

TANZANIA / JUDGMENT

# magdalena francis vs national microfinance 2022 tzhc 15066 28 november 2022

COURT  
TZHCDECIDED  
28 November 2022

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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY OF MUSOMA AT MUSOMA  
REFERENCE APPLICATION NO 05 OF 2022 (Arising from Land Application No. 120 of 2018 of the  
District Land and Housing Tribunal for Mara at Musoma) BETWEEN MAGDALENA  
FRANCIS..... APPLICANT VERSUS

1. NATIONAL MICROFINANCE BANK (NMbP
2. LJ INTERNATIONAL LTD} > ..... RESPONDENTS
3. SALUM MOHAMED

## RULING

18/11/2022& 28/11/2022 F.H MAHIMBALI J.: The applicant in this application has been aggrieved by the decision of the trial tribunal (The District Land and Housing Tribunal of Mara at Musoma) in Land Application No. 120 of 2018 which dismissed it for want of prosecution. The rationale behind the said dismissal order is this, the applicant before the trial tribunal accused the trial chairperson thereof (Mr. Kitunguru) for being bias as he sided with the first 1 respondent. The reason being simple, that he once saw the said chairman being with NMB Branch Manager in a social gathering (drinking beer). He related that situation as bias to the case. She then accused the Hon Trial Chairperson to recuse from the conduct of the said case. The Hon. Trial Chairperson after considering the arguments raised, he turned down the applicant's prayer of recusal and proceeded with the trial of the matter which move then discomforted the applicant who was then not ready to prosecute her case pressing for recusal of the Hon. Chairperson from the conduct of the matter. Eventually, the trial chairperson dismissed the case certainly, for want of prosecution. The applicant then filed reference application made under section 77 and order XLI rule 1 of the Civil Procedure Code Cap 33 R.E 2019 supported by her affidavit narrating what I have exposed above. In reply to the application, the first and second respondents amongst other things raised two preliminary objections on point of law, that:

1. THAT applicant's application is incompetent for being improperly filed before this court as the same contravenes the provision of section 77 of the civil procedure code and order XLI of the Civil Procedure Code. 2
2. THAT the application is incompetent being supported by incurable defective affidavit which contain arguments and prayers The preliminary hearing was argued by way of written submissions. Whereas the first and second respondents enjoyed the legal representation of Mr Gwakisa Gervas Adv, the applicant on the other hand stood unrepresented. Mr. Gwakisa Gervas in support of the objection, submitted on the first preliminary objection that the applicant's application is incompetent for being improperly filed before this court as the same contravenes the provision of section 77 and order XLI of the Civil Procedure Code, Cap 33 R.E 2019. As the said reference application was raised from the land application no 120 of 2018 which was dismissed on 28/04/2022 by DHLT for Mara at MUSOMA before Kitunguru E, it is his submission that, the applicant's application is improperly before this honourable court as the same ought not to be brought by way of reference rather the applicant was supposed to file an application to set aside the dismissal order. Only and in case of its refusal by the tribunal, then appeal would have been preferred to High Court. As this application emanates from the an application which was dismissed in the DHLT, the law is very clear on the procedure to be followed under such 3 circumstance as provided under regulation 11(2) of the Land Disputes Courts (the District Land and Housing Tribunal Regulations) 2003, GN No 174 of 2003 as it provides as follows: A party to an application may, where he is dissatisfied with the decision of the tribunal under sub-regulations (1), within 30 days apply to have the orders set aside, and the tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the Hight Court. He clarified that, reference application as provided under Section 77 and order XL1 rule 1 of Civil Procedure Code, Cap 33 R.E 2019, can only be made in a suit in which its decree is not subject to appeal. In that situation then, that subordinate court either on its own motion or on application of the parties can draw up a statement of facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point of the decision of the High Court. Otherwise, the only way for a party to go to the High Court by way of reference is when a person has been aggrieved with the decision of the taxing master in a taxation proceeding as provided by the Advocate Remuneration Order. On the second Preliminary objection, he argued that the applicant's application is incompetent for being supported with incurable defective affidavit which contains arguments and prayers. He submitted 4 that it is important to note that an affidavit is a substitute of oral evidence which should only contain statements of facts as was stated in the case of Uganda vs Commissioner for Prisons Exparte Matovu (1966) E.A 514 at page 520: "As a general rule of practice, an affidavit for use in court, being a substitute for oraievidence, should only contain statements of facts and circumstances which the witness depones either of his own personal knowledge or from information which he believes to be true. Such affidavit should not contain extraneous matters by way of objection, prayer, legal argument or conclusion". [Emphasis added]. As per paragraph 7 and 8 of the applicant's affidavit, he submitted that it is full of arguments. For example, as

