

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 411 OF 2022

(Arising from the District Land and Housing Tribunal for Kinondoni in Misc. Land Application No. 64 of 2018, originating from Land Application No. 108 of 2013)

VUMILIA NGURUBE MWAKASUNGA APPLICANT

VERSUS

HEMED JALALA HEMED RESPONDENT

RULING

Date of last Order: 06.09.2022

Date of Ruling: 08.09.2022

A.Z.MGEYEKWA

I am called upon in this matter to decide whether this court should exercise its discretion under section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] to extend the time within the applicant to lodge an appeal to this court against the decision of the District Land and Housing Tribunal in Land Application No.64 of 2018. The application is supported by an

affidavit deponed by Vumilia Ngurube Mwakasunga, the applicant. The respondent resisted the application and has demonstrated their resistance by filing two points of preliminary objection as follows:-

1. *This Application is res judicata as the same is substantially similar to the Misc. Land Application No. 60 of 2019 which was decided to its finality.*
2. *This application is incompetent or incurably defective for failure to attach a copy of the ruling.*

When the matter was called for hearing on 17th August 2022, the applicant appeared in person while the respondent enjoyed the legal service of Mr. Lutufyo Mvumbagu, learned counsel. On the parties' concurrence, the hearing of the preliminary objection was through written submissions the filing of which followed the schedule drawn by the Court.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the suit.

The learned counsel for the respondent started his onslaught by submitting on the first limb of objection that the instant application is *res judicata* as the same is substantially similar to Misc. Land Application No. 60 of 2019 that was decided in favour of the respondent. He went on to submit that the applicant applied for an extension of time to challenge the

decision emanating from Misc. Land Application No. 64 of 2018. He added that the applicant demonstrated similar reasons as advanced in the instant application, Hon. Mango, J after deliberation of the said reasons decided in favour of the respondent based on the fact that the applicant failed to state sufficient reasons for his delay.

The counsel went on to submit that thereafter the applicant disappeared, however, surprisingly she filed a similar application before this court. To buttress his contentions he referred this Court to section 9 of the Civil Procedure Code Cap. 33 which bars litigants from re-instituting suits which are directly and substantially similar to the former suit. It was his view that the cited section gives a broader meaning to include applications. It was his submission that the doctrine of res judicata bars the litigants who were parties of the former suit from re-litigating in respect of the same issue and the rationale behind is to end litigations and protect parties from being vexed by the same matter twice.

It was his further submission that the applicant was afforded the same opportunity to apply for an extension of time unsuccessfully vide Misc. Land Application No. 60 of 2019 thus, she has been precluded from re-filing a similar application before this court.

Arguing for the second limb of the objection, Mr. Lutufyo contended that the application is incompetent or bad in law for failure to attach a copy of

the Ruling of the impugned decision upon which the applicant is seeking an extension of time and failure to attach the same is fatal. He insisted that as long as the applicant is intending to challenge the decision of the trial tribunal under normal circumstances she is required to attach a copy of the said Ruling so that this court can be in a position to ascertain the legality of the impugned decision.

In light of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the application with costs.

In his reply, on the first limb, the applicant's legal Aid representative prepared the written submission on her behalf. The applicant contended that the doctrine of res judicata as stipulated under section 9 of the Civil Procedure Code Cap.33 entails that once a Court of competent jurisdiction to determines a matter in any suit or proceedings between the parties thereto has finally decided those matters, such decision unless reversed on appeal or revision is conclusive. She added that the doctrine act as an estoppel to such parties to re-litigating those same matters in any subsequent suit.

It was his view that relying on the doctrine of res judicata is not enough to show that the matter in issue is the same as in the previous proceedings. Supporting his submission he cited the case of **Bhagwasti v Ram Kali** (AIR) 1939 PC 133.

The applicant argued that the Court language of either the words 'dismissal' or 'granting' means a conclusive determination of the matter. To support his submission he cited the cases of **Mabibo Beer Wines & Spirits Limited v Fair Competition Commission & 3 Others**, Civil Application No. 132 of 2015, CAT at Dar es Salaam (unreported), and **Ngoni Matengo Cooperative Marketing Union Ltd v Alimahomed Osman** [1959] EA 577. The applicant submitted further that this Court in Misc. Land Application No. 60 of 2019 in deciding the matter used the term 'struck out and not 'dismissal'. She added that the Court of Appeal distinguished the two phrases in the cases of **Cyprian Mamboleo Hizza v Eva Kioso and Another**, Civil Application No.3 of 2010 at Tanga (unreported) and **Ngoni Matengo** (supra).

