

**THE HIGH COURT OF TANZANIA
(DAR ES SALAM DISTRICT REGISTRY)
AT DAR ES SALAAM
(PC) CIVIL APPEAL NO. 55 OF 2020**

SHEHEEZA MOEZ KARMALI.....APPELLANT

VERSUS

NOORKARIM DIAMOND KARMALI.....RESPONDENT

*(Originated from Revision Application No. 4 of 2020 District Court of Ilala before Hon
Mpaze.)*

JUDGMENT

MASABO J.:

The respondent Noorkarim Diamond Karmali filed an application for revision before the District Court of Ilala in Revision Application No 4 of 2020 in which he was challenging the final order of Upanga Primary Court in Probate and Administration Cause No. 134 of 2015. Upon being served, the Appellant herein raised a preliminary objection on seven points of law, that: the court lacked jurisdiction; the application is time barred; the court was improperly moved; the application disclosed no cause of action; and that the application is an abuse of court process. The respondent conceded to the preliminary objection and prayed for withdraw with leave to refile. In consideration of these prayers, the court struck out the matter with leave to refile. The Appellant is disgruntled. His appeal is based on only one ground that by striking out the application with leave to refile the District Court erred in law. His argument is that the proper action was to dismiss the application. He is on this basis praying that for nullification of the order and substitution of the same with a dismissal order.

Hearing proceeded in writing. Both parties were represented. Mr. Audax Kahendaguza Vedasto, learned counsel appeared for the Appellant whereas the Respondent enjoyed the service of Mr. Yassin Maka, Advocate.

Mr. Kahendaguza arguments in support of the appeal is that, the order for striking out with leave to refile was a fatal contradiction to the established principles as articulated in **Petromark Africa Ltd V Exim Bank (T) Ltd** (Civil Appeal No: 58 of 2012) where it was held that once a preliminary objection is raised, the proper course for the respondent is to concede to it which implies an acceptance by the applicant that the objection is correct. He argued further that, since one of the objections raised was that the application was time barred, the proper cause for the court was to dismiss the application pursuant to section 3 (1) and 46 of the Law of Limitation Act [Cap 89 R.E 2019]. The case of **Stephen Wasira v Joseph Warioba** (1999) TLR 334 and **Hashim Madongo and 2 others V Minister for Indusrty and trade** (Civil Appeal No. 27 of 2003, Court of Appeal of Tanzania (unreported) were cited in support of the position that the proper course for the court was to dismiss it and not to strike out.

Mr. Maka for the respondent submitted that the appeal is misconceived and lacks limbs to stand on because it is against an interlocutory order which does not finalize the case, hence contrary to section 43 (2) of the Magistrates' Courts Act [Cap 11 RE 2019] and Section 74 (2) of the Civil Procedure Code [Cap 33 RE 2019] which bars appeal from interlocutory orders. To fortify his argument Mr. Maka cited the case **Tanzania Motor**

Services Limited and Two Others V Mehar Singh, Civil Appeal No 115 of 2005, Court of Appeal of Tanzania at Dodoma (unreported), and **Junaco (T) Limited and Another V Harel Mallac Limited**, Civil Application No. 473/14 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Having given due consideration to ground of appeal, the original record and the submission made by the learned counsels, it would appear to me that two issues awaits my determination:

1. Whether the application is an interlocutory order
2. Whether the application of Revision No 4 of 2020 was properly struck out.

Regarding the first issue it is an undisputed fact that interlocutory orders are not appealable. Section 43 (2) of the Magistrates' Courts Act [Cap 11 RE 2019]:

"No appeal or application for revision shall be made in respect of interlocutory or order of the District Court of Resident Magistrates Courts unless such orders determines the suit to its finality."

In the same spirit, Section 74 (2) of the Civil Procedure Code [Cap 33 RE 2019] provides that:

"no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrates' Court or any other

tribunal, unless such decision or order has effect of determining the suit to its finality”.

The import of these provisions which is are in simiral spirit with the section 5(1)(a) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] has been broadly litigated. There are numerous authorities including the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa & 2 Orthers**, Civil Application No. 80 of 2016 — (unreported), and in **Peter Noel Kingamkono v. Tropical Pesticides Research**, Civil Application No. 2 of 2009, Court of Appeal of Tanzania (unreported) and **Junaco (T) Limited and Another V Harel Mallac Limited** (Supra). In the latter case the Court of Appeal having cited with approval its previous decision in **Murtaza Ally Mangungu** (supra) and in **Peter Noel Kingamkono** (supra) it held that

' In view of above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply 12 "the nature of the order test". That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.

Guided by the above principles, I am of the settled view that the order being challenged in this appeal is interlocutory as it did not determine the rights of

the parties. Thu, pursuant to Section 43 (2) of the Magistrates' Courts Act [Cap 11 RE 2019] and Section 74(2) of the Civil Procedure Code, it is incompetent before this court.

As this finding suffices to dispose of the application, I will not go to the second question.

In the final event, the application is struck out with costs for incompetence.

DATED at DAR ES SALAAM this 18th day of June 2020.



J.L. MASABO

JUDGE