

TANZANIA / JUDGMENT

RULING JOSEPH MWAMBENJA VS FURAHA MALUNDI

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TANZLIIDECIDED
19 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CIVIL REVISION NO. 16870 OF 2024 CASE REFERENCE NO.
202407151000016870 (Originating from Miscellaneous Civil Application No. 000007397 of 2024 at
District court of Rungwe) Between JOSEPH
MWAMBENJAAPPLICANT VERSUS FURAHA
MALUNDI..... RESPONDENT

RULING

3rd & 19th December 2024 NONGWA, J. This application is made under section 44(1)(a)(b) of the Magistrates Courts Act [Cap 11 R: E 201] “the MCA” and section 79(1)(c) and 95 of the Civil Procedure Code [Cap 33 R: E 2019] “the CPC”, the applicant seeks for the following orders;

- a) That this Honorable Court may be pleased to call for and examine the records of proceedings relating to Miscellaneous Civil Application No. 000007397 of 2024 at District court of Rungwe and satisfying itself of the as to the correctness, legality and propriety of the application for setting aside dismissal order of the Civil Appeal No. 1 2302 of 2024 at the district court of Rungwe delivered by hon. Ramla Shehagilo-RM, dated 14th June 2024.
- b) Costs of the application be granted for. Briefly it is stated, the Respondent filed Civil Appeal No. 2302 of 2024 in the District Court of Rungwe challenging the decision of the Primary Court of Rungwe district at Katumba. On various dates Respondent defaulted appearance in the said Civil Appeal and the court dismissed the appeal for non-appearance by the Respondent. The Respondent successfully filed an application for Re-Admission of the said Civil Appeal, Miscellaneous Civil Application No. 000007397 of 2024. Aggrieved the applicant filed this application for revision contending that the Respondent did not advance any reasons which would warrant the district Court of Rungwe to re admit Appeal. The application has been supported by the affidavit of the applicant John Mwambenja and who has been appearing in person. In his affidavit the applicant alleges that the District Court proceedings, ruling and Drawn order are tainted with material irregularities and illegalities which require the intervention of this court. Upon being served with the application documents, the respondent refiled counter affidavit opposing the application and

accompanied it with three points of preliminary objections to the effect; 2

1. That the application for revision is bad in law for contravening section 79(2) of the Civil Procedure code, Cap 33 R.E 2022
2. That the affidavit in support of Chamber summons especially paragraphs 7 and 8 (i, ii, iii and iv) is bad in law for being argumentative. As it is ordinarily the practice of this court that, once a preliminary objection is raised, the court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. On the hearing the applicant appeared in person whereas the respondent had service of Mr. Ezekiel Mwampaka, learned advocate. By consensus of parties indorsed by the court, hearing of preliminary objection was by filing written submissions. In his submission Mr. Ezekiel Mwampaka cited section 79(2) of the CPC insisting that no application for revision can be made in respect of any preliminary or interlocutory decision or an order of the court unless such decision or order has the effect of finally determining the suit. He further contended that the order subject of this application did not finally determine the suit (appeal) since no rights of the parties under the appeal were determined. That Miscellaneous Civil Application No. 7397/2024 was not an independent suit since the rights of the parties rested on the main suit (appeal) and not on the application and that the order of the court 3 setting aside its dismissal order is an interlocutory order as it does not finally determine the suit. That the trial magistrate only removed a dismissal order and ordered that the appeal to proceed interparty from the stage it had been stopped. The counsel supported his submission by the holding in *Tanzania Motor Services Ltd & Others vs Mehar Singh t/a Thaker Singh*, Civil Appeal No. 115 of 2005 [2006] TZCA 5 (21 July 2006; TanzLII). As to the last limb of objection, Mr. Mwampaka stated the position of the law that an affidavit is supposed to be confined to such fact as the deponent is able of his own knowledge to prove. On this he cited O. XIX R. 3(1) of the CPC. He submitted that, paragraphs 7, 8 and 9 of the applicant's affidavit are offensive as they contain arguments hence subject to be expunged and the court proceed with the rest of the paragraphs if they stand. Replying, the Respondent attacked the grounds of preliminary objection being misconceived as the same do not fit with the tests provided in landmark authority of *Mukisa Biscuit Manufacturing Co.Ltd vs West End Distributors Ltd* [1969] E.A. 696 and *Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu) vs Selemani Hamisi (the Administrator of the Estate of the late 4 Hamisi Abdallah)*, (Civil Appeal No. 314 of 2020) [2022] TZCA 43 (21 February 2022; TanzLII) that it is settled law that a pure points of law does not arise if there are contentions on facts yet to be ascertained by evidence. The Respondent vehemently differed with the arguments advanced by counsel for the Respondent stating that after the ruling in the said Misc. Civil Application No. 7397 of 2024, the Applicant had no room to appeal under Order XL of the Civil Procedure Code henceforth opted to exercise his right of revision as the only remedy to pursue his rights. He further argued that the cited cases are irrelevant and distinguishable to the present application since the applicant had no right of appeal and that every case should be judged on its own facts the preliminary objection be overruled. As to the second limb of objection, the applicant disputed the fact that named

