IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 254 OF 2021

RAMADHANI KHAJI TAHALALA alias
RAMADHANI KHAJI MBALIKA..... APPELANT

VERSUS

EQUITY BANK TANZANIA LTD.....1ST RESPONDENT

KANU EQUIPMENT AGRICULTURAL LTD.....2ND RESPONDENT

HILLARY SAMWEL KERARYO.....3RD RESPONDENT

R U L I N G

Date of last Order:30/03/2022
Date of Ruling: 29/04/2022

T.N. MWENEGOHA, J.

The appellant herein was the applicant in Misc. Land Application No. 392 of 2020 (herein forth Application) at the District Land and Housing Tribunal of Kinondoni. He moved the Tribunal under regulation 11(2) of the Land Dispute Court (The District Land and Housing Tribunal) Regulation, 2003, G.N No. 174 praying to set aside the orders of the Tribunal dated 24/3/2020 which dismissed Land Application No. 419 of 2019 and Misc. Land Application No. 527 of 2019. Both matters were dismissed for non-appearance of the appellant herein.

The Chairman of the Tribunal dismissed the Application for being filed under wrong provision of the Law and for having no merits.

The appellants dissatisfied with the said decision preferred the current appeal with one ground of appeal,

- That the trial tribunal erred in law and fact for failure to consider that the remedy for citing wrong provision of law is to struck out the pleading and not dismissal.

The appeal was conducted by way of written submission and all parties filed their submission as schedule and they are appreciated for adhering with court schedule.

Advocate Nehemia Gabo representing the Appellant submitted that the trial Chairman mistakenly dismissed the Application in lieu of striking out the same since the Tribunal had Suo motto discovered that the said application was preferred under wrong provision of law. He submitted that, the Trial Chairman having found the Application to be incompetent, was supposed to strike out the said Application. That, he was surprised that the Chairman proceeded to determine the matter on merits.

In reply Advocate Caster Gerald Lufungulo for the 1st Respondent submitted that the Chairman was of the opinion that the application being brought under Rule 11(2) was not correct. Moreover, even if the Application was brought under correct provision, the same could not stand as the applicant has not adduced sufficient evidence to warrant the Tribunal to set aside the dismissal order. To him he cannot find anything in the trial judgment which suggest that the application was dismissed solely for wrong provision of the law but rather for want of merits to set aside the dismissal order.

Ms. Clara Mramba, Advocate for the 2nd Respondents partly agreed with the appellant that the trial Chairman had to strike out and the application after finding that it was brought under wrong provision rather than dismissing it. She insisted that the moment the Court found that it was improperly moved it was not supposed to proceed on merits.

Ms. Mramba did not dispute the appellant's prayer of trial denovo of application but she stated that if the matter will be retried the tribunal will still find it to be brought under wrong provision. That, the appellant does not have any resort to set aside the dismissal order of the first application which was dismissed under Regulation 15(a) of Regulation due to the fact that the regulation only allow setting aside dismissal order made under Regulation 15(a) of the Regulation.

Mr. Mluge Karoli Fabian, Advocate of the 3rd Respondent, stated that the trial Chairman was correct in dismissing the application before him. That, his reasoning is cited at page 2 to 5 of the Ruling of the Application that the Chairman did not only dismiss the application for wrong citation he also found the application to have no merits.

I have considered submissions of both counsels, the issue for determination is whether the Chairman was correct to dismiss the application before him instead of sticking it out.

Before discussing the merit of the application, I see it prudent to highlight the legal difference between the word "Strike out" and "dismissing". Msoffe, J.A (as he then was) in the case of ***Cyprian Mamboleo Hizza vs. Eva Kioso & Another,*** In Civil Application No. 3 of 2010, Court of Appeal of Tanzania at Tanga where he cited with approval the case of ***Ngoni-***

Matengo Cooperative Marketing Union Ltd. V. Ali Mohamed Osman (1959) EA577 had this to say:-

> *"..... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."*

Msofe, J.A added further that,

> *"Presumably, if the application had not been dismissed the applicant could have gone back to the High Court and start the process afresh. Since the application was dismissed instead of being struck out, he came to this Court vide Civil Application No.4 of 2009 by way of a "second bite", so to speak."*

