IN THE HIGH COURT OF DAR ES SALAAM
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 226 OF 2018

(Arising from Civil Appeal No. 50 of 2007)

MROLELE GRASTIAN.....APPLICANT

VERSUS

MANAGING DIRECTOR TAN PESCA CO. LTD ..... RESPONDENT

RULING

MASABO J.L.:-

The application is made under Section 95 of the Civil Procedure Code, Cap 33 RE 2002. The applicant is praying for the following orders:

1. That, this court be pleased to uphold the judgment entered n favor of the applicant by Hon. Makaramba J., in Civil Appeal No. 150 of 2007 on 6th 2009 in the presence of both parties
2. That this court be pleased to quash and set aside the decree dated 9th February 2012 as it goes against its judgment dated 6th October 2009
3. That this court be pleased to uphold its decree dated 3rd March 2012 and extracted on 31st March 2016
4. Any other reliefs as the court may deem fit to grant

In brief, the application emanates from a termination of an employment relationship between the Applicant and the Respondent which ensured on 19th August 2004. Dissatisfied with the termination the Applicant sought

remedy at the Conciliation Board which on 29th January 2005 ordered reinstatement and payment of full salaries and fringe benefits to the Applicant. Nearly two years passed without action. The Applicant instituted a labour case No. 4 of 2007 in the District Court for Kibaha which was decided in the Respondent's favour. Disgruntled, he appealed to this Court in Civil Appeal No. 150 of 2007. The Parties were heard in writing and on 6th October 2009, the Court presided over by Makaramba, J, entered judgment in favour of the Applicant. Both the applicant and the Respondent appeared in person on the day of judgment. Having won the case, the Applicant retreated. He came back after two years to follow-up the judgment on 9th March 2012. Instead of being supplied with the judgment he was supplied with a decree signed on 9th February indicating that the matter was struck out by Hon. Makaramba J on 9th February 2012 for lack of prosecution. After further inquiry, he was furnished with another decree signed by Deputy Registrar which indicated that the judgment was delivered 3rd March 2012.

The application was heard in writing with the consent of both parties. In support of the Application, Ms. Neema Joram counsel for the Applicant, having narrated the scenario above argued that the existence of two decrees has inhibited execution. She argued that, under Order XX Rule 20 of the Civil Procedure Code, there is no time limitation for the parties to collect judgment and decree hence the court mislead itself in striking out the matter which had already been finalized as there was nothing for the Applicant to prosecute. She added that, when the Court entered judgment on 6th October

2009 in the presence of both parties it became functus officio. She cited the case of Zee Hotel v Minister of Finance (1997) T.L.R in support.

On his part Mr. Wilbroad Nuguna, counsel for the Respondent did not contest the series of events as narrated above. His submission centered on the competence of this application whereby he submitted that, the application is misconceived in that, the applicant ought to have moved the court to set aside the decree which contravenes its previous decision. He argued that, section 95 does not suffice as the Applicant has not given sufficient explanation as to the events leading to the inconsistencies.

In rejoinder Ms. Joram argued that order XX Rule 6(1) of the Civil Procedure Code requires that the decree shall agree with the judgment and since in the instant case the two are conflicting, it is with the courts discretion to order rectification of the anomaly. She reasoned further that; the discrepancies must have been occasioned by human error in handling of files hence this court have power to invoke section 95 of the CPC to ensure that the ends of justice are met. She cited the case of Regional Manager **TANROADS Kagera v Ruaha Concrete Company Limited**, Civil Application No 97 of 2007 Court of Appeal of Tanzania (unreported) and **Tanga Cement Company limited v Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, Court of Appeal of Tanzania (unreported) where it was held that the discretionary powers of the court must be judiciously exercised taking into account the circumstances of the case guided by the principles of justice, equity and common sense. Based on

these two cases he implored the court to determine the application in the applicants favour so that he can enjoy the right he has waited for so long. She further added that, the application to set aside a dismissal order as provided for under Order IX Rule (3) and (4) of the Civil Procedure Code is not applicable to the circumstances at hand as the matter was already dismissed.

I have dispassionately considered the argument by both parties. I will first address myself to the point of law raised by the Respondent regarding the competence of the Application. His major contention is that, since there was a dismissal order the Applicant ought to have moved the court to set aside the dismissal order, an argument which was nonetheless not supported by any legal provision nor a case authority.

Section 95 under which the application is made provides for inherent powers of the court, broadly interpreted to mean those powers which are expressly not provided by the Code of Civil Procedure, but conferred on the court in addition to those expressly provided by the Code. It provides that:

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"

It is now a settled principle of law that, section 95 of the Civil Procedure Code which provides for inherent powers of this court can only be invoked

where there is no clear provision in the CPC. Articulating this Principle, the Court of Appeal of Tanzania in **Bunda District Council v. Virian Tanzania Ltd** [2000] TLR 385

> "Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which will meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked; it is only when there is no clear provision in the Civil Procedure Code that inherent jurisdiction can be invoked." [emphasis added]

In its previous decision in **Attorney General v. Maalim Kadau and others** [1997] T.L.R. 69, the court held that:

> It is trite knowledge that the inherent powers of the court provided under this section of the Civil Procedure Code are invoked in situations where the court has authority or jurisdiction to deal with the matter and there is no specific provision of the law in place. [emphasis added]

In the same spirit in **Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Ltd (IPTL) and Others** [2000] TLR 324, the Court had this to say regarding the exercise of inherent powers.

> "As I understand it, this section does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do and does, is to save inherent powers of those courts. The section is undoubtedly a very useful provision, but it is not a panacea for all ills in the administration of justice in civil cases. Commenting on section 151 of the Indian Code of Civil Procedure which is in *pari material* with that section, the learned authors of The Law of Civil Procedure, (6 ed)., observe, at page 324, as follows: "The power is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment." [emphasis added]

Guided by these authorities, the question that confronts me is whether or not the application herein is remedied by any provision under the Civil Procedure Code? Having perused the case file, I have found nothing to contradict the narration provided by the Applicant pertaining to the background of the Application. As rightly stated by the Applicant, there are three contradicting documents in the case file, namely a judgement dated 6th October 2009 delivered in the presence of both parties and dully signed by the Presiding judge. An order dated 9th February 2012 signed by the same judge striking out the appeal for want of prosecution and a decree signed by C. Magesa Deputy Registrar dated 31st March 2016 purporting to have been

extracted from the judgment delivered on 3rd March 2012. What the Applicant is seeking from this court is rectification of the anomaly occasioned by the discrepancies.

My perusal of the original record reveals that, the appeal was finally determined on 6th October 2009. After more than a year had lapsed since the determined of the appeal, on 8th February 2011, the case file was inadvertently placed before the presiding judge and was inadvertently scheduled for ruling on 31/3/2011. None of the parties appeared on the said none who made an order for ruling in the absence of the parties. On the said date none of parties entered appearance and the matter was scheduled for judgment on 28/7/2011. As none of the parties entered appearance the court ordered publication of notice for judgment and rescheduled the same to 9/2/2012. Records reveal further that none of the parties entered appearance on the material 9/2/2012 on which date the court made the following order:

> **CRT.** The judgement in this matter has been finalized a long time ago. However, efforts to serve the parties to come and receive it have failed. In this circumstance, this Court caused service by publication to be affected which was done on the 23/9/2011. However still neither the Appellant nor the Respondent turned up. In the circumstances, let it be ordered as follows.
> **Order.** The matter is hereby struck out for non-prosecution on the appellant.
> No orders as to costs

I have noted further that, there was a duplicate file created in respect of the same case. The judgment delivered by Makaramba J, was placed in a duplicate file and this, in my strong view might have significantly constributed to the anomaly herein challenged.

This being said, the decisions being challenged having originated from an appeal is covered by Order XXXIX. None of the provisions in this part apply to the instant case. Order XXXIX Rule 11(2) which provides for dismissal of appeal upon the party's default of appearance on the date scheduled for hearing is inapplicable as the matter was already heard and finally determined hence there was nothing for the Appellant to prosecute. In my view, the only provision which the Applicant could invoke under the circumstances is Order XLII Rule 1(b) which provides an avenue for a party who is aggrieved by a non-appealable decree or order which is tainted by mistake or error apparent on the face of the record to apply for review of the decree or order. Since the proceedings leading to the order dated 9th February 2012 was based on nullity proceedings the provision of Rule 1(b) could be employed to cure the anomaly and this would entail that there was a remedy under the law.

However, considering the circumstances giving rise to the application and the nature of the remedy provided under Order XLII(1)(b), I am of the strong view that it is fair and just to invoke the principle of overriding objective provided for under section 3A and 3B of the Civil Procedure Code, Cap 33 RE 2018 which is geared towards facilitating just, expeditious, proportionate

and affordable resolution of all matters (**Ashraf Akber Kgan v Ravji Govind Varsan**, Civil Appeal No. 5 of 2015, Court of Appeal of Tanzania (unreported). Is a trite law that procedural irregularity should not vitiate proceedings if no injustice has been occasioned. Thus, rules of procedure being handmaids of justice should not be employed to thwart justice (See **the Judge In-charge High Court Arusha v. N.I.N. Munuo Ng'uni**, Civil Appeal No. 45 of 1998 CAT at Arusha (unreported).

Having determined the point raised by the respondent, let me proceed to the merit of the Application. As alluded to earlier in the instant case there are three documents, a judgment, an order and a decree. Without repeating what I have said above regarding the proceedings pertaining to the order striking out the appeal, I am certain that the same was a nullity and I will therefore, confine my determination to the judgment and the decree.

It is a trite law that a decree been an extract of the judgment should agree with the judgment. Order XX Rule 6(1) of the Civil Procedure Code clearly stipulates that:

> 6.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

Further, Rule 7(1) of the same Order states that:

> The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge

> or Magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Therefore, in the instant case, since the judgment was delivered on 6th October 2009 the decree ought to bear the same date. To the contrary, the decree which was extracted on 31st March 2016 and signed by Deputy Registrar purported that the judgment was delivered on 3rd March 2012 hence contravened the requirements above.

Based on what I have endeavored to state above, I allow the Application and set aside the order dated 9th February 2012. The Registrar is to rectify the anomaly in the decree and furnish the Applicant with a correct decree.

I make no orders as to costs.

DATED at DAR ES SALAAM this 30th day of April 2020

J.L. MASABO

JUDGE