

**IN THE HIGH COURT OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**MISCELLENEOUS CIVIL APPLICATION NO. 1 OF 2019**

(Originating from Taxation Civil Reference No. 1 of 2017)

**COSATO DAVID CHUMI..... APPLICANT**

**VERSUS**

**WILLIAM JOSEPH MUNGAI.....RESPONDENT**

**RULING**

**KENTE, J:**

By any standards, this ruling which is in relation to a preliminary objection raised by the respondent herein namely William Joseph Mungai to challenge the application brought by one Cosato David Chumi seeking for restoration of Taxation Civil Reference No. 1 of 2017 which was dismissed for want of prosecution, must be very brief.

Notably, the present application is purportedly made under section 95 of the **Civil Procedure Code (Cap 33 RE 2002)** and this has prompted Mr. Nyalusi learned counsel for the respondent to

lodge a notice of preliminary objection containing three points but for the purposes of this ruling, I am of the respectful view that, point number one is sufficient enough to dispose of this matter. It is in that point contended for the respondent that this application is defective for containing (sic) wrong provisions of the law. The import of Mr. Nyalusi's point is that the application has been brought under the wrong provisions of the law. The learned counsel contends in his written legal arguments that the application ought to have been brought under Order IX Rule 8 of the **Civil Procedure Code** as amended by Rule 7 of the **Amendments of the First Schedule** to the Rules which provides that:-

***"where a suit is dismissed wholly or partly under Rule 7 the plaintiff shall be precluded from brining a fresh suit in respect of the same cause of action but he may apply for an order to set the dismissal aside and if he satisfies the court that there was sufficient cause for his nonappearance when the suit was called on for hearing the court shall make***

*an order setting aside the dismissal upon such terms as to costs or otherwise as it think fit and shall appoint a day for proceeding with the suit (Emphasis is ours)".*

With regard to section 95 of the **Civil Procedure Code** under which the application is purportedly made, Mr. Nyalusi referred this Court to the case of **Mary Emmanuel Mmari Vs. James Christian & Another, Misc. Land Application No. 64 of 2017** in which the court citing with approval the case of **Aero Helicopter (T) Limited Vs. F. N. Jansen [1990] TLR 142** held that:-

*"The inherent powers of the court under section 95 of the Civil Procedure Code is exercisable where the law has made no provision governing the particular matter at hand."*

Submitting in reply, Dr. Utamwa who appeared on behalf of the applicant contended that all matters of taxation are governed by the **Advocates Remuneration Order of 2015** and that the said Order has no provision which specifically deals with a situation obtaining in

this matter and which can be used to move the court to grant a restoration order. According to Dr. Utamwa, the lacuna created by the **Advocates Remuneration Order** can only be cured by the invocation of section 95 of the **Civil Procedure Code**.

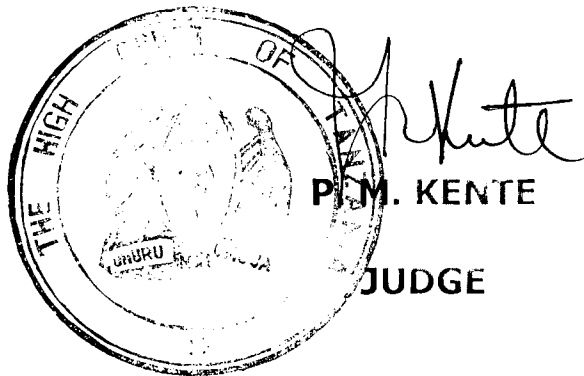
With due respect to Dr. Utamwa, I do not agree with him. In my view, the filing of an application for restoration of an application for reference which was dismissed for want of prosecution is not by itself, a taxation matter. It cannot therefore be said to be governed by the provisions of the **Advocates Remuneration Order of 2015**. Instead, as correctly submitted by Mr. Nyalusi, an application of the present nature falls under Order IX Rule 8 of the **Civil Procedure Code**. It follows in my judgment that, the citing of section 95 of the same code as the enabling provision in an application of the present nature was to say the least, a lackadaisical legal performance which cannot move this court to grant the orders sought.

In line with the case of **Elly Peter Sanya Vs. Ester Nelson, Civil Application No. 3 of 2015, Court of Appeal of Tanzania**

**at Mbeya** (unreported) to which I was ably referred by Mr. Nyalusi learned counsel for the respondent, as the court has not been properly moved the present application is incompetent. On account of the said incompetency, the preliminary objection is sustained and the application is hereby struck out with costs. The applicant, is at liberty, if he is still desirous, to lodge a fresh application citing the proper provisions of the enabling law.

It is so ordered.

DATED at IRINGA this 21<sup>st</sup> day of May, 2020.



**P.M. KENTE**  
**JUDGE**