IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LAND APPLICATION NO 26 OF 2020

(Originating from Ruling and Order in Revision No. 6 of 2019 in the High Court of Tanzania at Iringa)

BETWEEN

CHRISTIAN KALINGA.....APPLICANT

VERSUS

PAUL NGWEMBE.....RESPONDENT

RULING

Date of last order: *09/11/2021*
Date of Ruling: *07/12/2021*

MLYAMBINA, J.

In this application, the Court will address on the effect of challenging interlocutory orders and the duty of an Advocate to advise his/her Client properly on the legal procedure before the Court of law. The decision will restate a principle that; if an Advocate advises his/her Client negligently or recklessly on the elementary legal issue which any reasonable person would have expected him/ her to know or he ought have to know by virtue of his profession, any damages or costs thereof will be imposed to him/her in *persona.* The facts of this matter are that; the Applicant filed this application seeking to obtain leave to appeal to the Court of Appeal of Tanzania intending to challenge ruling and order in the *Land Revision No 6 of 2019* of this Court dated 26th June, 2021. The Respondent not amused and without prejudice to

his counter affidavit, filed a notice of preliminary objection challenging the competence of the application on two ground of objection namely: *One, the Applicant's application is bad in law as it contravenes the provision of section Section 74 (2) of the Civil Procedure Code Cap 33 [R. E. 2019]. Two, the Applicant has filed an application against a wrong party.*

The Respondent exercised his right of hearing by dropping the second limb of preliminary objection and argued the first limb of preliminary objection only.

It has to be noted, however, that the Court had directed the objection be argued by way of written submissions but the Applicant opted not to file a reply. The non- compliance of the Applicant to the Court order of filing the written submission in reply to the raised preliminary objection is as good as non-appearance when the matter was fixed for hearing of the raised preliminary objection by the Court. It was the wisdom of the Court of Appeal of Tanzania in the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal No. 41 of 2014 at page 3 that:

> *We are taking this course because failure to lodge written submission after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case.*

The same position was underscored in the case of **Abisai Damson Kidumba v. Anna N. Chamungu and 3 Others,** Miscellaneous Land Application No. 43 of 2020 District Registry of Mbeya at Mbeya (unreported), in which the Court observed:

> *...The law is settled to the effect that a case shall face dismissal for want of prosecution if a party fails to file his*

written submission on the date fixed by the Court... Consequently, under the circumstances, I dismiss the Applicant's application with costs for want of prosecution.

The above being the case, failure of the Applicant to file his reply submissions amounted to her failure to defend the preliminary objection without the notice on the day fixed for hearing of the said preliminary objection. The same position was stated in the case of **Patson Matonya v. The Registrar Industrial Court of Tanzania & Another**, Civil Application No. 90 of 2011 (unreported).

Being guided with the afore position, the Court will proceed to determine the preliminary objection based on the Respondent's written submission only. Prior to that, it is *albeit* necessary to record the brief background of the matter as narrated by the Respondent. It stands unopposed that the Respondent filed *Land Application No 29 of 2019* before the District Land and Housing Tribunal for Iringa at Iringa. Without prejudice to his written statement of defence the Applicant herein lodged a notice of preliminary objection on two grounds namely: *First*, that the Applicant has no *locus standi*. *Second*, that the matter is *res-Judicata*. On his submission the Applicant herein abandoned the first and opted to dwell with the second limb of objection.

On 23rd September 2019 the trial Tribunal overruled the objections and ordered *Land Application No. 29 of* 2019 to proceed on its merit. However, when the matter came for hearing on 6th November, 2019 the Applicant's Counsel raised an objection that he was intending to appeal against the order of the Tribunal pronounced on 23rd September, 2019 and the Respondent's Counsel objected vigorously that interlocutory orders are not appealable. Eventually, on 11th November, 2019 the Tribunal overruled the objection and

ordered *Application No 29 of 2019* to proceed on its merit. On 3rd December, 2019 when the matter came for hearing the Applicant's Counsel without producing evidence raised an objection that the Tribunal had no jurisdiction to proceed hearing the case as he had filed a revision before this Court. The trial Tribunal overruled the objection and ordered the main application to proceed hearing, however the Applicant's Counsel declined to proceed with the case. Following such frivolous objections and decline to proceed with case by Applicant's Counsel, the Respondent Counsel prayed for hearing to proceed *ex-parte*, the prayer which was granted by the trial Tribunal and forthwith *ex-parte* hearing proceeded.

