

**THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC.LAND APPLICATION NO. 482 OF 2021**

(Originating from the decision of the District Land and Housing Tribunal for at Kinondoni at Mwananyamala in Land Application No. 243/2011, Hon. Mbilinyi, Chairperson)

**MUSTAFA KIMARO ..... APPLICANT**

**VERSUS**

**MARIAM HAMIS MAFTAHA ..... RESPONDENT**

**RULING**

*Date of Ruling 22.03.2022*

*Date of the last order 22.03.2022*

**A.Z.MGEYEKWA, J**

I am called upon in this matter to decide whether this court should exercise its discretion under section 41 (2) of the Land Disputes Court Act, Cap. 216 [R.E 2019] and sections 93 and 95 of the Civil Procedure Code Cap.33 [R.E 2019] to extend time within the applicant to file an appeal against the decision of this District Land and Housing Tribunal for

Kinondoni at Mwananyamala. The application is supported by an affidavit deponed by Mustafa Kimaro, the applicant. The respondent resisted the application and has demonstrated his resistance by filing counter affidavit deponed by Mariam Hamisi Maftaha, the respondent.

When the matter came for hearing on 14<sup>th</sup> December, 2021, the applicant enlisted the legal service of Mr. Ambrose, learned Advocate, whereas the respondent was enjoyed the legal service of Mr. Gagusia, Michael learned Advocate. This court *suo mottu* called upon the parties to address the court whether this application is not *res judicata* to Land Appeal No. 224 of 2020 that was dismissed on 2<sup>nd</sup> August, 2021 and whether this court is *functus officio* to determine the instant application and hearing was scheduled on 22<sup>nd</sup> March, 2022.

On 22<sup>nd</sup> March, 2022 parties addressed the court whereas, Mr. Ambrose, Advocate was the first one to kick the ball rolling. In his submission, the learned counsel for the applicant was brief. He submitted that the matter was not conclusively determined and there was no any decision regarding the applicant's application. Mr. Ambrose went on to submit that after the dismissal order with respect to Land Appeal No. 224 of 2020, the remedy is to file an application for an extension of time to allow this court to grant the applicant to file an appeal. In his view, this

court is not *functus officio* to determine the instant matter at hand since the previous matter was not conclusively determined and there was no any decision in place.

In response, Mr. Kabuzya, counsel for the respondent was focused and straight to the point. He contended that the application is *res judicata* as per section 9 of the Civil Procedure Code Cap 33 [R.E. 2019]. He submitted that the applicant lodged Land Appeal No. 243 of 2020 before Hon. Makani, J which was dismissed for being time-barred. He added that thereafter the applicant filed a No 482 of 2021 seeking for extension of time to appeal against the Land Appeal No. 243 of 2011. In his view, he stated that the matter is *res judicata* since the parties in the said appeal and the instant application are the same.

Mr. Kabuzya went on to submit that on 13<sup>th</sup> September, 2021, the applicant filed Misc. No 482 of 2021 seeking for extension of time to appeal against the Land Appeal No. 243 of 2011 were as the same subject matter are same as in Land Appeal No. 224 of 2020. To fortify his submission, he cited the cases of **Jesca Deus v Fatuma Maghimbi & Hoyce Lymo**, Land case No. 197 of 2014, and **Umoja Garage v NBC Ltd**, Civil Appeal No. 63 of 2003 CAT (unreported).

Regarding the issue of *functus officio*, Mr. Kabuzya contended that the application is *functus officio* for the reason that the applicant has filed Land Appeal No.224 of 2020 which was dismissed for being time-barred. In his view, this court is *functus officio* to determine the application for an extension to file a Land Appeal which was already been dismissed by this court for being out of time. To buttress his contention he cited the cases of **Nuru Mbaraka v Awadh Abeid Kiwasa & Bahati** Kiyana TLR [2002] 188 and **Mwasit Ally v Diamond Trust Bank**, Civil Case No. 53 of 2016 both held that the High court Judge cannot sit and nullify the decree of her fellow Judge.

On the strength of the above submission, he beckoned upon this court to dismiss the application for being *res judicata* and for the reason that this court is *functus officio*.

In rejoinder, the learned counsel for the applicant contended that section 9 of the Civil Procedure Code Cap.33 is inapplicable in the instant matter as there is no issue of *res judicata* since Land Appeal No. 224 of 2020 was not determined on its finality and that this application is for extension of Appeal.

Having gone through the submissions from both sides it would appear to me that the Application for extension of time to appeal against Land application No.243 of 2011 was granted by this Court on 30<sup>th</sup> September, 2019 in Misc. Land Application No.581 of 2018. Consequently, the applicant filed a proper appeal vide Land Appeal No. 224 of 2020 which was dismissed on 02<sup>nd</sup> August, 2021 for being time-barred. I am in accord with the learned counsel for the respondent that as long as the Land Appeal No. 224 of 2020 was dismissed by this court then this court is *functus officio* to determine the application for extension of time to file an appeal which was before this court and this court dismissed it for being time-barred.

It is trite law that where the matter is dismissed, that is the conclusive end of it, and the remedy for the same is to appeal to the next higher rank court. At the time this court determined the Land Appeal No. 224 of 2020 automatically this court was *functus officio* to determine the matter before it for the second time. It is worth noting that an order for dismissal implies that a competent suit/appeal has been disposed and the proper remedy is to lodge an appeal. In the cases of **Mabibo Beer Wines & Spirits Limited vs Fair Competition Commission & 3 Others**, Civil Application No. 132 of 2015, **Ngoni Matengo Cooperative Marketing**

**Union Ltd v Alimahomed Osman [1959] EA 577**, Civil Application No. 3 of 2010 - **NIC and Another v Shengena Ltd**; Civil Appeal No. 27 of 2003 - **Hashim Madongo and Two Others v The Minister for Industry and Trade and Two Others**; Civil Appeal No. 18 of 2008 (all unreported).

On the foregoing reasons, I fully subscribe to the counsel for the respondent's opinion that this matter before me is *functus officio* before this court. I proceed to dismiss the instant application without costs.

Order accordingly.

DATED at Dar es Salaam this 22<sup>nd</sup> March, 2022.



A.Z.MGEYEKWA

**JUDGE**

22.03.2022

Ruling delivered on 22<sup>nd</sup> March, 2022 in the presence of Ambrose Malamsha, learned counsel for the applicant, and Mr. Michael Kabuzya, counsel for the respondent was remotely present.



A.Z.MGEYEKWA

**JUDGE**

22.03.2022