

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 198 OF 2021

(Arising from Misc. Land Application No. 278 of 2020, originating from Application No. 118 of 2020, Kibaha District Land and Housing Tribunal)

BENJAMIN MAKOLE.....APPELLANT

VERSUS

UPCOMING INVESTMENT LTD..... 1ST RESPONDENT

JUDY GOLD MINES LTD..... 2ND RESPONDENT

JOSHMA CONSTRUCTION GRP.....3RD RESPONDENT

JB SANGA GENERAL SUPPLY.....4 RESPONDENT

JUDGMENT

Date of order: 6.10.2022

Date of Ruling: 10.10.2022

KADILU, J.

This is an appeal which stems from the decision of Kibaha DLHT in Misc. Land Application No. 278 of 2020. The material facts to the dispute are briefly that; the appellant filed Misc. Land Application No. 278 of 2020 at Kibaha DLHT seeking an injunction order to restrain the respondents from continuing with mining activities on the appellant's land, and Land

Application No. 118 of 2020 which was the main application. Before the application for injunction was determined, the respondents raised a preliminary objection to the effect that Kibaha District Land and Housing Tribunal had no jurisdiction to determine the matter because it was not a land matter. The objection was argued by way of written submissions leading to the Tribunal's ruling of 2/8/2021 which sustained the objection. Aggrieved by the ruling, the appellant lodged an appeal before this court as Land Appeal No. 198 of 2021.

The following are the appellant's grounds of appeal:

1. That the Tribunal erred in law and fact by failure to consider that the appellant had no Application No. 118 that was pending before it.
2. That the Tribunal erred in law and fact by raising issues and assume the answers without affording the parties an opportunity to address the Tribunal prior to its determination.
3. That the tribunal erred in law and fact in failure to consider that the agreement entered was based on the applicant's land containing crops and the respondent trespassed into it, hence it is a pure land matter.
4. That the tribunal erred in law and fact in failure to interpret the definition of 'land' as defined in the Land Act, and if it were so

considered, the Tribunal could have ended to a decision that it had jurisdiction.

5. That the tribunal erred in law and fact in failure to consider the applicant's submissions and had it considered, it could have led to the determination of the main application in merit.
6. That the tribunal erred in law by arriving to a decision without involving the assessors, contrary to s. 23 (1) and (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019].

The respondents did not file a reply to the petition of appeal. When the appeal was called for hearing the appellant was represented by Mr. Alex Enock, learned Advocate and Mr. Frank Michael appeared for the respondents. When Mr. Frank was reminded by the court that he did not file a reply to the petition of appeal, he replied that the respondents had opted to proceed without filing a reply. In support of the appeal, the appellant's Advocate started by a prayer to abandon the 1st ground of appeal. He then reiterated the 2nd, 3rd, 4th, 5th and 6th grounds of appeal as contained in the petition of appeal.

Having summarized the submissions and arguments of both learned counsel for and against the appeal, I should now be in a position to determine the appeal. However, in the course of composing this judgement, I observed that the decision of Kibaha District Land and Housing Tribunal which the appellant is challenging did not determine the dispute between the parties to the finality. Therefore, I invited the Advocates for the parties to address me on whether or not the appeal is properly before this court.

Mr. Alex Enock submitted that s. 74 (2) of the CPC read together with Order XL, Rule 1 (a) allow appeals against interlocutory orders. According to him, the matter which was struck out in the DLHT with directives to file it in the court of competent jurisdiction, is similar to returning the plaint as stipulated under Order XL, Rule 1 (a) of the CPC. He explained that the decision from which the appellant has preferred the present appeal determined the matter to the finality, therefore it is appealable. He maintained that the appeal is properly before this court. However, he prayed that if the court finds otherwise, then it should not impose costs on the appellant because the point was not among the grounds of appeal. It was raised by the court in its own motion.

Mr. Frank Michael, Advocate for the respondents argued that Order XL Rule (1) (a) that was referred to by the learned Counsel for the appellant is all about returning the plaint. This case, there was no plaint since the decision was a ruling on a preliminary objection. The appellant was prevented to appeal by s. 74 (2), CPC. The law cited by the learned Counsel is irrelevant because the point here is whether the decision, he is appealing against is appealable or not. The CPC is very clear that decisions which do not determine cases to the finality are not appealable. I submit that it was not proper for the appellant to appeal against an interlocutory order. I object the learned Counsel's proposition that costs should not be imposed on them. The respondents have incurred costs in prosecuting this appeal. I pray for the appeal to be struck out with costs.

