

TANZANIA / JUDGMENT

Second Final Ruling MAYAYI MAKUYA AND OTHERS

COURT
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27 March 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TABORA SUB-REGISTRY AT
TABORA LAND APPEAL NO. 29138 OF 2024 (Arising from Land Application No. 41 of 2020 of
District Land and Housing Tribunal for Nzega and originating from Land Dispute No. 10/2019 of
Lugubu Ward Tribunal)

1. MAYAYI MAKUYA
2. KISHUKA MAPAA APPELLANTS
3. NYONGO MAYAYI VERSUS JIDUTA MASANJA
RESPONDENT

RULING

18th and 27th March, 2025 MIRINDO, J.:

- [1] Mayayi Makuya, Kishuka Mapaa and Nyongo Mayayi are entangled with Juduta Masanja in a dispute over the ownership of a piece of land situated at Mgazi Village, Lugubu Ward within Igunga District in Tabora Region. They are dissatisfied with the decision of Nzega District Land and Housing Tribunal of 2nd December 2022 declaring them trespassers and Juduta Masanja as the lawful owner of the disputed land.
- [2] Subsequently, they lodged an appeal to the High Court at Tabora and that appeal was registered as Land Appeal No. 15 of 2023. The appeal contained five grounds of appeal. When the appeal came for hearing on 14th February 2024, this Court invited learned counsel for both sides to address it on the propriety of the first ground of appeal. In the first ground of appeal, the appellants, Mayayi Makuya, Kishuka Mapaa and Nyongo 1 Mayayi complained that the Tribunal's decision hinged upon the weak evidence, specifically the sale agreement (Exhibit P 1) that was fraudulently procured. The appellants counsel, Mr. Stephen Michael Kaijage, conceded that this ground of appeal contained criminal accusations and pointed out the matter was reported to investigatory organs. He pleaded with the Court to "suspend the appeal pending the outcome of the ongoing criminal case." The respondent's counsel, Mr. Sosthenes Mwigamba, agreed with the concerns raised by Mr. Kaijage and the prayer for the prayer for the suspension of the appeal. This Court granted the prayer and suspended

the appeal pending the outcome in the criminal case.

- [3] On 25th September 2024 both parties appeared before this Court for necessary orders and this Court enquired about the progress of the ostensible criminal case. Upon this inquiry, the appellants' counsel, Mr. Kaijage sought leave of this Court to withdraw the appeal without costs with leave to refile it pending the completion of the criminal case. The respondent, Jiduta Masanja, who appeared in person, had no objection to the prayer. The prayer was granted with orders that the appeal was marked withdrawn with leave to refile and both parties to bear their own costs.
- [4] On 18th November 2024, the appellants returned to this Court and registered Land Appeal No. 29138 of 2024 containing five grounds. The respondent raised a preliminary objection to the appeal as being premature and offending the principle of *functus officio* in the light of the previous order of this Court.
- [5] Arguing in support of the preliminary objection, Mr. Mwigamba, the respondent's counsel, pointed up that in the absence of information clarifying the status of the criminal 2 investigation the instant appeal was premature. He added that the appeal should have been refiled after completion of the criminal investigation or finalization of the criminal case. In opposition, Mr. Kaijage, the appellant's counsel, asserted that though they withdrew the appeal pending the completion of criminal investigation, they do not have control over the criminal investigation machinery or finalization of criminal cases. Mr. Kaijage added that they wrote letters alerting this Court about loss of control over the criminal case. Mr. Mwigamba denied seeing any appellants' letters addressed to this Court about the criminal investigation. The very fact that the appellants are unable to control, or lost control, of the criminal case, Mr. Mwigamba asserted, should have been formally presented in court prior to the refiling of the instant appeal.
- [6] I have perused the court file and noticed that there is a letter from the National Prosecution Service of 19th September 2023 addressed to the appellants' counsel. The essence of the letter is that the National Prosecution Service returned the criminal investigation file to the police for further investigation. The criminal investigation file is about the respondent and another person who is apparently not a party to this case.
- [7] Mr. Mwigamba contended that the instant appeal has not only been prematurely filed but it has equally contravened this Court's order. He noted that the initial appeal contained five grounds of appeal and the appellant obtained leave to file three additional grounds of appeal resulting in eight grounds of appeal. Again, the appellants obtained leave to withdraw the initial appeal with an option to refile it. He complained that the instant appeal rests on five grounds of appeal while the essence of the withdrawal order envisaged refiling the appeal containing original eight grounds without amending them. 3 On these accounts, the learned respondent's counsel, concluded that the instant appeal is prematurely filed in apparent disregard of this court's withdrawal order. He invited this Court to apply the principle that court orders should always be obeyed as was reaffirmed in *Tanzania Bundu Safaris Limited v*

Director of Wildlife and Another [1995] TLR 246 and Wildlife Lodge Ltd v Country Council of Narok and Another (2005) TLR 344 and struck out the appeal with costs.