The above quotation in the **Ngoni-Matengo** case was also quoted with approval by the Court of Appeal Tanzania in **Abdallah Hassan vs. Vodacom (Tanzania) Limited, Civil Appeal No. 18 of 2008.** The Court of Appeal of Tanzania in the **Abdallah Hassan vs. Vodacom (Tanzania) Limited** case (supra) also referred to its decision in **Thomas Kirumbuyo & Another vs. Tanzania Telecommunications Co. Limited, Civil Application No. 1 of 2005** in which, speaking through Lubuva, J.A, it held:

> *"From the outset, and without prejudice, it is to be observed that the learned judge having upheld the preliminary*

objection that the application was hopelessly out of time, and therefore incompetent, should have proceeded to strike it out. Dismissing the application as happened in this case, presupposes that the application was competent and that it was heard on merits".

From the above position the term "strike out" is applied by the court after finding that the application is incompetent. In this situation a party may have the room to correct the said application and refile at the same Tribunal/Court. Where in case the matter has been "dismissed" it implies that the matter has been determined and a party cannot come again at the same Tribunal or Court seeking for the same order. The remedy available is to go for appeal or revision to the higher court or to file for review.

Coming back to the merit of the case, I have gone through the said Ruling where at page 4 the last paragraph the Chairman stated that:-

"Kwa maana hiyo maombi haya kuletwa chini ya kanuni ya 11(2) haikuwa sahihi sababu au amri ya kufuta shauri haikutolewa chini ya kanuni ya 11(1)(b) ya kanuni ya baraza."

Translating the above quoted Ruling, the Chairman was of the finding that the said Application has been brought under wrong provision which is Regulation 11(2) as the previous order of dismissal was not brought under the said provision.

This court is of the finding that once the chairman discovered that the application had been brought under wrong provision of law, then he should have declared the whole application incompetent. The tribunal having been

improperly moved, cannot advance and determine the merit of the application.

In the case of **Thomas David Kirumbury and another vs. Tanzania Telecommunication Co. Ltd, Civil Application No. 62 of 2010, Court of Appeal of Tanzania** which cited with approval the case of **Edward Bachura and 3 others vs. Attorney General, Civil Application No. 128 of 2006 (unreported)** it was held that:-

> *"Wrong citation of the law, section, subsection and paragraphs of the law or non- citation of the law will not move the court to do what it is asked and renders the application incompetent"*

As stated above both parties are in agreement that the Chairman raised the preliminary objection *suo motto* but he did not give parties right to submit on it and what he did was to go to the merit of the application. This is unprocedural; once the Tribunal noted the point of law such as this one which touches the competence of application it was required to give parties right to be heard. In the case of Said **Mohamed Said vs. Muhusini Amiri &another, civil Appeal No. 110 of 2020 Court of Appeal of Tanzania at Dar es salaam** had the following to say:-

> *"Unfortunately, in our present case, despite being raised, the learned judge did not wish to address the issue of jurisdiction to which he was obligated to consider even by raising it Suo motu. Instead, he proceeded to hear and determine the suit without, first, ascertaining if the suit was lodged within time. Time bar touches on the jurisdiction of the court. That was,*

in our decided view, an error which cannot be condoned. Simply stated, even upon failure by the respondents to lodge submissions in support of the objection, the trial judge ought to have asked the parties to address him on that issue so as to satisfy himself if the court had the requisite authority to hear and determine it."

Applying the above quotation, the Chairman had to discuss the competence of Application without going to the merits of Application. The Tribunal even asked itself if it was wrongly moved how could it determine on the merits. Moving the Tribunal under wrong provision is as good as the Tribunal was not moved at all.

From the above position, the Chairman was supposed to strike out the Application for being incompetent as the Tribunal was not moved. He was not supposed to go to the merits of the Application.

Having said that I hereby use my revisionary power to quash and set aside the decision of the Tribunal for the reason explained above. Any interested part may file a fresh Application. Appeal is allowed with no order as to costs.

It so ordered.

T. N. MWENEGOHA
JUDGE
29/04/2022

THE HIGH COURT OF TANZANIA
LAND DIVISION