

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT MUSOMA**

MISCL LABOUR APPLICATION NO. 1 OF 2020

(Arising from Execution No. 46 of 2015)

**BENJAMINI MUGAGANIAPPLICANT
VERSUS
BUNDA DISTRICT DESIGNATED HOSPITAL..... RESPONDENT**

RULING

16th and 23rd October, 2020

KISANYA, J.:

Benjamini Mugagani, the applicant herein has moved this Court to grant him leave to file an application for execution of the decree of Musoma Conciliation Board dated 12/08/1998 out of time. His application has been made under rules 24(1) and 55(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007 and section 95 of the Civil Procedure Code [Cap. 33, R.E. 2002]. It is also supported by an affidavit sworn by the applicant on 29th January, 2020.

The applicant deposed in paragraph 9 of the said affidavit that, his application for execution of the decree subject to the present application was struck for being time barred. However, a copy of ruling annexed to the affidavit and marked "G" shows that, his application for execution of the said award was dismissed by this Court in Execution No. 46 of 2015. It was not struck out as adduced by the applicant under oath.

Consequently, upon being served with this application, the respondent filed a Notice of Objection on the following points of law:

1. *The matter complained of was dismissed on 10th November, 2017 hence this Court is *functus officio* (see applicants- annexure “G”).*
2. *Statutorily rule 24(1), rule 55(1), (2) of GN No. 106 of 2017 and section 95 of the CPC 1996 do not mandate a *functus officio* court to legitimate revise its earlier decision.*
3. *The drawn order complained of is not attached.*
4. *The application is frivolous intended to abuse court process.*

At the hearing of the preliminary objection, the applicant enjoyed the legal services of Mr. Masoud Hamisi, learned advocate while the respondent was duly represented by Mr. Ernest Mhagama, learned advocate.

When Mr. Mhagama was called on to submit in support of the application, he opted to argue the first, second and fourth points of objection jointly while the third point of objection was dropped. He stated that, all points were related to the competence of this Court to determine the present application. The learned counsel submitted that, since the application for execution was dismissed by this Court for being time barred, the Court is *functus officio* to entertain the same matter. Mr. Mhagama was of the firm view that, the applicant ought to have appealed to the Court of Appeal. He cited the case of **Hemed Hakiyamungu vs Seleman Maramba**, Civil Appeal No. 12 of 2004 HCT at DSM (unreported) where his lordship Shangwa, J (as he then was) had this to say in respect of an application for restoration of an appeal which had been dismissed for want of prosecution:

“...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*."*

In view of the above, Mr. Mhagama submitted that, although this Court has inherent powers under section 95 of the CPC, a finalized matter cannot be refiled and determined by the same Court. He then moved the Court to dismiss the present application with costs on the ground that, it was frivolous.

Responding, Mr. Hamisi argued that, the application was properly before the Court. He submitted that the Court was right to dismiss the application for execution filed by the applicant after being filed out of time. However, the learned counsel was of the view that, once a matter is dismissed for being time barred, the right approach is to seek for extension of time. Therefore, he was of the firm position that, the Court was not *functus officio* to determine the present application. His position was based on the fact that, this Court has never entertained the application for extension of time. In that regard, Mr. Hamis submitted that, the case of **Abdalla Hakiyamungu** (supra) is distinguishable in the circumstances of this case. He therefore asked the Court to dismiss the preliminary objection.

Rejoining, Mr. Mhagama submitted that, as far as execution of the award subject to this application is concerned, the dismissal order issued by this Court is final and conclusive and that parties cannot bring another application for extension of time or execution. He reiterated his position that, the proper recourse for the applicant was to appeal against the dismissal order.

I have carefully considered the rival arguments advanced by the learned counsel for both parties. In the light of the submissions made by the parties,

the issue for consideration is whether the present application is competent before the Court.

I have noted that, parties do not dispute that the applicant filed an application for execution of the decree subject to this application. Also, parties do not dispute that, the said application was dismissed by this Court on the account that it was time barred. Mr. Mhagama is of the view that, the application is not competent and that, the Court is *functus officio*. On the other hand, Mr. Hamisi argues that the application was properly filed before the Court.

For better understanding of the discussion at hand, I wish to reproduce what was held by the District Registrar of this Court who heard the application for execution of the award in Execution No. 46 of 2015.

