IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 37/01 OF 2021

THE MANAGING DIRECTOR, ABSA BANK TANZANIA LIMITED (FORMERLY KNOWN AS BARCLAYS BANK (TANZANIA) LIMITED.....APPLICANT

VERUS

FELICIAN MUHANDIKI.....RESPONDENT

(Application for Extension of Time to lodge a notice of Cross-Appeal in respect of Civil Appeal No. 82 of 2016, before the Court of Appeal of Tanzania at Dar es Salaam)

RULING

1st & 16th June, 2022.

FIKIRINI, J.A.:

By way of notice of motion, the applicant filed this application under Rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking an extension of time to lodge a notice of cross-appeal in respect of Civil Appeal No. 82 of 2016. An affidavit of John Laswai, learned advocate duly instructed by the applicant, supported the application, whereas that of Felician Muhandiki, the respondent, opposed the application.

As gathered from the notice of motion and the reliefs sought, the genesis of the application unfolds as follows: the respondent sued the applicant then through "The Managing Director, Barclays Bank Tanzania Ltd" in Civil Case No. 36 of 2011 in the District Court of Ilala at Samora. The applicant lost and unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam in Civil Appeal No. 157 of 2013. Still aggrieved, the applicant preferred an appeal to this Court, as Civil Appeal No. 88 of 2016. Likewise disgruntled by the same decision, the respondent appealed to this Court in Civil Appeal No. 82 of 2016, which is still pending before this Court.

On 19th August, 2019, the Court struck out Civil Appeal No. 88 of 2016 on the grounds of failure by the applicant to attach the proper order giving leave to appeal. The striking out order prompted the applicant to lodge Miscellaneous Civil Application No. 231 of 2020 before the High Court (Dar es Salaam District Registry), seeking an extension of time to lodge a notice of intention to appeal. Meanwhile, the applicant lodged the present application knowing the other application was still pending before the High Court on the pretext that the route taken was

long, tedious, unnecessary, and time-consuming. The applicant prays for the grant of this application to allow her to lodge a notice of cross-appeal in respect of the still pending Civil Appeal No. 82 of 2016, urging that there are serious points of law and illegalities to be considered by this Court.

On the respondent's part, upon being served with the notice of motion, he lodged a notice of preliminary objection on 9th June, 2021, namely:

1. *The present application is res sub judice to Miscellaneous Civil Application No. 231 of 2020, which is still pending before the High Court.*

2. *The applicant is abusing the court process in administering justice by lodging two similar applications to this Court and the High Court at the same time.*

3. *The applicant is a stranger to the respondent's Civil Appeal No. 82 of 2016; it has no locus standi to apply for the orders sought in the present application.*

On 1st June, 2022, when this application came on for hearing, Dr. Onesmo Michael Kyauke and Mr. Francis Mgale, both learned advocates, appeared for their respective parties.

Submitting on the first point of objection, Mr. Mgale contended that Miscellaneous Civil Application No. 231 of 2020 and Civil Application No. 37/01 of 2021 are similar as they both intend to revive Civil Appeal No. 88 of 2016, which was struck out on 19th August, 2019. He further contended that the two applications are involving the same parties and the same subject matter contravened the dictates of section 8 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). He added that the provision prohibits any court from proceeding with the trial of any case in which:

> *"a matter in issue is directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim to litigate under the same title where such case is pending in the same or any other court having jurisdiction to grant the reliefs sought."*

Regarding the two co-existing applications, Mr. Mgale submitted that since the Miscellaneous Civil Application No. 231 of 2020, lodged in the High Court on 8th May, 2020, was lodged before the present application, the latter having been lodged on 18th February, 2021; ought to be struck out. Bolstering his submission, Mr. Mgale relied on the case of **Marungu Sisal Estates Limited v. George Nicholous Efstathiou & 2 Others** [2003] T. L. R. 22.

On the fact that the High Court had, on 3rd September, 2021, dismissed the application for extension of time in Miscellaneous Civil Application No. 231 of 2020, Mr. Mgale contended that following that dismissal order, the status of the current application has thus changed from being *res-subjudice* to being *res judicata*. Under the circumstances, he added, the only remedy was to appeal the dismissal order.

On the second point of objection that the current application is an abuse of the court process, Mr. Mgale submitted that the existence of two applications between the same parties and on the same subject matter before the courts was an abuse of the court process. The remedy

for such occurrence is to dismiss the present application, stressed the learned counsel. Fortifying his stance, he relied on the case of **Blue Star Service Stations v. Jackson Musseti T/A Musseti Enterprises** [1999] T. L. R. 80 and **Harish Ambaram Jina (by his Attorney Ajar Patel) v. Abdulrazak Jussa Suleiman** [2004] T. L. R. 334.

