IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 3046 OF 2024

(Arising from Land Case No. 5/2013 by Hon. Mkasimongwa J., High Court of Tanzania, at Dares Salaam dated 30th June 2015)

LEKAM INVESTMENT CO. LTD .....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

AL-JUMAA MOSQUE .....1st RESPONDENT

THE ADMINISTRATOR GENERAL .....2nd RESPONDENT

CLEMENT KAHABUKA .....3rd RESPONDENT

ABDALLAH ILAMULIRA .....4th RESPONDENT

RULING:

04th & 15th April 2024.

KIREKIANO; J.

The parties' relationship is centred on litigation over a disputed property in Plot No. 28, Block A, Uhuru Street. The background on ownership of this property is of its own story but not the subject of this application. Suffice it to say here that this court on 30th June 2013 in Land Case no. 05/2013 (Hon. Mkasimongwa, J) entered an ex parte judgment against the applicant declaring 1st respondent the lawful owner of the

disputed property. In aftermath of that decision there has been a series of applications. Leaving the details behind, the applicant in this application prays for the following orders:

1. *That, the Honourable Court be pleased to extend the time within which the applicant can be permitted to lodge a notice of appeal against the whole decision of this Court, in the Land Case No. 5 of 2013 dated 30th June, 2013 before Hon. Mkasimongwa, J.*
2. *That this Honourable Court be Pleased to grant any relief it deems fit to grant.*
3. *The cost of this application be provided for,*

When this application was scheduled for hearing the first respondent posed a preliminary objection against the application on two points thus;

1. *The application is incompetent as the applicant has no right of appeal after having pursued an application for setting aside the same ex-parte judgment sought to challenge by way of appeal.*
2. *The application is an abuse of the process of the court for being forum shopping.*

The applicant had the service of Mr Ambrose Mkwera learned advocate while the 1st Respondent was represented by Mr Daimu Khalfan and Mr Abdul Fatah learned advocates, the second respondent was represented by

Mr Ayoub Sanga and Mr Silvanus Rwechungura learned state attorneys. The third and fourth respondents defaulted appearance despite efforts to serve them by publication.

For sake of coherence this application, it is common ground that; **first,** on 30th June 2013 this court Hon. Mkasimongwa, J passed Ex pate Judgment against the applicant. **Second,** on 30th October 2020, this court Masabo J dismissed the applicant's application to set aside the ex parte judgment. There was an attempt to appeal to the court of appeal against this decision, the appeal was struck out for want of leave and later application for extension of time to obtain leave was withdrawn.

In support of the first point of objection, Mr Daimu submitted that as it stands, the applicant has no right of appeal against the ex parte decision thus extension of time cannot be competent. According to him, the applicant had two options as remedy thus; **first**; to set aside the ex parte judgment, under order IX Rule 13 (1) CPC **or second**, to appeal against the merit of the ex parte judgment under section 5 (1) (a) of the Appellate Jurisdiction Act. In his contemplation, the options are disjunctive and not conjunctive or cumulative.

He argued that the first option to set aside the judgement was determined on merit before Masabo J, thus the applicant is precluded from

pursuing the 2nd option which is to appeal against the merit of the decision. In support of his position, he cited the court of appeal decision **in Dangote Industries Limited Tanzania vs Warnercom T. Limited (Civil Appeal 13 of 2021) [2022] TZCA 34 (17 February 2022** but also, Indian Decisions in **Pratap Rai and Another vs Sohan Lal and Ors. on 3 March 1994 at 247 and Bank of India Vs Lakshimani Dass and others AIR [2000] SC 1172. VSL 3 SCC 640** to the effect that where two remedies are available and a party opts to take one option in derogation of the other, a part is a bond by the option he made"

On the second point, he argued that the applicant having been heard on merit on the first application to set aside the appealable decision, it is an abuse of the court process, to switch to another remedy believing the same to be favorable. This was a forum shopping. He cited the decisions from Philippine Supreme Court in **Jesse Yap, Petitioner, Vs. Court of Appeals (Special Eleventh [11th] Division), and Eliza Chua and Evelyn Jurisprudence > the Year 2012 > June 2012 Decisions > [G.R. No. 186730: June 13, 2012]** and decisions from Supreme Court of India in **Udyami Evam Khadi Gramodyog Welfare vs State Of U.P. And Others on 5 December, 2007** at paragraph 9. On the tests to determine whether a party violated the rule against forum shopping,

On his part Mr. Sanga for 2 second respondent was brief. He did not subscribe to the view taken by Mr Daimu, instead, he took a stance that in the case of **Dangote Industry** at page 10 the Court of Appeal expressed that the right of appeal exists irrespective of other premises. What was emphasized in that decision, is that the applicant cannot exercise the two remedies at the same time or simultaneously.