The applicant continued to submit that the available remedies where a matter is dismissed and struck out are not the same. The aggrieved party whose case has been dismissed is to appeal and the remedy where the case is struck out the remedy is to refile the case at the same court. To fortify her submission, she cited the cases of **MM Worldwide Trading Company Ltd & 2 others v National Bank of Commerce Ltd**, Civil Appeal No. 288 of 2017 CAT at Dar es Salam (unreported), **Olam Uganda Ltd suing through its Attorney United Youth Shipping Company Ltd v Tanzania Harbour Authority**, Civil Appeal No. 57 of 2002 (unreported)

and **Joram Emmanuel Gagala v Emmanuel Mkongo**, Civil Appeal No. 33 of 2020 HC at Arusha (unreported).

On the second limb of the objection, the applicant argued that the application if brought under section 41 (2) of the Land Disputes Courts Act, Cap. 216 and the provision does not require the applicant to attach a copy of the impugned Ruling. She added that the requirement is only on appeal as provided under Order XXXIX Rule 1 (1) of the Civil Procedure Code Cap. 33. The applicant submitted that if there is a *lacuna* in the Land Disputes Courts Act, Cap. 216, then, this court can invoke the provision of the Civil Procedure Codes, Cap. 33 but Cap.33.

On the strength of the above submission, the applicant urged this court to overrule the preliminary objection with costs.

Having heard the learned counsels' submissions in support and against the preliminary objection and upon thorough perusal of the record of the application, to satisfy myself on the propriety or otherwise of the application before this court. On the first limb of the objection, the respondent's counsel argued that the application is *res judicata*. The learned counsel for the respondent submitted that the applicant filed a Misc. Land Application No. 60 of 2019 before this court and again she has filed the instant application which is similar to the previous application. Reading the applicant's affidavit, the applicant did not mention or inform

the court that she filed a similar application in 2019 before this court. However, the record reveals that the applicant filed a Misc. Land Application No. 60 of 2019 before this court praying for an extension of time to file an appeal against the decision of the District Land and Housing Tribunal in Land Application No.64 of 2018. The said application arises from Land Application No. 108 of 2013. In her reply to the written submission, she stated that the previous application was struck out thus she was allowed to file another application before the same court.

The record shows that Misc. Land Application No. 60 of 2019 was heard on merit, the mean that the applicant in Misc. Land Application No. 60 of 2019 unsuccessfully applied for an extension of time. Consequently, the practice, however, has been that when the court finds that the applicant in the application for extension of time has failed to adduce sufficient reasons, the remedy is to dismiss the application not to strike out, and the aggrieved party if wishes he can file an appeal and not to file a fresh application. See the case of **Barclay Bank Tanzania Ltd v Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016, CAT [TANZLII 17th May, 2021, the Court of Appeal of Tanzania observed that the learned Judge should have resorted to section 3 of the Law of Limitation Act, Cap.89 to dismiss the application instead of striking it out as she did. The content of **Barclay Bank Tanzania Ltd's** case (supra) is similar to the

circumstances at hand. In the case at hand, the Misc. Land Application No. 60 of 2019 was unsuccessfully therefore the remedy was to dismiss the application instead of striking it out. Therefore, I am in accord with Mr. Lutufyo that the matter before this court is *res judicata* since it involves the same parties, same subject matter and the same was determined on merit.

In the upshot, I sustain the first limb of preliminary objection. Consideration of the second limb of objection will not affect the above finding. I accordingly refrain from delving into it Thus, I proceed to dismiss the instant application without costs.

Order accordingly.

Dated at Dar es Salaam this date 8th September, 2022.




A.Z.MGEYEKWA

JUDGE

08.09.2022

Ruling delivered on 8th September, 2022 via video conferencing whereas the applicant and Mr. Lutufyo, learned counsel for the respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

08.09.2022