

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.57 OF 2021**

SABATH MSHABAA MROSSO (under Power of Attorney) of the

ASGARALI NAZARALI BHARWANI **PLAINTIFF**

VERSUS

ALELIO NGOYAI LOWASSA **DEFENDANT**

RULING

Date of last order: 07.09.2021

Date of Ruling: 10.09.2021

A.Z.MGEYEKWA, J

On 27th April, 2021 the Plaintiff herein, instituted this suit against Alelio Ngoyai Lowassa, seeking eight reliefs as follows:-

- a) That, the Plaintiff be declared the lawful owner of Plot No. 412/Jangwani Beach Area, Kinondoni, Dar es Salaam.*
- b) That, the Defendant be declared a trespasser on Plot No. 412/Jangwani Beach Area, and eviction be ordered against her.*

- c) *The Defendant be ordered to demolish her building therein erected illegally and give vacant possession to the Plaintiff.*
- d) *The Defendant be permanently restrained to make disturbance to the Plaintiff regarding the suit property.*
- e) *The Defendant be ordered to pay damages caused by destroyed the Plaintiff's property.*
- f) *The defendant be ordered to pay general damages as it will be assessed by the Court.*
- g) *Costs of this suit be paid by the Defendant.*
- h) *Any other relief (s) as this Court may deem fit and just to grant.*

The Defendant's Advocate filed a Written Statement of Defence disputing the claims and the learned counsel also raised a point of Preliminary Objection that:-

1. *That the suit is incompetent and improperly before this court in view of the clear legal procedure stipulated under the provisions of Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 after Plaintiff's suit was dismissed with costs under Regulation 11 (1) (b) of GN. No. 174 of 2003, way back in 2016.*

When the matter was placed before me for hearing on 18th August, 2021 the Plaintiff enjoyed the legal service of Mr. Henry Kishaluli, learned counsel whereas the Defendant enjoyed the legal service of Mr. John Kamugisha, learned counsel.

The learned counsel for the Defendant was the first one to submit he contended that the suit is improperly before this court and therefore incompetent in view of the clear legal procedure stipulated under the provision of Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 after the Plaintiff's suit was dismissed with costs under Regulation 11 (1) (b) of GN. No. 174 of 2003, way back in 2016.

The learned counsel for the Defendant argued that in 2007, the Plaintiff instituted a similar suit against the Defendant in Application No. 401 of 2007 before the District Land and Housing Tribunal for Kinondoni in Kinondoni District at Mwanayamala. He added that the suit was litigated upon by parties for about nine years before it was dismissed with costs in 2016 for nonappearance of the Plaintiff pursuant to Regulation 11 (1) (b) of GN. No.174 of 2003 which state that:-

" 11 (2) A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1) within 30 days

apply to have the orders set aside, and the Tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the High Court.”

The learned counsel for the Defendant went on to argue that the Plaintiff's case was struck out with costs. He added that the Plaintiff kept silent without taking any step to remedy the situation for over three years until 27th April, 2021 when the Plaintiff knocked on the doors of this court purporting to institute a fresh suit as if he has never been in court. The learned counsel for the Defendant that after the Plaintiff's application to set aside the dismissal order been refused for being incompetent the proper forum available to the Plaintiff was not to file a fresh suit but to lodge an appeal to the High Court pursuant to Regulation 11 (2) of GN. No.174 of 2003.

Insisting, the Defendant's Advocate contended that the instant suit before this court is after the Plaintiff had realized that he was out of time to lodge an appeal. He added that instead of pursuing an extension of time to file an appeal. It was his view that the Plaintiff act was an abuse of court process. He valiantly submitted that circumventing the legal procedure is legally unacceptable.

On the strength of the above argumentation, Mr. Kamugisha beckoned upon this court to dismiss the suit with costs and order the Plaintiff to adhere to the legal procedure to pursue his right if so wishes.

In reply, the learned counsel for the Plaintiff started to with an opening statement that for the interest of justice and to see justice is met between the parties, the case should be determined on merits and not on technicalities so long it does not prejudice the rights of the parties. He valiantly contended that the applicability of Regulation 11 (2) of the (District Land and Housing Tribunal) Regulations, 2003 GN. No.174 of 2003 is not a mandatory provision of law to be applied in setting aside the dismissal order. He added that the term may make it not mandatory and the same gives room for other options for seeking the remedy to apply and that is what the Plaintiff did considering the circumstances and facts before him.

The learned counsel for the Plaintiff continued to submit that in the eyes of the laws there is no need to pursue any remedy at the tribunal. He added since the application was instituted the application was as good as no application since the plaintiff had no locus to institute the said application. It was his view that it was not worth pursuing the dead application in the eyes of the law. The learned counsel concentrated to

submit on the facts of the case which was before the tribunal and the same is irrelevant to the preliminary objection raised by the Defendant. Therefore, I am not going to reproduce in this Ruling.

Mr. Kishaluli continued to submit that the provision of Regulation 11 (2) of GN No. 174/2003 gives discretionary remedy which means that the Plaintiff had an option under the Civil Procedure Code, Cap.33 [R.E 2019]. To support his submission he referred this court to section 51 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] which state that:-

“ The District Land and Housing Tribunals shall apply the regulations made under section 56 and where there is inadequacy in those regulations it shall apply the civil procedure code.”

Mr. Kishaluli also referred this court to Order IX Rule 3 of the Civil Procedure Code Cap.33 [R.E 2019]. Stressing, it was his view that according to the circumstances and facts of this case filing the instant case before this court was a right and does not contravene any provision of law, this, the preliminary objection is demerit.

