

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

LAND APPEAL NO.168 OF 2021

*(Originating from District Land and Housing Tribunal for Kinondoni in
Application No. 323 of 2016)*

JULIUS LUGAZIYA APPELLANT

VERSUS

ADAM MSELEMRESPONDENT

RULING

Date of last Order: 12.07.2022

Date of Judgment: 21.07.2022

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No. 313 of 2017. The material background facts to the dispute are not difficult to comprehend. They go thus: The respondent lodged an application at the District Land

and Housing Tribunal for Kinondoni praying to be declared the lawful owner of the suit land, the appellant be ordered to vacate the suit premises and restrained to interfere with the respondent's right of peaceful enjoyment of ownership. The applicant in his submission contended that the appeal is against the Order issued by Hon. Lung'wecha dated 15th April. 2021. The learned counsel in his Ruling stated that the counter claim was also struck out.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No.323 of 2016 and raised three grounds of grievance, namely:-

- 1. That the Trial Tribunal erred and grossly misdirected itself in law and on the facts in ruling that Land Case No. 323 of 2016 had been conclusively determine without first disposing of the counter-claim therein contained.*
- 2. That having so found and determined the Trial Tribunal further erred and grossly misdirected itself in holding that Land Case No. 313 of 2017 was properly before the Tribunal.*
- 3. That the decision and orders of the Trial Tribunal are legally and factually problematic on any other ground (s).*

When the matter came up for orders on 6th July, 2022 the respondent had the legal service of Mr. Erick Kamala and the appellant was absent. The respondent's counsel prayed for a hearing date of preliminary objection. Hearing of the matter was through written submissions the filing of which followed the schedule drawn by the Court.

In his written submission, the respondent complained that the appeal is time-barred as per section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The respondent contended started to narrate the historical background which I am not going to reproduce hereunder.

Mr. Kamala contended that the impugned Ruling was delivered on 19th July, 2017 and the appellant lodged the instant appeal on 17th August, 2021 which is over three years after the delivery of the District Land and Housing Tribunal Ruling. He added that the Ruling dismissed the appellant's preliminary objection in Land Application No. 313 of 2017 which was delivered on 15th April, 2019, and two years lapsed before the appellant lodged the present appeal. He added that the Land Application is pending before the tribunal.

It was his submission that the law governing appeals from the District Land and Housing Tribunal to the High Court is section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] that stipulates that an appeal may be lodged within 45 days from the date of the decision or order. To bolster his submission he cited the case of **Halima S. Sukuzi v Sihaba Nassoro**, Land Appeal No. 141 of 2016. He insisted that the matter is time-barred. He added that section 74 (2) of the Civil Procedure Code Cap.33 [R.E 2019] stated that no appeal shall be against or made in respect of any preliminary or interlocutory decision. He insisted that the Land Application No. 313 of 2017 is still pending before the tribunal and the ruling of the tribunal is unappeasable as it did not finally determine the application.

On the strength of the above submission, he prayed for this court to uphold the preliminary objection with costs.

In reply, the appellant's counsel started to submit by stating that there is a slip of pen that the appeal is against the ruling in Land Case No. 313 of 2016. He submitted that it is clearly pointed out that the appeal is against the order of Hon. Lung'wecha delivered on 15th April, 2019 which was extracted on 14th July, 2021. He added that the appellant could not have

challenged the order in Land Case No. 313 of 201, because the order of the tribunal was passed in his favour by Hon. Mlyambina, Chairman, as he then was. He urged this Court to consider this as an appeal against the Order of Lung'wecha of 15th April, 2021.

Submitting against the preliminary objection, the learned counsel for the appellant submitted that the Application No. 313 of 2016, along the defence was pleaded a Counter-Claim and the same was determined and the appellant waited for the date to be fixed for this hearing, which was never availed. Before that could be done, and to pre-empt the on-going legal process, the Respondent filed Land Case No.313 of 2017. We resisted this "new" land case on the grounds that the previous case No. 313 of 2016 had not been disposed of. This complaint was rejected on the ground that when Hon. Mlyambina, had sustained our preliminary objection against the Respondent's case, he had also dismissed the counter-claim. This finding by Lung'wecha was of his own making, and as such, patently incapable of support.

He claimed that the decision of closing the Land Case No. 313 of 2016, prejudiced the appellant herein. He added that the file was purportedly closed, there is no decree or order in that file against which allowed them to

lodge an appeal, because technically, that file, in law still exists. He added that the cause of action is not that which is restricted by Section 74 (2) of the Civil Procedure Code.

The learned counsel for the appellant contended that it is trite law that when any matter is due for delivery of a decision, the parties must be notified and where such decision has been made. He added that, therefore, time will only start counting upon the parties after being made aware of a decree that they seek to impugn, and the counting does not begin when the ruling / order was made. Supporting his submission he cited the cases of **Alex Senkoro & 3 Others vs. Eliambuya Lyimo (As Administratrix of the Estate of Frederick Lyimo, Deceased)**, Civil Appeal No. 16/2017. CAT (unreported) it was his view that the cited case of the Court of Appeal renders the decision in Halima **Sukuzi v Sihaba Nassoro** (supra), cited by the respondent, hollow and of no consequence.

In conclusion, the learned counsel for the appellant urge this Court to dismiss the preliminary objections for the proper end of justice.

In his rejoinder, the learned counsel for the respondent reiterated his submission in chief. He distinguished the cited case of **Alex Senkoro** (supra). Mr. Kamala argued that in the cited case, the Court of Appeal

addressed the issue of time barred by relying on the provision of the Law of Limitation of Time, Cap. 89 [R.E 2019] and section 41 of the Land Disputes Courts Act, Cap. 216 which was revised in 2002 that is not applicable in this present matter.

He added that the allegations of the appellant cannot stand since the appellant has not lodge a letter to request for a copy of the ruling. Ending. He urged this court to sustain the preliminary objection and dismiss the appeal with costs.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by both learned counsels. Having done so, it should be now opportune to determine the preliminary objection raised by the respondent's Advocate and the main issue for determination is *whether the preliminary objection is meritorious*.

Before addressing the point of law, the learned counsel for the respondent has stated that the Land Application No. 313 of 2017 is pending before the Tribunal and the learned counsel for the appellant had simply stated that the cause of action is not that is restricted by section 74 (2) of the Civil Procedure Code, Cap.33. I find it prudence to address

this issue before addressing the issue whether or not the appeal before this court is time barred.

The learned counsel for the appellant claimed that the present appeal is against the decision of Hon. Lung'wecha dated 15th April, 2019, however, the third ground in the Memorandum of Appeal, the appellant is claiming that the trial tribunal erred in and grossly misdirected itself in holding that Land Application No. 313 of 2017 was properly before the tribunal that means the appellant is also disputing the order of the Chairman which was issued in Land Application No. 313 of 2017 and there is no dispute that the said Application is pending before the District Land and Housing Tribunal for Kinondoni.

Going through the court records and as rightly pointed out by the learned counsel for the respondent, I have noted that the Land Application No. 313 of 2017 is pending before District Land and Housing Tribunal for Kinondoni. That means the appeal partly is against an interlocutory order. The Land Application No. 313 of 2017 is pending before Hon. Rugarabamu. Even the order of Hon. Lung'wecha dated 15th April, 2019 is an interlocutory order because the application is not determined to its finality.

It is trite law that if a preliminary objection disposes of the case, it can be revised contrary that it cannot be revised. In the case of **Lucky Spin Ltd (Premier Casino) Ltd v Thomas Alcorn & Joan Alcorn**, Revision No. 445 of 2015 Labour Division at Dar es Salaam. As rightly pointed out by the learned counsel for the respondent that no appeal can be filed in respect of interlocutory decision or order of the Court or Tribunal unless such decision or order has the effect of finally determining the suit. Section 74 (2) of the Civil Procedure Code Cap.33 [R.E 2019] provides that:-

*" 74 (2) Notwithstanding the provisions of subsection (1), and subject to subsection (3), **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 the effect of finally determining the suit.**" [Emphasis added].*

Applying the above provision of the law, it is crystal clear that Interlocutory decisions or orders of the Court or Tribunal are not subject to revision. I fully subscribe to the learned counsel for the respondent submitted that the instant appeal cannot be exercised since the District Land and Housing Tribunal has not decided the Land Application No. 313

of 2017 to its finality. Therefore even the point of objection concerning time barred cannot be determined at this juncture because this application is filed prematurely before this court.

In the upshot, I proceed to strike out the Land Appeal No. 168 of 2021 without costs.

Order accordingly.

Dated at Dar es Salaam this date 21st July, 2022.




A.Z.MGEYEKWA
JUDGE
21.07.2022

Ruling delivered on 21st July, 2022 in the presence of Erick Kamala, learned holding brief for Dr. Chacha, learned counsel for the appellant and Erick Kamala, learned counsel for the respondent.




A.Z.MGEYEKWA
JUDGE
21.07.2022

Right to appeal fully explained.