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

LAND APPEAL NO. 06 OF 2021

SHEILA SENYONI.....APPELLANT

VERSUS

HALIMA RAMADHANI.....1ST RESPONDENT
ASHURA JUMA MZIBUA.....2ND RESPONDENT
GLORY SIMON UMBELLA.....3RD RESPONDENT
FLORA MGIMWA.....4TH RESPONDENT

Date of Last Order: 19.05.2022
Date of Ruling: 20.06.2022

RULING

V.L. MAKANI, J.

This is the ruling in respect of the preliminary objection that was raised by respondents that:

> *The appeal is incompetent and defective for being brought as Petition of Appeal while registered as Land Appeal in lieu of Memorandum of Appeal as per Order XXXIX, Rule 1 of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**).*

The preliminary objection was orally argued by Mr. Elias Rugomela, Advocate on behalf of respondents and Mr. Hermus Mutatina, Advocate on behalf of the appellant.

Mr. Rugomela for respondents argued that, the appeal is defective for being brought as a Petition of Appeal instead of Memorandum of Appeal. That under section 38 of the Land Disputes Court Act, Cap 216 RE 2019 an appeal to the High Court from District Land and Housing Tribunal (**District Tribunal**) has to be by way of Memorandum of Appeal filed in the District Tribunal. He said Regulation 24 of GN 174/2003 does not state the form. But section 51 of the Land Disputes Court Act allows the CPC to be used. He said Order XXXIX of the CPC states that any appeal should be in a form of Memorandum of Appeal and since the matter originates from the District Tribunal then it should be by way of Memorandum of Appeal as opposed to Petition of Appeal. He said when exercising original jurisdiction, the time limit is 45 days making it different when exercising appellate or revisionary jurisdiction which is 60 days, hence making the Petition of Appeal to be different from the Memorandum of Appeal which is 45 days. He said section 53 of the Interpretation of Laws Act states that when the word "shall" is quoted then it is mandatory and the same has been used in Order XXXIX of the CPC. That the appellant ought to have filed a Memorandum of Appeal and not a Petition of Appeal. He relied on the case of **Amidu Damian Likiliwike vs. Steven Temba, Land Appeal No.3 of 2020 (HC-**

Iringa) (unreported). He added that procedural law is enacted to make good the procedure of the court and the documents were filed by an advocate and not a layman. The negligence by the advocate should not be excused. He insisted that the advocate should act diligently as stated in the case of **Martha Daniel vs Peter Nnko [1992] TLR 359.** He prayed for the appeal to be struck out with costs.

In reply, Mr. Mutatina said that since a Memorandum of Appeal is on record in the court file, then the court should be guided with what is before the court and not extraneous matters introduced by advocates. On the other hand, he said if there is such an omission then it should be overlooked as it does not go to the root of the matter and there is no prejudice that has been occasioned. He invited the court to be consider the principle in the case of **Basil Massawe vs. Petro Michael (1996) TLR 2026** where it was stated that the use of a petition instead of a memorandum cannot render the appeal incompetent. He prayed for the preliminary objection to be dismissed with costs.

In his brief rejoinder, Mr. Rugomela said that the document which he has been served with is the Petition of Appeal filed on 07/01/2022. That there is no proof of other service to him. That the cases cited by Mr. Mutatina has been overruled by a number of cases. He said that the decision of **Basil Massawe** (supra) was made in 1996 and Interpretation of Laws Act came into force in 21/09/2004.

I have considered the submissions presented by the respective Counsel for the parties. What is for consideration is whether the preliminary point of objection raised by defendants have merit.

It is without dispute the matter at hand is an appeal wihich has been preferred against the decision of the District Tribunal in exercise of its original jurisdiction. Since there is no format that has been provided by the Land Dispute Court Act and the Regulations thereunder, section 51 of the Land Disputes Court Act comes into hand and allows the application of the CPC. Order XXXIX Rule (1) of the CPC provides that, appeals to the High Court shall be by way of Memorandum of Appeal.

I have noted that what is before the court is a Memorandum of Appeal. Though Mr. Rugomela insisted that he was served with a Petition of Appeal, but what has to be relied upon, is the record in court and not otherwise. Subsequently, the Memorandum of Appeal filed in court is the one to be considered and not what is in possession of Mr. Rugomela. Since what is filed in the court is a Memorandum of Appeal then the claims by the respondents are devoid of merit.

Notwithstanding what has been established above, even if what was in court was a Petition of Appeal, still the omission is not fatal as it does not go to the root of the appeal nor does it prejudice the rights of the respondent in any way. In other words, it does not affect the substance of this appeal. I am aware that the overriding objective principle cannot be applied blindly against the mandatory provision of the procedural law which goes to the foundation of the case (**Mondorosi Village Council vs 2 others vs Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 of 2017**), but in this application the principle can be applied as the grounds of appeal which lay the foundation of appeal have not been touched but only the title which can easily be corrected.

In the result the preliminary objection raised has no merit and it is consequently dismissed. Costs shall follow events.

It is so ordered

V.L. MAKANI
JUDGE
20/06/2022