

IN THE HIGH COURT OF TANZANIA

AT MTWARA

MISC. CIVIL APPLICATION NO. 9 OF 2012

ARISING FROM MISC. CIVIL APPLICATION NO. 12 OF 2011

AND CIVIL REVISION NO. 1 OF 2010

OF THE HIGH COURT OF TANZANIA AT MTWARA

ORIGINAL CIVIL CASE NO. 4 OF 2009 OF

RESIDENT MAGISTRATE COURT OF MTWARA

ANTONY PETER MILANZI APPLICANT

VERSUS

1. AZARAM MOHAMED DADI } RESPONDENT

2. STRAIGHTLINE AUCTION MART }

R U L I N G

20th Day of June, 2013 & 2nd Day of August, 2013

M.G. Mzuna, J:.

Antony Peter Milanzi, is applying for leave to appeal to the Court of Appeal of Tanzania against the decision of this court (Hon. Lila, J) in Misc. Civil Application No. 12 of 2012. He also prays this court to stay the execution of the orders in civil case No. 4 of 2009 of the Resident Magistrates' Court of Mtwara.

1/ The first issue is whether the applicant has properly cited the enabling provisions of the law? In other words, has he moved this court?

In his arguments which touches on the merits of the application, the applicant prays for leave to appeal to the Court of Appeal of Tanzania as he says was dissatisfied with the decision of this court which dismissed his application to restore the dismissed suit. That, he was sick the fact which made him fail to attend court. He therefore prayed before this court to allow his application so that his fate can be heard on merit.

On their part, the respondents prayed for this court to dismiss the applicant's application because he seems not to be serious. This, if done, they further said, will enable the purchaser to be handled his properly as they say the matter went to the Court Broker after all due process were followed.

It is worth noting that the application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act Cap 142 R.E. 2002, Rule 45 (a) (b) of the Tanzania Court of Appeal Rules, 2009, Order XXXIX Rule 5 (1) of the Civil Procedure Act Cap 33 R.E. 2002 and any other enabling provisions of the laws.

Based on the above, the citing of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 142 R.E. 2002 by the applicant has made this court totally perplexed and ask whether there is such provision of the law? To

the best of my understanding, there is no Appellate Jurisdiction Act Cap 142 R.E. 2002 instead there is Appellate Jurisdiction Act **Cap 141** R.E. 2002.

Failure to cite relevant provision of law which enables the court to hear and determine such application renders the application incompetent as the court is not properly moved. This position was well stated in the case of **CITIBANK Tanzania Limited Vs. Tanzania Telecommunications Company Limited and 4 Others** Civil Application No. 65 of 2003, CAT, (unreported). Lubuva, JA (as he then was) held at Page 14 that:

"...the court was not properly moved by citation of inapplicable rule. It follows therefore that the application was incompetent."

This is a "pure point of law" and the court can raise it anytime *sua motu*. That was well stated in the case of **Karata Ernest & Others v. Attorney General**, Civil Revision No. 10 of 2010 (CAT) unreported. The remedy is to have the application struck out.

The second issue is whether the two applications one for leave to appeal to the Court of Appeal and another for stay of execution can be argued in a single application?

It is not disputed that there are two different applications in one chamber summons and are supported by one affidavit. In the first application, the applicant prays for this court to grant leave so that he can appeal to the court of Appeal of Tanzania against the ruling issued by Hon. S.A. Lila, J on 18/9/2012 in Civil application No. 12 of 2011. In the second application he is praying for this court to stay the execution of the Mtwara Rm's Court order in Civil Case No. 4 of 2009. When faced with a similar position, my brother Lila, J held that these are omnibus applications which cannot be lumped together in one application. That was held in the case of **Mohamed Hassani V. Said Mussa Omary and Another**, Miscellaneous Land Application No. 7 of 2010 HC Mtwara (unreported), the decision which I fully subscribe to.

The applicant ought to have filed two applications bearing two different case numbers. The court could have decided which should start before another one. In any case, that one for leave to appeal to the court of appeal of Tanzania against the decision of this court in civil application No. 12 of 2011 could to my view, precede the other one. The logic underlying this need to have the two applications filed in different case files is basically rooted in two vital points: First, each must have the court fees paid failure of which denies court of such fees. Secondly, it is practically impossible that one affidavit can base on two applications. Even if it could, I am worried may not meet the tests of a proper affidavit. This can be vividly seen even in the applicant's affidavit which touched on the aspect of eave to appeal to the court of appeal leaving the issue of stay of execution

not covered. That being the case, the 2nd issue is therefore answered in the negative that it was wrong to argue the two applications together.

The third issue is whether, the application for leave is accompanied by the requisite documents?

The provisions of Rule 49 (3) of the Tanzania Court of Appeal Rules 2009 in very clear terms mandatory requires every application for leave to appeal to the court of appeal filed in the High Court to be accompanied by a copy of the order of the High Court. I have perused the chamber application filed by the applicant and I have not seen such order of the High Court sought to be appealed against by the applicant. The applicant filed a chamber summons supported by his affidavit and the judgment only. No copy of the order of the High court was attached to this application. The applicant's application did not therefore satisfy the requirements of the law under Rule 49 (3) of the court of Appeal Rules 2009. The third issue is equally answered in the negative and therefore this application is rendered incompetent.

For the above stated reasons, I find that the applicant's application did not comply with the mandatory legal requirements. It is incompetent. The same is accordingly struck out with costs.

M. G. Mzuna,
JUDGE.
2/8/2013

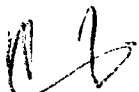
Date: 2/8/2013

Applicant: Present

1st Respondent: Present

C/C: Namanga

Court: Ruling delivered.


M. G. Mzuna,
JUDGE.
2/8/2013

