

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.408 OF 2021
(Originating from Land Case No.435 of 2017)**

AKIBA COMMERCIAL BANK PLC APPLICANT

VERSUS

MOHAMED SALEHE AFIF YAHAY 1ST RESPONDENT

PROPERTY MASTERS LTD 2ND RESPONDENT

TITO WILBARD BIGAMBO t/a

TITO GENERAL STORES LTD 3RD RESPONDENT

RULING

Date of last order: 11.10.2021

Date of Ruling: 13.10.2021

A.Z.MGEYEKWA, J

This application is brought under section 96 of the Civil Procedure Code Cap.33 [2019]. The applicant seeks this court to correct the Decree in Land Case No. 435 of 2017. The application is supported by an affidavit deposed by Mr. David Benjamin Wasonga, learned counsel for the

applicant. The 1st respondent feverishly opposed the application. In a counter-affidavit sworn by Mr. Daniel Haule Ngudungi, learned counsel for the respondent. The appeal has hit a snag. On 3rd September, 2021 the respondent lodged a preliminary objection against the appeal which sought to impugn the decision of the tribunal on one point of preliminary objection which read:-

" This court has no jurisdiction to determine this application as there exists a notice of appeal duly lodged to the Court of Appeal for appeal purposes by the 1st respondent."

When the matter came up for orders, the applicant had the legal service of Ms. Jacqueline, learned counsel for the applicant, and Mr. David, learned counsel for the respondent. It was guided that the application be disposed of by way of written submissions whose filing was to confirm the schedule. Whilst the applicant was to prefer his on or before 4th October, 2021, the respondent was scheduled to file his on or before 08th October, 2021, Rejoinder, if any, was to be filed on 11th October, 2021. Whereas the applicant conformed to the filing schedule, nothing has been filed by the respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the schedule.

This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard ex-parte. The Court of Appeal of Tanzania holding in the case of National **Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 at Dar es Salaam (unreported), it held that:-

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

The stance taken in the above-cited case is consistent with an earlier position, taken by this Court in **P3525LTidahya Maganga Gregory v Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported). It was held thus:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing

or want of prosecution. The attendant consequence of failure to file written submissions is similar to those of failure to appear and prosecute or defend, as the case may be. The Court's decision on the subject matter is bound... Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered."

Likewise, the Court of Appeal of Tanzania had a similar holding in the cases of **Patson Matonya v Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011, and **Geoffrey Kimbe v Peter Ngonyani**, Civil Appeal No. 41 of 2014 (both unreported). In consequence of the foregoing, it is ordered that the matters be determined *ex parte*, by considering the application based on the submission filed by the applicant's Advocate.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which I could not overlook.

In his submission, Mr. Daniel Ngudungi, learned counsel for the respondent contended that this court has no jurisdiction to determine this application as there exist a notice of appeal duly lodged to the Court of

Appeal for appeal purposes by the 1st respondent. He added that after the judgment was delivered, the 1st respondent after going through the judgment and decree filed a Notice of Appeal on 28th June, 2021 and the applicant was duly been served.

Mr. Ngudungi went on to submit that once there is a Notice of Appeal lodged against the decision of this court at the Court of Appeal of Tanzania, this court ceases to have jurisdiction to try the current application for correction of a decree which is subject to appeal, save for application for leave to appeal, application for certifying points of law and application for extension, the rest are to be handled by the Court of Appeal of Tanzania. He added that the instant application is not among the said applications thus it was his view that this applicant by the law cannot be determined by this court and the same be dismissed with costs. To fortify his position he referred this court to the case of **Aero Helicopter (T) Ltd v F. N Jensen** (1990) TLR 142, the Court of Appeal held that:-

" However since this matter is before Court of Appeal and the Applicant herein proves there is a notice of appeal to the court of appeal, this Honourable court remains functus officio as once notice of appeal have been lodged ceases the High Court, hence the High Court becomes functus officio."

He also cited the cases of **Arcado Ntagazwa v Buyogera Julius Bunyango** (1997) TLR 242 and **Awiniei Mtui and 3 others v Stanley Ephata Kimambo, (Attorney for Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2014.

On the strength of the above, the learned counsel for the respondent contended that this application is not one among the saved application by the law. He urged this court to uphold the preliminary objection and dismiss the application for correction of a decree with costs.

Having so submitted against the preliminary objection, Mr. Ngudungi, learned counsel for the applicant prayed this court to dismiss the point of preliminary objection raised by the respondent's Advocate.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by Mr. Ngudungi. Having done so, it should be now opportune to determine the issue *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 raised preliminary objection falls exactly on the jurisdiction of the court as rightly pointed out by the learned counsel for the respondent and the decisions of the Court of Appeal of Tanzania made in 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.

I fully subscribe to the submission of the learned counsel for the 1st respondent. 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 Ali Mahomed 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."

For the above reasons, I sustain the preliminary objection and proceed to strike out the application for lack of jurisdiction with costs.

Order accordingly.

Dated at Dar es Salaam this date 13th October, 2021.




A.Z. MGEYEKWA

JUDGE

13.10.2020

Ruling delivered on 13th October, 2021 in the presence of Ms. Jacqueline Kulwa, learned counsel for the 1st respondent.




A.Z. MGEYEKWA

JUDGE

13.10.2020