

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

HC. CIVIL APPEAL NO. 12 OF 2004

ABDALLAH HEMED HAKIYAMUNGU.....APPLICANT

VERSUS

SELEMANI MARANDORESPONDENT

RULING

A.Shangwa,J.

On 13/7/2005, Mihayo,J dismissed Civil Appeal No 12 of 2004 for want of prosecution due to the fact that the appellant ABDALLAH HEMED HAKIYAMUNGU failed to file his written submissions in respect of his appeal on 8/1/2005 as ordered by the Court.

On 28/9/2005, ABDALLAH HEMED HAKIYAMUNGU filed an application for leave to restore his appeal.

On 11/11/2005, learned counsel for the respondent Mr. Marando, Advocate filed a notice of preliminary objection against the said application on three grounds. First, that no fees for filing it were paid. Second, that it is time barred. Third, that it is supported by an incurably defective affidavit.

On 6/2/2006, I ordered that the respondent's preliminary objection should be argued by way of written submissions. It was so argued.

In his written submissions, Mr Marando for the respondent abandoned his first and second grounds of objection. He maintained the third ground only. In his written submissions on the third ground, he pointed out that paragraphs 2,3 and 4 of the affidavit in support of the

application are a narration of the appeal and that paragraphs 5,6,7,8 and 9 of the said affidavit are all arguments pointing out the errors of the judge. He contended that an affidavit of this sort is incurably defective. Furthermore, he submitted that this Court can not set aside its own judgment as it is functus officio and that the available remedy to the applicant is to appeal to the Court of Appeal of Tanzania.

I have read paragraphs 2,3,4,5,6,7,8 and 9 of the applicant's affidavit in support of his application and found that it is true as submitted by Mr. Marando for the respondent that paragraphs 2,3 & 4 of the applicant's affidavit are a narration of appeal No.70 of 2002 which he filed in the District Court of Ilala and appeal No 12 of 2004 which was filed in this court and dismissed for want of prosecution. I have also found it to be true that paragraphs 5,6,7 and 8 contains arguments against the judge's dismissal

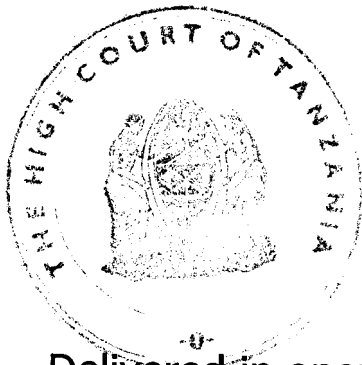
order of the applicant's appeal and paragraph 9 contains an argument that if his application is not granted, he will lose his land.

I entirely agree with Mr. Marando that the applicant's affidavit in support of the application is incurably defective for containing a narration of his appeals which he lodged in the Ilala District Court and in this Court and for containing arguments against the judge's dismissal order of his appeal and that he will lose his land in case this application is not granted.

As the affidavit in support of the application is incurably defective, this Court cannot act on it and grant this application. Indeed, as correctly submitted by Mr. Marando, if the applicant is not satisfied with the judgment of this Court in which his appeal was dismissed for want of prosecution, the right thing to do is to appeal to the Court of

Appeal of Tanzania. It is true also that after having dismissed his appeal, this Court is functus officio.

For these reasons, I uphold the respondent's preliminary objection and I strike out the applicant's application. I make no orders as to costs.




A. Shangwa, J.

24/5/2006.

Delivered in open Court this 24th day of May, 2006.


A. Shangwa,

JUDGE

24/5/2006.