“Now since the present application was filed on 07th December, 2015, well after the expiration of twelve (12) years which is prescribed by law it is apparent that it is time barred and it deserves to be dismissed.

Just in the upshot and for the foregoing reasons I uphold the first point of preliminary objection. I find and hold that this application is time barred. It is accordingly dismissed in terms of section 3(1) of the Law of Limitation Act.”

As stated herein, the order sought in the present application is for extension of time to file an application for execution. It is my considered view that, the end result of the present application is to enable the applicant to file another application for execution while his previous application was dismissed for being time barred. That is when the issue related to competence of instant application comes in.

It is settled law that when a matter filed before the Court is dismissed, it indicates that, the matter was competent, determined and disposed of. This

stance was stated in the celebrated case of **Ngoni - Matengo Co-operative Marketing Union Ltd. v Alimahomed Osman** (1959) EA 577 when the Court of Appeal for Eastern Africa held:

“ . What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. (Emphasis added)

Applying the above decision to the present case, much as the application for execution of decree subject to this application was dismissed, that suggests that it was determined or disposed of on merit. Therefore, the applicant is barred to institute the present application which aims at bring up the dismissed application.

With due respect, I beg to differ with Mr. Hamisi who reasoned that, the proper remedy to a party whose application or appeal is dismissed for being time barred is to file an application for extension of time. As rightly argued by Mr. Mhagama, the right recourse in such a case is to appeal against the dismissal order. In alternative, he may file an application for revision to higher court or apply for review before the same court. Otherwise, the Court cannot extend time to determine an application which was dismissed by it. This position was taken in **East African Development Bank vs Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009, CAT at DSM (unreported) when the Court of Appeal cited with approval its decision in **Olam Uganda Limited suing through its Attorney United Youth Shipping Company Limited vs Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 (unreported) where it was held that:

"A suit or legal proceeding instituted beyond that period does not lie and in the light of the mandatory provisions of section 3 (1) of the Law of Limitation Act 1971 "shall be dismissed whether or not limitation has been set up as a defence"

.....

In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court....."

The Court of Appeal went on to hold as follows:

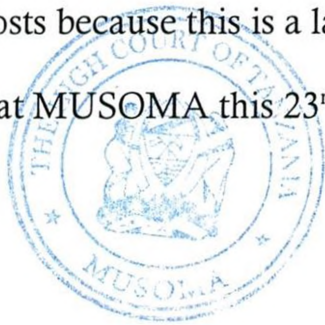
"It follows that once an order of dismissal is made under section 3 (1) it is not open to an aggrieved party to go back to the same court and institute an application for extension of time. The remedy is to seek review before the same court or to lodge an appeal or a revision before a higher court. The rationale is simple. That is, as far as the court is concerned the issue of time limitation has been determined. So, a party cannot go back to the same court on the same issue. It follows that, after the order of dismissal was made by Mandia, J. on 22/6/2007 it was not open to the appellant to go back to the same court and institute the application for extension of time before Sheikh, J. In short, the application before Sheikh, J. was res judicata."

Guided by the above position of the highest Court of this land, it is apparent that, as far as the issue of time limitation subject to the present application is concerned, it was determined by this Court in Execution No. 46 of 2015 on 10/11/2017. In that regard, the present application is res judicata.

Likewise, the law is settled that, the Court becomes *functus officio* once a decision in a matter of judicial proceedings has been reached. See the case of **Benhardard Mbaruku Tito and Another vs R**, Misc. Economic Cause No. 8 of 2018, HCT (Economic Crimes Division (unreported)). Since the issue of time limitation was decided by this Court in the above stated case, I am of the opinion that, the Court is barred to determine the same matter by way of extension of time.

For the above reasons, I hereby uphold the preliminary objection. The present application is incompetent on the account that, the Court has already determined matter related to time limitation of application for execution of the award. In the result, this application is hereby struck out. I make no order as to costs because this is a labour matter.

Dated at MUSOMA this 23rd day of October, 2020.





E. S. Kisanya
JUDGE

Court: Ruling delivered this 23rd October, 2020 in the presence of the applicant in person and Mr. Ernest Mhagama, learned advocate for the respondent. Bench Clerk, Mariam present.

Right of appeal is well explained.




E. S. Kisanya
JUDGE
23/10/2020