The learned counsel for the Plaintiff stated that the court to determine who is the lawful owner of the suit premises. He added that according to the circumstances and fact of the matter the pecuniary value of the land,

it is not worth a justice to pursue the application which at the end will be struck out for lack of jurisdiction. To support his argumentation he cited the cases of **Fredrick Selenge & another v Agnes Masele** (1988) TLR 99 and **Felix Mosha & 3 others v The Capital Market and Securities & AG**, Civil Case No. 16 of 2011 whereby Hon. Fauz Twaib, J (as he then was) dismissed the preliminary objection considering that no failure of justice will be occasioned to the respondent for the case to proceed on merit.

On the strength of the above submission, Mr. Kishaluli beckoned upon this court to dismiss the preliminary objection for being demerit.

In his brief rejoinder, the learned counsel for the respondent reiterated his submission in chief. He admitted that the word may imports discretion. It was his view that and the word may be intended to give discretion to an aggrieved party to the extent of filing a fresh suit. He added that Regulation 11 (2) of the (District Land and Housing Tribunal) Regulations, 2003 GN. No. 174/2003 gives discretion to an aggrieved party to opt either to apply within 30 days to set aside the dismissal order or not. He went on to state that if a party does not opt to apply to set aside the dismissal order then it means the order remains intact and in force. Insisting, he argued that Regulation 11 (2) of the (District Land and Housing Tribunal)

Regulations, 2003 GN. No.174/2003 does not extend an option to an aggrieved party to file a fresh suit in another court. Mr. Kamugisha strongly submitted that Order IX Rule 3 of the Civil Procedure Code Cap.33 [R.E 2019] does not apply in the circumstances of this case. It was his view that the Civil Procedure Code Cap.33 [R.E 2019] applies in a situation where a particular aspect is not covered in the relevant law.

Stressing, he argued that the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003 through Regulation 11 (2) it is self-satisfactory. It covers the situation at hand, it offers a remedy in the event a party is aggrieved or dissatisfied with the dismissal order which the plaintiff has already exercised and it offers further remedy for appeal where the aggrieved party application is refused. Insisting, Mr. Kamugisha urged this court not to give the Plaintiff any room to unduly avoid the legal avenue provided by the law.

Having digested the learned counsels' submission and the pleadings therein on the sole preliminary objection raised by the Defendant's learned counsel, I am settled that the issue for consideration is *whether the case is appropriately filed before this Court*.

The record reveals that the instant suit was filed in this court on 27th April, 2021 as a fresh case. The learned counsel for the respondent came

up with an objection that the case is improper before this court as per Regulation 11 (2) of Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003. He claimed that the matter was dismissed way back in 2016. I have perused the court records and found that one Asgarali Nazaral Bharwani lodged the said application praying for a declaration that the respondents have trespassed his suit premises located in Plot No. 412 Jangwani Beach and build on it. The Plaintiff in the original case prayed for the tribunal to demolish the buildings. The matter was dismissed under Regulation 11 (1) (b) of GN No. 174 of 2003 for non-appearance. In 2016, the applicant lodged Land Application No.377 of 2016 for restoration of Application No. 401 of 2007. The application was struck out for being incompetent.

On his side, the Plaintiff's Advocate claimed that Regulation 11 (2) of Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003 is not couched on the mandatory term. It was his view that the party is at liberty to apply for setting aside the dismissal order.

I am not in accord with the Plaintiff's Advocate submission that the Order IX Rule 3 of Civil Procedure Code Cap.33 [R.E 2019] was applicable in the said situation since there was no lacuna in the Land

Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003. Regulation 11 (2) of Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003 was a suitable provision of law to move the Plaintiff to set aside the dismissal order in respect to Application No. 401 of 2007. For ease of reference, I reproduce Regulation 12 (1) of Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003 as hereunder:-

“ 11 (2) A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1) within 30 days apply to have the order set aside, and the Tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the High Court.”

The above provision is couched not on mandatory form, thus, I fully subscribe to both learned counsels submission that the provision of law Regulation 11 (2) of Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 GN. No.174/2003 is not couched on the mandatory form. However, the same does not mean that the aggrieved party had an option to file a fresh suit without setting aside the dismissal order.

At the time the Plaintiff lodged an application before the tribunal and the same was dismissed he was required to set aside the dismissal order. The Plaintiff attempted to set aside the dismissal order but his application was struck out for being incompetent. He had a chance to file another application to set aside the dismissal order at the tribunal, however, he opted to come before this court to institute a fresh case. It is noteworthy that at the moment when the Plaintiff lodged an application for setting aside the dismissal order and the same was dismissed, he was banned to institute a fresh suit concerning the same subject matter. The available remedy was to file a proper application to set aside Application No. 401 of 2007.

For the sake of clarity, I have read the case of **Felix Mosha** (supra). In the cited case, the issue for discussion was on the non-citation of the provision of law. Non-citation of the law can be corrected by canceling the wrong provision of the law and insert a proper provision of the law. Thus, in my view, the cited cases are distinguishable from the instant case. In the instant case, unlike the cited cases of **Felix Mosha** (supra), the Plaintiff's suit is improperly filed before this court since he has not exhausted the available remedies. Therefore, there is no way this court could proceed to determine the matter on merit.

Based on the above findings, I am of the settled view that, the Preliminary Objection raised by the learned counsel for Defendant is laudable. The suit is incompetent before this Court. I accordingly proceed to dismiss the suit without costs.

Order accordingly.

DATED at Dar es Salaam this 10th September, 2021



A.Z.MGEYEKWA

JUDGE

10.09.2021

Ruling delivered on this 10th September, 2021 via audio teleconference whereby Mr. Henry Kishaluli, learned counsel for the Plaintiff and Mr. John Kamugisha, learned counsel for the Defendant were remotely present.



A.Z.MGEYEKWA

JUDGE

10.09.2021