

TANZANIA / JUDGMENT

fredrick sylvester mokiwa as a minor suing through ridhuan a mringo as his next friend vs hambasia n maeda another 2023 tzhclandd 16791 17 august 2023

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17 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND APPEAL NO. 186 OF 2022 [Originated from decision of District Land and Housing
Tribunal Kinondoni in Misc. Application No. 1090 of 2021) FREDERICK SYLVESTER MOKIWA (as a
Minor suing through RIDHUAN A. MRINGO as his next
friend..... .APPELLANT VERSUS HAMBASIA
N.MAEDA.....1st RESPONDENT GEZA RASHID
MBEYU..... 2nd RESPONDENT

JUDGMENT

Date of last Order:13/06/2023 Date of Judgment:17/08/2023 K. D. MHINA, J This appeal stems from the District Land and Housing Tribunal ("the DLHT") for Kinondoni in Land Application No. 1090 of 2021. It was an application for an extension of time to set aside and to set aside the dismissal order made by the Tribunal on 19 February 2021 while dismissing Misc. Application No. 303 of 2020. The brief background of this case can be derived from the facts which led to the institution of Application No. 1090 of 2021. The Appellant i had filed Application No. 303 of 2020 in the District Land and Housing Tribunal of Kinondoni in which he was seeking for the revision of the decision of Kawe Ward tribunal. The application for revision was dismissed on 19/2/2021 under the provisions of Regulation 15(a) of the G.N. No. 174 of 2003 (The Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2002 for want of prosecution. Following the dismissal, the applicant made an application which was combining two main prayers to wit extension of time and setting aside the dismissal order. The first Respondent, by notice, raised four preliminary points of objection. On 21 July 2022, the application was struck out for the reason that the Law of Limitation Act was inapplicable in the application before the Tribunal for revision originated from the Trial Tribunal. The appellant was aggrieved by that decision; hence he has preferred this appeal on three grounds

1. That the learned Chairman in the District Land and Housing Tribunal erred in law in holding that the application before him was preferred under inapplicable provision of law to wit section 14(1) of the Law of Limitation Act while there were other enabling provisions which were capable of enabling the 2 Tribunal to entertain the application and make a decision on merit.
2. That the learned Chairman in the District Land and Housing Tribunal erred in law in not holding that even in the absence of any enabling provision, the Tribunal was seized with requisite jurisdiction to entertain the application before it
3. That the learned Chairman in the District Land and Housing Tribunal grossly erred law in basing his entire decision on the inapplicability of the Law of Limitation Act without inviting parties to address the Tribunal on that point hence denying the appellant a fundamental right of being heard. The appeal was argued by way of written submissions. The appellant was represented by Mr. Dennis Michael Msafiri, learned advocate, while the 1st respondent was represented by Mr Amini Mohamed Mshana, Advocate. The 2nd respondent was represented by Mr. John Remmy, also a learned Advocate Mr. Msafiri opted to argue all grounds together and submitted that the learned Chairman erred in reasoning that the provisions of the Law of Limitation Act were inapplicable to the application before him because the jurisdiction to the Tribunal to entertain revision proceedings of the proceedings and decision of a ward tribunal has been conferred by or under section 36 of the Land Disputes Courts Act. This provision does not provide a time limitation within which a party or any person can apply for revision. He further submitted that despite the provisions of section 52(2) of the Land Disputes Courts Act, Cap 216 providing that the Law of Limitation Act, Cap 89 shall apply to the Tribunal in the exercise of its original jurisdiction, that section does not exclude the possibility of the Law of Limitation Act applying in other proceedings before the Tribunal while exercising its other jurisdiction such as revision jurisdiction. Further submitted that Regulation 15(a) of G.N. No. 174 of 2003, under which the learned Chairman made an order dismissing the application for revision, neither does it provide for room for a party to apply to set the dismissal aside nor time limitation within which to make such an application. Furthermore, the appellant's counsel submitted that in view of the provisions of section 51 (2) of the Land Disputes Courts Act the appellant cited section 95 of the Civil Procedure Code as another enabling provision in the application for setting aside the dismissal order made by the learned Chairman on 19/2/2021. If the Chairman had looked at the preliminary objection before him in its wider perspective and had he invited parties to address him on the applicability of section 14(1) of the Law of Limitation Act and section 52(2) of the Land Disputes Courts Act, he would not have struck out the application on the basis of inapplicability of the Cap 89 to revision proceedings before the Tribunal. The appellant counsel concluded that the learned Chairman citing and basing his decision on section 52(2) of the Land Disputes Courts Act is tantamount to having raised a preliminary objection suo mottu, argued it himself and proceeded to condemn the appellant by striking out his application without giving him an opportunity of being heard. Failure to hear a party is a breach of a fundamental rule of natural justice. In reply, the counsel for the 1st