paragraphs contain arguments as submitted by counsel for the Respondents, in the alternative he cited the case of Ignazzio Messina vs Willow Investment SPRL, Civil Application No. 21 of 2001 that if the court finds the said paragraphs are offensive, the remedy is to expunge such offensive paragraphs and proceed with the hearing and determination of the application basing on the remaining paragraphs. 5 Lastly, he prayed that the Respondent's preliminary objections be dismissed with costs for being devoid of merit and order the application to be heard on merit. On costs he cited the cases of Bowen, L.J in the case of Cropper vs. Smith (1884) 26 Ch. D. 700 as quoted in the case of Note Waljee's (Uganda) Ltd vs Ramji Punjabhai Bugarere tea Estates Ltd [1971] 1 EA188. Having considered the rival submissions for and against the objections, the issue for my determination is whether the preliminary objections have merits. I will start to examine the law under which the application is made as the applicant's submission hinted and see if the objections by the respondent is valid. Section 44(1)(a)(b) of the MCA provides; '44(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-

- (a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay; 6
- (b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit: Whereas section 79(1)(c) of the CPC provides; 'The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-
- (a) N/A
- (b) N/A
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity. (emphasis supplied) Powers of the court under section 44(1)(a) of the MCA is supervisory and is done on the on-going proceedings. Supervisory powers of the high court over the subordinate court are exercised suo moto and not by application by any person though it may be from a complaint lodged administratively. In the case of Abdallah Hassani vs Juma Hamis Sekiboko, Civil Appeal No. 22 of 2007 (unreported) cited in Director of Public Prosecutions vs Elizabeth Michael Kimemeta @ Lulu, 7 Criminal Appeal No. 6 of 2012 [2012] TZCA 3 (17 September 2012; TanzLII) the court stated: 'Looking at the quoted provision, we are of the settled view that the mode by which a matter comes to the High Court and the type of powers to be exercised under one subsection differ from the other. Under subsection 1 (a) the court acts suo motu and of course this can be ignited by a complaint, a tip-off from a law-abiding citizen or a discovery of undeserving element in the course of its inspection of

