THE LAW CERTIFICATE OF TITLE NO. 13306 WITH L. O. NO.157769, PLOT NO. 40, BLOCK "E" Section III, MOSHI MUNICIPALITY, REGISTERED IN THE NAME OF SYLVESTER PETER MUSHI TO RAMADHANI MOHAMED SHOO AND NOTICE TO PRODUCE THE CERTIFICATE OF TITLE NO. 13306 WITH L.O NO. 157769, PLOT NO. 40, BLOCK "E" Section, III, MOSHI MUNICIPALITY, REGISTERED IN THE NAME OF SYLVESTER PETER MUSHI.

BETWEEN

SYLVESTER PETER MUSHI.....1ST APPELLANT

PHILIPINA ZAKARIA MKENDA.....2ND APPELLANT

AND

THE COMMISSIONER FOR LANDS.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

KHADIJA RAMADHANI MOHAMED MITA (As

Administratrix of the Estate of the Late RAMADHANI

MOHAMED SHOO).....4TH RESPONDENT

RAJABU MOHAMED (As

Administrator of the Estate of the Late RAMADHANI

MOHAMED SHOO).....5TH RESPONDENT

RULING

Date of Last Order: 29.05.2024

Date of Ruling : 25.06.2024

MONGELLA, J.

This Ruling follows a preliminary objection raised by the counsel for the 4th and 5th respondents to the effect that: *“the amended application No. 13 of 2023 now pending before this court is bad and incompetent in law as it contravenes section 102 (3) of the Land Registration Act, Cap 334 R.E. 2019 as it is not accompanied by a copy of the decision, order or act appealed against.”* The preliminary objection is with respect to the appellant's amended Petition of Appeal filed on 19th September 2023 following an order of this court to file the same. The order was issued following leave to join the suit granted to the 4th and 5th respondents in Misc. Land Application No. 30 of 2023 issued on 07th September 2023.

The preliminary objection was argued by the parties' counsels. On the part of the 4th and 5th respondent, it was Mr. Gwakisa Kakusulo Sambo, learned advocate. Addressing the point of objection, he contended that the application is bad in law and incompetent before this court for not being accompanied by a copy of the decision or order or act appealed against as required under **Section 102 (3) of the Land Registration Act, Cap 334 R.E. 2019**. He claimed to have requested, paid and perused the court file to ascertain whether the accompanying documents were filed therein, but noted none to have been filed rendering the appeal to have contravened the mandatory requirement of the law.

Expounding on the provisions of **Section 102 (3) of the Land Registration Act, Cap 334 R.E. 2019**, Mr. Sambo contended that the provision is couched in mandatory terms as it uses the word “shall” meaning that the appeal has to be accompanied by either the act, order or decision appealed against. In his stance, failure to accompany such documents renders the appeal incompetent *ab initio*. In the premises, he had the stance that the only remedy was to strike out the amended petition with costs. He persuaded this court to subscribe to his stance with a decision of this court rendered in the case of **Joseph Yesaya Mfinanga vs. Assistant Registrar of Titles and Another**, Civil Appeal No. 3 of 2023 (HC at Arusha, unreported).

Considering that the omission was committed during filing of the amended petition of appeal, Mr. Sambo further argued that when amendment is done and amended documents filed, the former ones cease to have legal force. That, the previous documents are treated as dead, incapable of being relied upon or referred to. To bolster his point, he referred the case of **Ashraf Akber Khan vs. Ravji Govind Varsan** [2019] TLR Vol. 1, 59. In addition, on the strength of the case cited, he urged this court not to be persuaded to look into the former petition, which ceased to have effect after filing of the amended petition.

Mr. Sambo further pre-empted the appellant from relying on the overriding objective principle enshrined under **Section 3A and 3B of**

the Civil Procedure Code, Cap 33 R.E. 2019. He argued that the overriding objective principle was not established to bless contravention of mandatory provisions of the law. In this case, he had the firm stance that the overriding objective principle is not applicable as the provision of the law uses the word “shall” which means mandatory in terms of **Section 53 (3) of the Interpretation of Laws Act, Cap 1 R.E. 2019.** He further urged the court to be guided by the decision of the Court of Appeal in the case of **Peter Samanya Msacky vs. Chief Executive Officer Agricultural and 2 Others**, Civil Appeal No. 249 of 2019 (CAT at Arusha, unreported).

