

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 353 OF 2021**

(Originating from the Ruling of the Resident Magistrate Court of Dar es Salaam at Kisutu in Miscellaneous Civil Application No.61 of 2021 before Hon. Simba PRM dated 2<sup>nd</sup> September 2021)

**GLOBAL AGENCY LIMITED.....APPELLANT**  
**VERSUS**

**CHIGOTO PLUS LIMITED..... RESPONDENT**

**JUDGMENT**

*Date of last order: 20/07/2022*

*Date of Judgment: 19/08/2022*

**E.E. KAKOLAKI J.**

Before the Resident Magistrate Court of Dar es Salaam Region at Kisutu in Civil Case No. 84 of 2018, the respondent herein and financial consultant filed a suit against the appellant seeking among other things, the appellant/defendant to pay her the professional fees amount to Tsh. 95,830,300, after rendering financial services to her without payment of the consultation fees. The record reveals that, after institution of the said case appellant admitted the debt, the result of which on 26/02/2019 the two parties filed a deed of settlement in court which led into consent judgment and decree against the appellant. As the respondent was in the execution

process of the decree, appellant allegedly lately learnt the money in dispute and subject of the decree was already paid to the respondent and that, the decree was obtained fraudulent, hence filed an application for extension of time within which to file an application for Review of the consent Judgment/decree in Misc. Application No.79 of 2020, the application which was later on dismissed for want of prosecution. In the course of seeking the remedy for the said dismissed application, appellant alleged to have noted another new fact of fraud to the effect that, even the invoice that gave birth of the consent Judgment/decree was fraudulently obtained. That, it is that fact which prompted her to file a fresh application before the same Court for extension of time within which to file an application for review of consent judgment via Misc. Civil Application No. 61 of 2021. The same could not survive as it met strong opposition of the respondent who raised two preliminary points of objections to the effect that, **first**, the application is misuse of court process and **second**, that the same is untenable, whereas parties were ordered to dispose it by way of written submissions. After consideration of both parties submission the trial court dismissed the application on the ground that, the court was functus officio to entertain it for being a replica of Misc. Civil Application No. 79 of 2020 which was

dismissed by the same court for want of prosecution, hence the present appeal in which appellant has advanced three (3) grounds going thus:

1. That the learned trial magistrate erred in law and fact for not considering the facts in Miscellaneous Civil Application No.79/2020 as being different from facts in Miscellaneous Civil Application No.61/2021, thus wrongly hold that the former is the replica of the latter.
2. That, the learned trial magistrate erred in law and fact for failure to raise and determine an issue of whether or not the new facts averred in the affidavit in Miscellaneous Civil Application No 61/2021 constituted fraud thus justifying the applicant/ appellant to file a fresh application.
3. That, the learned trial magistrate erred in law and fact for failure of evaluating the evidence raised in the affidavit of the applicant's deponent thus considering irrelevant considerations leading to the wrong decision.

When this appeal was called for hearing, both parties were represented and were heard viva voce. Appellant was represented by Mr Obadia Kajungu while respondent enjoyed the services of Mr. Gabriel Mnyele, both learned

advocates. Submitting in support of the appeal, Mr. Kajungu who prefaced his submission by explaining the background of this appeal, sought leave of the court to argue all grounds collectively. He said appellant is challenging the trial court findings that, Misc. Civil Application No. 61 Of 2021 subject of this appeal was a replica of the dismissed Misc. Civil Application No. 79 of 2020. According to him, the trial magistrate misconceived the provision of section 42 as compared to section 46 of the evidence Act, [Cap. 2019], in which section 42 of Evidence Act tallies with section 9 of the CPC on the issue res judicata. In his view, there is an exception where it comes to section 46 and more particularly when the adverse party proves to the court that, the judgment, order or decree was delivered by the court not competent to deliver it or was obtained by fraud or collusion. Mr. Kajungu placed reliance in the case of **Government of Libya Vs. Meis Industrial Co. Limited and 2 others**, Civil Case No 225 of 2012 (HC), where this Court held that, section 46 has modified the rule as to res judicata which now does not apply when fraud is involved, as was also said by Lord Coke, "fraud avoids all judicial acts ecclesiastical and temporal"

In further view of Mr. Kajungu, unlike the affidavit in Misc. Civil Application No. 79 of 2020, the affidavit in the dismissed application subject to this

appeal contains new facts on allegation of fraud as averred in paragraph 11 of the affidavit, and that, paragraph 15 explained the invoice which is also disputed and further that, in paragraphs 5 and 11 of the affidavit it was contended that, respondent was colluding with the accountant to exaggerate the invoice. To him, the allegation of fraud warrants a fresh suit as it was held in the case of **Bhatia Brothers Ltd Vs. Abaly Alibhai Aziz**, Civil application No. 41 of 2001 (CAT) at page 4 that, a preliminary objection is not complete as the court has to get into the merit of the application and see whether the case falls into one or other circumstances justifying review. According to Mr. Kajungu, the trial Court ought to have considered the facts as stated in affidavit in support of the application to establish the respondent's fraud so as to prevent her from benefiting from his own wrong, hence refrain from dismissing the application. He rested his submission by requesting the court to allow the appeal and order that, appellant be heard on merit in the course.

