IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL APPEAL NO 27 OF 2021

(Arising from Miscellaneous Application No. 30 of 2021 of Musoma District Court)

JULIUS MADARAKA MASHAURI.....APPELLANT

VERSUS

MUSA MASHAURI MAKARANGA.....RESPONDENT

JUDGMENT

2/6/2021 & 22 /7/2022

F. H. Mahimbali, J

The appellant hereinabove is aggrieved by the decision of Musoma District Court in which dismissed his review application filed before it on the legal objection raised by the respondent's counsel that the application for review preferred under the CPC was not tenable as it was not the applicable law for matters originating from Primary Courts.

The brief background facts of the case can be summarised this way. That the appellant's appointment as administrator of the estate of the late Ernest Mashauri Makaranga was revoked for failure to discharge his duties as per law rendering the administration of the said estate endless and un accounted. In his place, the respondent was appointed.

He is dissatisfied by that revocation alleging that it was done exparte. He resorted to challenge it before the same trial court but in vain. Eventually, he preferred an appeal against the trial court's findings via Probate Appeal No. 6 of 2021 before the District Court of Musoma. Unfortunately, the said appeal was dismissed by the District Court for failure to file written submissions timely as ordered by the District Court.

For the apparent reasons that the filing by the said written submission by the appellant was timely done as ordered, the appellant filed an application for review for the District Court to review its own decision. He did so by filing an application under order XLII, Rule 1(1) a of the CPC. The respondent resisted the application by filing a legal objection that as the matter originated from decision of Primary Court, then the applicable law is not CPC. The said application was thus dismissed, thus the basis of the current appeal in which the appellant three grounds of appeal, namely:

1. *That the District Court erred in law in dismissing the application instead of striking it out.*
2. *That the magistrate grossly erred in holding that the provisions of Civil Procedure Code can not apply to matters originating from Primary Court.*
3. *That the magistrate grossly misapplied the provisions of section 37(3) of MCA, Cap 11, R.E 2019.*

During the hearing of this appeal, the appellant enjoyed the legal representation of Mr Malima David and Thomas Makongo, learned advocates whereas the respondent enjoyed the representation of Mr. Edson Philip, also learned advocate.

Arguing in ground two of the appeal, Mr David Malima submitted that the magistrate grossly misdirected in holding that the provisions of Civil Procedure Code cannot apply to matters originating from primary court. In his view, he submitted that it was the mistake that the application for review (Misc. Application 30/2021) was improperly before the district court as there was an apparent error on the District Court's findings as the magistrate did not address herself when determining that application. Thus, the applicant was right to involve the provision order XLII rule 1(1) of the CPC that was an obvious error. However, the trial magistrate or the counsel for respondent did not tell which provision provide for that restriction the use of CPC on matters originating from the primary court. He added that, saying that the appellant was supposed to file the application restoration instead of review is baseless, redundant and idle of any merit.

On the third ground of appeal, he submitted that the trial magistrate grossly erred on the interpretation of section 37 of the MCA.

The misinterpretation of the trial magistrate is based on the context of the said section. That the entire section talks about the substantial justice to be done and has nothing to talk of review as reasoned. It follows that, the appellant in this appeal could not invoke section 37 of MCA seeking for review order of the trial court. Further to that, he submitted that the trial magistrate grossly erred to construe section 37 (3) of MCA, contains paragraphs a-d and (i) – (iv).

On ground number one of appeal, Mr. Malima submitted that the trial magistrate erred in law in dismissing incompetent application if at all it was improperly filed. After the trial court had found that the court was not properly moved, the remedy available is to strike out application and not dismiss it. He said so because it is now trite law in our land that wrong citation of the law, section, subsection or paragraphs of the law or none citation of the law, will not move the court to entertain such. In any sense, the remedy is strike out. In support of his assertion, he provided a number of unbroken chain of authorities to that effect such as Edward Bachewa and 3 others vs AG and Another, Civil Application No 128 of 2006, CAT Mtwara, CRDB (1996) vs Bakari Mohamed and Mdalula, Civil application no 4 of 2004, CAT – Dar es Salaam to mention but a few. Considering further the principle of overring objective as

enshrined into our Constitution as well as Civil Procedure Code, Cap 33 R. E. 2019 especially Section 3 A (1) and (2) is clear on the import of overriding objective. Had the trial court found that it was improperly moved by wrong citation of law, it could have struck out the application instead of dismissing it. He wondered, how trial court applied that rule in reaching decision as per circumstances surrounding that case. In adding to the submission of Mr. Malima, Mr. Makongo submitted that in the context of the said matter, as there is a discovery of new fact, the application before that court was proper. The cited case by the trial court is not binding to this court. By the way it is a High Court's decision in which this court is not binding to this proceeding. For the foregoing reasons, they prayed that this Court to quash that decision and set it aside.

