

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IRINGA DISTRICT REGISTRY
AT IRINGA**
MISC. CIVIL APPLICATION NO. 18 OF 2021
**(Arising from Civil Appeal No. 14 of 2019, in the High Court of
Tanzania, at Iringa).**
UNILIVER TEA TANZANIA LIMITED.....APPLICANT
VERSUS
FESTO ANTONY MBILINYI.....RESPONDENT

RULING

18/7 & 21/8/2022.

UTAMWA, J.

In the application at hand, the applicant is UNILIVER TEA TANZANIA LTD. She moved this court for the following orders:

- (i) For granting extension of time so that she (the applicant) can apply for leave to appeal to the Court of Appeal of Tanzania (The CAT) out of time, against the judgment and decree of this court (Matogolo, J.) in Civil Appeal No. 14 of 2019.
- (ii) For costs to be provided for; and
- (iii) For any other relief(s) this Honourable court may deem fit and just to grant.

The application was made under Sections 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (The AJA) by way of chamber summons. It was supported by an affidavit of Mr. Jackson Bidya, the applicant's counsel.

The grounds for the application as set out in the affidavit supporting the application are summarized as follows: that, the respondent had filed in the District Court of Mufindi District, at Mafinga (The trial court) a claim against the applicant's act of prohibiting the respondent's motor vehicle from accessing the applicant's private road. The trial court decided in favour of the respondent. The applicant was aggrieved by the decision of the trial court and appealed to this court. In turn, this court decided the appeal partly in her favour. It did so by setting aside the award of Tanzanian Shillings (Tshs.) 5,000,000 as special damages since the respondent had failed to prove the amount claimed. The applicant also alleged that, there are illegalities and irregularities in the trial court's decision. These included the act of the trial court in entertaining the case after the expiry of the speed track. The trial court also wrongly received unqualified documentary evidence and acted upon it.

Now, the applicant intends to appeal against the decision of this court to the CAT. However, she failed to file her leave to appeal within the prescribed time, hence this application.

The respondent objected the application through the counter affidavit sworn by himself. In essence, he did not object the back ground of the matter as narrated in the affidavit. He however, refuted the existence of the illegalities complained of by the applicant and the fact that he will not be prejudiced if this court grants the application. He further disputed the fact that there are good grounds for granting the application.

The application was disposed of by way of written submissions. The applicant was represented by Mr. Jackson Bidya, learned advocate. On the other hand, the respondent enjoyed the services of Mr. Hafidhi Mbinjika, learned counsel.

In his submissions supporting the application, the applicant's counsel adopted the affidavit supporting the application. He further submitted essentially that, there were illegalities in the decision of the trial court which in law constitute sufficient reasons for granting the prayed extension of time. He cited a number of precedents to support this legal position.

On his part, the learned counsel for the respondent did not dispute the legal position highlighted by the applicant's counsel. He however, contended that, the applicant did not demonstrate the alleged illegalities, and if he did, the same did not fit as sufficient reasons since they were not on the face of record.

In fact, I did not narrate the submissions of both sides in details purposely. This is due to the reasons I will parade soon, which said reasons led me to decide this matter without considering the contents of the affidavit, the counter affidavit and the submissions by both parties.

It is common ground that, when the applicant filed the present application (No. 18 of 2021) in July, 2021 before this court, she also lodged a separate application for extension of time to file the notice of appeal to the CAT out of time. That other application was registered as Misc. Civil Application No. 17 of 2021. The said application (No. 17 of 2021) related to the same Civil Appeal No. 14 of 2019 (before this court) and the same parties as in the present application. The applicant however, did not

promptly bring the co-existence of these two applications to the attention of the court so that it could consolidate them for a convenient hearing as the practice requires. This court therefore, heard both applications separately by written submissions and noted their relationship when it was already late.

The fate of the said Misc. Civil Application No. 17 of 2021 (for extension of time to file the notice of appeal out of time) was made known to the parties just this morning. This was when this court dismissed that Application with costs.

Now, it is my conviction that, since the applicant delayed to file the notice of appeal within the time prescribed by the law [i.e. 30 days from the date of the impugned decision of this court as per rule 83(2) of the CAT Rules], the above discussed dismissal of her application (for the extension of time to file the notice out of time) has negative legal consequences to her right to file the notice. The dismissal deprives her of that right unless she successfully takes some other legal steps that will resuscitate it, but currently, the door is closed against her.

