

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

MISC. LAND APPLICATION NO. 540 OF 2022

ISSA RAJABU MCHOMVU.....APPLICANT

VERSUS

AZIZA RAJABU KONDO.....RESPONDENT

Date of Last Order: 22.12.2022
Date of Ruling: 27.02.2023

RULING

V.L. MAKANI, J

This ruling in respect of preliminary objection raised by respondent that:

- 1. The application is incompetent for being res judicata.*
- 2. The application is incompetent for abuse of the court process and delay the ends of justice.*

The matter proceeded by way of written submissions and the respondent drew and filed her own submissions. The submissions in reply on behalf of the applicant were filed by Justin Attorneys.

On the first point of objection Ms. Kondo said that applicant is seeking extension of time within which to file revision against the judgment and decree of Kisarawe District Land and Housing Tribunal (District Tribunal) in Land Revision No.165 of 2021. He said that the application is *res judicata* to Misc. Land application No.270 of 2022 which was determined on 20/06/2022 for being time barred (**Annexure Z-2**). She said the matter at hand has been finally and conclusively been determined and this court has no jurisdiction. She relied on the case of **MM Worldwide Trading Company Limited & Others vs. National Bank of Commerce Ltd, Civil Appeal No.258 of 2017 (CAT-DSM)**(unreported). He said that proper avenue was for the applicant to file an appeal against the decision in Land Application No.270 of 2022.

On the second point of objection, she said the respondent is the owner of the disputed land which measures 3 acres since 1992 up to 2018; when cause of cation arose, applicant had already been served with Notice of Appeal on 04/07/2022 to the Court of Appeal against the decision in Misc. Land Application No.270 of 2022. That after the striking out of Misc. Land Application No.270 of 2022 for being time

barred there is no room for seeking extension of time to file revision as was done by the Applicant. She said after receipt of the Notice of Appeal 04/07/2022, the filing of this application on 08/09/2022 amounts to abuse of the court process. She prayed for the court to uphold the raised objections with costs.

In reply, the Counsel for the applicant said that the application at hand emanates from Land Appeal No.140 of 2020 in which the High Court ordered the matter to start afresh in the court with competent jurisdiction. That the respondent instituted Land Dispute No.70 of 2021 at Msimbu Ward Tribunal without the applicant's knowledge and it ruled in the respondent's favour. The applicant was aggrieved with the decision and filed Revision No.165 of 2021 at the District Tribunal which was decided in the applicant's favour. The applicant filed then Misc. Land Application No.270 of 2022 for review which was struck out for being time barred and the applicant decided to file this application.

Counsel said that the issue of *res judicata* does not apply in the present matter. That Misc. Land Application No.270 of 2022 was in respect of revision and was not heard and decided in its finality while in this application the applicant is seeking for extension of time. Thus section 9 of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**) does not apply. That respondent's opinion that application No.270 of 2022 should have been dismissed instead of struck is just a misconception. Counsel further reiterated his earlier opening submission and insisted that illegalities must be on the face of the records. Counsel relied on the case of **Principal Secretary Ministry of Defence and National Service vs Devram Valambia (1991) TLR 387**

On the second limb of preliminary objection, Counsel said that there is no appeal/revision which has been dismissed for being out of time as per section 3 (1) and (2) of the Law of Limitation Act, Cap 89 RE 2019 (the **Limitation Act**). That the complained Misc. Land Application No. 270 of 2022 was struck out after the court noted that the decision of the lower Tribunal was tainted with illegalities. That there is no abuse of the court process in that regard. Counsel prayed for the preliminary points of objections to be dismissed with costs.

In rejoinder, Ms. Kondo reiterated her main submissions and added that Misc. Land Application No.270 of 2022 was revision and not review and further that the said application was heard and determined to its finality that it was time barred. She reiterated her prayers for the objections to be upheld with costs.

The main issue for consideration is whether preliminary points of objection raised by respondent have merit. But before embarking on considering the objections I would wish to set the records straight as per the court records.

