

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

**LAND CASE NO. 156 OF 2020**

**1. ANGELO FERNANDES** }  
**2. SHAHISTA ADAM** } ..... **PLAINTIFFS**

**VERSUS**

**1. HOUSES AND HOMES LIMITED** }  
**2. JITESH JAYANTILAL LADWA** }  
**3. BHAVESH CHANDULAL LADWA** } ..... **DEFENDANTS**  
**4. NILESH JAYANTILAL LADWA** }  
**5. AATISH JDHIRAJLAL LADWA** }

**RULING**

Date of Last Order: 13/08/2021 &  
Date of Ruling: 20/08/2021

**S.M. KALUNDE, J.:**

By an amended plaint dated 04<sup>th</sup> November, 2020 Angelo Fernandes and Shahista Adam, the plaintiffs herein, filed Land Case No. 156 of 2020 ("**the suit**") against the defendants. The plaintiffs claim against the defendants jointly and severally is for a declaration that they are lawful owners of Apartment No. F5 and F6 on 2<sup>nd</sup> Floor, F wing situated on Plot No 78/1-4 at Mzimuni Street, Msasani Beach, Kawe Area, Kinondoni

Municipality, Dar es salaam (**"the suit property"**); Permanent injunction restraining the defendants from interference with peaceful enjoyment of the suit property; a declaration that an eviction organised by the carried out by the defendants was illegal and unlawful; and payment of punitive and general damages.

On being served with plaint, on 17<sup>th</sup> November, 2020 the 2<sup>nd</sup> defendant filed his defence, the effect of which was to deny all the plaintiffs allegations. The 2<sup>nd</sup> defendant pleaded further that, the plaintiffs were not lawful owners of the security property hence they were not entitled to any relief.

Together with his Written Statement of Defence, the 2<sup>nd</sup> defendant has raised three (3) preliminary points of law objecting the suit to proceed against him. The points *in lamine* raised are that: -

- (1) The plaint is incurably defective for contravening Order VII Rule 1 (R) of the civil Procedure code Cap. 33 R.E 2019:**
- (2) The present suit is an abuse of court process; and**
- (3) That the suit is res-subjudice to the intended appeal the notice of which was filed in this Hon court on October, 2020.**

The preliminary objections were argued by way of written submission. The 2<sup>nd</sup> defendant was represented by **Mr. Sisty Benard**, learned Advocate and the plaintiffs were being

represented by **Mr. Alex Mgongolwa**, learned advocate. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were represented by **Mr Shedrack Samwel**, however, since they did not raise any objection, they did not submit for or against the objections.

For the reasons that shall be apparent later in this decision, I propose to first discuss the question of abuse of court process.

At outset Mr Sisty, abandoned the third point objection and proposed to submit on the 1<sup>st</sup> and 2<sup>nd</sup> points of objection. Submitting on the issue of abuse of court process, the counsel argued that the issue touches the jurisdiction of this court in entertaining the present suit. In support of this point, Mr. Sisty argued that, sometimes on 17<sup>th</sup> May, 2020, the plaintiffs filed, against the 2<sup>nd</sup> defendant, Land Case No 75 of 2020 over the same suit property. He added that, the said suit was struck out by this court on 25<sup>th</sup> September, 2020. He added that, instead of instituting a fresh suit on 12<sup>th</sup> October, 2020, the plaintiffs logged a Notice of Appeal to the Court of appeal seeking to challenge the whole decision of this court in Land case No 75 of 2020.

The counsel argued that the notice of appeal was still pending as it has never been withdrawn. He added that, the position of the law was settled that once a Notice of appeal is logged, the original or trial court ceases to have jurisdiction to entertain the case. In bolstering his position, he cited the case of **East Africa Development Bank vs. Blueline**

**enterprises Limited, Civil Appeal No 101 of 2009**  
(unreported).

The counsel concluded that, since the Notice was timely logged and served to the Defendants and has never been withdrawn, the present suit was an abuse of court process, and thus the suit ought to be dismissed with costs.

In response Mr. Mgongolwa argued that the counsel for the defendant was attempting to mislead the court. The counsel admitted that the plaintiffs, initially filed Land Case No. 75 of 2020 which was eventually struck out on technicalities. He argued that the remedy available for the plaintiffs was to file a fresh suit.

As for the notice of appeal, the counsel did have much to say, he submitted that there was no appeal to the Court of Appeal. He argued that there was no notice of appeal as, if the same was present, it would have been served to the defendants within seven (7) days, as per the Court of Appeal Rules, 2009. The counsel concluded with a prayer that the preliminary objections were misconceived and not tenable in law. He prayed that the same be dismissed with costs.

Having presented the arguments advanced by the parties,

I have given full consideration to the pleadings and submissions from both counsels. I do not think, however, that the lengthy submissions need detain me that much. The issue for my determination is whether the P.O is merited.

It is not in dispute that prior to the present suit, the plaintiffs filed, before this Court, Land Case No. 75 of 2020. There is also no dispute that, on 25<sup>th</sup> September, 2020, this Court (**Hon. Maghimbi, J**) struck out Land Case No. 75 of 2020. Subsequent to that, through an amended plaint dated 04<sup>th</sup> November, 2020, the present suit was filed.

Mr. Sisty argued submitted that, prior to filing the amended plaint, on 12<sup>th</sup> October, 2020 the plaintiff logged a Notice of Appeal intending to challenge the whole decision of this Court dated 25<sup>th</sup> September, 2020. In accordance with the pleadings Mr. Sisty was served with the said Notice of Appeal on 26<sup>th</sup> October, 2020. Mr. Sisty was of the view that, since the Notice of Appeal was still intact and has not been withdrawn the present suit was an abuse of Court process. He therefore urged this Court to strike out the suit with costs.