On 08th January, 2020 when matter was called to proceed with the *ex-parte* hearing the Respondent's Counsel surprisingly was informed that the relevant file has been called before this Court for revision. *Land Revision No. 6 of 2019* which was before Honourable Judge F.N. Matogolo was dismissed and the Applicant's Counsel was condemned to bear the costs of that application. Aggrieved with that decision the Applicant has filed this instant application seeking leave to appeal to the Court of Appeal of Tanzania. Until now *Land Application No. 29 of 2019* is pending before the District Land and Housing Tribunal for Iringa.

As narrated above the gist of this application is predicated upon preliminary objection raised by the Applicant which was overruled by the trial Tribunal and ordered *Land Application No. 29 of 2019* to proceed on its merit.

Consequently, the Applicant filed this application seeking to obtain leave to appeal to the Court of Appeal of Tanzania intending to challenge ruling and order in the *Land Revision No. 6 of 2019* of this Court dated 26th June, 2021 which was predicated upon preliminary objection contrary to the provision of

Section 74 (2) of the Civil Procedure Code, Cap 33 [R. E. 2019] which provide as follows:

> *Notwithstanding the provisions of subsection (1) and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other Tribunal, unless such decision or order has the effect of finally determining the suit.*

As argued by the Respondent, it is trite law that no appeal or application for revision shall lie against the decision of any preliminary or interlocutory order. The Court of Appeal of Tanzania in various decisions has emphatically decided so, for example in the case of **Pardeep Singh Hans v. Merey Ally Saleh & 3 Others,** Civil Application No 422/01 of 2018, (unreported) at page 9 the Court had this to say:

> *It is therefore plainly that the impugned ruling of the High was unappealable from interlocutory preliminary objection. We wish to emphasise that no appeal exists when the decision intended to be appealed against does not finally determine the matter.*

Similar position was taken by the Court of Appeal of Tanzania in the case of **Sudi Khamis Sudi & 3 Others v. Maurice George Mbowe Jiliwa & 3 Others**, Civil Application No 362/17 of 2018 (unreported) and **Yusuph Hamis Mushi & Another Vs Abubakari Khalid Hajj & 2 Others**, Civil Application No 55 of 2020 (unreported).

As properly submitted by the Respondent, the test as to whether the judgment or order is an interlocutory or otherwise, depends on whether the order or judgement finally determines rights of the parties. If it does, ought to be treated as a final order, and if it does not, it is an interlocutory order. The Court of Appeal of Tanzania had an opportunity to define what an interlocutory order entail, in the case of **Junaco (T) Limited and Another v. Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 (unreported). In so doing, the Court revisited the decision of Lord Alverston in **Bozson v. Altrincham Urban District Council** (1903) 1 KB 547 at p. 548 which was cited in the case of **Tanzania Mortor Services Ltd and Another v. Mehar Sing t/a Thaker Singh,** Civil Appeal No. 115 of 2005 (unreported). The recitation goes:

> *It seems to me that the real test for determining this question ought to be this: Does the judgement or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.*

The Court of Appeal in **Junaco (T) Ltd case** *(supra)* went further to cite the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and 2 Others,** Civil Application No. 80 of 2016 (unreported) in which the same Court recited the decision of Lord Alverston (*supra*) and referred to it as "the nature of the order test". The Court, therefore, made an observation at page 12-13 of the decision in **Junaco (T) Limited case** *(supra)* that:

> *...it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply "the*

nature of the order test". That is, to ask oneself whether the judgement or order complained of finally disposed of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.

Further, the Court of Appeal of Tanzania in the case of **Vodacom Tanzania Public Limited Company v. Planetel Communications Limited,** Civil Appeal No. 43 of 2018 (unreported) emphasized on the legal position that no appeal shall lie to the appellate Court against an interlocutory order.

In **Vodacom case** *(supra),* the Court after revisiting various decisions, including but not limited to the case of **Britania Biscuits Limited v. National Bank of Commerce and Doshi Hardware (T) Ltd,** Civil Application No. 195 of 2012 (unreported), and **Vidyadhar Chavda v. Dr. Indira Chavda,** Civil Appeal No. 99 of 2012 (unreported), observed at page 16 of its decision as follows:

In the light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable save where it has the effect of finally determining the charge, suit or petition.