In his response, Mr. Mnyele attacked Mr. Kajungu's submission while raising three (3) concerns before he countered each ground of appeal. He remarked his concerns as *One* that, the appellant has not argued his appeal apart from bringing new and completely different case. *Secondly*, the grounds of appeal

are not based on what was decided by the lower court and *thirdly*, that, the ruling sought to be impugned was on preliminary objections and not on the merit of the application as the base of the trial magistrate decision is at page 2 of his ruling. According to him, there was neither preliminary objection nor decision concerning res judicata. He said, the trial Magistrate summarized the submissions from both learned counsels at pages 2-3, where the respondent had submitted that, the two applications were similar, and that, after narrating the parties' submissions the trial magistrate never considered them instead he departed and sought to invoke the requirement of the CPC about setting aside the dismissal order before he dismissed the matter as depicted at page 4 of the ruling. In view of above submission Mr. Mnyele insisted that, the trial magistrate dismissed the application because he believed after dismissal of the application No. 79 of 2020 appellant was supposed to exhaust the available remedies one of which is to file an application for setting aside the dismissal order. According to Mr. Mnyele, appellant was satisfied with that decision that is why there is no any ground of appeal to that effect. To him the first ground of appeal has no basis. Mr. Mnyele also faulted the second ground of appeal branding it to have been raised prematurely as the trial magistrate decision did not address the

issue as to whether there was existence of fraud or not, hence the ground does not arise from the trial magistrate decision. On the third ground, he contended that, the appeal is untenable as the same could only be tenable if the trial magistrate had gone into the merit of the application in his decision. He said, even the relief sought were not dealt with or subjected to discussion by the lower court, hence it was wrong for Mr. Kajungu to submit on the merit of the application before the lower court. Mr. Mnyele did not spare the authorities cited by the applicant's counsel, as he termed them to be irrelevant and inapplicable under the circumstances of this case. He finally pray the court to dismiss the appeal with cost.

In a short rejoinder, Mr. Kajungu stated that, he was glad that his fellow counsel admitted the fact that the trial court did not decide basing on what was submitted. He insisted that, the decision of the trial magistrate court was based on the principle of res judicata as evidenced at page 3 of the ruling. As to whether the trial magistrate considered the merit of the application, Mr. Kajungu submitted that he did, as evidenced at page 4 where the trial magistrate stated that, he perused the applications. He then reiterated his prayers and rested the submissions.

I have accorded both parties' submission the deserving weight as well as considered the authorities cited in support of this appeal. I also have had enough time to travel through the records of Misc. Civil Application No 61 of 2021 and Misc. Civil Application No. 79 of 2020, in the exercise of this Court's powers of re-evaluating the trial court's evidence and come up with its own finding as the first appellate Court. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported). In essence the issues subjecting the parties to contest are whether the preliminary objection that disposed of the application was based on the raised point of preliminary objections by the respondent and whether parties' submission were considered by the trial court.

After a close and thorough perusal of the impugned ruling it came into this Court's attention and satisfaction that, the application was not heard on merit as Mr, Kajungu would want this court to believe but rather the court dealt with the preliminary objection raised by the respondent to the effect that, the application was preferred in abuse of courts process and that for that matter the same is untenable in law. Hence the trial court dealt with the preliminary objections raised by the respondent and decided on them. With



that finding, I subscribe to Mr. Mnyele's propositions that, the preferred grounds of appeal are not based on trial court's decision save for the first one, as the application was not decided on merit, hence the court could not go deep to consider both parties averments in their affidavit and counter affidavit as Mr. Kajungu wanted this Court to believe and so find.

