

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

MISC. CIVIL APPLICATION NO. 46 OF 2021

*(Arising from Misc. Application No. 01 of 2018 High Court of Tanzania and Civil Case No. 73 of 2017
Bukoba District Court and Bukoba District Court Civil Revision No. 12 of 2017)*

MESHACK ARON..... APPLICANT

VERSUS

CHRISTINA DEOGRATIAS..... RESPONDENT

RULING

Date: 18/10/2021.

Mwenda, J.

This application is for an order to set aside the dismissal orders albeit out of time brought by the applicant vide order. XLIII R.2 and O.IX R.9 of CPC [Cap 33 RE 2019] and S.14 (1) of the Law of Limitation Act [Cap 89 RE 2019]. It arises from the Ruling of this court in Misc. Application No. 1 of 2018 dated 4/5/2010 and is supported by an affidavit sworn by Meshack Aaron, the applicant.

When served with the applicant's chamber application, the respondent challenged it by a counter affidavit accompanied by a notice of Preliminary Objection with two points to wit:

1. That, this honourable court is a wrong LEX FORA.

2. That the applicant is praying to set aside neither a non-existing judgment nor a decree.

It is trite law that once a Preliminary Objection is raised the court has to deal with it first before resorting to the hearing of the main case.

During hearing of this application, the applicant was represented by Mr. Assey, learned counsel and the respondent enjoyed the legal services of Mr. Bengesi, learned counsel.

When invited to argue in support of the Preliminary Objections, Mr. Bengesi, learned advocate for the respondent informed this court that he was going to argue the said points of objections in sequence.

With regard to the first point of objection, Mr. Bengesi submitted that this court lacks jurisdiction or forum to entertain this matter as it had already dealt with it before another judge in Civil Application No. 24 of 2020 where it (the said application) was struck out.

According to Mr. Bengesi following the order of striking out Civil Application No. 24 of 2020 the applicant ought to have preferred this present matter before the Court of Appeal. To support his argument, Mr. Bengesi cited a case of ***MM Worldwide Trading Company Ltd and two others vs. National Bank of Commerce Limited, CAT, Civil Appeal No. 258 of 2017*** (unreported) and ***Tanzania***

Breweries Limited vs. Edson Muganyizi Barongo and 7 others, Misc. Labor Application No. 79 of 2014 (unreported). He then stressed that it is not proper for a trial court to adjudicate on a suit founded on subject matter already declared as time barred in a former suit before the same court.

With regard to the second limb of Preliminary Objection Mr. Bengesi submitted that this application is brought without being accompanied by a copy of judgment. He thus concluded by prayers for this court to up hold the Preliminary Objections with costs.

Responding to a submission by the learned counsel for the respondent Mr. Assey, learned counsel for the applicant submitted that Civil Application No. 01 of 2018 was dismissed by this court for want of prosecution. According to him, following that order the only remedy available for them was to apply for an order to set it aside. He supported his submission by citing order IX Rule 9 of the Civil Procedure code, [Cap 33 RE 2019] in that the proper court to restore the said case is the same court which issued the dismissal order.

With regard to citations made by Mr. Bengesi, the learned advocate by the respondent, i.e **MM Worldwide Trading Company Limited and two others. vs. National Bank of Commerce Limited and Tanzania Breweries Limited vs. Edson Muganyizi Barongo and 7 others** (supra), Mr. Assey, learned counsel for the appellant was of the view that they are distinguishable as the

circumstances to the said cases are different. He said in the said cases the circumstances which led to their dismissal was their being filed out of time.

With regard to submission by learned counsel for the respondent that the present application is accompanied by neither a judgment nor a decree, Mr. Assey submitted that they are applying for restoration of a dismissed case vide order IX Rule 9 of CPC. He thus prayed this court to overrule the Preliminary Objection to pave way for the hearing of the main application to proceed.

Rejoining to the submission by the learned counsel for the applicant Mr, Bengesi, learned counsel for the respondent stated that the cases of ***MMM Worldwide Trading Company Limited and two other vs. National Bank of Commerce Limited (unreported) and that Tanzania Breweries Limited vs. Edson Muganyizi Barongo and 7 others*** (unreported) [supra] are relevant to the present application. He added that the applicant have failed to state how the said cases (supra) are distinguishable and to him the applicant ought to have come before this court seeking leave to appeal to the Court of Appeal and not otherwise.

With regard to Mr. Assey's argument that they have brought this application under order IX rule 9 of the Civil Procedure Code, [Cap 33 RE 2019] praying to set aside the dismissal order, Mr. Bengesi rejoined that this order i.e [order IX rule 9 of CPC] (supra) is not applicable as there were neither decree nor judgment which were struck out or dismissed. He said the cited law and the prayers are conflicting.

He concluded by repeating to their previous prayers, that this application be dismissed.

I have gone through the submission by both parties and came up with one issue, that is whether the preliminary objections have substance.

From the records, this application originates from this court's Misc. Application No. 01 of 2018. The said application was dismissed for want of prosecution. Following the said dismissal order the applicant filed Civil Application No. 24 of 2020 praying for, among other things to set aside the dismissal order which was struck out for citation of a non-existing law to move the court and for being filed out of time. The applicant have then surfaced with the present application.

The present application is brought under ***Order XL III Rule 2 and Order IX Rule 9 of Civil Procedure Code [CAP 33 R.E 2019] and Section 14 (1) of the Law of Limitation Act [CAP 89 R.E 2019].***

Looking at the wording of order IX Rule 9 of Civil Procedure Code, [Cap 33 RE 2019] it is evident that the said order applies in applications to set aside ex parte judgment entered against the defendant. The said rule read as follows and I quote:

"In any case in which a decree is passed ex parte against a defendant he may apply to the court by

which the decree was passed for an order to set it aside,....” [Emphasis added].

In his chamber application the applicant prayed among other things for an order that the court be pleased to SET ASIDE the dismissal order albeit OUT of time. That being the case therefore, it is evident as, was rightly submitted by Mr. Bengesi that the applicants’ prayers are contradicting the law in support of his application.

This court is of the firm view that it is not properly moved for wrong citation of enabling provision. In the case of ***Ibrahim Seif Chubi (Administrator of the estate of the late Mohamedi Chubi vs. Hawa Mohamedi Chubi and another, Misc. Land Case Application No. 428 of 2020***, citing the case of ***AMI Tanzania Limited vs. Dorin Donald Darbria, Misc. Commercial Revision No. 200 of 2016*** (unreported) cited the case ***Abdul Aziz Suleiman vs. Nyaki Farmers’ Cooperative Ltd and another*** (1996) EA 409 it was held inter alia that:

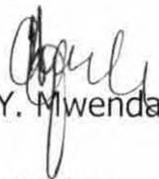
“...the applicant is required to cite the relevant provision from which the court derives power to hear and determine the application”

In this application, the enabling provision cited do not support the prayers and as a result the application is incompetent. As the application is incompetent I am of

the view that this court lacks mandate to determine the Preliminary Objections raised by the respondent. I thus proceed to strike out this application with costs.

It is so ordered.





A.Y. Mwenda
Judge

18.10.2021

This Ruling is delivered in chamber under the seal of this court in the presence of the appellant Mr. Meshack Aron and in the presence of Ms. Christina Deogratias the respondent.




A.Y. Mwenda
Judge

18.10.2021

