

TANZANIA / JUDGMENT

20101207 TZHC Arusha

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TZHCDECIDED
7 December 2010

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IN THE HIGH COURT OF TANZANIA AT ARUSHA MISC. CIVIL APPEAL NO. 23 OF 2003
(ORIGINAL RM'S COURT ARUSHA APPLICATION NO. 6 OF 2003) PATRICK KAGARUKI &
ANOTHER APPELLANT /RESPONDENT ' VERSUS ' ARUSHA MUNICIPAL COUNCIL
RESPONDENT/OBJECTOR

RULING

CHOCHA, J. This ruling is a product of a notice of Preliminary objection raised by Mr. Oja re learned advocate for Arusha Municipal Council hereinafter referred to as the objector. The preliminary objection derives from an appeal filed by Patrick Kagaruki and Joseph Laizer who are 1st and 2nd appellant respectively. For the purposes of the objection proceedings they are I respondents. The only ground for objection is that the order appealed from is not appellable thereby rendering the appeal incompetent. Mr. Ojare submitted that the order annexed to the memorandum of appeal is interlocutory as there is still a main suit pending in the subordinate Court. He also intimated that what transpired before the lower court had nothing to do with the merit of the case. 1 Mr. Ojare invoked the provision of section 43 of Magistrate Courts Act as amended by Act No. 25 of 2002 that prohibits appeals from interlocutory order if it does not finally determine the suit. The learned advocate for the respondent went further that the aforementioned amendment (Act No. 25 of 2002) binds the appellant. It became operational on the 14th December 2002. This appeal was instituted on 3rd October 2003 when the law was already in force as certified vide Civil Appeal No. 88- of 2003 Court of Appeal (unreported) between Ngorongoro Conservation Area Authority V. Samwel Maeda. The respondent did not have much to say. His main concern was the decision in civil review No. 6 of 2003 by Msumi (RM) which he said was in conflict with another review No. 5 of 2002 by Mushi (RM) of the same court and concurrency in respect of similar matter. The respondent wonder as to why should two magistrates of the same concurrency review twice the same matter. The dispute revolve on issues: Whether applications No. 5 of 2002 and No. 6 of 2003 are similar such that the later is duplicity. If yes, whether the subordinate Court became functus officio after revising application no. 20 of 1998. Finally, whether the appeal really emanates from an interlocutory order. I will begin with the 1st issue. What I see is that the two applications were not only dealt with by two different magistrates. They were constituted with different matters. 2 . · '~ Application No. 5 of 2002 contains a memorandum for review in ' respect of exparte judgment No. 20 of 1998 where tJpon an order for, and warrant of attachment were issued. The review was specifically a result of

a dispute of the contents of the warrant of attachment. The flanking prayers were to inter alia, to vacate the same, and to require the Court Broker to pay the second respondent his demands. The application failed. I was ruled time barred. On the other hand, an application No. 6 of 2003 for review before Msumi (RM) concerned an order for the execution of the decree. Herein, the prayers were, one, to discharge the applicant from liability arising out of execution of decree. Two for the wrongly attached motor vehicle as per section 38 (1) and section 68 (e) of Civil Procedure Code. In this regard, it is not correct that there was a double review in respect of the same matter. Therefore there was nothing wrong for the two magistrates to act the way they did. The second magistrate was therefore naturally; NOT "functus officio" This note concludes both the 1st and 2nd issues. On the last issue. The premise is for me to clarify what is it all about interlocutory order. In the case of Henry Lyimo Vs. Eliabue Matee (1991} TLR 93, an interlocutory order has been defined by court to mean an interim order pending the determination of the case. 3 . In another case of University of Dar es Salaam V. Sylvester Cyprian and 210 others the Court held the following: " . Interlocutory order/proceedings are the one that do not decide the rights of the parties but seek to keep things in status quo pending determination of those rights or enable the court to give directions as to how cause is to be conducted or what is to be done in the process of cause so as to enable the Court ultimately decide on the right of the parties.. " The background is that the respondents were aggrieved by the ruling of the subordinate court which overruled their objection which they had raised vide Civil Application No. 6/2003, namely that the application was res judicata and time barred. What the trial magistrate (Msumi) actually did in application No. 6/2003, was to dispose off the objections before the determination of its merits. The trial Magistrate over ruled all two objections and ordered the application to proceed. This is what sparked into this appeal and the present objection. What I now find is that the learned magistrate's order was clearly an interlocutory one. It was an interim order pending the determination of the application or suit. It is not permanently decisive on the parties' rights. Section 43 of Magistrate Court Act as amended by Written law Miscellaneous Amendment No. 25 of 2002 expressly directs that:- 4 " " Subject to the provisions of subsection

- (3) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or : I order of the district court or a resident magistrate unless such a decision or order : I has the effect of finally determining the criminal charge or the suit'~ I That said, I find the objection meritorious. It is sustained. I In view of the nature of the matter, costs shall follow the event. Nj>.z. C~A JUDGE 07/12/2010 NPZC/PJL. 5

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Prepared on 23 October 2026 · Esheria