The position of law is further clear and mandatory that, where an application for a certificate (of point of law) or for leave to appeal to the CAT is necessary (as in the case at hand), it shall be made after the notice of appeal is lodged; see rule 46(1) of the CAT Rules. This position was underlined by the CAT (through the judicial prudence of Mwampashi, J.A.) in the case of **Modestus Daudi Kangalawe (Administrator of the estate of the late Daudi Temaungi Kangalawe) v. Dominicus Utenga, Civil Application No. 139 of 2020, CAT at Iringa**

(unreported) at page 9 of the typed version of the ruling. This court (through the judicial mind of my Sister, Mgonya, J.) also reiterated the position in **Shamash Ramzan Dharamsi Walji (As Personal Legal Representative of Karim Abdulrasul Adam) v. Asily John Mwankenja, Misc. Land Application No. 404 of 2017, High Court of Tanzania (Land Division) at Dar es Salaam** (Unreported).

It follows therefore, that, according to the law, filing a notice of appeal is a condition precedent for an application for leave to appeal to the CAT. Now, owing to the above arrangement of the laws in our jurisdiction, the earlier conversed dismissal of the applicant's application also deprives her of the right to apply for the leave to appeal. This is so because, her right to file the notice of appeal no longer exists due to the same dismissal of the application.

It follows further in my settled opinion that, the pending determination of the merits for the application at hand (for extension of time to apply for the leave to appeal out of time) has been overtaken by events. In simple words, the application has been rendered purposeless by the above debated dismissal of the application. This is because, even if the application will be considered on merits and granted (by extending the time for lodging the intended application for leave to appeal out of time), that course will be a mere academic or superfluous exercise with no tangible fruits to the applicant. This follows the fact that, at the end of the day, even if the applicant will be granted the intended leave to appeal, she will not have any legal opportunity to appeal to the CAT since she will not have filed the notice of appeal. This particular view is fortified by another

position of the law that, a notice of appeal is a legal requirement under rule 83(1) of the CAT Rules. It is in fact, a vital document for an appeal to be filed before the CAT and it actually institutes the appeal itself.

The crucial issue at this juncture is therefore, *what is the way forward or the fate of the application at hand upon the court dismissing the Application No. 17 of 2021 (for extension of time to file the notice of appeal out of time)?* Indeed, since the present matter was heard (by written submissions) as I observed above and was only pending for ruling, it has to be ended by an order of this court according to the prevailing circumstances. In practice, a court of law can end a matter before it through different kinds of orders depending on the nature of the matter at issue. Such kinds of orders include a dismissal order or an order for striking it out. In law, the former order applies when the court hears and determines a matter on merits. On the other hand, the latter order is relevant when a court finds a matter before it incompetent for any reason. The above dissimilarity between the two kinds of orders was highlighted by the CAT in the case of **Mustafa Songambele v. The Republic Criminal Application No.3 of 2016, CAT at Iringa** (unreported).

In my view, however, a dismissal order may also be made against a matter which is not heard on merits if the law provides so. A good example of this situation is when a court finds a matter before it to be time barred. The provisions of section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2019 demonstrates this situation. It guides that, such kind of a matter shall be dismissed; see also the case of **Hezron Nyachiya v. Tanzania Union**

**of Industrial Commercial Workers and another, CAT, Civil Appeal
No. 79 of 2001** (unreported).

Now, in the matter at hand, though the court heard the parties on merits by written submissions, which said course is also a legally recognized method of hearing some matters in courts of law, the matter has not yet been decided by this court pronouncing its ruling. Now, due to the above discussed fact that the matter has been overtaken by events (owing to the dismissal of the applicant's application (for extension of time to file the notice out of time), this court cannot proceed to compose and pronounce its ruling and make a dismissal order against the applicant's application at hand (for extending time to apply for leave to appeal).

Additionally, according to the law and practice in this land, a court of law is not always enjoined to make a ruling, let alone a ruling on merits upon hearing the parties. Examples of circumstances fitting this situation, especially in civil proceedings are many. Take for instance, a court hears a matter (whether on a preliminary objection or on merits) and reserves its ruling for another date, but before it pronounces it the party who instituted the matter withdraws it for any reason. Under such situation, in my concerted opinion, it will be needless for the court to go on pronouncing its ruling on the issues addressed by the parties during the hearing. Otherwise, doing so will amount to a superfluous judicial exercise which is not the objective of the adjudication process. This process is reserved only for determining rights of the parties and not as a platform for judicial writing-exhibitions.

