

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND CASE NO. 92 OF 2020**

**MOA GENERAL TRADING CO. L IMITED.....PLAINTIFF**

**VERSUS**

**CHRISAK FARMS.....1<sup>ST</sup> DEFENDANT**

**DIMITRA HATZIS** (Administrator of the  
Estate of Pierina Calaviras Deceased).....2<sup>ND</sup> DEFENDANT

**ESTHER SHAURI MARO t/a**

**MEM AUCTIONEERS & GENERAL BROKERS.....3<sup>RD</sup> DEFENDANT**

**ANTONIO ROMANO @ MANGOROMA.....4<sup>TH</sup> DEFENDANT**

**MANGOROMA CONSTRUCTION & CIVIL  
ENGINEERING COMPANY LIMITED.....5<sup>TH</sup> DEFENDANT**

Date of Order: 05.05.2021

Date of Ruling: 31.05.2021

**RULING**

**V.L. MAKANI, J**

This ruling is in respect of points of preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows:

- 1. The court has no jurisdiction to entertain this case.*
- 2. The case is res judicata.*

As for the first point of preliminary objection Mr. Jackson Liwèwa, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants stated that first, that there is notice of appeal in the court of appeal since 2009 in which the court must take judicial notice under section 58 of the Evidence Act CAP 6

RE 2019. He said there is a notice of appeal in respect of **Commercial Case No.7 of 2009 at High Court Commercial Division between MOA General Trading Co. Limited vs. Dimitra Hatzis (Administrator of the Estate of Pierina Calaviras), Antonio Roman @ Mangorama & Esther Shauri Maro @ MEM Auctioneers and General Brokers Limited** where objection proceedings were heard against the sale of Plot No. 82/3 Block E, Kihonda Industrial Area in Morogoro which resulted into the sale of the said plot. He said the Notice of Appeal to the Court of Appeal was filed by the late J.E.A. Mwakajinga, Advocate on 22/02/2010. He said once a Notice of Appeal is filed in the Court of Appeal, this court ceases to have jurisdiction over a matter. He relied on the case of **Serenity on the Lake Limited vs. Dorcus Martin Nyanda, Civil Revision No.1 of 2019 (CAT-Mwanza)** (unreported). He said since the Notice of Appeal has not been struck out or withdrawn it means that the Notice is still valid and hence the High Court is ceased to have jurisdiction to determine a dispute on Plot No. 82/3 Block "E" Kihonda Industrial Area in Morogoro.

The second point of objection is that this suit is res judicata. Mr Liwewa said that the arguments are almost like those of the first

point. He said the parties in this present case are the same and the issue in dispute has already been determined by the commercial court in Commercial Case No.7 of 2009. He said the parties are the same that is **MOA General Trading Co. Limited vs. Dimitra Hatzis (Administrator of the Estate of Pierina Calaveias), Antonio Roman @ Mangorama & Esther Shauri Maro @ MEM Auctioneers and General Brokers Limited** and the issue in both the previous and present case is on Plot No. 82/3 Block "E" Kihonda Industrial Area. He said since the matter was finally determined by the Commercial Court then this suit is res judicata as per section 9 of the Civil Procedure Code CAP 33 RE 2002. Mr. Liwewa relied on the case of **Dr. Bakilana Augustine Mafwere t/a Bakilan Animal Care vs. Annaeli Gideon Orio & Others, Civil Appeal No. 33 of 2016 (CAT-DSM)** (unreported).

He said another aspect that took away jurisdiction of the court is that Plot "E" Kihonda Morgoro was in the name of Antonkio Romano @ Mangorama and was sold by public auction on the 10/07/2009 by the Order of the court dated 10/07/2009 for TZS 26,000,000/= and the successful winner was Chrisaki Farms. He said the parties started to litigate since 2009 at Commercial Case No. 7 of 2009 and the case

was finalised on in 2010. He said another case to challenge the sale on the said plot was instituted at the District Land and Housing Tribunal in Morogoro in Land Application No. 55 of 2012 and it was dismissed on 13/08/2014 for want of jurisdiction hence this current case. Mr. Liwewa was of the view that the interest of the society demands an end to the litigation. He relied on the case of **Stephen Masato Wasira vs. Joseph Sinde Warioba & the Attorney General [1999] TLR 334**. For the reasons stated Mr. Liwewa prayed for the suit to be dismissed with costs.