- [8] Mr. Mwijage stuck to his guns and contended that there is nothing from the withdrawal order directing the appeal to be refiled on the same grounds. He sought to distinguish the two cases referred to by Mr. Mwigamba on the grounds that the instant appeal has not disobeyed the court order. He asserted that as *domini litis*, the appellants have the right to determine the appeal grounds and not the respondent: it is the appellant, and not the respondent, who knows the weight of the instant appeal. The learned counsel pointed out that they withdrew the initial appeal because it contained the ground regarding forgery committed by the respondent. The counsel did not expressly admit that they abandoned that ground in the instant appeal. He adamantly dismissed the complaint that the instant appeal should have been brought on the same grounds as those in the initial appeal because the respondent's counsel averment was unsupported by law. Mr. Mwigamba disagreed and remarked that instant appeal departed from the initial appeal and amounts to an amendment, and not refiling, as envisaged in the withdraw order.
- [10] Addressing the complaint that the instant appeal contravened the principle of *functus officio*, a complaint apparently left unargued by Mr. Mwigamba; Mr. Kaijage pointed out 4 that there is no decision of this Court terminating the appeal between the appellants and the respondent. It was his contention that this Court is not disarmed from entertaining the instant appeal and the instant appeal does not deprive criminal investigatory machineries from performing their duties.
- [10] Presumably, in the alternative, the appellants' counsel argued that the objection fell short of the test of point of law articulated in the best-known case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. He insisted that the objection cannot bring to finality the pending appeal in the sense that it cannot lead to its dismissal.
- [11] I have fully examined these submissions and I am perfectly satisfied that the preliminary objection raised by the respondent's counsel does not satisfy the test of a point of law elaborated in *Mukisa Biscuit Manufacturing Co Ltd*. There is no doubt that preliminary objections should be on a pure point of law as was articulated by Law JA in *Mukisa Biscuit Manufacturing Co Ltd* at page 700: So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration
- [12] A preliminary objection should hinge upon ascertained facts (*Cotwo (T) Ottu Union and Another v Honourable Iddi Simba, Minister of Industries and Trade and Others* 5 [2002]TLR 88). The essence of being a pure point of law is that the objection should not call for adduction of evidence. This limb of preliminary objections has been pronounced upon by the Court of Appeal in numerous cases and in *Soitsambu Village Council v TBL*, Civil Appeal

105 of 2011, Nsekela JA speaking for the Court of Appeal said: A preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as preliminary objections only those points that are pure law, unstained by facts or evidence, especially disputed points of facts or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits.

- [13] The first part of Mr. Mwigamba's argument in support of the preliminary objection rests on the appellants' obligation to apprise this Court on the status of the criminal case prior to their refile of the instant appeal. This obligation points to the need to produce some evidence or report to the Court rendering the complaint unsuitable for determination as a preliminary point of law.
- [14] A second aspect of the preliminary objection, but most frequently overlooked, is found in Newbold P's formulation in *Mukisa Biscuit Manufacturing Co Ltd* at page 701 is that an objection on the point of law should not require an exercise of discretion: A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
- [15] The respondent's preliminary objection rests on at least two factors: (i) the appellants' dereliction of duty to notify the High Court about the appellants' impossibility in controlling the criminal investigation or finalization of the criminal case; (ii) the appellants' duty to obtain leave of this Court to abandon certain grounds of appeal, in particular, the first ground of appeal in the initial appeal alleging fraud.
- [16] These factors are subject to the discretion of the court. Accepting and acting upon the information to be availed by the appellants is at the discretion of this Court. At the discretion of this Court equally lies the power to grant leave to the appellants to abandon any of the grounds of appeal originally filed. Finally, and more importantly, "suspending" the appeal pending or re-admitting it, upon completion of criminal investigation or finalisation of the potential criminal case is at the discretion of the Court as well.
- [17] The general rule of practice is that a court may stay civil proceedings pending the determination of criminal proceedings, and vice versa, if both proceedings have been instituted concurrently on the basis of similar facts (*DPP v Leon's Silayo Ngalai*, Criminal Appeal 109 of 1990, Court of Appeal of Tanzania at Arusha (1990), (unreported), per Mnzavas, JA for the Court. This rule, derived from the common law, embodies a discretionary power exercisable in the clearest cases where the applicant established real danger of prejudice resulting in miscarriage of justice if the civil proceeding is preceded

with concurrently with the criminal proceeding (Jefferson Ltd v Bhetcha [1979] 2 All ER 7 1108; R v BBC, x p Lavelle [1983] 1 All ER 241 (QBD) at 255. This test has been restated by Carey JA in Bank of Jamaica v Dextra Bak and Trust Co Ltd [1999] JLR 361: I would state the rule thus-the Court in the exercise of its inherent jurisdiction to control its own proceedings is required to balance justice between the parties, taking account of all relevant factors. What most not be lost sight of is, that it is the justice between the parties in the civil action which is being balanced and the onus is on the Defendant (who seeks the stay) to show that the Plaintiff's right to have its claim decided should be interfered with...If that be right, then interest of the Defendants in a criminal case, who are not parties to the civil action, cannot, in my view, be relevant consideration.

- [18] On this account, the Court of Appeal of Tanzania in Gapco (T) Ltd v Mbaraka K. Igwe, Civil Appeal 89 of 2006 held that generally civil and criminal proceedings “can and more often than not operate side by side” albeit the misconception that “a civil action cannot take precedence over a criminal action. Either can precede the other.”
- [19] All those factors, being subject to the discretion of this Court, cannot be disposed of by way of preliminary objection. They can be disposed of in the normal way at the commencement of the hearing of the appeal without there being a preliminary objection.
- [20] Having reached this conclusion, it is unnecessary for me to rule on whether the expression “refile” embodies an amendment.
- [21] It follows that the preliminary objection is overruled. Costs shall abide the outcome of the appeal which is to proceed to hearing. 8 DATED at TABORA this 27th March, 2025 FRANK M. MIRINDO JUDGE COURT: Ruling delivered this 27th day of March, 2025 in the presence of Advocate Steven Kaijage for the appellants and in the presence of the respondent in person. B/Clerk: Omari Mkongo (SRMA) present. FRANK M. MIRINDO JUDGE 27/3/2025 COURT: Right of appeal explained. FRANK M. MIRINDO JUDGE 27th March, 2025 9

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