Mr. Mgongolwa maintained that there was no appeal pending, because if there was an appeal the defendants would have been served with the notice within seven (7) days.

Seemingly, Mr. Mgongolwa does not dispute the fact that the plaintiff's logged a Notice of Appeal. His argument is that the notice was not served to the defendants. I took a liberty to consult the records before this Court. In the end I observed that the said notice was slotted for admission on 09<sup>th</sup> October, 2020 and eventually marked as logged before this Court on 12<sup>th</sup> October, 2020. In his pleadings, Mr. Sisty attached a copy of the Notice which indicate that it was served on him on 26<sup>th</sup>

October, 2020 at around 11:21 am. That fact has not been challenged or refuted by the plaintiffs.

I am aware that, a party dissatisfied by the decision of this Court has the right to seek redress through an appeal. I am also alive with the position that, and as rightly argued by Mr. Mgongolwa, once a suit is struck out, the remedy available to the aggrieved party is to file a fresh suit to safeguard his interests. In the circumstances of the present case, the question now is whether it is proper for the plaintiff to challenge the decision of this Court striking out a suit (**Land Case No. 75 of 2020**) and at the same time maintain a fresh suit (**Land Case No. 75 of 2020**) which is intended to safeguard the same interests. I do not think that was proper.

I agree with Mr. Sisty that, in the circumstances of this case, the Notice of Appeal logged on 12<sup>th</sup> October, 2020 is still intact and laying at the Registry of the Court of Appeal. The position of the law is well settled that a Notice of Appeal ceases to have effect upon a Court order deeming it to have been withdrawn in terms of Rule 91 (a) of the Court of Appeal Rules. See **East African Development Bank v. Blueline Enterprises Limited** (supra) and **Williamson Diamond Limited v. Salvatory Syridion & Another**, TBR Civil Application No. 15 of 2015(unreported).

There is no dispute that, through the Notice of Appeal logged on 12<sup>th</sup> October, 2020 and still intact at the Registry of the Court of Appeal, the plaintiffs are challenging the decision

of this Court striking out Land Case No. 75 of 2020. Without deciding, assuming that the plaintiff proceeds to prosecute the appeal and went on to succeed in restoring Land Case No. 75 of 2020 and that suit proceeds to its merit, what will be the position and status of Land Case No. 156 of 2020? How would the decision in the two cases be reconciled? Similarly, to the suit, if it succeeds would the plaintiff still maintain their pursuit of the intended appeal? Certainly, I think it is prudent for the plaintiff to choose one course of action, otherwise they cannot be allowed to play a game of chances or ride two horses at the same time. Prudence would dictate that the appeal be determined first before a fresh suit is filed.

The above view finds the sustenance from various decisions of the Court of Appeal, particularly, **East African Development Bank v. Blueline Enterprises Limited** (supra); **Attorney General vs Tanzania Ports Authority & Another** (Civil Appl. No.467/17 of 2016) [2020] TZCA 380; (07 August 2020); and **Hector Sequiraa vs Serengeti Breweries Ltd** (Civil Appl. No.395/18 of 2019) [2020] TZCA 1849; (13 November 2020 TANZLII).

In **Attorney General vs Tanzania Ports Authority & Another** (Supra), the Court (**Wambali, J.A.**) observed that:

“It is instructive to note that in **Attorney General v. Hammers Incorporation Co. Ltd and the Board of Trustees of the Cashewnut Industry Fund**, Civil Application No. 270 of 2015 (unreported), **we remarked that to allow a party to prosecute an application for revision where one of the**

**parties has initiated the process towards lodging the appeal is to cause confusion in the administration of justice.** We held a firm view that this applies even where the applicant was not a party to the impugned proceedings before the lower court or tribunal. In the present application, the observation is sounder as the applicant seeks to defend the same interest of the first respondent who is wholly owned by the Government and has initiated the process to challenge the decision by lodging the notice of appeal.”

Commenting on an attempt to ride two horses by filing multiple proceedings, the Court of Appeal (**Levira, J.A.**) in **Hector Sequiraa vs Serengeti Breweries Ltd** (Supra) had this to say:

“Considering the circumstances, we observe that, **the act of the applicant to lodge this application calls to be discouraged because it turns the Court's proceedings to be a game of chances in finding lee ways to succeed by filing unwarrantable applications.** We are in agreement with Mr. Mgongolwa that this application was prematurely lodged and indeed the applicant is riding two horses at the same time. On this position, we are not travelling in a virgin land but we have found comfort from our previous decision in **Hamis Said Mkuki v. Fatuma Ally**, Civil Appeal No. 147 of 2017 (unreported) at page 33, where we held that **the law does not allow riding two horses at the same time because it amounts to an abuse of court process.**”

[Emphasis mine]



Given the circumstances, as the notice of appeal lodged by the plaintiff to challenge the decision of Court in Land Case No 75 of 2020 is still intact, I hold that the present suit which intends to safeguard the interest of both plaintiffs through fresh suit cannot be maintained. Therefore, I sustain the second point of the preliminary objection.

Having sustained the second point of objection, I do not deem it appropriate to consider the first point of objection. Consequently, I strike out the suit with costs.

**It is so ordered.**

**DATED at DAR ES SALAAM this 20<sup>th</sup> day of August, 2021.**



  
S. M. KALUNDE  
**JUDGE**