In response Mr. Thomas Mathias, Advocate for the plaintiff on the first point of objection said that the argument that there is a pending Notice of Appeal pending at the Court of Appeal cannot constitute a purely point of law as it invites the court to peruse the court file looking for evidence as was stated in the case of **Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696** and **Karata Ernest & Others vs. Attorney General, Civil Revision No. 10 of 2010 (CAT-DSM)** (unreported) and **DPP vs. Amin Talib Mselém & 5 Others, Criminal Appeal No. 561 of 2016 (CAT-Shinyanga)** (unreported). He further said the notice requires further proof because the alleged notice was filed

way back in 22/02/2010 and no necessary steps were taken therefore there is no pending notice before the Court of Appeal. He said according to Rule 91(a) of the Tanzania Court of Appeal Rules a party who has lodged a notice of appeal and fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal. He relied on the case of **Athanas Simon vs. Kabanga Nickel Co. Limited, Civil Application No. 1 of 2014 (CAT-Bukoba)** (unreported). He distinguished this case with the cited case of **Serenity on the Lake Limited** (supra). He said in the latter case the Court dealt with a Notice of Appeal which was active as the appellant took all the necessary steps towards the appeal while in this case no necessary steps were taken after the Notice of Appeal was filed. He said even the Notice of Appeal filed emanated from objection proceedings which according to the law is not appealable. He said the case of **Dr. Bhakilana Austine Mafwele t/a Baklina Animal Care** (supra) is also distinguishable because the appellant filed a Notice of Appeal and at the same time refiled the same case which the Notice of Appeal emanated.

Mr. Mathias further submitted that Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants said the instant case originated from the objection

proceedings. He said our law is clear that a person aggrieved with the decision of the court in objection proceedings may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit if any other order shall be conclusive. He cited Order XXI Rule 62 of the Civil Procedure Code CAP 33 RE 2019 and the case of **Amour Habib Salum vs. Hussein Bafagi, Civil Application No. 76 of 2010 (CAT-DSM)** (unreported). For this reason, he said the principle of *res judicata* would not apply. He prayed for the preliminary objection to be dismissed.

Mr. Mathias further concluded his submissions by stating that a matter in a civil trial must be heard on substantive claim and the court should uphold the overriding principle as was in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph, Civil Appeal No. 55 of 2017 (CAT-Mwanza)** (unreported). He prayed for the preliminary objections on the points of law to be overrule with costs.

In rejoinder Mr. Liwewa said that according to sections 58 and 59(1) of the Evidence Act no fact which a court takes judicial notice needs to be proved. The court may peruse the file to satisfy itself on that fact or may require the person who want the court take judicial notice

to produce any such book or document as it may consider necessary to enable it to do so. He said as per the law and looking at the plaint and annexures filed by the plaintiff it is vivid that there was Notice of Appeal to the Court of Appeal, and he said Mr. Mathias conceded to that. He said if the Notice of Appeal was not struck out or withdrawn in accordance with Rule 89 of the Court of Appeal Rules the notice is still valid. He said Rule 91 of the Court of Appeal Rules was introduced to curb behaviour of people filing Notice of Appeal and failing to pursue which always resulted to the Notice of Appeal to be withdrawn and the other party who was served to be paid costs. He said since there was no withdrawal order attached to the plaint to prove withdrawal then the Notice of Appeal is still valid and the High Court is ceased to have jurisdiction.

As for the second point of preliminary objection on res judicata, Mr. Liwewa reiterated what he stated in the main submissions. As for the interpretation of Order XXI Rule 62 of the CPC he said Counsel for the plaintiff has wrongly interpreted the said provision. He said a party may institute a fresh case where there is no other order made. But when there is an order made during that proceeding that order is conclusive as held in the case of **Amour Habib Salum** (supra). He

further said that Order XXI of the CPC should not be read in isolation as the suit property Plot No. 82/3 Block E Kihonda Morogoro in the name of Antonio Romano @ Mangoroma was sold by the court under Order XXI Rule 92 of the CPC hence there was an absolute sale.

Mr. Liwewa went on saying that the overriding objective principle raised by Counsel for the plaintiff is not applicable in this case as it was introduced to do away with technicalities pertaining to the procedure and cannot do away with jurisdiction issues. He relied on **Mariam Sambura (Legal Personal Representative of the Late Ramadhani Abas) vs. Masoud Mohamed Joshi & 2 Others, Civil Appeal No. 109 of 2016 (CAT-DSM)** (unreported) where the Court of Appeal said that overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case. He prayed for the preliminary objections to be sustained with costs.