After consideration of the submissions by the learned Advocates, the issue for determination is whether the appeal has merit. I have examined the ruling by District Land and Housing Tribunal for Kibaha in respect to Misc. Land Application No. 278 of 2020 dated 2/8/2021 and found that the Chairman sustained the preliminary objection raised by the respondents on the ground that the case before the tribunal was based on mining activities, not a land dispute. The application was struck out and the appellant was

ordered to file his complaint in an ordinary court, not the tribunal which is special for land disputes. In that regard, the law is clear that interlocutory orders which do not determine cases to the finality are not appealable. S. 74 (2) of the CPC provides as follows:

"...no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit."

It was categorically contended by the Advocate for the respondents that no appeal lies because the ruling of Kibaha DLHT in Miscellaneous Land Application No. 278 of 2020 which struck out Land Application No. 118 of 2020 is not appealable as it is an interlocutory decision which is barred by the provisions of the CPC cited above. In this regard, he strongly contended that in the circumstances of this appeal, the ruling of the Tribunal in Miscellaneous Land Application No. 278 of 2020 did not finally determine Land Application No. 118 of 2020 as the same was struck out with an order to file it in a court of competent jurisdiction for hearing.

Advocate for the appellant maintained that the manner in which Land Application No. 118 of 2020 was struck out amounted to returning a plaint as provided under Order XL, Rule (1) (a) of the CPC, and that the same was

appealable. With due respect, I do not subscribe to the learned Counsel's interpretation because Land Application No. 118 of 2020 was not preferred to the DLHT by way of a plaint, rather, chamber summons supported by an affidavit. It is undisputed that, the determination as to whether the decision or order is final, preliminary or interlocutory depends on the circumstances of each case. It is in this regard that the Court of Appeal in *Yusuf Hamisi Mushi & Another v Abubakari v Khalid Hajj & Others*, Civil Application No. 55 of 2020, cited the case of *Bozson v. Artincham Urban District Council* (1903) 1 KB 547 where **Lord Alverston** observed as follows:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not it is then in my opinion, an interlocutory order."

This approach was also applied by the Court of Appeal in *Murtaza Ally Mangungu v. The Returning Officer for Kilwa & 2 Others*, Civil Application No. 80 of 2016 and *Peter Noel Kingamkono v. Tropical Pesticides Research*, Civil Application No. 2 of 2009 (both unreported). Applying the said approach to the instant appeal, I am of the view that the ruling of Kibaha DLHT in Miscellaneous Land Application No. 278 of 2020, did not finally determine the rights of the parties as the Tribunal upheld the preliminary objection to

the effect that it was not vested with requisite jurisdiction to determine the matter. In that situation, the appellant was not required to file an appeal in this court as he did.

Therefore, the appellant was required to exhaust the remedy for interlocutory decision instead of filing the appeal in this court. In the case of *Ms. Farhia Abdullah Noor v Advatech Office Supplies Limited & Another*, Civil Application No. 261/16/2017, Court of Appeal of Tanzania (unreported), it was held that the court's power of revision may be resorted to only where there is no right to appeal or where such right exists, but has been blocked by judicial process. The present matter is one of such cases in which the appellant had no right to appeal.

In such circumstances, I have to say that since the appellant was dissatisfied by the interlocutory order, that means he was not permitted to file an appeal because interlocutory decisions or orders of the tribunal are not subjected to appeal. I fully subscribe to the opinion by the learned counsel for the respondents who submitted that right of appeal cannot be exercised in a decision that has not finally determined the case as clearly stated under s. 74 (2) of the Civil Procedure Code Cap.33 [R.E 2019]. As a result, I proceed

to strike out the appeal for being incompetent before this court. Each party to bear his own costs. Order accordingly.



Kadilu

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KADILU, M.J.,

JUDGE

10/10/2022

Ruling delivered on the 10th Day of October, 2022 in the presence of Mr. Frank Michael, learned Advocate for the respondents, and Mr. Benjamin Makole, the appellant.



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KADILU, M. J.

JUDGE

10/10/2022.