It follows thus, that, the fact that the matter at hand has been overtaken by events demonstrated above (the dismissal of the Application No. 17 of 2021 for extension of time to file the notice of appeal out of time), is among the circumstances which exonerate this court from labouring in composing and pronouncing the pending ruling on the merits of the matter. This is irrespective of the fact that parties were actually heard on merits through written submissions.

On the other side, my considered opinion is that, upon the matter at hand being overtaken by events (following the dismissal of the Application No. 17 of 2021), it was rendered incompetent for being purposeless. This is so, because, its significance to the applicant legally depended much on the success of the dismissed Application. This view is based on the above cited provisions of the CAT rules which essentially, sets the rule of "No filing of the notice of appeal, no application for leave to appeal." Indeed, the vice versa is possible since rule 83(4) of the same CAT rule guides that, where an appeal lies only on a certificate of point of law or with leave to appeal, it shall not be necessary to obtain that certificate or leave before lodging the notice of appeal.

Certainly, our written law does not give a description of an "incompetent matter" before a court of law. Nonetheless, some other sources, including case law have strived to do so. In the **Mustafa Songambe case** (supra, at page 6.) for example, the CAT observed that, by the phrase incompetent matter (application) it means there was no proper application capable of being disposed of. In so doing the CAT followed its previous decision in the case of **Joseph Mahona @ Joseph**

Mboje @ Maghembe Mboje and Another v. Republic, Criminal Appeal No.215 Of 2008 (Unreported) which had also followed the decision of the erstwhile East African Court of Appeal in the case of **Ngoni Matengo co-operative Marketing Union Ltd V Ahmahomed Osman [1959] E. A. 577** at page 580. The same CAT in the case of **Haruna Mpangaos and 902 Others v. Tanzania Portland Cement Co. Ltd [2008] TLR. 189** (at page 194), following its previous decision in the case of **Fortunatus Masha v. William Shija and Another [1997] T.L.R. 41** observed *inter alia*, that, an incompetent appeal is one which in law, did not come into existence. Furthermore, the Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 833, describes the terms "incompetence" or "incompetency" as the state or fact of being unable or unqualified to do something or lack of legal ability to do something.

Now, the present application in my opinion, fits (directly or indirectly) into one or more of the above descriptions of an "incompetent matter." It for instance, fits into the description provided under the **Mustafa Songambe case** (supra) since it is no longer a proper application capable of being disposed of by a ruling (on merits) following the dismissal of the Application No. 17 of 2021 (though the matter has already been heard). The phrase "disposed of" in that precedent, I believe, meant to be heard and determined on merits. Again, the present application fits into the description of the terms "incompetency" or "incompetence" offered by the Black's Law Dictionary (supra). This is because, for the dismissal of the said application, the present application has been rendered unable or

unqualified to be determined on merits by a ruling of this court, though it was heard.

Owing to the above reasons, it is my conviction that, for the sake of justice under the prevailing circumstances of the case, it is legally prudent to merely strike out the present application for being rendered incompetent by the operation of law as demonstrated previously. This is the proper legal remedy under the circumstances of the case as discussed earlier.

As to costs, I find that, this is a fit case to apportion the costs. This is because, the applicant cannot be blamed for instituting the present application which has been found incompetent by the operation of the law as demonstrated above.

Having observed as above, I strike out the application and direct that, each party shall bear its own costs. It is so ordered.



JHK UTAMWA
JUDGE
21/07/2022

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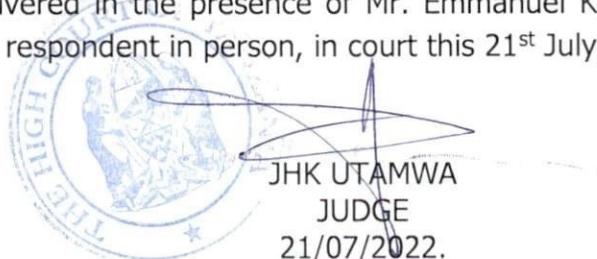
CORAM: JHK. Utamwa, J.

For Appellant: Mr. Emmanuel Kyashana, advocate.

Respondent: present in person.

BC: Gloria, M.

Court; Ruling delivered in the presence of Mr. Emmanuel Kyashana, advocate for the applicant and the respondent in person, in court this 21st July, 2022.



JHK UTAMWA
JUDGE
21/07/2022.