respondent submitted that the appeal itself is, in fact, a breach of the law because the order striking out the application is, unappealable. It did not close the door but only said that the invoked law was incapable of moving the court to grant the orders prayed for. He cited the case of Yahya Khamis vs. Hamida Haji Idd and other Others, Civil Appeal No. 225 Of 2018, and Pardeep Singh Hans vs Merey Ally Saleh And 3 Others, Civil Application No. 422/01 0 F 2018, where it was held that "We wish to emphasize that no right of appeal exists when the decision intended to be appealed against does not finally determine the matter." 5 He further submitted that no law provides for an extension of time to set aside a dismissal order means that the law of the Limitation Act was inapplicable. On the ground of appeal, Mr. Mshana submitted that the Chairperson of the Tribunal was correct in holding that in its revisional powers, it had no powers under the law of limitation act. Objecting the appeal, Mr. John Remmy for the 2nd respondent submitted that the fact which had submitted by the counsel for the Appellant that the honourable tribunal was not seized to have jurisdiction to entertain the application by relying on the cited section does not hold water since the tribunal was moved with a wrong citation which does not empower to grant what it was prayed to do even if other Section 95 of the Civil Procedure Code and other provision cited by the Appellant therein. In rejoinder, Mr. Msafiri reiterated at length what he had submitted earlier in the submission in chief, and I don't see the reason to summarise here what he had submitted. In addition, he responded to the issue raised by Mr. Mshana regarding the issue that an order striking out the application was not appealable. On this, he submitted that generally, it is correct to say that 6 an order of striking out a matter does not necessarily finally determine the matter, but the struck-out order can be made erroneously with the effect of rendering the affected party remediless. In this matter, the appellant was denied a right to be heard, and there was a miscarriage of justice. Having carefully considered the grounds of appeal, the written submissions made by counsel for the parties, and examined the record before me, I find it appropriate to start with the issue raised by Mr. Mshana Advocate in his submission regarding the propriety of the appeal. He "attacked" the appeal to be improper since the struck-out order is not appealable. On this issue, Mr. Msafiri did not submit much apart from a general admission though he stated that the struck-out can be made erroneous. The issue raised is very important because it looks at the propriety of how to knock into the court's doors before going inside into the merits or demerits of the matter. This issue should not detain me long because it is not a new phenomenon in our jurisdiction. The Court of Appeal in Cyprian Mamboleo Hizza vs. Eva Kioso and another, Civil Application No. 3 of 2010 (unreported) while cited 7 Ngoni- Matengo Cooperative Marketing Union Ltd. vs. Ali Mohamed Osman (1959) EA 577 it held that: . 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. 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." (Emphasis supplied) Again, the Court of Appeal in Abdallah Hassan vs. VODACOM(T) Civil Appeal No. 18 of 2008 (unreported), it emphasized the distinction and consequences between "dismissing" and "striking out" an appeal and the circumstances where each applies. It was held that "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". With these binding decisions of the court of appeal, it is crystal clear, therefore, that there is a clear distinction between dismissing and striking out an application, a suit or an appeal, as the case may be. Dismissing an application, a suit or an appeal, as the case may be, would signify that the matter has been entertained on merits. Therefore, there is a right to appeal. While striking out an application, a suit or an appeal, as the case may be, would imply that there was no matter before the court to be entertained on merits. Therefore, the remedy is to file afresh as there is no right to appeal. Flowing from above, the appeal before me is not proper as it was filed against unappealable decision. Though it was not on the grounds of appeal but the counsel for the first respondent rightly raised the issue during the submission the parties argued on the same. Therefore, there was a right to be heard. Since I find and hold that this appeal was not proper, then there is no need to deliberate the merits or demerits of the grounds of appeal. 9 In the end result, this appeal is struck out as incompetent for being filed against unappealable order (decision). It is struck out with costs. It is so ordered/1 HINA DGE 17/08/2023 10

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