Mr. Sambo found the omission by the applicant going to the root of the petition as this court, in its capacity as an appellate court, will not be in the position to verify what is complained against taking into account that the appeal itself does not emanate from the lower courts, but from a quasi-judicial body, that is, the 2nd respondent. In conclusion, he prayed for the appeal to be struck out with costs.

On the other hand, Mr. Emmanuel William Ndaga, learned advocate for the applicant, passionately disputed the preliminary objection. In his stance, the application was perfect before the court as the complained of documents were duly filed. He alleged that the amended petition was filed electronically on 18th September 2023 and the alleged accompanying documents were filed thereof accordingly. He claimed that, it was on 19th September 2023 when he

filed the hard copies in the court registry. In the circumstances, he called for this court to disregard the preliminary objection and order the matter to proceed on merits.

He referred to **Rule 4 (2) and Rule 8 of the Judicature and Application of Laws (Electronic Filing) Rules, 2018**, which govern electronic filing in court. In his view, the document filed were complete and competent otherwise the same would have been rejected if they were not accompanied by the decision appealed against in terms of Section 102 (3) of the Land Registration Act. In addition, he contended that under **Rule 8 of the Electronic Filing Rules**, the court is bound by the documents electronically filed and approved by the court and not the ones manually filed.

Arguing further, he challenged the respondent for failure to state how they have been prejudiced by the omission to attach the decision appealed against in the manually filed appeal. In support of his position, he referred the case of **Yusuph Nyabunya Nyatururya vs. Mega Speed Liner Ltd. and Another**, Civil Appeal No. 85 of 2019, in which he said, the court held that the factor to consider is whether the respondent has been prejudiced by the failure to serve them.

Despite being pre-empted to rely on the overriding objective principle, Mr. Ndaga still relied on the same. Referring to **Section 3A and 3B of the Civil Procedure Code**, he argued that disputes filed in

courts of law should be heard on merit. That, courts should not be bound by technicalities when dispensing justice. In that respect, he prayed for the court to hear the matter on merits and dispense justice to the parties.

In the alternative, however, he submitted that in the event the preliminary objection is upheld by this court and the matter struck out, the appellant should be given leave to re-file within seven (7) days from the day of the court's order. He prayed so under **Section 95 of the Civil Procedure Code**, which provides for inherent powers of the court.

Mr. Sambo rejoined. In his submission he had the view that the appellant's counsel has misconceived the gist of the preliminary objection. He argued that what the preliminary objection concerns, is non-attachment of the act, order or decision appealed against, which has nothing to do with filing of the application electronically or manually. He challenged the appellant's contention that he filed the required documents electronically on the ground that the alleged amended appeal filed electronically does not either contain the scanned copy of the act, order, or decision appealed against. In that respect, he found irrelevant the cited provisions under the Electronic Filing Rules as there is no provision in the Rules that relinquishes the mandatory obligation to attach the documents.

Arguing about the relevance of attaching such documents, he contended that the logic behind **Section 102 (3) of the Land Registration Act** is to enable the court to know what the appellant is appealing against taking into account that the decision appealed against does not emanate from subordinate courts, but from a government agency with quasi-judicial functions. In that regard, he held the stance that the fact that the deputy registrar never rejected the petition when filed electronically, does not, in the eyes of law, render the amended petition competent. He argued so contending that the procedure of uploading pleadings and attachments for admission purposes is not meant for serious scrutiny of the document by the deputy registrar, but for administrative purposes only, which do not oust the party's duty to file relevant documents.

Mr. Sambo distinguished the case of **Yusuph Nyabunya Nyatururya vs. Mega Speed Liner Ltd. and Another** (supra) cited by Mr. Ndaga whereby he contended that in the said case, the complained of document was a court document, that is, a judgement and decree. However, he said, in the matter at hand, the complained of document is not a court document, but a document from another government agency with quasi-judicial powers. He further pointed out another distinguishing feature contending that in the cited case, the documents were attached on the record of appeal, but did not tally, while in the matter at hand, the documents have not been attached at all which is a total contravention of the law.

With regard to the overriding objective principle, he maintained his argument that the same is not a panacea of all ills and cannot be invoked in mandatory requirements of the law. He still considered the attachment of the decision, order, or act appealed against being mandatory requirement under **Section 102 (3) of the Land Registration Act**. He thus urged the court not to invoke the same.