On his part, Mr. Edson Philipo maintained his stand as it was before the District Court the CPC in matters originating from primary court does not apply save the MCA and the rules made therefrom. He relied his stand in the decision **Gregory Raphael vs Pastory Rehabura**, Civil Appeal no (2005) TLR 99. He clarified that section 3 of the CPC, also mentions the courts which shall apply the CPC in their original jurisdiction. No Primary Court is mentioned there.

On ground number 1, he submitted that what was filed before the District court, the District court had no jurisdiction to entertain it. Thus, it rightly dismissed that application instead of striking it out. The situation would have been different had the court had power to grant what was being asked but not wrongly presented. In this matter, the genesis of this appeal was a dismissal of the case for want of appearance. Instead of restoring the appeal, the appellant preferred to file review. If the appeal was dismissed for want of appearance, the remedy is restoration. The review application was uncalled for.

On ground number 3 that the trial magistrate erred in applying section 37 of the MCA, the same is a general section for the grant of justice in the absence of specific provision. It was his view that the same was rightly used.

In his rejoinder submission, Mr. Makongo while reiterating their submissions in chief, he added that, there is nowhere prohibited that for a case dismissed for want of prosecution, the only available remedy is restoration and not review. As there is no legal provision pointed out barring the said review, the application before the subordinate court was properly placed. He concluded that though the CPC is not applicable in

primary court, however when the proceedings shift to District Court or High Court by any legal course, the CPC can come into play.

Having heard the submissions from both sides, the vital question now is whether in the given circumstances, this appeal is meritorious. As per submissions by both parties, the common question has been whether the CPC is applicable in the proceedings (appeals) originating from Primary Courts.

The G.N. No. 312 of 1964 is the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, provides for an answer as what law should govern appeals in the District Court and High Court for matters originating from Primary Courts. The said GN 312 of 1964 defines "appellate court" to mean the High Court or the district court, as the case may be. Therefore, the CPC is a misplaced Law for such situation.

As per facts behind this appeal, the appellant is aggrieved by the order of the District Court dismissing the appeal on ground of non-appearance (non-filing of the written submissions timely). Thus, as that amounted to failure to comply with the court's directives, thus failure to prosecute it. The appeal was thus dismissed for want of prosecution. The appellant believing that he filed his submissions timely and provided

evidence on that, he resorted to file review application but applying the provisions of the CPC? Was that right? Mr. Malima and Makongo for the appellant say it was right but Mr. Philipo counters it.

According to the case of **Benedict Mabalanganya vrs Romwald** Senga, Civil Application No. 1 of 2002, CAT at Mbeya, it was held that

> *"Thus the law which provides the High court with the power of review does not apply to the Primary Court and, therefore the High Court does not have power of review the matters emanating from the Primary Court"*

I have equally not got one for a review application on matters originating from Primary Court at the District Court. So, as the High Court lacks powers of review of matters originating from the Primary Court, equally the District Court lacks powers of review for matters originating from Primary Court. I say so because the CPC as it is, has no provision catering for matters originating from Primary Courts. I say so because as per Section 2 of the CPC Act and further that Section 3 of the same CPC Act, the term 'court' doesn't include primary court.

However, in the circumstances of this case, the available remedy is provided under rule 17 of the GN 312 of 1964 which deals with the re-admission of appeal dismissed for default. The said rule provides:

"Where an appeal has been dismissed under subrule (2) of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing it may re-admit the appeal on such terms as to costs or otherwise as it thinks fit".

Since the appellant avers that he had filed it timely as per his affidavit and the supplementary affidavit of Ruth Emmanuel Kilasa secretary to Mr. Makongo's office with proof of the payment transaction, it was good ground for re-admission of the said appeal. I say so because, the dismissal of the said appeal by the district court though not directly stated, could be taken as based under rule 13 (2) of the GN 312 of 1964, the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules. That said, grounds two and three hereby collapse.

As regards to the first ground, I concur with Mr. Malima and Makongo that incompetent application or appeal is subject to strike out order and not dismissal as opted.

Having said so, I partly allow this appeal on the considered view that the remedy available on the wrong application is to strike out the

application, and not to dismiss the suit. I hereby quash the order of the district court dismissing the application and set it aside and substitute it with the strike out order. The appellant is then at liberty to invoke the provisions of Rule 17 of the GN 312 of 1964, the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules to re-admit his dismissed appeal but subject to the law of limitation. All in all, the GN 312 of 1964, the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules under rule 3 provides further what to do in event the said appeal is out of time.

Each party shall bear its own costs. It is so ordered.

DATED at MUSOMA this 22nd day of July, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 22nd day of July, 2022 in the presence of both parties present in person.

F. H. Mahimbali

JUDGE

22/07/2022