

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 106 OF 2021

(From Ruling of the High Court in Misc. Civil Application No. 53 of 2021 dated 22/07/2021 originating from RM's Court of Mwanza at Mwanza, Civil Case No. 65 of 2018).

BRYSON MUSHI..... APPLICANT

VERSUS

STANBIC BANK TANZANIA LIMITED RESPONDENT

RULING

Date of last order: 24/12/2021

Date of Ruling: 14/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection to the hearing of the application raised by the Counsel for the Respondent which reads as follows: -

"That this Honourable Court has no jurisdiction to set aside its ruling dated 22/02/2021."

The Applicant had filed an application under section 2(1) of the Judicature and Application of the Laws Act, [Cap. 358 R. E. 2019] praying for the following orders: -



"This Honourable Court be pleased to set aside a dismissal order and in lieu thereof substitute it with the proper order of struck out (sic)."

Hearing was conducted by way of written submissions whereas Mr. Steven Makwega, learned Advocate, submitted on behalf of the Applicant and Dr. George Mwaisondola, learned Advocate submitted on behalf of the Respondent.

Supporting the preliminary objection, Dr Mwaisondola submitted that this Court is *functus officio* as far as Miscellaneous Civil Application No. 106 of 2021 is concerned on reasons that this Court delivered its ruling in Miscellaneous Civil Application No. 53 of 2021 dismissing the same application with costs on ground that it sought for a certificate of this Court that there is a point of law for consideration by the Court of Appeal under the provisions of section 5(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R. E. 2019] as if the matter was originating from primary courts while it originates from the court of a resident magistrate therefore requiring only leave.

To bolster his position of the law, Dr. Mwaisodola cited case of **Petrolux Service Stations vs. NMB Bank PLC and Another**, Misc. Land Application No. 86 of 2020 (unreported) where this Court (Hon. Kisanya, J.) referring to the case of **Kamundi vs. R.** (1973) EA stated the

circumstances under which a court becomes *functus officio* that it is when it makes an order finally disposing of a matter. The Counsel was of the views that the Applicant could not come to this same Court inviting it to re-open or re-write the ruling. The Counsel observed that the Applicant had three options namely, appealing to the Court of Appeal, applying for revision or review in the same court if he felt that there is an error on the face of the ruling. He called upon this Court to sustain the objection and dismiss the application with costs.

On his side, the Counsel for the Applicant, Mr. Makwega submitted in support of the application arguing that it is true that they filed an application for a certificate on point of law for consideration by the Court of Appeal. The Counsel conceded that a case originating from a court of the resident magistrate is not among the cases requiring a certificate of law in order to appeal to the Court of appeal but insisted that it was a mere citing of a wrong provision of the law. It was the Counsel's argument that the court wrongly dismissed the matter instead of striking it out. The reason given by the Counsel is that the application was not heard on merit but was heard on preliminary legal issue. To the Counsel's views, there is a big difference between "dismiss" and "strike out" He relied on the authority in the case of **Rev. Charles Iseke and**



Another vs. Registered Trustees of Anglican Church of Tanzania, Civil Application No. 7 of 2011 (unreported). He distinguished the case of **Petrolux Service Station Limited (supra)** in that while that case was heard on merit, the impugned decision was not. He prayed the objection to be overruled and application heard on merit.

Those were the submissions by the counsel. I am thankful to the them; both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The main issue in this matter is whether this Court is *functus officio* in this application.

In law a court becomes *functus officio* when it passes or makes an order finally determining a matter before it. This was a decision in **Kamundi vs. Republic** (1973) EA 540 cited by my brother Hon. Kisanya, J. in **Petrolux Service Stations Limited case (supra)**, a position of the law I agree with, the erstwhile East Africa Court of Appeal held *inter alia* that : -

"a court becomes functus officio when it disposes of a case by a verdict of guilty or passing sentence or making some orders finally disposing of the case."

The same position was followed by this Court in the case of **Bibi Kisoko Medard vs. Minister for Lands Housing and Urban Developments and Another** [1983] TLR 250 in which the late Mwakibete J, held that a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio. See also a case of this Court of **Omahe Garani vs. Wambura Francis**, Miscellaneous Land Appeal No. 31 of 2020 (unreported).

From the position of the law stated above a question is whether the impugned decision in Miscellaneous Civil Application No. 53 of 2021 finally disposed of the matter. In my opinion the answer is in affirmative. I say so because this Court rightly found that the application before it was about application for a certificate on point of that the intended appeal concerned a point of law worth for consideration by the Court of appeal and this Court was moved under section 5(2)(c) of the Appellate Jurisdiction Act. When dismissing the application, this Court stated as follows: -

"Actually with greatest respect from its inception the application was uncalled for..... At least it is undisputed fact that the provisions of the Act applied only where the matter



originated from ward tribunal or primary court for that matter."

In paragraph 8 of the affidavit in support of the application it was averred that the application was brought under wrong provision of the law. With due respect, the Counsel for the Applicant is not correct, the records show that application was for a certificate on point of law and was brought under the correct provision of the law which is applicable for grant of a certificate on point of law. However, the matter complained of by the Applicant did not originate from a ward tribunal nor a primary court, it originated from a court of a resident magistrate which needs leave only. It appears, in his mind, the Applicant was applying for leave, but the records filed show that he was applying for a certificate on point of law and the same was filed under the correct provisions of the law, hence this Court rightly dismissed the application.

This Court has asked itself whether under those circumstances can set aside its own decision which dismissed Miscellaneous Civil Application No. 53 of 2021; I find the answer is in negative.

The reason is that the ruling finally disposed of the application after finding that it was not a question of mere citing wrong provisions of the law, but it was "from its inception uncalled for." This means, the

application lacked proof of the averments in the affidavit. According to the case of **Ngoni-Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman** [1959] E.A 577, it is the substance of the matter which is looked at not the words dismiss or struck out. His Lordship Kitusi, JA interpreting the authority in **Ngoni-Matengo Cooperative Marketing Union Ltd's case (supra)** stated in the case of **Quality Group Limited Versus Tanzania Building Agency**, Civil Application No. 182 of 2016 (unreported) as follows: -

"To me, the fact that the application was held to have lacked proof of the averments in the supporting affidavit only means that it was conclusively determined on the merit."

It follows therefore that the ruling of this Court in Miscellaneous Civil Application No. 53 of 2021 finally and conclusively disposed of the application, this Court is *functus officio*, it cannot neither re-open nor re-write the same ruling and change its ruling as intended by the Applicant.

His Lordship Kitusi in the case of **Quality Group Limited Versus Tanzania Building Agency (supra)** dismissed the application for want of jurisdiction, he stated as follows: -


"I agree with Ms. Lupondo that I am barred from sitting on the same application between the same parties."



Seeking inspiration from the principle of res judicate and certainly for the reason that the same parties were heard on the same application in Civil Application No. 102 of 2015 I dismiss this application with costs."

In the upshot, I do hereby dismiss the application for want of jurisdiction. The Applicant to bear the costs of the application. Order accordingly.




F. K. MANYANDA
JUDGE
14/03/2022