I have gone through the rival submissions by Counsel. The main issue for consideration is whether the preliminary objections raised have merit. I will start with the first objection on the jurisdiction of this court.



Indeed, there is no dispute that there is a Notice of Appeal by the applicant in the Court of Appeal against the decision in Commercial Case No. 7 of 2019. The said Notice of Appeal was filed on 22/02/2010 and that since its filing no necessary steps have been taken on the part of the plaintiff. This fact has not been controverted, the only departure is that while Mr. Liwewa submits that the filing of the Notice of Appeal entails cessation of jurisdiction of this court, Mr. Mathias claims that according to Rule 91 of the Court of Appeal Rules, if no necessary step is taken the Notice of Appeal is deemed to have been withdrawn.

It is settled law that once a Notice of Appeal has been filed under Rule 83(1) of the Court of Appeal Rules, 2009 the High Court is seized of its jurisdiction. According to the case of **Matsushita Electric Co. Ltd v Charles George t/a C.G. Travers, Civil Application No. 71 of 2001** (unreported), the Court stated as follows:

*"Once a Notice of Appeal is filed under Rule 76 [now Rule 83 (1) of the Rules] then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a Certificate of law."*

This was also stated in the case of **Aero Helicopter (T) Limited vs. F.N. Jensen [1990] TLR 142.**

Mr. Mathias suggested to this court that if a party fails to take essential steps the notice of appeal is deemed to have withdrawn the said notice in terms of Rule 91(a) of the Court of Appeal Rules. However, the position is that a Notice of Appeal is not deemed to have been withdrawn automatically. The withdrawal would only have effect upon a Court order deeming it to have been withdrawn. In other words, there is no automatic withdrawal of the Notice of Appeal without there being a following Order of the Court to that effect. The Court of Appeal in the case of **Mohamed Enterprises Tanzania Limited vs. The Chief Harbour Master & The Tanzania Ports Authority** cited with approval the cases of **East African Development Bank vs. Blueline Enterprises Limited, Civil Application No. 101 of 2009 (CAT-DSM)** and **Williamson Diamond Limited vs. Salvatory Syridion & Another, Civil Application No. 15 of 2015 (CAT-Tabora)** (both unreported). In the latter case the Court of Appeal stated as follows:

*"It seems to us that the purpose of Rule 91 (a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the Court. We are*

*further of the view that in exercising such power, the Court may do so **suo motu** (after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84 (1) of the Rules."*

Similarly, in the former case, the Court of Appeal stated clearly that unless there is a court order, the Notice of Appeal would not cease to have effect. The Court stated:

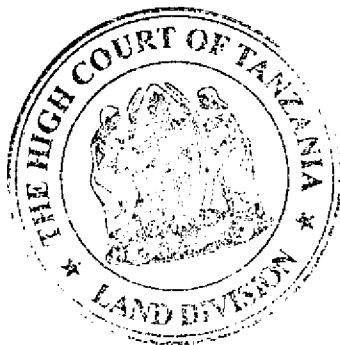
*"Going by the practice of this Court a notice of appeal which is deemed to have been withdrawn under Rule 84 of the Court of Appeal Rules, 1979 (now Rule 91 (a) of the Rules) is usually followed by an order from the Court to that effect. Mr. Kesaria could not produce any such order. So, in the absence of such an order or any order... striking out the notice it follows that, as stated above, the notice is still intact."*

In the present case, as said above, there is no dispute that the Notice of Appeal was filed by the plaintiff on 22/02/2010. But the said notice irrespective that no essential steps have been taken, is still on record as of this date and there is no formal order of the Court for withdrawal or striking out the said notice. In the absence of the order to withdraw or strike out the Notice of Appeal as subscribed in the cases of **East Africa Development Bank vs. Blueline Enterprises Limited** and **Williamson Diamond Limited vs. Salvatory Syridion & Another** (supra), the said Notice of Appeal filed as against the decision in Commercial Case No. 7 of 2009 remains intact. It follows

therefore that the High Court has been deprived of its power to entertain the suit whose subject matter, that is the dispute on Plot No. 82/3 Block "E" Kihonda Industrial Area in Morogoro, is the same as the one giving rise to the Notice of Appeal. Briefly stated this court has no jurisdiction to entertain the suit.

In view of the above, I shall not dwell on the other point of objection that was raised. In the result, the first preliminary objection on a point of law is upheld and the suit is dismissed with costs for want of jurisdiction.

It is so ordered.



*V.L. Makani*  
**V.L. MAKANI**  
**JUDGE**  
**31/05/2021**