

TANZANIA / JUDGMENT

lussia k msokwa vs judith t kahes

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM MISC. LAND APPEAL NO. 06 OF 2022 (Originating from the decision of the District Land and Housing Tribunal of Itala at Ilala before Hon. Mwabulambo in Misc. Land Application No. 537 and No. 538 of 2021) LUSSIA K. MSOKWA..... APPELLANT VERSUS JUDITH T. KAHES..... RESPONDENT

JUDGMENT

Date of the last order 02.03.2022 Date of Judgment 30.03.2022 A.Z.MGEYEKWA, J This is the second appeal that arises from Misc. Land Application No.537 and No. 538 of 2021 in the District Land and Housing Tribunal for Ilala at Ilala dated 1st December, 2022. The matter originated from Mzinga Ward Tribunal had decided in favor of the respondent in Case No.79 of

2020. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant instituted a suit at the Ward Tribunal of Mzinga at Ilala. The suit was related to land ownership. The 1 appellant claimed that she is the lawful owner of the suit land. The respondent on his side testified to the effect that he bought the suit land in 2013. The appellant acknowledged that the respondent was the first one to occupy the suit land. The trial tribunal decided the matter in favour of the respondent. Dissatisfied, with the decision of the trial tribunal, the applicant lodged an appeal before the District Land and Housing Tribunal for Ilala. The record also reveals that the appellant in his Memorandum of Appeal referred to two Applications; Application No. 538 of 2021 and Application No. 539 of 2021. Before hearing of the matter the respondent raised four preliminary objections on both applications and the District Land and Housing Tribunal sustained the objections and struck out Application No. 538 of 2021 and Application No. 539 of 2021. Believing the decision of the District Land and Housing Tribunal for Ilala was not correct, the appellant lodged this appeal on six grounds of complaint seeking to assail the decision of this appellate tribunal as follows:-

1. That the tribunal erred in law and facts by making a decision in favor of the respondent. That the case was dismissed on the ground that the application was not signed by the applicant and also the application was stamped with an office stamp instead of an 2

attorney's stamp. The courts' system nowadays is governed by the "overriding principle" that this principle requires courts to deal with cases justly, speedily, and to have regard for substantive justice. This principle also tries to avoid the prioritization of procedural technicalities in the process of justice administration. So for the Tribunal to dismiss the application on the ground of technicalities was wrong.

2. That the Tribunal erred in law and facts by stating in its decision that the application was not signed by the applicant. Upon the perusal done on 24th of Dec 2021, we found that the document was signed by the applicant on all pages of the instant application. So, it was wrong to say the application was not signed while it was signed.
3. That the Tribunal erred in law and facts by dismissing the appellant application on the ground of technicalities. Through "overriding principle" the courts are insisted to stick with substantive issues and furthermore, the court is given the power to allow amendment where the application has defects that are rectifiable instead of dismissing the application. As a matter of fact, a preliminary objection consists of a point of law that has been pleaded or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit. 3
4. That the Tribunal erred in law and facts by dismissing the applicant's application on the point of "wrong citation" of the law. It is purely wrong because the position has been settled by applying the "overriding objective principle" or "oxygen principle" which requires courts to be just, expeditious, proportionate, and affordable resolution of civil disputes. The principle also has elaborated even where the applicant has wrongly cited or non-citation of the law in his or her application.
5. The tribunal erred in law and facts by allowing execution while the judgment and decree of the ward tribunal had not clearly stated the boundaries of the disputed plot as it has been explained in various cases. The court or tribunal is not allowed to execute the decree if the judgment and decree have not clearly stated the boundaries or margins of the disputed plot. Therefore, the District tribunal was primarily wrong to execute the said decree.
6. The tribunal erred in law and facts by dismissing the applicant's application on the ground that the demolition of a subject matter was overtaken by an event. The demolition was done by the broker before the expiry of ten days of notice of intention to demolish the subject matter centrally to the requirement of the law. 4 The submission was by way of written submission in which the appellant was represented by Mr. Godfrey Renatus Hossa, learned Advocate, whereas the respondent was represented by Shaibu R. Chagaluma learned Advocate. Both parties complied with the court order. Supporting the appeal, the counsel for the appellant opted to combine all grounds of appeal and argued them together. In his submission, Mr. Godfrey was brief and focused. He faulted the Honorable tribunal for dismissing the appellant's application based on the ground that the affidavit was defective. He also faulted the tribunal for not applying the 'overriding objective principle' to grant leave to the appellant to amend the defective affidavit. To support his argument he cited the

case of Jacobo Magoiga Gichere v Peninnah Yusuph, Civil Appeal No. 55 of 2017. Mr. Godfrey went on to argue that the tribunal dismissed the applicant's applications based on technicalities that are legally prohibited under Article 107A (2), (e) of the Constitution of the United Republic of Tanzania of 1977 which provides that:- "(2) in delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles that is to say:- 5

- (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice" The learned counsel for the appellant further went on to submit that both Applications No. 538 and No.539 were duly been signed. To fortify his submission he referred this court to annexure XBT 1. Mr. Godfrey contended that the District Land and Housing Tribunal Chairman executed the Ward Tribunal decision without knowing the proper boundaries of the disputed land. To bolster his argument, he cited the case of Mbeya Rukwa Auto Parts and Transport vs Jestina George Mwakyoma