In respect to this application, the Court do agree with the Respondent that the application is predicated upon an interlocutory order whose main case is still pending before the District Land and Housing Tribunal for Iringa. Whatever preferred by the Applicant in this Court is nothing than episode in a long line of delaying tactics and pure deliberate abuse of Court process.

That being done by an experienced Advocate, the Respondent has invited this Court to issue punitive costs to the Advocate in *persona* as it was so ordered by this Court in the impugned *Land Revision No. 6 of 2019.*

In the same spirit, the Respondent was of view that; this application is not worth be considered, and he believes even the learned Advocate is well- aware that what he is doing is nothing than wastage of valuable Court's time, time of the Respondent and delay finalization of the pending main case at the Tribunal. Moreover, this application is aimed to cause injustice to the Respondent. As such, the Respondent accordingly, prayed this Court in arriving to the conclusion to order the Applicant's Advocate to pay costs in persona as this Court did in *Land Revision No 6 of 2019.*

I have passionately considered the submission of the Respondent. I entirely agree with him that the Applicant in the case at hand suffers damages because of careless or negligent advice from his Advocate. The Jurists Rosi E.J. Kinemo and Alfred C. Nyamwagi in their paper called: **The tort of negligence on Advocates** in Tanzania at tzonline.org/pdf/thetortofnegligence defined tort of negligence as follows:

> *Negligence as an act of omission which constitutes a breach of a duty of care owed by another person by the person who acts or fails to act and which causes other person to surfer harm.*

Based on the afore definition, it is the findings of this Court that; there was duty of care owed by the Applicant's Advocate. Thus, upon such breach causes great loss in terms of time and costs to the Applicant (Client) for failure to properly advise his Client on the required legal

procedure which does not need even a Master's Degree for one to comprehend.

It is an elementary principle of law envisaged under *Section 74 (2) of the Civil Procedure Code (supra)* that no appeal can be filed against any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other Tribunal. Such appeal can only be preferred if the impugned decision or order determines the suit conclusively. Since that elementary principle of law is expected to be known by any qualified Advocate, the Court has no other option than to condemn the Applicant's Advocate being negligent in advising his Client. There are three reasons. *First*, the Applicant's Advocate is presumed to know or ought to have known the proper procedure of the law. *Second*, the act of taking legal action against interlocutory orders has been done by the same Advocate repeatedly as briefed earlier on. *Third*, the Applicant's Advocate being also an officer of the Court had a sole duty of helping his Client and the Court in doing justice of the case on merits of the main matter than wasting time on untenable applications. In the case of **Mohamed Ikbal v. Esrom M. Maryogo,** Civil Application No. 141/01 of 2017, Court of Appeal of Tanzania at Dar es Salaam it was held that:

> *An Advocate is an officer of the Court, he is therefore expected to assist the Court in an appropriate manner in the Administration of justice. One of the important characteristics is an openness.*

Been confounded with the Applicant's Counsel acts, I do agree with the Respondent that the Applicant should not be tasked to pay costs of this case.

The principles of justice require costs of the case be borne by the Applicant's Advocate in person, who out of professional negligence, orchestrated the unnecessary hopeless applications against orders and decision of interlocutory in nature. In the case of **William Getari Kegege v. Equity Bank and Another**, Civil Application No. 24/08 of 2019 Court of Appeal of Tanzania at Mwanza at page 10 it was held that:

> *A litigant should not be allowed to suffer through the Mistake of an Officer of the Court connected with the administration of justice...*

In the circumstances, the preliminary objection is sustained. Consequently, the Application is dismissed for being preferred to challenge an interlocutory decision. Costs of this application be paid by the Applicant's Counsel one Maurice Mwamwenda of Mausa Attorneys at Law in person.

THE HIGH COURT OF TANZANIA

Y.J. MLYAMBINA

JUDGE

08/12/2021

Delivered and dated this 8th day of December, 2021 in the absence of the Applicant and in the presence Gaspar Kalinga for the Respondent.

THE HIGH COURT OF TANZANIA

Y.J. MLYAMBINA

JUDGE

08/12/2021