

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MWARIJA, J.A, KITUSI, J.A. And KEREFU, J.A)**

**CIVIL APPLICATION NO. 144/02 OF 2018**

**MEET SINGH BHACHU ..... APPLICANT**

**VERSUS**

**GURMIT SINGH BHACHU ..... RESPONDENT**

**[An application from the Judgment and Decree of the High Court of  
Tanzania at Arusha]**

**(Maghimbi, J.)**

**dated the 1<sup>st</sup> day of March, 2016**

**in**

**Civil Case No. 9 of 2013**

-----

**RULING OF THE COURT**

15<sup>th</sup> & 17<sup>th</sup> February, 2021

**KITUSI, J.A.:**

This is a ruling on whether we should mark this application withdrawn as prayed by Mr. Colman Ngalo, learned advocate for the applicant, or we should strike it out with costs as prayed by Mr. Bharat Chadha, learned advocate for the respondent.

When the application came up for hearing, Mr. Ngalo immediately informed the Court that he was seeking leave to withdraw it under Rule 58 (1) of the Tanzania Court of Appeal Rules, 2009, as amended (the Rules) because, he stated, the execution which this application had

intended to stay has been carried out by the Administrator General, not a party to these proceedings. The learned counsel had earlier filed a notice indicating his intention to withdraw the application.

However, Mr. Chadha resisted the application, drawing our attention to a notice of preliminary objection he had earlier filed challenging the competence of the application on two points. The learned counsel submitted that the intended withdrawal is a move meant to pre-empt the preliminary objection which, he submitted further, this Court has consistently disallowed. He cited the case of **Tanzania Spring Industries and Autoparts Ltd v. The Attorney General & 2 Others**, Civil Appeal No. 89 of 1998 (unreported). He prayed for an order striking out the application with costs.

In response Mr. Ngalo submitted that this application presents a unique scenario in which the respondent, though cited, has no role to play because he was not the one responsible with the execution in question. He submitted further that the respondent need not have filed any documents in reply because in any case the sought order of stay would not have been directed to him. The learned counsel pointed out that he served the Administrator General and Mr. Samwel Cosmas Mutabazi, learned State Attorney entered appearance. Responding to the allegation

that the intended withdrawal came after being served with the notice of preliminary objection, Mr. Ngalo submitted that his notice of withdrawal was signed on the same date as the notice of preliminary objection, therefore it is not true that the withdrawal was prompted by the objection.

We have given this small but thought-provoking point due consideration in line with the learned arguments, and it seems to us settled that one cannot withdraw an incompetent appeal or application. This is because it has been the practice of this Court, which appeals to logic, that once a preliminary objection has been raised, it must be heard first, and the other party is precluded from doing anything to pre-empt it. See our decisions in **Method Kimomogoro v. Registered Trustees of TANAPA**, Civil Application No. 1 of 2005, **Godfrey Nzowa v. Seleman Kova & Tanzania Building Agency**, Civil Appeal No. 3 of 2014, **Mary John Mitchel v. Sylvester Magembe Cheyo & Others**, Civil Application No. 161 of 2008 and **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Attorney General**, Civil Application No. 552/04 of 2018 (All unreported).

We are therefore inclined to agree with Mr. Chadha because after all, his contention on the incompetence of the application is not all too new.

As early as 27<sup>th</sup> March 2018 the respondent raised the issue of the incompetence of the application under paragraph 3 of the affidavit in reply. The notice of preliminary objection came much later, when Mr. Ngalo could have taken steps long before the said objection had been raised, but he did not.

Consequently, for the reasons shown, we strike out the application with costs.

It is so ordered.

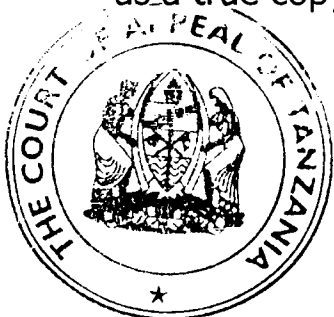
**DATED at ARUSHA** this 17<sup>th</sup> day of February, 2021.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Ruling delivered this 17<sup>th</sup> day of February, 2021 in the presence of Mr. Bharat Chadha, learned counsel for the Respondent also holding brief for Mr Colman Ngalo, learned counsel for the Applicant., is hereby certified as a true copy of the original.



  
H. P. NDESAMBURO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**