Now having so found let me step into the shoes of the trial court to see whether the application was preferred in misuse of court process complained of by the respondent. A glance of an eye to the records of Misc. Civil Application No. 61 of 2021, unearthed the facts that, the appellant had applied for leave to file an application for Review of the Consent Judgment in Civil Case No 84 of 2018, outside the prescribed period of time, before the respondent raised two points of objection as alluded to above whereby both parties were accorded right to be heard. In my further perusal, it came to knowledge of this Court that, in their submission's the respondent complained that, the court was functus officio as the reliefs/prayers sought in Misc. Civil Application No. 61 of 2021 subject of this appeal were a replica to the ones that were contained in Misc. Civil Application No. 79 of 2020, the application which was dismissed for want of prosecution. It was the respondent's argument that the only relief available to the appellant was for

her to apply to set aside the dismissal order in Misc. Application No. 79 of 2020, under Order IX Rule 9 of the CPC but not to bring a fresh application on similar prayers. It was the respondent's submission therefore that, the appellant for that matter was in abuse of the court process.

In response the appellant resisted the submission that, the application under consideration by the trial court was a replica of the earlier on filed application in Misc. Civil Application No. 79 of 2020, which was dismissed for want of prosecution. It was submitted that, in the fresh application unlike the former one the applicant had raised new fact of fraud which was to be considered by the trial as the same was not covered in the dismissed application. Hence the trial court was invited to dismiss the raised preliminary objection as the preferred application was not in abuse of court process.

Having revisited both applications under contest, it remains uncontroverted fact to this Court that, the payer sought in both of them was the same which is for extension of time within which to file an application for review of the Judgment and decree in Civil Case No. 84 of 2018. It is also undisputed fact that the former application in Misc. Civil Application No. 79 of 2020 was dismissed for want of prosecution on 17/02/2021 before the fresh one on the same prayer was preferred on 13/05/2021 before the same Court in

Misc. Civil Application No. 61 of 2021. Now the follow up question is whether the appellant was right to bring a fresh application on the same prayer after dismissal of the former one. I have no difficulties in answering this question in negative. I so find as the available remedy as rightly stated by the trial court in its ruling at page 4 was to file an application for setting aside the dismissal order, the remedy which the appellant failed to exhaust. I therefore embrace the trial court's decision that bringing a fresh application on same prayer was in misuse of court process which no doubt is a mockery of justice. It is from that background with due respect to Mr. Kajungu, I disassociate with submission that, the case was decided basing on the fact that, the application was res judicata as the trial court's finding in answer to the raised preliminary point of object was that, the application was preferred in misuse of court process for being a replica of the dismissed one. I therefore find the first ground of appeal to be unmeritorious.

Concerning the second and third grounds of appeal, as alluded to above they both refer to matter which were not determined by the trial court, hence this Court cannot entertain and determine them at this appellate stage. It is trite law that, the appellant court will not determine matter not decided by the lower court. This legal stance was well adumbrated in the case of **Farida**

**and Another v. Domina Kagaruki**, Civil Appeal No. 136/2006 (CAT Unreported), where the Court of Appeal held that-

*"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

Before I pen off, one glaring question arising out of the impugned ruling is whether the trial court having found that the second preferred application was in abuse of court process, was right to dismiss the application. It is the law that a matter will be dismissed upon being heard on merit unless otherwise preferred outside the prescribed time limitation. When the same is found to be incompetent before the court or in abuse of the court process the only recourse is to strike it out. This settled position of the law was stated in the case of **Cyprian Mamboleo Hizza Vs. Eva Kiosso and Another**, Civil Application No. 3 of 2010 when citing the decision of the Court of Appeal in Eastern Africa in the celebrated case of **Ngoni- Matengo Cooperative Marketing Union Ltd Vs. Ali Mohamed Osman** (1959) EA 577 where at page 580 in its effort to distinguish the meaning of "striking out" an appeal etc. and "dismissing" etc. the Court had this to say:

*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."*

In this matter since the same was not determined on merit but rather on the preliminary points of objection raised by the respondent, the appropriate order to be invoked by the trial court was to strike it out and not to dismiss it. Having so found I invoke the revisionary powers bestowed to me under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019], and proceed to set aside the dismissal order in Misc. Civil Application No. 61 of 2021 and substitute thereof the order of striking out the application for being in abuse of court process.

In the upshot, the appeal is allowed to the extent stated above on substitution of final orders, otherwise the rest of the appeal is devoid of merit and the same is hereby dismissed.

I order each party to bear its own costs.

Ordered accordingly.

DATED at DAR ES SALAAM this 19<sup>th</sup> August, 2022.



E. E. KAKOLAKI

**JUDGE**

19/08/2022.

The Judgment has been delivered at Dar es Salaam today 19<sup>th</sup> day of August, 2022 in the presence of Mr. Lucas Myula, advocate for the Respondent and Mr. Asha Livanga, Court clerk and in the absence of the appellant,.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

19/08/2022.