lower court's records. Here, the High Court's powers are mainly administrative and not judicial as such. We are fortified in this view by the wording used. The court would give directions where necessary in the interest of justice and the Courts shall comply with such directions without undue delay. This cannot be on merits of the case because the High Court cannot direct a lower court what decision it should make and how. In our view direction envisaged here are the ones related to the supervisory role of the High Court and which would include for example, transferring a case from one Court to another or from one magistrate to another or directing that it be put on first track during scheduling for hearing. Under this subsection, in giving its orders, the High Court is not enjoined to contact any of the parties involved.' [Emphasis supplied.] 8 Thus, in *Peter Michael Madeleka vs Republic*, Criminal Appeal No. 263 of 2022 [2024] TZCA 356 (14 May 2024; TanzLII), the court concluded that; 'We think the appellant will now be aware if indeed he was unaware that, section 44(1) (a) of the MCA gives no right in the litigant to move the High Court to exercise its supervisory powers it being exercisable at the instance of the court itself.' Given the above, this application cannot be entertained under section 44(1)(a) of the MCA as that is only exercisable by the court suo moto and a party cannot move the High Court to exercise its supervisory powers through a formal application as done by the applicant in this case. That means the court is wrongly moved under sub-section 44(1)(a) of the CMA, which as the law stands is not fatal. Regarding section 44(1)(b) of the MCA and 79(1) of the CPC, these are typically reserved for revision and it applies for finalised proceedings in the subordinate courts. The catch word under 44(1)(b) is determined while 79(1) is decided. Revision power of the court may be made suo moto or upon application by a party or interested person but it has to be done under the confine of law giving right for revision. Having made the above distinction on application of supervisory and revisional powers of the high court, I now move to consider whether the 9 court is clothed with powers to revise the impugned order. According to the respondent the it is interlocutory orders not amenable to revision under section 79(2) of the CPC while the applicant's argument was that has no right of appeal under order XL of the CPC save for this revision. The applicant is not right on this aspect, right of appeal is provided under O. XL rule (1)(t) of the CPC, that; '(t) an order of refusal under rule 19 of Order XXXIX to re-admit, or under rule 21 of Order XXXIX to re-hear, an appeal' However, that right is in regard to refusal to re-admit the appeal. Once the application is granted, aggrieved party cannot appeal because it becomes interlocutory order. In the case of *Paul A. Kweka & Another vs Ngorika Bus Services & Transport Company Limited*, Civil Appeal No. 129 of 2002 [2006] TZCA 10 (4 October 2006; TanzLII) the court discussed the input of O.XL of the CPC which bar appeal against the order setting aside dismissal order under O. IX rule 13 of the CPC, that; 'It is our view that an order under Order IX, rule 13 of the C.P.C. is not appealable, as is the case in India. The reasons which led the legislature to bar an appeal against the order of the District Court and/or Resident Magistrates' Courts setting aside ex parte decrees should be applied indiscriminately to bar such appeals from orders issued by the High Court in identical 10 situations. The rationale for making the orders non-appealable is not hard to find. Firstly, it promotes an expeditious administration of justice, that is it ensures timely justice, at the same time making access to justice

affordable, that is less costly. Secondly, and more importantly, it affords both parties in the case equal opportunity to be heard at the full trial. It would be recalled that the right to a full hearing is one of the basic attributes of the right to equality before the law granted under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.' In another case of Celestine Samora Manase & Others vs Tanzania Social Action Fund & Another, Civil Appeal No. 318 of 2019

[2022] TZCA 58 (24 February 2022; TanzLII) the court made it clear that an order setting aside ex-parte judgment is interlocutory order not appealable. It stated; 'we have no difficulty in answering it in the affirmative. The impugned decision of Wambura, J. in the ancillary application did not finally and conclusively dispose of the issues before the High Court because by setting aside Mipawa, J.'s ex parte judgment, the court essentially reopened the proceedings in respect of the main application for the parties to be heard inter partes and the matter to be determined on the merits.' The above applies to this application, what the district court did was to re-admit the dismissed appeal, which now re-opened the main case for 11 the parties to be given hearing on the grounds of appeal presented. Thus the order became interlocutory and it could not be challenged by way of appeal or revision. In Murtaza Ally Mangungu vs The Returning Officer of Kilwa & Two Others, Civil Application No. 80 of 2016; the court had this to state; 'In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply the nature of the order test. That is, to ask oneself whether the decision or order complained of finally disposes of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.' Thus, while the law under Order XL Rule 1(t) of the CPC provides for the right to appeal when the court refuses the application for re-admission of an appeal but does not provide the remedy of appeal for the opposite party when the said Application is granted, that does not mean that the aggrieved party can file for revision in that respect. From the discussion above, this court has no powers to revise the order or decision in a pending case before the subordinate court, those decisions are excluded by the law under sections 43(2) of the MCA and 79(2) of the CPC from revision. I therefore, find merits in the first 12 objection. Having so stated, I find no reason to deliberate on second limb of objection for it will just be for academic with no purpose to serve in the case at hand. In the upshot, the 1st preliminary objection is sustained, this application is incompetent for reasons stated above. I hereby struck it out without costs. The matter is remitted to the district court to proceed from where it stopped. It is so ordered. V.M NONGWA JUDGE 19/12/2024 Dated and Delivered at Mbeya this 19th December 2024 in presence of the applicant. V.M NONGWA JUDGE 13

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Prepared on 14 October 2026 · Esheria