

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

MISCELLANEOUS LAND CASE APPEAL NO 17 OF 2022

(From the Decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala Land Appeal Case No. 87 of 2020 and Original Ward Tribunal of Mwananyamala Ward Application No.17 of 2016)

ALLEN JUMA KASINDE APPELLANT

VERSUS

BUPE LAURENCE MWAKATENYARESPONDENT

Date of last Order: 21/09/2022
Date of Ruling: 04/10/2022

RULING

OMARI, J.:

The Appellant herein having been aggrieved by the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala (the DLHT) in Land Appeal Case No. 87 of 2020 where he appealed against the decision of the Ward Tribunal of Mwananyamala Ward Application No.17 of 2016 preferred this appeal. In the course of hearing the appeal, the learned counsel for the Respondent, raised a Preliminary Objection against the appeal on a point of law. The said Objection centred on the assertion that the appeal was wrongly before the court for it contravenes section 38 (2) of the Land Disputes Courts Act Cap 216 (RE 2009) (the LDCA).

Highlighting on the point of objection, the learned counsel for the Respondent submitted that the present appeal was filed by way of a Memorandum of Appeal and not a petition as required by section 38 (2) of the LDCA. He passionately argued that the appeal needs to be struck out so that it is refiled as appropriate. He went on to assert that this was decided in the case of **T.G World International LTD vs Carrier Options Africa (Tanzania) LTD** Civil Appeal No. 23 of 2021, High Court of Tanzania at Arusha (unreported) where the court observed that the requirements in the cited provision are made in mandatory language for the purpose of establishing orderly procedures for conduct of appeals. He went on to say this makes the appeal incompetent. He prayed for it to be dismissed with costs.

In his reply the learned advocate for the Appellant restated the Preliminary Objection as raised by the learned advocate for the Respondent and went on to ask the court to use overriding objective principle so as to do away with technicalities and facilitate the dispensation of justice. He prayed that the appeal not be struck out but the court invoke the overriding objective principle. He went on ahead to distinguish this current appeal from the **T.G World International LTD vs Carrier Options Africa (Tanzania) LTD**

case (*supra*) where in his opinion the Appellant in the said case filed a petition without the Decree being appealed against, therefore it is irrelevant to the present appeal. He prayed for the court to invoke the overriding objective principle and do justice.

Before I go on to determine whether the Objection raised is meritorious and therefore sustained or not, I find it necessary to address two issues. The first being the **T.G World International LTD vs Carrier Options Africa (Tanzania) LTD** (*supra*) as distinguished by the learned counsel for the Appellant. Counsel maintained that in the said case the Appellant just filed a petition without the Decree being appealed against and by necessary implication different from the one before this court. My reading of the said Ruling makes me opine that either counsel did not understand the nature of the objection(s) raised and the arguments of both sides for and against the objection(s) or he wanted to mislead this court. Throughout the Ruling the issue of preferring an appeal through a 'Petition of Appeal' and not a 'Memorandum of Appeal' is discussed and finally decided by the court. Perhaps, counsel read and used the decision 'conveniently' to suit his argument.

The second issue I would like to address is that of overriding objective principles also commonly known as oxygen principles. Counsel for the Appellant in his reply on the point of objection raised invoked the principles and made reference to facilitating the dispensation of justice without being encumbered with technicalities. This is in my considered opinion a misuse and application of the principles and more so the spirit on which Article 107A (2) (b) and (e) of the Constitution of the United Republic of Tanzania, 1977 is founded upon. For avoidance of doubt let me reproduce section 3A the Civil Procedure Code, Cap 33 (R.E 2019) (herein the CPC) which provides as follows:

'(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act. (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).'

There is nothing in the above section that seems to suggest that the court should trivialize mandatory rules of procedure as laid down by the law. What exactly the overriding objective principles entail are as provided for in section

3B CPC and in my very humble opinion there is nothing therein that warrants trivializing rules of procedure, or giving them a skewed interpretation to cover up for litigants' omissions. The principle is in my very humble opinion was not supposed to facilitate disregard for procedures then then invoke it like some magic wand that makes problems disappear or change form. To cement my point let me also reproduce section 38(2) of the LDCA that governs this appeal and which the learned counsel for the Appellant is asking the court to regard as a mere technicality.

'Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought.' (Emphasis supplied)

There is also nothing in the above subsection that seems to suggest it is not mandatory to file a petition and perhaps when one realizes they are have not done so the court can just shrug it off in the name of facilitating the dispensation of justice.

This subject has been discussed many times by the highest court of the land which I am well aware, has two views on the overriding objective principle, the first being that the principle can be used to cure defects, thus allowing

parties to rectify errors and omissions then go on with the appeals; see for example **ABSA Bank Tanzania Limited & Another vs Hjordis Fammestad** (Civil Appeal No.30 of 2020) [2021] TZCA 553.

The second view is that the principles were not meant for curing legal defects that would otherwise topple a matter before a court see for example **Juma Busiya vs Zonal Manager, South Tanzania Postal Corporation** (Civil Appeal No.273 of 2020) [2021] TZCA 522; **Jacob Bushiri vs Mwanza City Council & Others** (Civil Appeal No.36 of 2019) [2021] TZCA 300.

On the basis of the foregoing; I find that the point of objection raised by the Respondent to have merit. As a consequence, I proceed to struck out the Appeal with costs. It is so Ordered.





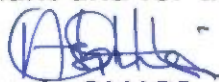
A.A. OMARI

JUDGE

04/10/2022

Ruling pronounced and dated 04th day of October, 2022 in the presence of learned advocates for the Appellant and for the Respondent.




A.A. OMARI

JUDGE

04/10/2022