

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 180 OF 2021**

*(Arising from Misc. Land case No. 33 of 2020 & Misc. Land Application  
No. 561 of 2020)*

**MARY MAKORERE ..... APPLICANT**

**VERSUS**

**REHEMA MFAKI ..... RESPONDENT**

**RULING**

Date of Last order: 24.09.2021

Date of Ruling: 28.09.2021

**A.Z. MGEYEKWA, J**

Mary Makorere; the applicant herein under section 93 of the Civil Procedure Code Cap.33 [R.E.2019]. The applicant seek extension of time to lodge an application for review out of time. She want to challenge the decision of this court in Misc. Land Case Appeal No. 153 of 2016 delivered on 23.10.2019 by Hon De-Mello, J. The application is supported by an affidavit deponed by Ms. Mary Makorere, the applicant, and contested by

a counter affidavit deponed by Rehema Mfaki, the respondent. The application stumbled upon preliminary objections from the respondent. The learned counsel for the respondent raised three points of preliminary objection as follows:-

- 1. That the applicant's application is frivolous and intended to delay the end of justice hence an abuse of court process.*
- 2. That, the applicant's Affidavit contain false statements hence that the same should not be relied upon in support of the chamber summons.*
- 3. That the applicant's Affidavit contain extraneous matters by way of legal arguments and conclusions hence that it offends the mandatory requirements Order XIX Rule 3 (1) of the Civil Procedure Code Cap.33 [R.E. 2019].*

In this application, the applicant was represented by Mr. Magusu Magoka, learned Advocate whereas the respondent enjoyed the legal service Mr. John Nyange, learned Advocate.

The preliminary objection was argued by way of written submissions, whereas the respondent's Advocate filed his submission in chief on 10<sup>th</sup> September, 2021. The applicant's Advocate filed a reply on 20<sup>th</sup> September, and a rejoinder was filed on 24<sup>th</sup> September, 2021.

Mr. Nyange, learned counsel for the respondent was the first one to submit. He stated that the application is bad in law for being incompetent before this court. He went on to submit that upon the delivery of the Judgment in Misc. Case Land Appeal No. 153 of 2019, the applicant lodged a Notice of Appeal to the Court of Appeal before this court on 15<sup>th</sup> November, 2019 and that was immediately he served the respondent via her previous Advocate Hamza Matongo. He went on to state that upon such Notice being lodged, this Honorable court ceased to have jurisdiction to entertain the application for enlargement of time for review out of time as suggested in the current matter at hand.

Fortifying his submission, the learned counsel for the respondent referred this court to the case of **Serenity on the Lake Ltd v Dorcus Martin Nyanda**, Civil Revision No.1 of 2019 (CAT) (Unreported), the Court of Appeal referred to the case of **Tanzania Electric Supply Company Limited v Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No.142 of 2012 where the Court of Appeal of Tanzania held that:-

*"It is settled law in our jurisprudence, which is not disputed by counsel for the applicant, that the lodging of the Notice of Appeal in this court against an appealable decree or order of the High Court, commences proceedings in this Court. We are equally*

*convinced that it has long been established law that once a notice of appeal has been lodged, the High Court ceases to have jurisdiction over the matter."*

He went on to submit that the issue of jurisdiction can be raised at any time. The learned counsel for the respondent submitted that this is the right time to raise the issue of Jurisdiction. To support his position, he referred to the case of **Tanzania Revenue Authority Vs Kotra Company Limited**, Civil Appeal No. 12 of 2009 (Unreported) where the Court of Appeal of Tanzania held:-

*"The question of Jurisdiction is fundamental in court proceedings and can be raised at any stage, even at the appeal stage. The Court, suo motu, can raise it. In Baig and Butt Construction Ltd v Hasmat Ali Baig, Civil Appeal No. 9 of 1992 this Court raised suo motu in appeal to it question of the High Court not having jurisdiction to hear a review case regarding an order made by the District Registrar. It said the Judge of the High court had no jurisdiction as only the District Registrar could review the order he had made earlier..."in RICHARD JULIUS RIKAMBURA AND ISSACK NTWA MWAKAJILA AND ANOTHER (CAT) MZA Civil Application No. 3 of 2004".*

The learned counsel for the respondent insisted that so long as the said notice is still in force, then this Honorable court lacks jurisdiction to entertain this matter.