As to the appellant's counsel's prayer that seven days' leave to re-file should be granted in case of the preliminary objection being sustained, Mr. Sambo vehemently disputed the prayer. He argued that the prayer is misplaced and shall pre-empt the preliminary objection raised. He considered such move forbidden by the law whereby he referred the case of **Meet Singh Bhachu vs. Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018 (CAT at Arusha, unreported), to support his stance. He found Section 95 of the Civil Procedure Code inapplicable and maintained his prayer for the appeal to be struck out with costs.

After keen consideration of the arguments by the learned counsels on the preliminary objection, I find it undisputed that the same centres on the filing of the amended petition of appeal following this court's order to join the 4th and 5th respondents. As correctly argued by Mr. Sambo, once an amendment is ordered by the court and filed accordingly, the previous record, that is, the pleading and all its attachments cease to exist or rather rendered redundant. See, **Ashraf**

Akber Khan vs. Ravji Govind Varsan (supra), in which the Court of Appeal referred to its previous decision in **Tanga Hardware and Autoparts Ltd. and 6 Others vs. CRDB Bank Ltd.**, Civil Application No. 144 of 2005 (unreported), which also referred the case of **Warner v. Sampson & Another** [1959] 1 Q.B. 297, that held:

“... once pleadings are amended, that which stood before amendment is no longer material before the court.”

It appears Mr. Ngada is also at one with this legal position for he never challenged the same. Instead, he contended that the alleged appealed against decision was attached to the amended pleading filed electronically. As stated, the preliminary objection before this court is pegged under **Section 102 (3) of the Land Registration Act**. For ease of reference, I wish to reproduce the provision as hereunder:

102 (3) “Every appeal shall be made in the form of a petition in writing presented to the High Court by the appellant or his advocate and **every such petition shall be accompanied by a copy of the decision, order or act appealed against.**”

As stated earlier, the appellant’s counsel, at first contended that the copy of the decision was attached to the petition when filing the appeal electronically. However, considering his submission and prayer that, shall the matter be struck out he should be allowed to re-file within seven days, I find him not being sure of his assertion. That

inclines me to agree with Mr. Sambo's submission in rejoinder that no decision, order or act was attached even when filing electronically.

The law, as quoted above under **Section 102 (3) of the Land Registration Act**, is couched in mandatory terms to the effect that an appeal from the decision of registrar of titles to this court is by way of petition of appeal accompanied by copy of the decision, order or act appealed against. In that respect, the omission to accompany the petition with the copy of decision, order or act becomes a fatal irregularity and cannot be saved under the overriding objective principle as contended by Mr. Ndaga. This position has as well been settled by this court in a number of cases whereby the matter was struck out for failure to accompany the petition of appeal with the copy of decision, order or act of the registrar of titles. See: **Joseph Yesaya Mfinanga vs. Assistant Registrar of Titles and Another** (*supra*); and **Farid Ahmed Mbarak Bazar vs. The Assistant Registrar of Titles & The Attorney General** (Misc. Land Appeal No. 26181 of 2023) [2024] TZHCLandD 309 (30 April 2024).

Mr. Ndaga, I suppose having realised his mistake, prayed for this court to grant the appellant leave to re-file the appeal within seven days. This prayer met vehement opposition from Mr. Sambo on the ground that granting such leave would amount to pre-empting the preliminary objection. I however, do not agree with Mr. Sambo's reasoning on this issue. In my considered view, when a matter is struck

out, the affected party is at liberty to re-file the matter subject to limitation law. This is regardless of whether leave to re-file has been granted or not. At this point as well, the preliminary objection will have already been resolved, thus not being affected in any way.

In my view, leave to re-file can be granted at the court's discretion, which is exercised judiciously, by considering special circumstances or the situation of the case as a whole. In the matter at hand, taking into account the fact that the matter has dragged in this court for more than a year and that the omission was occasioned during filing of the amended petition of appeal following prayer by the 4th and 5th respondents to be joined, I find this being a fit case to grant leave to re-file.

In the foregoing, the appeal at hand is hereby struck out. The appellant is at liberty to re-file the matter afresh in this court. Shall he opt to do so, leave is hereby granted to re-file the matter within fourteen (14) days from the date of this Ruling. Each party shall bear his own costs on this matter.

Dated and delivered at Moshi on this 25th day of June 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA