

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 153 OF 2019

*(Appeal originating from Kariakoo Primary Court in Probate No. 140/2007
and Miscellaneous Civil Application No. 81 of 2019 from District Court of
Ilala)*

1. Mohamed Ahmed Soli
2. Omary Abdul Useja (The Administrators of **Appellants**
the Estates of the late
Mohamed Useja Mwendapole

VERSUS

1. Rajabu Shabani Kinande
2. Farida Mwinshehe (The Administrators of **Respondents**
the Estates of the late
Mariam Mohamed Useja

JUDGEMENT

Date of last order: 13.05.2020

Date of Judgement: 27.10.2020

EBRAHIM, J.:

The Applicants herein unsuccessfully sought to appeal against the decision of the Primary Court of Kariakoo, i.e. Probate Cause No. 81/2019 vide Civil Appeal No. 159 of 2018 at the District Court of Ilala. The Resident Magistrate Court dismissed the appeal for being time barred. Still wanting to pursue the appeal, the Applicants filed an application for extension of time at the District Court of Kinyerezi, i.e. Miscellaneous Civil Application No. 81 of 2019. The Respondents herein successfully raised a point of preliminary objection that the RM's court has become functus officio to entertain an application for extension of time to lodge an appeal in the same court since the same court had dismissed the appeal for being time barred.

Aggrieved by the decision in Miscellaneous Civil Application No. 81 of 2019, the Applicants have lodged the instant appeal raising four grounds of appeal as follows:

1. That the District Court erred in law and fact in holding that the application for extension of time is functus officio.

2. That the District Court erred in law and fact by failure to assess the basis of preliminary objection.
3. That the District Court erred in law in pronouncing a ruling without proper order of the court.
4. That the District Court erred in law and fact by discussing a preliminary objection which was withdrawn.

The appeal was argued by way of written submission. Both parties appeared in person. I shall not reproduce the submissions by parties since they are in the record. I shall however refer to them in the course of addressing substantive issues.

Having carefully read the rival submissions of the parties, it is obvious that the bone of contention is whether it was correct for the District Court Magistrate to rule that the court was functus officio to entertain an application for extension of time filed in that court.

Going by the Applicants submission and rejoinder, they are stressing on the point that since the appeal was not heard and determined on merits, it was wrong for the District Court to hold that the application for extension of time was functus officio as there was no previous application for extension

brought by the Applicants. In showing what amounts to *functus officio*, the Appellants cited the case of **Bibi Kisoko Medard Vs. Minister for Lands, Housing and Urban Settlement** (1983) TLR 250 where it was held that *"the court having heard a matter cannot re-discuss the same issue not being an appeal court"*.

They also referred to the case of **TTCL & Others V Tri-Telecommunication TZ Ltd** (2006) EA 393 where the court held that *"it was functus officio to entertain a revision on the proceedings of the High Court after it had examined the same proceedings in the previous revision."*

Responding to the argument by the Applicants, the Respondent contended that the law is settled that once the case is dismissed by the Court of competent jurisdiction, then it cannot be re-opened by the same court and make determination as dismissal order becomes final and conclusive upon parties. The Respondents contended further that if the Applicants were dissatisfied with hon. Sachore's decision of dismissing their appeal, or if they believed that it was wrong for the court to issue an order of dismissal instead of struck out order; they should have also appealed to the High Court instead of going back to the same court with an application for extension of time. They cited the Court of Appeal case of **Cyprian**

Mamboleo Hizza Vs Eva Kioso and Another, Civil Application No. 3 of 2010 (Unreported) which held that:

"Presumably, if the application had not been dismissed the applicant could have gone back to the High Court and start the process afresh. Since the application was dismissed instead of struck out he came to this Court vide Civil Application No. 4 of 2009 by way of a "second bite", so to speak".

He concluded on the point that if the application for extension of time would have been determined and granted it would have resulted into restoration of the appeal which was dismissed by the same court by another magistrate.

Before I proceed to address the main issue, I wish to point out on the outset that it was wrong for the District Court magistrate in the application for extension of time to state that "because the appeal filed out of time was dismissed **instead of being struck out**; then the court has become functus officio." The contention by the District Court here was that **instead of struck out order, the court dismissed the appeal for being time barred hence it has become functus officio.** Indeed, the District Magistrate was correct that the dismissal of the appeal by the previous magistrate of the same court rendered the court functus officio to entertain

an application for extension of time. However, the suggestion that an appeal which was filed out time ought to be struck out is a misconception of the law. Unfortunately, the same assumption was picked by both parties.

The law is clear that once a matter is dismissed for being time barred, **irrespective of the phrase used**, the remedy is not to apply for extension of time before the same court. Borrowing a leaf from the spirit of **section 3(1) of the Law of Limitation Act**, it follows that there is no room for a matter found to be time barred either in the High Court or court subordinate thereto to be struck out but rather the remedy is to dismiss it.

Now coming to the effect of dismissal order in respect of Civil Appeal No. 159 of 2018. After the District Court had dismissed the matter for being time barred, the remedy available to the Applicants was not to file an extension of time because the appeal was not determined on merits; if aggrieved the remedy was to appeal to the High Court because the dismissal order for a case found to be time barred concluded the matter. I find an inspiration from the decision of the Court of Appeal in the case of **East African Development Bank Vs Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 (unreported) where it was held *that where an*

*order for dismissal is made under **section 3(1) of the Law of Limitation Act**, it is not open for an aggrieved party to come back to the same court and institute an application for extension of time.*

Tailoring the principle enunciated by the Court of Appeal above to our instant case, it is apparent here that irrespective of the law used, once the matter is time barred the remedy is to dismiss it and an aggrieved party cannot seek redress by going to the same court and institute an application for extension of time. Again, I associate myself with the holding of this court where my brother Judge Siyani faced with the similar issue in the case of **Boniface Inyansi Vs Amini Hussein Rukoba and Another**, Miscellaneous Civil Application No. 55 of 2019 (unreported) held as follows:

*"Taking a leaf from the above authority, it is apparent that since the **applicant's appeal was dismissed for being time barred, the remedy cannot be returning to the same court by way of an application for extension of time.** In my considered opinion, the principle set out in the case of *Olam Uganda Limited suing through its Attorney United Youth Shipping Limited V Tanzania Harbor Authority*, **cuts across all the proceedings regardless of the law applicable because when a matter is dismissed for being time barred, such***

dismissal order becomes final in that court as far as time limitation is concerned". (Emphasis added).

I also subscribe to the principle of the Court of Appeal in the cited case of **Cyprian Mamboleo Hizza Vs Eva Kioso and Another (Supra)** that, if the matter is **not dismissed but struck out** a party can presumably go back afresh to the same court and start again and not otherwise.

That being said, the first ground of appeal is baseless and it flops.

As for the remaining grounds of appeal, I find them all to have no basis. Beginning with the second ground, it is obvious that the issue of functus officio is a point of law as it goes to the jurisdiction of the court to adjudicate the matter. As for the 3rd ground of appeal, the District Magistrate expressly sustained the point of preliminary objection which is obvious that the prayers by the Respondents that the application be dismissed was allowed by the court. Lastly, the court dismissed the matter on the basis that the same was time barred. More- so nothing stopped the court from giving its opinion on the issue of wrong citation.

All said and done, I find the appeal to be unmeritorious and I accordingly dismiss it with costs.

Accordingly ordered



R.A. Ebrahim
R.A. Ebrahim

Judge

Dar Es Salaam
27.10.2020