per paragraph 8 provides that: "That the trial chairman dismissed the application under rule 11(b) of the GN No 174/2003 that the applicant was not present before the trial tribunal something which is not true as the applicant was present before the tribunal with prayer of no confidence with the trial chairman". That the statement of the deponent on his affidavit is not the statement of fact, rather it is an argument which needs to be deliberated whether it is true she was present before the tribunal or not, also at paragraph 9 and 10 it contains prayers as per Uganda's case(supra) he prayed before this court to dismiss it with costs. 5 On her part, the applicant submitted that, the counsel for the 1st and 2nd respondents has misunderstood the gist of regulation 11(2) of LDC (supra). This provision is only applied for those who were recorded absent without good cause or with good cause, when the application was fixed for hearing she was absent and the Charmain dismissed the application for want of prosecution. The reason advanced by the chairman was that the applicant failed to give evidence and thus was geared by the applicant after filing the letter of no confidence and she kept pressing for recusal of the trial chairman, but Mr Kitugulu E , refused. Therefore regulation 11(1) (b) of the LDC relied by the respondent's counsel does not apply to the situation at hand. Since the dismissal of the application by the trial chairman was not based on the merits of land application no 120/2018 but on separate argument between the trial chairman and the applicant, she insisted that this application is merited. She submitted further that, since the provision of order XLI rule 1 of the CPC is based on the concept that the dismissal order of the same land application No 120/2018 was not subject to appeal and that the trial chairman was required to strike out instead of dismissal order. 6 On the second preliminary objection that the application is incompetent for being supported with incurable defective affidavit which contains arguments and prayer, she conceded with it and prayed that the said paragraph 8 of the applicant's affidavit be expunged instead of the whole affidavit. Having heard the submissions of both parties on the preliminary objection raised by respondent in this court, the issue is whether this application for reference is properly filed before this court? As stated hereinbefore, this application is filed under section 77 and order XLI of the Civil Procedure Code, section 77 Of CPC. The same provides that: "Subject to such condition and /imitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court and the High court may make such order thereon as it thinks fit" Also order XLI Rule 1 on it is on the effect that: Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained 7 and refer such statement with its own opinion on the point for the decision of the High Court. The term reference is defined in Black's law DictionaryZb mean "refer to " In other words, reference is the legal process in which a party who is discontented with a decision of a lower court to refer the matter to the High Court for corrections. In the case at hand the applicant was dissatisfied with the order of the tribunal on which the applicant's

application was dismissed for want of prosecution by the Tribunal chairman hence to file this application in according to section 77 of CPC and order XLI of CPC. Since what was ruled by the trial chairperson in refusal to recusal was not a final order of the tribunal, that was not an appealable order as it was merely an interlocutory order. The Applicant was then obliged to proceed with the trial of the case to its finality. In case of adverse decision against her, she would have then raised it as amongst her grievances before the appellate court. By her refusing to give her testimony before the trial tribunal was not the legal solution available for her grievance. As she failed to adduce evidence before the trial tribunal, suggests that she was unable to prosecute her case. The trial tribunal was then rightly justified to dismiss it. However, it was not rightly dismissed under regulation 11(l)b of Cap 216 as both parties were present at the trial tribunal as per proceedings of the case. It was supposed to be dismissed for want of prosecution pursuant to Order VIII, Rule 21 (a) of the CPC, Cap 33 R.E 2022 which caters for situation of failing to comply with the Courts previous direction. However, by her filing the reference application before this Court as done, was not the right legal course. There is nothing referenceable to this Court as there is no any legal doubt for this Court's intervention and redress. The applicant ought to have challenged the same by way of appeal or revision as the case may be if the right to appeal was not available. Having said so, the application is nevertheless misplaced, and it is dismissed. Nevertheless, as the trial tribunal invoked the wrong provision of the law in dismissing the said application. By the revisionary powers vested to this Court under section 43 of the LDCA, Cap 216, I hereby quash and set aside the erroneous order of the trial tribunal. In its place, I order the tribunal record to be remitted back before it for the parties to be re-summoned and proceed with the trial from where it ended. In event of the resistance by the applicant or any other party, then the tribunal order appropriately as per law. 9 In the circumstances of this case, parties shall bear their own costs as the said error was omitted by the trial tribunal itself. 10

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