[2003] TLR 251 (CAT) which observed that:- "The District land and housing tribunal was not correct to execute the decree whose decision the boundaries of the disputed plot are unknown" The learned counsel for the respondent added that the Ward Tribunal did not show how the respondent acquired the disputed land. Mr. Godfrey contended that the vendor was supposed to be joined in dispute as per Order 1 (3) of the Civil Procedure Code Cap. 33 [R.E.2019]. On the strength of the above submission, the learned counsel urged this court to allow the appeal and quash the decision of the District Land and Housing Tribunal of Ilala with costs. 6 In response, Mr. Shaibu, learned Advocate for the respondent contended that the applicant has consolidated two different applications without leave of the court and that he is surprised to see the appellant appealing against Applications No. 537 and 539 of 2021, however, if so wishes could have lodged two different appeals. Mr. Shaibu contended that the Memorandum of Appeal was not signed. He further argued that the appellant's submission in chief is different from the grounds of appeal. He argued that the overriding objective principle cannot apply to rescue every irregularity found in suits/application and that the appellant's application failure of the deponent to sign in the affidavit and the attesting the affidavit by using the law firm's stamp as a Commissioner for Oath instead of the advocate's stamp) cannot be rectified by overriding principle. To bolster the above submission, Mr. Shaibu cited the case of Njake Enterprises Limited vs Blue Rock Limited and Rock and Venture Company Limited, Civil Appeal No. 69 of 2017 Court of Appeal of Tanzania at Arusha Unreported, and Order VI Rule 14 of the Civil Procedure Code, Cap. 33 [R.E. 2019]. Mr. Shaibu did not end there, he pointed out that the applicant's applications were struck out, hence that the appellant was not barred to rectify the mistakes and filing fresh applications instead of appealing. He further contended that the appellant adduced many facts that are less 7 concerned with any ground of appeal, hence that such facts should not be considered. On the strength of the above, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs. In rejoinder, the appellant had nothing new to rejoin. He maintained his argument in chief that the grounds used to dismiss her applications were based on

technicalities curable under Article 107 A (2), (e) of The Constitution of the United Republic of Tanzania of 1977. Having considered the submissions from both sides, the appellant in his submission opted to submit generally, I will as well limit myself to determine all grounds of appeal. Therefore, I will determine the third ground, the appellant blamed the tribunal for striking out the applications on the ground of technicalities. From the outset, I have to say that the applicant's applications in respect to Misc. Land Application No. 538 of 2021 and Misc. Application No. 539 of 2021 were struck out, hence the appellant was not barred to rectify the mistakes and lodge fresh applications instead of lodging an appeal before this court. After a careful perusal of the court records in this appeal, I found out that Misc. Land Application No. 537 was not annexed to this appeal hence the same was disregarded. However, in both appellant's applications; Misc. Land Application No. 538 of 2021 and Misc. Application No. 539 of 8 2021 and referring to the appellant's submission in chief on page 3 of the first paragraph it shows clearly that the said applications were struck out and not dismissed by the District Land and Housing Tribunal for Ilala. There are numerous precedents in our jurisprudence that ruled that where a suit or application is struck out, the remedy available is to correct the mistake and file a fresh suit or application and not to lodge an appeal. In numerous cases, the Court of Appeal of Tanzania and this court has stated the difference between dismissal and struck out. In the case of Mabibo Beer Wines & Spirits Limited v Fair Competition Commission & 3 Others, Civil Application No. 132 of 2015, the Court 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 that there was no proper appeal capable of being disposed of " Similarly, in the case of National Insurance Corporation (T) Ltd v Shengena Limited, Civil Application No. 230 of 2015, Court of Appeal of Tanzania, at Dar es Salaam (unreported) the court of Appeal observed the following when giving the difference between the dismissal order and an order of striking out:- "For that matter we wish to remind the learned judges that orders of dismissal and striking out a matter have different legal consequences. /Is 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." In the circumstances, in view of my deliberation above on the position of the law and based on the cited authorities, since the application was struck out means the appeal was not properly before the tribunal capable of being disposed of. Therefore, as long as the appeal was not disposed of, the appellant had an opportunity to exhaust other remedies before the District Land and Housing Tribunal before coming before this court. For those reasons, I fully subscribe to the submission of the learned counsel for the respondent that the applicant was not barred to rectify the mistakes and file a fresh suit instead of lodging an appeal before this court. 10 Since the determination

of the third ground suffices to dispose of the appeal, I shall not consider the remaining grounds of appeal. I, therefore, proceed to strike out the appeal without costs. Order accordingly. Dated at Dar es Salaam this date 31st March, 2022. 03.2022 Judgment was delivered on 31st March, 2022 in the presence of Mr. Godfrey Renatus Hossa learned counsel for the appellant and Mr. Shaibu R. Chagaluma, learned counsel for the respondent. JUDGE 31.03.2022 Right of Appeal fully explained. 11

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