He also argued that there was no question on forum shopping since all rights are statutory. He cited Court of Appeal decision in **YARA Tanzania Limited vs DB Shapriya & Co. Limited (Civil Appeal No. 360 of 2022) [2023] TZCA 17763 (18 October 2023) page 15** to support his position.

In his reply, Mr Mkwera Counsel for the applicant responded that given the decision in **Mukisa Biscuit** and **Yohana Michael Slengasin Vs Mirambo Mabuku,** the first respondent argument does not address the pure point of law.

On the first point, he argued that given the Appellate Jurisdiction Act, an appeal against an ex parte order is an automatic right. Hence the right cannot be curtailed under any circumstance. He echoed the decision in **Yara Tanzania Ltd** cited by Mr Sanga.

On the second point, he did not subscribe to the view taken by Mr Daimu because there is no pending application in court. In his view, forum shopping is where two options exist at the same time and are exercised at per. According to him the cited decisions from India and Philippines cited by Mr. Daimu are distinguishable.

Briefly, Mr. Daimu rejoined that it is the cited decision of **Yara Tanzania Ltd** which is distinguishable because there were two applications but the 1st one had not been determined on merit.

The law as it stands under Order IX Rule 13 (1) **Civil Procedure Code Cap 33 [RE 2022]** is to the effect that in case a decree is passed ex parte against a defendant, the defendant may apply to the court by which the decree was passed for an order to set it aside. As such under section 70 (2) of the Code but also section 5 (1) (a) of the Appellate Jurisdiction Act, an appeal may lie from an original decree passed ex parte. The parties' point of departure and Centre of the objection is whether a party who exercises discretion to opt to set aside the decree is barred from the remedy of appealing and vice versa hence this application is a forum shopping.

Now in the matter at hand what is at issue is the remedy available to the applicant. There is no dispute that there was a decision refusing to set aside the ex parte judgment.

The question is whether the same bared the subsequent application as argued by Mr Daimu. In this, I have reflected on the cited case of **Dangote Industry**. What the court of appeal meant as rightly submitted by Mr. Sanga was that the appellant should not have simultaneously filed an appeal in the Court along with an application to set aside the ex parte judgement. In other words, the right of appeal reserved by the aggrieved party was not conquered by the existence of other options to set aside the decision. In the cited case of **YARA Tanzania Limited (supra),** This position was elucidated on Page 15;

> *"We thus find that it was wrong to equate the right to appeal with the right to set aside a default judgment as riding two horses at the same time. At this point, we wish also to briefly state that, there can never be a double jeopardy to a party who is exercising his right of appeal provided by the machinery of law*

This question has also been a subject in this court, Given the similar discussion and parties' contending position, this court in **Registered Trustees of Pentecoste Church in Tanzania vs Magreth Mukama**

(Civil Appeal 45 of 2015) [2016] TZHC 2 (15 December 2016)

Maige J, maintained a position that;

> *"A right to appeal against an ex-parte decree on its merit is automatic and does not depend upon there being a prior attempt to have it set aside".*

Given the above, maintaining this position, I do not subscribe to the view taken by Mr Daimu that the applicant's attempts to set aside the ex parte decision precluded him from pursuing the right to appeal. I see no merit in the first point of objection.

On the aspect of forum shopping, having decided on the first point submitted at length by Mr Daimu, I have also considered the decision in **JESSE YAP** considered the test of *Litis pendent,* as a ground for the dismissal of litigation that is to say situation where two actions are pending between the same parties for the same cause of action such that the second action becomes unnecessary and vexatious and will deserve dismissal. The court said in its rather instructive interpretation of what amounts to forum shopping that;

> *To determine whether a party violated the rule against forum shopping, the most important factor to ask is whether the elements of lists pendent (sic) are present, or whether a* ***final judgment in one case***

> ***will amount to res judicata in another,*** *i.e., whether in the two or more cases pending, there is the identity of parties, rights or causes of action, and the reliefs sought. (Emphasis supplied).*

I have decided above that the application to set aside an ex parte order does not make the right to appeal res judicata. As such there is no pending application in court pursuing attempt to set aside the ex parte judgment. It is based on this that I am of the settled mind that the decision cited on forum shopping was distinguishable for being in a different context.

In the end the points of objection raised by the 1st respondent's deficiency, of merit the same is overruled, costs shall be determined in the final hearing of the application.

A.J KIREKIANO

JUDGE

15.04.2024

Ruling delivered in presence of Mr. Ambroce Mkwera counsel for the applicant and in presence of Mr. Samwel Mtabazi, State Attorney for the 2nd respondent and in presence of Mr. Abdul

Fattah for the 1st respondent and in absence of 3rd and 4th respondents.

A.J KIREKIANO

JUDGE

15.04.2024