The applicant herein filed two applications which were both before Hon. Mwenegoha, J. These were **Land Revision No. 15 of 2022** (arising from Revision No. 165 of 2021 of the District Tribunal) and **Misc. Land Application No. 270 of 2022** (application for stay of execution pending the hearing and determination of Land Revision No. 15 of 2022). The Land Revision No. 15 of 2022 was struck out with costs, while the application for stay was withdrawn. However,

throughout the submissions by the parties, they have been referring to the application for revision as Misc. Land Application No. 270 of 2022 (which is not correct) instead of Land Revision No. 15 of 2022. This court will therefore stick to the correct references as per the court record to avoid any further confusions.

As for the objection that this application is *res judicata* Land Revision No. 15 of 2022, Counsel for the parties is not disputing the existence of the said Land Revision No. 15 of 2022. However, the respondent states that the application at hand is *res judicata* because Land Revision No. 15 of 2022 was finally and conclusively determined. On the other hand, the applicant states that Land Revision No. 15 of 2022 was only struck out and not dismissed as per section 3(1) of the Limitation Act. In that regard therefore, the only task of the court is to determine whether Misc. Land Application No. 15 of 2022 was struck out or dismissed and the consequences therefrom.

An order of dismissal means that the matter was heard and finally determined on its merit and that order has the effect of preventing

the applicant from pursuing the same matter before the same court. Meanwhile, an order striking out a matter means that the matter was heard but for certain reasons it was found to be incompetent, and this would enable the applicant to rectify the error or defect and refile the same application after rectification (see **Singida Sisal Products & General Supply vs. Rofu General Trading Limited & 4 Others, Commercial Review No.17 of 2017 (HC-Commercial Division)** (unreported). This is also the position maintained by the Court of Appeal of Tanzania in the case of **National Insurance Corporation (T) Limited vs. Shengena Limited, Civil Application No. 230 of 2015, (CAT-DSM)** (unreported) where it was stated:

"...we wish to remind the learned judges that orders of dismissal and striking out a matter have different legal consequences. As rightly submitted by the applicants, while the former order presupposes that the matter has been heard on merit and finally determined hence hampers the appellant from pursuing the same matter before the same court, the later does not for it presupposes that the matter is not heard on merits but for certain causes it is found incompetent..."

However, in the case of **MM Worldwide Trading Company Limited** (supra) the principle was elaborated further that, irrespective that an order may have used the words striking out, but

where the matter relates to time limitation, the order amounts to a conclusive determination of the matter. In other words, where limitation of time is involved, regardless of the order (dismissal or striking out), the matter is deemed to be conclusively determined. The Court of Appeal in this cited case followed the case of **Ngoni Matengo Cooperative Marketing Union Ltd vs Ali Mohamed Osman [1959] EA 577** and stated:

"That decision is an authority for the proposition that it is the substance of the matter that must be looked at rather than the words used. It is clear to us that irrespective of the words used, the final order amounted to a conclusive determination by the trial court disposing of the former suit being time barred. In our view, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3(1) of the [Limitation] Act."

In the case of **Hashim Madongo & 2 Others vs. Minister for Industry & 2 Others, Civil Appeal No. 27 of 2003 (CAT-DSM)** (unreported) the Court of Appeal dealing with **"striking out"** vs. **"dismissal"** on account of time bar had this to say:

With respect, we wish to pause here and observe that, for reasons which will be apparent hereunder, Ms. Monica Otaru was correct in the assertion that after the application was determined by Kalegeya, J. the appellants were not at liberty to bring a fresh application,

notwithstanding that the Judge "struck out" the application instead of "dismissing it."

The order of this court dated 20/06/2022 in Land Revision No. 15 of 2022 is clear that the matter is struck out with costs and not dismissed. However, the basis of the striking out of the suit was that the applicants were conceding to the preliminary objection raised by the respondent that the suit was time barred. In essence, by the applicants conceding to the objections raised, they agreed that the suit was time barred and as such the matter was conclusively determined and therefore did not have the effect of reviving it. It is *res judicata*. In such a situation and in terms of the cited cases above, it is not open for the applicants to come back in the same court and seek extension of time. Indeed, when Counsel for the applicants pleaded with the court to give him an order for striking out instead of dismissal, he was aiming at coming back to court after rectification of the procedure. But this is not feasible as the basis of the order is time limitation.

Having established that this application is *res judicata*, I find it academic to discuss the remaining point of objection. In the result,

the preliminary points of objection raised by respondent have merit and are upheld. The application is dismissed with costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
27/02/2023