

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

MISC. LAND APPLICATION NOL 564 OF 2021

(Arising from High Court in Land Appeal No. 63 of 2015; Originating from
Msasani Ward Tribunal in Application No. 260 of 2013)

SHUNYU JOSEPH NKUNZI.APPLICANT

VERSUS

CYRIL FREDRESPONDENT

Date of last Order: 19.08.2022
Date of Ruling: 10.10.2022

RULING

V.L. MAKANI, J

The respondent in this application raised a preliminary objection on a point of law that the court has no jurisdiction to entertain this application because there is a pending Notice of Appeal filed in the Court of Appeal on 25/05/2016.

The objection was argued orally, and on behalf of the respondent Mr. Paul Elias, Advocate said on 13/05/2016 judgment was delivered by this court in respect of Land Appeal No. 63 of 2015 (Hon. Nchimbi, J). On 24/05/2016 a Notice of Appeal was filed to challenge the said decision and on 10/06/2016 the applicant filed an application for

leave to appeal to the Court of Appeal which was accompanied by the said Notice of Appeal. The application for leave was Misc. Application No. 447 of 2016 and it was met with several objections and ultimately the application was struck out with costs on 30/07/2017. The applicant then filed this application for extension of time to file Notice of Appeal against the same decision in Land Appeal No. 63 of 2015. He said since 25/05/2016 when the Notice of Appeal was filed, there is no order of the Court of Appeal withdrawing the said notice and the compliance of withdrawal is by the Court of Appeal and not the High Court. He said allowing the applicant to file another Notice of Appeal while there is another one which has not been withdrawn is not proper. He said once a Notice of Appeal has been filed, then the applicant, has to move the Court of Appeal to withdraw the appeal. He said there is a letter showing that the Court of Appeal was consulted on the said Notice of Appeal. The letter refers to Misc. Land Application No. 447 of 2016 which application is before the High Court and not the Court of Appeal. He said in order for that the applicant knows whether or not the Notice was filed she ought to have referred the main case, that is, Land Appeal No. 63 of 2015. He thus prayed for the application to be dismissed.

In reply Mrs. Rwechungura on behalf of the applicant submitted that the objection raised does not meet the conditions of the law in the case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696**. She said when arguing this objection there is need to go to evidence. She further said the matter was not in her conduct but nevertheless the Court of Appeal has to have it on record. She said the Notice itself does not even have a stamp. She said when she inquired at the Court of Appeal the Registrar informed her that there is no Notice of Appeal or an appeal. She said the objection has no merit and it does not meet the conditions of the case of **Mukisa Biscuits** (supra).

In rejoinder, Mr. Elias said though, Counsel was not in conduct of the matter but as an Advocate she ought to have done a perusal before proceeding with the matter. He said the objection is a pure point of law because there are procedures to withdraw Notice of Appeal once filed. He said this is not a matter of evidence but a matter of compliance with the Court of Appeal Rules. He insisted that the Notice of Appeal is properly before the Court of Appeal and the applicant (then appellant) paid the requisite fees for filing the Notice. He reiterated his prayer for dismissal of the application.

I have listened to learned Counsel for the parties. The main issue for consideration is whether the objection raised by the respondent has merit.

Mrs. Rwechungura pointed out to the court that this is objection is not a pure objection on a point of law in terms of the case of **Mukisa Biscuits** (supra). But with due respect this is a matter of jurisdiction, rules and procedures and so it is a fit objection on a point of law. The argument is misconceived and thus disregarded.

The rival arguments are that while the applicant insists that there is no Notice of Appeal at the Court of Appeal the respondent has given a sequence of how the Notice of Appeal was filed by the applicant and up to this date the said notice has not been withdrawn or the appeal been heard, so this court is ceased of its jurisdiction to hear this application.

The records are very clear that there was a Notice of Appeal that was filed by the applicant herein on 25/05/2016. There is no concrete information as to what has transpired in respect of the Notice of Appeal and subsequent appeal. The applicant informed the court vide **Annexure A** to the Reply to the Supplementary Affidavit that the Court of Appeal is not aware of any appeal related to the parties. But

unfortunately, the letter by the Court of Appeal is to the effect that the Court of Appeal did not make a proper finding because the applicant did not quote the proper reference. That is why in the letter, the Registrar observed that the applicant might have quoted the High Court case instead of the reference at the Court of Appeal. In my perusal of the letter the reference number quoted is in respect of Misc. Land Application No. 447 of 2016 which was an application of this court (application for leave to appeal to the Court of Appeal) and not a reference number of the Court of Appeal. In addition, and as correctly observed by Mr. Elias, since the Notice was filed, then without an Order for withdrawal of the said Notice from the Court of Appeal the said Notice is presumed that it has not been removed from the records. In such circumstances, it is apparent that the Notice of Appeal is still before the Court of Appeal as such this court is ceased with the jurisdiction to do anything including hearing of this application for extension of time. In the case of **Prosper Petro Munisi (Legal Administrator of Peter Munisi) vs. Yunus Bakari Mshana & Another, Misc. Application No. 151 of 2019 (HC-DSM)**(unreported) my brother Hon. S.M. Kulita, J quoted with approval the case of **Matsushita Electric Co. Ltd v. Charles George t/a C. G. Travers, Civil Application No. 71 of 2001** (unreported) where it was stated:

"Once a Notice of Appeal is filed under Rule 76 (now Rule 83(1) of the Rules) then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law."

The Honourable Judge went on to quote the case of **Aero Helicopter Limited v. F. N. Jensen [1990] TLR 142** where it was stated:

"Once appeal proceedings to this Court have been commenced by filing a Notice of Appeal, the High Court has no inherent jurisdiction under section 95 of the Code for the simple reason that the proceedings are no longer in the Court as required by section 2 of the Code."

Similarly, since the Notice of Appeal has not been formally withdrawn vide an order of the Court of Appeal to that effect then this court has long been ceased with the jurisdiction to entertain this application as records of this court in respect of the matter are now with the Court of Appeal.

For the reasons hereinabove advanced, the preliminary objection raised has merit and it is hereby sustained. The application is dismissed with costs. It is so ordered.



V.L. Makani

**V.L. MAKANI
JUDGE
10/10/2022**