Submitting on the second limb of preliminary objection, the counsel for the respondent submitted that the applicant's application be dismissed for containing false statements contrary to Order XIX Rule 3 (1) of the Civil Procedure Code Cap.33 [R.E.2019]. he went on to submit that as per the annexure MM3 dated 16<sup>th</sup> August, 2020 the applicant was applying for copies of proceedings in respect to Civil Appeal No. 153 of 2016 which was before Hon. De-Mello and not copies of Drawn Order in Misc. Case Land Application No. 33 of 2020 before Hon. Kalunde J. as alleged.

On the strength of the above, he urged this court to dismiss the applicant's application for lack of proper affidavit.

In reply to the preliminary objections Mr. Magusu, learned Counsel for the applicant conceded on the 1<sup>st</sup> preliminary objection that once the notice of Appeal to appeal to Court of Appeal is Lodged, this court ceases to have jurisdiction over the matter. He stated that since that is the position of law this application is not properly before this court.

On the second limb of preliminary objection, the learned counsel for the applicant argued that the statements in the affidavit of the applicant are proper, without any color of false information and the same should be considered during the determination of this application.

Mr. Magusu submitted on the 3<sup>rd</sup> limb of preliminary objection, he stated that the applicant's affidavit does not offend the provision of Order XIX Rule 3 (1) but complied with the provision under Order XLII Rule 2 of the Civil Procedure Code Cap.33 [R.E. 2019] hence be considered in this application.

In conclusion, Mr. Magusu on his submission at para 6 of the written submission in opposing the "PO" invited this court to struck out the application due to the fact that, a court with no jurisdiction has no power to dismiss any matter before it.

In his rejoinder, Mr. Nyange's counsel for the respondent maintained his submission in chief. He urged this court to uphold the three raised preliminary objections raised be upheld with costs.

Having gone through the submissions from both sides, I opt to start with the 1<sup>st</sup> preliminary objection as to *whether this court is clothed with jurisdiction to entertain this application at the pendency of the Notice of Appeal to the Court of Appeal of Tanzania?*

The position of the law regarding the preliminary objection was articulated in the landmark case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd** [1969] 1 EA 696 that:-

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which has arisen by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an **objection to the jurisdiction of the court**, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.* (Emphasis added)

The first raised preliminary objection falls exactly on the jurisdiction of the court as rightly pointed out by the learned counsel for the respondent and his reference to the case of **Serenity on the Lake Ltd v Dorcus Martin Nyanda**, Civil Revision No.1 of 2019 (unreported) in which the Court of Appeal was referring to the case of **Tanzania Electric Supply Company Limited v Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Limited (T)**, Civil Application No.142 of 2012 where the Court of Appeal of Tanzania held that once a Notice of Appeal to the Court of Appeal has been lodged, then this court’s jurisdiction over the matter ceases.

Besides, I am in accord with the learned counsel for the respondent in the given position of the law as stated in the case of **Tanzania Revenue Authority** (supra) that the issue of jurisdiction is fundamental and can be raised at any stage of the case including this stage of this application.

On the other side, the learned counsel for the applicant has conceded on the position of the law and was of the view that this application is incompetent before this court and therefore the remedy is to strike out. I fully subscribe to the submission of the learned counsel for the applicant. It is indisputable fact that this court lacks jurisdiction to entertain this matter since there is a pending Notice of Appeal to the Court of Appeal of Tanzania. The law is well settled when it comes to the Court deciding whether to dismiss or strike out a matter before it. In the case of ***Ngoni Matengo Cooperative Marketing Union Ltd v Alimahomed Osman*** [1959] EA 577, the defunct Court of Appeal for Eastern Africa made the following statement of principle:-

*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in 5 each case was to "strike out" the appeal as being incompetent; rather*



*than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

With the above findings, I refrain from deciding on the remaining points of preliminary objections as any result out of it will have no useful effect on this application. It will be an academic endeavor.

In the upshot, I find this matter incompetent before this court, I sustain the first preliminary objection and therefore, I proceed to strike out the application with costs.

Order accordingly.

Dated at Dar es Salaam this date 28<sup>th</sup> September, 2021.



  
A.Z.MGEYEKWA

**JUDGE**

28.09.2021

Ruling delivered on 28<sup>th</sup> September, 2021 in the presence of Mr. Magusu, learned counsel for the applicant also holding brief for Mr. John Nyange, learned counsel for the respondent.



  
A.Z.MGEYEKWA

**JUDGE**

28.09.2021