

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 43 OF 2023

BETWEEN

FATUMA SHEFA AYOUB..... APPLICANT

VERSUS

ATHUMAN MOHAMED TUWANO..... 1ST RESPONDENT

EQUITY BANK LIMITED.....2NDRESPONDENT

RULING

A. MSAFIRI, J.

The applicant has brought this application under section 42 (2) of the Land Disputes Courts Act, Cap. 216 R.E 2019 and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019.

She is seeking for an order of extension of time to file an appeal to this Court against the Judgment of Application No. 37 of 2022 by the District Land and Housing Tribunal for Temeke (trial Tribunal). The application is supported by an affidavit of the applicant herself.

The application was contested by the 1st respondent who filed his counter affidavit and raised a preliminary objection on point of law to the effect that the affidavit supporting chamber summons is fatally defective as it was sworn before Ms. Mary Nyasebwa at a date and time she was not in

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possession of valid practicing certificate. The 2nd respondent was in support of the application so did not file a counter affidavit.

On 24/2/2023, the matter was set for hearing. The applicant was represented by Mr. Sosthenes Edson, learned advocate, the 1st respondent was represented by Mr. Hope Kawawa, learned advocate and Mr. Mwang'eza Mapembe and Ms. Happiness Karoli, learned advocates, appeared for the 2nd respondent.

Mr. Edson addressed the Court on the raised preliminary objection and submitted that, the applicant concede with the raised preliminary objection and prayed to withdraw the application with leave to refile. He prayed to do so without costs.

Mr. Kawawa vehemently objected to the prayer of withdrawal of the application. He argued that what has been done by the applicant is tantamount to gross negligence. He asserted that, if the counsel for the applicant would have done due diligence, he would have discovered that the affidavit is defective and that since he did not do so, he prays that the applicant's prayers be rejected. That if the prayer of withdrawal will be granted by the Court, then it should be with costs.

Mr. Edson reiterated his submission and prayers and added that the act of the advocate to attest the affidavit of the applicant while her practicing certificate has not been renewed does not go to the merit of the case.

Having heard the submissions from the rival parties, the issue here is whether the prayer of withdrawal of the application is tenable. *Acle*

It is trite law that once a preliminary objection has been raised, it has to be determined first before proceeding with anything on the merit of the case. It is also a rule that, when the preliminary objection is raised on the matter, the other party (adversary party) cannot withdraw the said matter until the objection has been disposed of.

The other party if he agrees with the preliminary objection which have been raised, the only way is to concede, and since the remedy for incompetent matter before the court is to strike it out, then the court will proceed to strike out the said matter.

The applicant has instituted this application since 30th January 2023. The 1st respondent filed his counter affidavit on 17th Feb. 2023 where he also raised a preliminary objection.

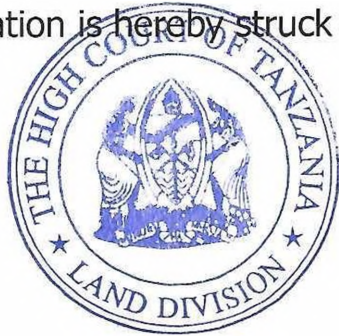
The applicant had an ample time since the date he has filed his affidavit, to detect the defectiveness and seek leave of the Court to withdraw the matter even before the 1st respondent has filed his preliminary objection. The parties appeared for the first time before the Court on 15 Feb 2023. On that date, the counsel for the applicant could have sought leave to withdraw the matter but did not so until the preliminary objection has been raised.

Now, the applicant cannot be allowed to withdraw this matter at this stage when a preliminary objection has been raised about the competency of this application.

However, the applicant through her advocate has conceded to the raised preliminary objection and since he agrees that this application is incompetent. *Adls.*

before the Court, then the remedy is not to withdraw the same but to strike it out.

The prayer for withdrawing the application is not granted. The Application is hereby struck out with no order to costs.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal dotted line.

A. MSAFIRI
JUDGE

24/02/2023