IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO.440 OF 2020

(Arising from Misc. Land Application No. 122 of 2013 and from Execution No. 403 of 2009, in the District Land and Housing Tribunal for Ilala District at Mwalimu House)

MAKERZ LIMITED.....APPLICANT

VERSUS

FATUMA HUSSEIN MOHAMED.....1ST RESPONDENT

FRANK M.H. MHILU.....2ND RESPONDENT

RULING

OPIYO, J.

Two objections were advanced by the 1st respondent above, Fatuma Hussein, one to the effect that, this court lacks jurisdiction to entertain the instant application owing to its decision in respect of the same matter in Land Appeal No. 4/2017 delivered on 22/12/2017 and also a ruling issued in Land Application No. 127/2018 dated 21/9/2019. The 2nd objection states that, the application is incompetent for non-citation of the specific court's Registry or Division.

Hearing was done by written submissions, Advocate Charles G. Lugaila for the 1st respondent while the applicant was represented by Mr. Alex Mashamba Balomi. Mr. Lugaila for the 1st respondent submitted that, the

Land Application No. 122 of 2013 of the District Land and Housing tribunal for Ilala has already been determined to its finality by this court vide Land Appeal No. 4 of 2017. It was the 2nd respondent who filed the said appeal and later the same was dismissed. Also the 2nd respondent filed an application for review; vide Misc. Land Case Application No. 127 of 2018 which was also dismissed on 21st September 2018 by this same court. He argued that, based on the above set of facts, it is obvious that the court's hands are tied under the principle of *functus officio,* hence this application is incompetent and un-maintainable in law.

As for the 2nd objection, Mr. Lugaila argued that, the applicant's pleadings do not state which exact Registry or Division of the High Court, the case at hand has been filed. To him that is a fatal mistake which renders this application incompetent.

Mr. Mashamba in reply for the applicant started by arguing that, the two objections are not on point of law; they are mere technical issues which can be cured by applying the overriding objective principles. For the meaning and what constitutes a preliminary objection, he cited the case of **COTWU (T) OTTU Union and another V. Hon Idd simba Minister for Industries and Trade and Another (2002) TLR 88** where Kisanga, JA (as he then was) held that: -

> *'A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and if sustained a preliminary objection should be capable of disposing of the case.'*

He also cited the case of **Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors Ltd. (1969) EA 696** in support of the same position adding that, the improper raising of points by way of preliminary objections should stop as doing so does nothing but, unnecessarily increase costs and, on occasion confuse the issues. That, justice should always be done without undue regard to technicalities.

He then argued that, as the applicant was not a party to the original suit and subsequent appeal determined by this court, he is not bound by all the decisions made before regarding this matter, thus, this matter cannot be *functus officio.*

He thus concluded that, the above preliminary objections have not been raised in the binding spirit of the Court of Appeal of Tanzania which seriously discourages this growing behavior to avoid determination of matters on merits based on irrelevant and curable defects. He thus, urged for the dismissal of the preliminary objections with costs.

I will start with second objection. In my view this objection is entrenched on technicalities which do not touch on the root of this case, hence by invoking the oxygen rule, I find it desirable to cure the said problem. (**see Yakobo Magoiga Gichere versus Peninah Yusuph, Civil App. No. 55 of 2017, CAT (unreported)** and **Njake Enterprises Limited versus Blue Rock Ltd and Rock Venture Company Ltd, Civil App. No. 69 of 2017, CA, (Unreported).** It is a common knowledge that the appeal from District Land and Housing Tribunal lies to this registry, therefore failure to mention this

particular registry is a mere slip of the pen rather that an oversight that cannot be cured by oxygen principle. Eventually, this objection is overruled.

On the first point of objection, it is my view that the objection has merits for the reasons to be enumerated shortly. This is an application for an extension of time to pursue another course, i.e. file a revision against Misc. Land Application No. 122 of 2013 and Execution No. 403 of 2009, of the District Land and Housing Tribunal for Ilala. One the face of it, one can argue that the preliminary is baseless for the reasons that the applicant was not a party to those matters before the ilala Tribunal and that, at this stage the applicant intends to only for extension of time to take a certain course, this courts previous decision on the matter will not be affected with the decision on the same. However, deeper looking on the matter reveals different outcome.

The gist of the preliminary objection is that, this court lacks jurisdiction to entertain the application at hand owing to its decision in respect of the same matter in Land Appeal No. 4/2017 delivered on 22/12/2017 and also a ruling issued in Land Application No. 127/2018 dated 21/9/2019. To the 1st respondent's counsel, allowing this application will contravene the cardinal principle in administration of justice that once the decision has been rendered by a competent court, the judge is lacking power to make any changes. The record shows that, this matter was between the 1st and second defendant at the District Land and Housing Tribunal for Ilala. At the Tribunal the second respondent had unsuccessfully sued the 1st respondent over the ownership of the suit property. The matter was finally decided. And it came as an appeal to this court and equally determined by this court.

It not in dispute that the applicant like any other aggrieved person who is not a party to a matter, he may go to the higher court for revision to rectify the error he noted. However, in this particular case, the room for revision is already closed as this same court had already dealt with the matter against which the revision is intended to be sought in appeal, Land Appeal No. 4 of 2017. Thus, if this court proceeds to allow the application at hand it will avail a room for the applicant to take a dead course, in that, he will make an application that is incompetent before this same court. The same court cannot determine the mater both in appeal and revision. Therefore, if the applicant was interested in applying for revision, she should make application to the Court of Appeal, not this same court which determined the appeal already, as correctly argued by the counsel for the respondent. By saying so, I am not pre-empting the applicant's intended course, but rather help her not to waste time in pursuing a dead course. I therefore, dismiss this application with costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

M. P. OPIYO,
JUDGE
22/12/2020