On the third point of objection that the applicant is a stranger to the present application, Mr. Mgale submitted that in Civil Appeal No. 82 of 2016, the appellant is "*Felician Muhandiki v. the Managing Director of Barclays Bank (Tanzania) Limited.*" In contrast, in the present application, the parties are the "*Managing Director ABSA Bank Tanzania Limited v. Felician Muhandiki.*" According to the counsel, the applicant was never a party in the Civil Appeal Nos. 82 or 88 of 2016, and thus a stranger to the Civil Appeal No. 82 of 2016, which is still pending before this Court, and was to the Civil Appeal No. 88 of 2016, which was struck out on 19th August, 2019.

Mr. Mgale further contended that under Rule 10 of the Rules, an extension of time could only be sought by a party who was a party in the

case and not a stranger. In the present application, the Managing Director Barclays was the one who could exercise the right and not the Managing Director ABSA, who has no *locus standi* for being a stranger, maintained the learned counsel.

He urged the Court to sustain the three points of objection raised and dismiss the application with costs based on his submissions.

On his part, Dr. Kyauke contended that the two applications, even though they are between the same parties, were quite different. The applicant's application before the High Court was under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), for grant of an extension of time, while the one before this Court preferred under Rule 10 of the Rules is for extension of time to lodge a notice of cross-appeal. Expounding on the present application, Dr. Kyauke contended that although not on record, the lodging of the present application came about after appearing before the Court, who advised that following the proper procedure would take long. Subsequently, a shorter route was opted for, resulting in the present application.

Addressing the first point of objection on the application being *res-subjudice* or *res-judicata,* he contended that since this Court has its own rules, the CPC did not apply. And even if it was applicable, still the High Court had no jurisdiction to determine an application for an extension of time to lodge a cross-appeal. According to him, the doctrines would only apply had there been two applications before this Court.

He further contended that the High Court ruling came out while this application already existed and that the two applications were different. Having said so, Dr. Kyauke dismissed the argument that the application was *res-judicata*.

Submitting on the second point that the application was an abuse of the court process, he dismissed the assertion arguing that after filing the Miscellaneous Civil Application No. 231 of 2020, the applicant realized that the route taken was long and thus opted to lodge the present application. Bolstering his submission, he contended that appeal is a Constitutional right; therefore, any litigant should be allowed to exercise

such a right, mainly the applicant who has averred in the affidavit that there are illegalities.

The third point on the applicant's *locus standi* to file the present application, Dr. Kyauke, contended that there was no longer an entity known as Barclays Bank Tanzania Limited. And in paragraph 2 of the affidavit in support, the applicant clearly illustrated on the change of name. Since the certificate of change on name issued by BRELA is on record, what was left was for the applicant to notify the Court.

On the strength of his reply submissions, he urged the Court to overrule and dismiss the preliminary points of objection with costs.

Winding up his submission by way of rejoinder, Mr. Mgale mainly reiterated his earlier submissions, contending that both applications were seeking an extension of time, even though the applicant relied on two different statutory provisions. Dr. Kyauke, in his submission, conceded that the application before the High Court, which was lodged before the present one, would have taken long, the assertion which Mr. Mgale did not contest. He, however, said that if the applicant intended to speed up

the process, they should have withdrawn the application before the High Court.

On the application of the CPC, Mr. Mgale, although he admitted that the CPC was not in use by this Court, contended that what mattered were the principles. Before the High Court ruling dismissing the application, the present application was *res subjudice*, and after the order, the application became *res judicata*. He argued that in both applications, the ultimate goal was to extend the time to revive the struck out Civil Appeal No. 88 of 2016, which struck out on 19th August, 2019. Though at two different courts but the applications were the same.

On Dr. Kyauke's assertion that the route taken of lodging Miscellaneous Civil Application No. 231 of 2020 before the High Court would have taken long, Mr. Mgale admitted the possibility. He nonetheless maintained that the best option ought to have been the withdrawal of the application before the High Court to pave the way for the present application and not to have both applications exist simultaneously. Emphasizing the point, Mr. Mgale submitted that there

are several decisions from this Court on the subject, though he did not mention any.

Concluding his rejoinder, Mr. Mgale contended that the applicant ought to have sought leave from the Court to join a new party or give the notice to notify the change of name. Since there was no such information, the applicant remained a stranger to the Civil Appeal No. 82 of 2016.

Having reviewed the notice of preliminary objection, the affidavits, authorities relied upon, and heard the counsel for the parties, the only thing for my determination is the sustainability of the preliminary points of objection raised.

It is evident and not disputed by the counsel for the parties that Civil Application No. 37/01 of 2021 and Miscellaneous Civil Application No. 231 of 2020, are both applications for an extension of time to file a notice of appeal related to Civil Appeal No. 88 of 2016 which was struck out on 19th August, 2019.

The provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. No. 141, R. E. 2019 (the AJA), read together with Rule 45 (1) (a) and (b) of the Rules, vested concurrent jurisdiction to both this Court and the High Court in granting an extension of time and leave to appeal. However, under Rule 47 (1) of the Rules, the law specifically requires that such applications be made before the High Court first. After the High Court has declined the application, the applicant can opt to approach this Court on second bite. In the case of **Thomas David Kirumbugo & Another v. Tanzania Telecommunication Co. Ltd**, Civil Application No. 1 of 2005 (unreported), the Court explained this procedure with clarity when it stated:

> *"From this provision, the position of the law is clear and unambigious. The application for leave to appeal or extension of time in which to appeal shall first be made to the High Court. Thereafter, and as provided under rule 43 (b), where an application for leave to appeal has been made to the High Court and refused, the application shall be made to the Court within fourteen days of that refusal."*

In the case before me, after the Court struck out Civil Appeal No. 88 of 2016 on 19th August, 2019, the applicant right away lodged Miscellaneous Civil Application No. 231 of 2020, which was the correct measure before the appropriate forum. Later on, Civil Application No. 37/01 of 2021 was lodged. Although CPC is not applicable as we have our own Rules governing proceedings before this Court, in principle, the present application before this Court was *res subjudice*, at one point since the two applications between the same parties and on the same subject matter could not exist simultaneously. This position is well pronounced in the case of **Sisal Estates Limited** (supra) cited by Mr. Mgale, though a High Court decision but the reasoning is sensible, that:

> *".....Both cases were commercial matters, both revolved around the same issue, the parties in both cases were the same or litigating under the same title, and as the Tanga case was prior in time, the suit in the Commercial Division must be struck out."*

Along the same line, since the applicant was seeking an extension of time to lodge a notice of appeal in both applications in respect of Civil

Appeal No. 88 of 2016 which was struck out, there was no need to have two applications on the same subject matter and between the same parties but before two different courts, albeit with concurrent jurisdiction. Under no circumstances the two applications could have procedurally co-existed.

After the dismissal of the application before the High Court on 3rd September, 2021, the applicant's application before this Court would have been appropriate as a second bite and not Civil Application No. 37/01 of 2021, which was lodged on 18th February, 2021, when Miscellaneous Civil Application No. 231 of 2020 was still pending before the High Court.

Dr. Kyauke, in his submission, in an attempt to downplay the principles of *res subjudice* and *res judicata* enshrined in sections 8 and 9 of the CPC, argued that the CPC does not apply in this Court; that is essentially the correct position. However, as contended by Mr. Mgale, the position which I share, in the circumstances of what is before me, what matters is the principle and not necessarily the application of the CPC. It

is evident that Miscellaneous Civil Application No. 231 of 2020, was lodged before the current application. The application before this Court was thus essentially *res judicata* prior to the dismissal of the application before the High Court. The only available remedy in the circumstances was to approach this Court by way of an application for extension of time commonly termed "second bite." Civil Application No. 37/01 of 2021 filed while Miscellaneous Civil Application No. 231 of 2020 was still pending cannot survive as it was inappropriately lodged. Dr. Kyauke's statement that the Court advised him on taking the shorter route, while not contested yet, could not be entertained, as I'm not convinced that he was unprocedurally advised to maintain two applications before two courts with concurrent jurisdiction.

By keeping both applications alive, the applicant was indeed riding two horses; the practice abhorred by the courts and, aside from being unprocedural, was also an abuse of the court process. Faced with the same scenario the Court in **The Registered Trustees of Kanisa La Pentekoste Mbeya v. Lamson Sikazwe & 4 Others,** Civil Appeal No. 210 of 2020, the Court inspired by the decision in **East African**

Development Bank v. Blue Line Enterprises Ltd, Civil Appeal No. 101 of 2009 (unreported) dismissed the appeal after concluding that the applicant's action of having two applications simultaneously was equivalent of forum shopping and thus an abuse of the court process.

The present application also suffers the same predicament, and guided by the decision above, I find the first and second grounds of objection with merits and sustain them.

The third ground on the applicant being a stranger to the respondent's Civil Appeal No. 82 of 2016, as such it has no *locus standi* to apply for the orders sought in the present application, should not detain me much. Dr. Kyauke's submission that the applicant has explained the name change and attached a copy of the certificate of Change of Name issued by BRELA annexed as "AB 1" has not been contested. What is missing is that the Court was not notified so that the information can go on record; the omission I find not fatal. This ground is without merit and hence overruled.

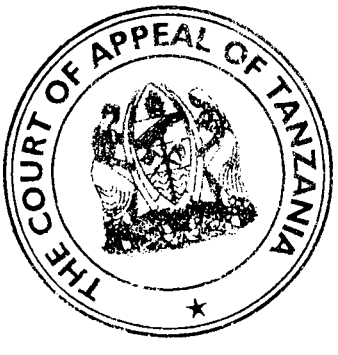
In the premises, I find the first and second points of objection validly raised and accordingly sustained. This application is thus struck out with costs.

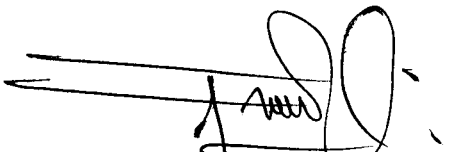
It is so ordered.

DATED at **DAR ES SALAAM** this 16th day of June, 2022.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 16th day of June, 2022 in the presence of Dr. Onesmo Kyauke, learned counsel for the applicant and Mr. Francis Mgane, learned counsel for the respondent, is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL