

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

PC CIVIL APPEAL NO. 36 OF 2021

(Appeal from the Ruling of the District Court of Kibaha at Kibaha in Misc. Civil
Application No. 46 of 2020 before Hon. F. Kibona, **RM** dated 11/02/2021)

JOHN MTAWALI KITUNDU.....APPELLANT

VERSUS

ASIA HAJI KIMBUNGA.....RESPONDENT

JUDGMENT

07th Oct, 2021 & 05th Nov, 2021.

E. E. KAKOLAKI J

Whether the District Court of Kibaha was functus officio to entertain the matter before it in Misc. Civil Application No. 46 of 2020, is the centre of controversy in this appeal. The appellant in this appeal is equipped with four grounds of appeal which I shall soon reproduce and the appeal proceeded by way of written submissions while both parties proceeding unrepresented as Mr. Benard S. Maguha, learned advocate was instructed by appellant for preparation of submissions only.

The facts that gave rise to this appeal can simply be stated as follows. The appellant being aggrieved with the decision and decree issued by the Primary Court of Mkuza in Matrimonial Cause No. 5 of 2011 had filed the appeal before the District Court of Kibaha in Matrimonial Appeal No. 7 of 2019 which ended up with dismissal for being filed out of time. Discontented with the dismissal order but being time barred to appeal the appellant before the same District Court of Kibaha in Misc. Application No. 31 of 2019, preferred an application for extension of time within which to file the appeal against the decision of Mkuza Primary Court, the application which was dismissed for want of merit. Undaunted the appellant filed another application in the same court in Misc. 46 of 2020, subject of this appeal, this time seeking for extension of time within which to file an application for revision against the decision of Mkuza Primary Court. Lucky was not his side as the same met resistance from the respondent who raised a Notice of preliminary objection to the effect that the court was functus officio to entertain it for having heard and determined conclusively the same matter in Misc. Civil Application No. 31 of 2019. Upon hearing the District Court sustained the objection hence dismissal of the said

application. It is from that decision the appellant is before this court canvassed with four grounds as stated before herein, going thus:

1. That the Honourable Magistrate erred in law and fact for holding that the Court was functus officio while it is not.
2. That the Honourable Magistrate erred in law and fact for failure to consider the application while the Court was having jurisdiction to entertain the application for extension of time to file the revision of the decision of Matrimonial Cause No. 05 of 2019 made by Mkuza Primary Court.
3. That the Honourable Magistrate erred in law and fact by reasoning that there was a right of appeal while the application for extension of time to Appeal was already dismissed by the same Court.
4. That the Honourable Magistrate erred in law and fact by failing to require parties to argue on the issue raised by the Appellant herein during hearing of the application concerning the validity of documents filed by the Respondent herein when she was responding to the application.

I have had time to peruse the record and the impugned ruling as well as the fighting submissions by the parties. To start with the first ground the

Issue is whether the District Court is functus officio to entertain the matter before it. What is gleaned from the submissions is that parties are at one that Misc. Civil Application No. 31 of 2019 was heard and determined conclusively after being dismissed. They only part their ways when it comes to the issue whether the subject matter conclusively determined in the said Misc. Civil Application No. 31 of 2019 is one and the same or similar to the one in Misc. Civil Application No. 46 of 2020, to render the District Court functus officio to entertain the latter matter. In his submission the appellant is contending that, the two application are separate in prayers as in the former one the prayer was for extension of time within which to appeal against the decision of Mkuza Primary Court which in the impugned decision it was for extension of time to file revision against the decision of the same Mkuza Primary Court, thus the court could in no way become functus officio. To the Contrary the appellant's submission is vied by the respondent arguing that since in the former application the prayers were dismissed the appellant ought to have appealed against such decision and his door for another application was closed thus, the District Court was functus officio to hear and determine an

application of similar prayer for extension of time. She therefore prayed this court to dismiss the appeal for want of merit.

It is trite law that court will be rendered functus officio when disposes of a case or matter by a verdict of not guilty or by passing sentence or by making some orders finally disposing of the case. In the case of **John Mgya and Four Others Vs. Edmundi Mjengwa and Six Others**, Criminal Appeal No. 8 (A) of 1997(CAT-unreported) the Court of Appeal cited with approval the principle laid down by the earnest Court of Appeal for Eastern Africa in **Kamundi Vs. R** (1973) EA 540 where it was stated:

*"A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not guilty or by passing sentence or **making some other orders finally disposing of the case.**" (Emphasis supplied)*

Similar views was aired by the Court of Appeal in the case of **Malik Hassan Suleiman Vs. SMZ** (2005) TLR 236, on when the court becomes functus officio where it had this to say:

"A Court becomes functus officio when it disposes of a case by verdict of guilty or by passing sentence or making

orders finally disposing of the case. In this case the learned judge became functus officio when he passed the judgment of 19 February 1998 and he was not closed with the necessary jurisdiction to review his own decision subsequently.” (Emphasis supplied)

Now guided with the principle in the above cited case and applying it to the facts of this case, I am satisfied and therefore agree with the applicant's submission that, the two applications, one for extension of time to file the appeal against the Mkuza Primary Court decision in Misc. Civil Application No. 07 of 2019 and the other in Misc. Civil Application No. 46 of 2020 seeking to file application for revision, were separate and distinct to each other. Thus, I am of profound view that the learned magistrate was in error to hold the court was functus officio to hear and determine Misc. Civil Application No. 46 of 2020 on belief that the court had adjudicated on the similar subject matter in Misc. Civil Application No. 31 of 2019 as the two applications were substantially separate and distinct from each other. My stance is fortified with the decision of the Court of Appeal in the case of **Elly Peter Sanya Vs. Ester Nelson**, Civil Appeal No. 151 of 2018 (CAT-unrepresented) where it was confronted with less or similar scenario to the present one where this Court, Revira J (As she then was) had rejected to

grant the applicant's application for extension of time to lodge a notice of appeal to the Court of Appeal and serve it out of time to the respondent against the ruling of Hon. Chocha, J and to lodge an application for leave for certification out of time that point of law were involved believing that the order sought was rejected by this court Chocha, J. On determining whether the High Court judge was right to reject grant of the said application or not the Court of Appeal citing making reference to the case of **John Mgaya and Four Others** (supra) held that:

*"...it is plain that the order of the High Court (Chocha, J.) dated 28/04/2015 in Misc. Civil Application No. 27 of 2014 dismissing the appellant's application did not dispose of an application similar to the one that was before Levira, J. that is, Misc. Civil Application No. 12 of 2016. **As demonstrated above, the two applications were substantially different. That order by Chocha, J. did not, therefore render the High court functus officio.**" (Emphasis added)*

As I have demonstrated above the two applications were substantially different, therefore I can safely hold which I hereby do that the dismissal of Misc. Civil Application No. 31 of 2019 did not render the District Court functus officio to hear and determine Misc. Civil Application No. 46 of 2020. Therefore the first ground of appeal has merit and I hereby uphold it. With

that conclusion the ground has the effect of finally determining this appeal as the rest of the grounds revolve around the same issue, thus I see no reason of determining them.

That said and done, this appeal has merit and is hereby allowed. The ruling of the District Court of Kibaha in Misc. Civil Application No. 46 of 2020, dated 11/02/2021, dismissing the application is set aside. This has the effect of restoring the said application and ordering its hearing to proceed on merit before another magistrate with competent jurisdiction.

Costs to follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 05th day of November, 2021.




E.E. KAKOLAKI

JUDGE

05/11/2021

Delivered at Dar es Salaam in chambers this 05th day of November, 2021 in the presence of both the appellant and the respondent in person and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. KAKOLAKI

JUDGE

05/11/2021